MINUTES OF
THE ADVISORY COMMITTEE ON RULES OF EVIDENCE
MEETING OF OCTOBER 9-11, 1967

The eleventh meeting of the Advisory Committee on Rules of Evidence was convened in the ground floor conference room of the Supreme Court Building on Monday, October 9, 1967, at 9:20 a.m., and was adjourned on Wednesday, October 11, 1967, at 3:45 p.m. The following members were present:

Albert E. Jenner, Jr., Chairman
David Berger (Unable to attend on Monday)
Hicks Epton
Robert S. Erdahl
Joe Ewing Estes
Thomas F. Green, Jr.
Egbert L. Haywood
Charles W. Joiner
Frank G. Raichle (Unable to attend Monday session and Tuesday morning session)
Simon E. Sobeloff
Craig Spangenberg
Robert Van Pelt
Jack B. Weinstein
Edward B. Williams (Unable to attend on Wednesday)
Edward W. Cleary, Reporter

Herman F. Selvin, Esquire, was unable to attend. Others present at the meeting were Honorable Albert B. Maris, Chairman, and Professors James Wm. Moore and Charles A. Wright, members of the standing Committee.

In the absence of the chairman, the meeting was opened by Judge Maris. Shortly thereafter, Mr. Jenner arrived and requested the reporter to open the discussion on

Agenda Item No. 1: MEMORANDUM NO. 17 - ARTICLE II. JUDICIAL NOTICE.

PROPOSED RULE OF EVIDENCE 2-01. JUDICIAL NOTICE OF ADJUDICATIVE FACTS.

Professor Cleary stated that at the last meeting, subsections (a), (b), (c), (d), and (e) with some changes had been approved. He said that a couple of other questions were: (1) whether the Committee ought to make some special provision or exception for the criminal case and (2) whether the Committee ought to make some provision, along perhaps the lines followed by the New Jersey Committee, with respect to so-called legislative facts as contrasted with so-called adjudicated facts.

Judge Weinstein said, with regard to provisions in the Model Penal Code, that material was not on judicial notice per se but in the discussion of presumption. The question, he said, was: "What should the judge tell the jury about the underlying policies in order for them to evaluate the weight that should be given to the legislative or judicial finding that a presumption ought to exist?"

Professor Cleary said that he supposed the question immediately confronting the Committee was whether there ought to be a special provision made in the criminal case. Dean Joiner felt that there should not be a special provision made at this point, and that, if the Committee had to deal with the question, it should be dealt with in direct relationship with presumption problems.

Following discussion, Mr. Epton suggested that subsection (f) read: "In jury cases, the judge shall instruct the jury to consider as evidence any facts judicially noticed."

There was a lengthy discussion on blood being a therapeutic drug.

Following that discussion and another centered around whether or not to insert the words "upon request" after the word "judge" in line 3, Professor Cleary asked if subsection (f) could be considered as being submitted by him to read: "In jury cases, the judge shall instruct the jury to accept as conclusive any facts judicially noticed which would otherwise be for their determination." He said he thought that that was the way in which it had been submitted at the close of the last meeting - with the additional language taken from the Uniform Rules.

Dean Joiner felt that an ambiguity could be avoided by having the language read: "In jury cases, the judge shall instruct the jury to accept any facts which would be otherwise for their determination as conclusive." Mr. Jenner pointed out that the issue before the Committee was whether or not to accept the reporter's addition of the phrase "which would otherwise be for their determination" to his submitted draft. During the ensuing discussion, Judge Sobeloff said he wondered whether it was necessary to make subsection (f) so clearly

subject to the limitations in the earlier subsections and whether there could be a phrase that would do that. Judge Maris suggested the addition of "in accordance with this rule" at the end of subsection (f). Judge Soboloff moved that at the end of line 4 of the draft dated 6-6-67, there be added the words "as otherwise authorized by this rule". The motion was lost by majority opposition.

Mr. Jenner said the issue before the Committee at that time was whether or not to have the reporter's suggested addition of the words "which would otherwise be for their determination" at the end of subsection (f). He inquired of the reporter why he had decided to not include in this rule the provision of the Uniform Rule that the judge shall indicate for the record the matter which is judicially noticed. Professor Cleary replied that he felt that that put an impossible burden on the judge, and the judge can not be expected to indicate for the record everything of which he takes judicial notice. A vote was taken on the issue of adding the phrase "which would otherwise be for their determination" at the end of line 4 on page 11 of the draft dated 6-6-67. The motion was lost by majority opposition.

At this point, Mr. Jenner went back to Rule 2-01(a) as drafted under date of 6-67 and said that he was concerned over the language. Professor Cleary stated that at the July meeting, the Committee had amended the subsection and approved it to read: "The facts must not be subject to reasonable dispute because: (1) generally known; (2) generally known within the territorial jurisdiction of the trial court, or (3) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Discussion ensued on the differences between "universally known" and "generally known". Mr. Jenner said that the word "because" bothered him as it seemed to make it delimiting. Judge Maris asked if that were not necessary though, because there may be facts which are not reason for dispute in this particular case because counsel for both sides stipulate that there is no evidence to the contrary. He said that does not mean that it may be stipulated - that counsel had to get into the act. Following discussion, Mr. Spangenberg moved that the language of subsection (a) of Rule 2-01 read as follows: "The facts must not be subject to reasonable dispute and must be generally known within the territorial jurisdiction of the trial court, or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." After a short discussion between Messrs. Jenner and Spangenberg, it was stated that Mr. Spangenberg's motion

was to strike provision (1) from subsection (a). During the discussion which ensued Dean Joiner said that since the rule has to work for appeals courts as well as trial courts, he thought both provisions (1) and (2) should be in the rule, because the appeals courts would have to sustain on facts generally known. Following a shorter discussion, a vote was taken on the motion to strike provision (1) from subsection (a). The motion was carried by vote of 6 to 5. Dean Joiner moved that the rule be approved as amended. After recess, Mr. Jenner stated that lines 4 through 8 as approved at the July meeting read: "(a) Kinds of facts. The facts must not be subject to reasonable dispute: (1) generally known; (2) generally known within the territorial jurisdiction of the trial court, or (3) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." At this point, since the reporter was not sure of whether there had been a motion to approve subsection (f), the chair assumed that there had been. A vote was taken on the motion, and it was carried by majority approval. Subsection (f) as approved reads: "(f) Instructing jury. In jury cases, the judge shall instruct the jury to accept as conclusive any facts judicially noticed." Dean Joiner moved that Rule 2-01 as modified by action of the Committee be approved. The motion was carried unanimously.

Professor Cleary asked the Committee whether it thought that there should be some special provision in Rule 2-01 with respect to legislative facts. He felt that it should be in the form of a disclaimer of intending to legislate in that area by this rule, or that perhaps the Committee should remain silent on this point. With regard to this, Mr. Jenner said that he would find out what is contained in the New Jersey Code.

Professor Cleary inquired if there was any disposition on the part of the Committee that they should get into the area of judicial notice other than in adjudicated facts or that they should remain silent. Professor Green moved that the reporter be requested to draft a provision along the lines suggested, i.e., that Rule 2-01 does not cover the subject of legislative facts - that recognition of such facts be left to decisional law. Judge Estes inquired of the reporter if he was against the inclusion, in the Rules of Evidence, of legislative facts. Professor Cleary replied that he would not want the rules to apply to legislative facts. He felt that there should be a disclaimer in express language. Judge Weinstein thought that the reporter had done an excellent job in Rule 2-01 of avoiding those areas of the Model Code and the Uniform Rules of Evidence which had been under criticism, and he did not think that the

reporter should have to get involved in drafting a definition of legislative fact. Dean Joiner agreed. Professor Green suggested that if the course mentioned were to be taken that it would be desirable to put the word "adjudicative" in the body of the rule rather than just in the caption. Judge Van Pelt suggested that the Committee move on to the next subject and leave it to the reporter to consider the subject matter further if he so desired and to report on it. Professor Green restated his earlier motion as being that the reporter draft a statement within Rule 2-01 that it does not apply to legislative facts, and that it is to be controlled by decisional law. Mr. Epton seconded. The motion was lost by majority opposition.

Judge Estes moved that the Committee either take out of the caption the words "adjudicative facts" or insert the word "adjudicative" before the word "facts" at the beginning of line 2 of Rule 2-01 as drafted under date of 6-07. Mr. Haywood made an alternative motion that the word "adjudicative" be added between the words "of" and "facts" in line 2. The motion was lost by majority opposition.

Judge Estes moved that the word "adjudicative" be stricken from the caption of Rule 2-01. Following short discussion, the motion was lost by majority opposition.

Agenda Item No. 2 - MEMORANDUM NO. 13

PROPOSED RULE OF EVIDENCE 6-01. GENERAL RULE OF COMPETENCY.

Dean Joiner moved that Rule 6-01, as submitted in the redraft, be approved. The motion was carried unanimously, and Rule 6-01, as approved, reads: "Rule 6-01. General rule of competency. Every person is competent to be a witness except as otherwise provided in these rules."

PROPOSED RULE OF EVIDENCE 6-02. LACK OF PERSONAL KNOWLEDGE.

Professor Cleary read Rule 6-02, as submitted in his second draft, and his comment thereto. Mr. Epton asked the reporter if the second sentence really added anything. Professor Cleary replied that outside evidence may have to be introduced, and that that was the only purpose of the second sentence. Mr. Spangenberg said that he liked the first draft (Memorandum No. 14) better. Judge Sobeloff moved that Rule 6-02 as submitted in the second draft be approved. Dean Joiner seconded the motion. During the lengthy discussion centered around a witness having personal knowledge of the matter, Judge Maris said it seemed to him that there was being put into the Rules of Evidence one which requires that in every case there be a preliminary showing of qualification made before the witness testifies on the fact. Professor Cleary said that he was not sure just what the Committee was arguing about - whether it was the fact that there was no requirement in the rule that

there be an objection or whether it was in the phrasing of the standard by which the presence or absence of first-hand knowledge is determined. Judge Weinstein felt that possibly the rule was troublesome because it was cast in terms of incompetency. He suggested the following: "Testimony with respect to a matter is inadmissible if the finding cannot be supported that the witness has personal knowledge of the matter." Mr. Williams suggested: "A witness may testify to any matter of which he has personal knowledge."

In answer to Judge Van Pelt's questioning of the reporter's improvement on the California Code, Professor Cleary read the provisions of California Evidence Rules 4.03 and 7.02 and stated that he had shortened the language in his proposed Rule 6-02. Judge Weinstein pointed out that Rule 6-02 was designed to meet two problems - one, the opinion problem, and two, the hearsay problem. He said as far as the opinion aspect, it is covered in Rule 7-01, and the hearsay aspect is covered in rules on hearsay. He suggested that Rule 6-02 be stricken, and said that, to him, something which was not first-hand knowledge was either opinion or hearsay. Professor Cleary said that, to him, hearsay was something which the witness said had been told to him. Mr. Erdahl said that it was generally accepted that a person could testify only on

matters of which he had personal knowledge, and he felt that there should be this rule in the rules of evidence. Following general discussion, Dean Joiner moved that Rule 6-02 as drafted by the reporter be approved. The motion was carried by vote of 7 to 2, and Rule 6-02 as approved reads: "Rule 6-02. Lack of personal knowledge. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 7-03, relating to opinion testimony by expert witnesses."

PROPOSED RULE OF EVIDENCE 6-03. OATH OR AFFIRMATION.

Professor Cleary gave the background of Rule 6-03. Judge Van Pelt moved that the rule as submitted by the reporter in his second draft be approved. Dean Joiner seconded. There was unanimous approval, and Rule 6-03 as approved reads: "Rule 6-03. Oath or affirmation. Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so."

PROPOSED RULE OF EVIDENCE 6-04. INTERPRETERS.

Professor Cleary explained the background of the second draft of Rule 6-04. Mr. Haywood moved that the rule be adopted as submitted in the second draft. During the short discussion concerning interpreters not being witnesses, Professor Cleary agreed that the reference to witnesses should not be in the rule. Mr. Haywood accepted the amended language, and Rule 6-04 as approved by a majority vote reads:

"Rule 6-04. Interpreters. Interpreters are subject to the provisions of these rules relating to qualifications as an expert and the administration of an oath or affirmation in appropriate form."

PROPOSED RULE OF EVIDENCE 6-05. COMPETENCY OF JUDGE AS WITNESS.

Mr. Spangenberg moved that Rule 6-05 which was resubmitted without change be approved. Dean Joiner seconded. There was unanimous approval, and Rule 6-05 as approved reads: "Rule 6-05. Competency of judge as witness. The judge presiding at the trial may not testify in that trial as a witness. If he is called to testify, no objection need be made in order to preserve the point for review." [Later action on this.]

PROPOSED RULE OF EVIDENCE 6-06. COMPETENCY OF JUROR AS WITNESS.

(a) At the trial.

Professor Cleary read proposed Rule 6-06 and gave a background of the word "empaneled". There was general discussion on the usage of the word, and Judge Eaton moved that the first sentence of Rule 6-06(a) be amended to read: "A member of the jury may not testify as a witness in the trial of the case in which he is sitting as a juror." Having been duly seconded, the motion was carried unanimously. Dean Joiner felt that a juror, who has information which could help the party [illegible], should be granted relief from jury service and be allowed to testify as a witness. Professor Green agreed. Judge [illegible] thought perhaps there could be a separate rule to cover the situation.

After lunch, Professor Cleary stated that Mr. Epton had suggested the deletion of the words "for review" from line 5. Dean Joiner asked the reporter why he thought the sentence was important. Professor Cleary replied that it was put in because it was thought that it might be very prejudicial to the litigant to have to raise the objection. Judge Sobeloff suggested that the wording be: "Any objection may be made out of the presence of the jury." After a very short discussion, Judge Sobeloff moved that the second sentence of Rule 6-06 read as follows: "If he is called to testify, the other party may make his objection out of the presence of the jury."

After general discussion centered around the difference between being called and being called to testify, Judge Sobeloff restated his motion as being that the second sentence read as follows: "If he is called to testify, the opposing party shall be afforded an opportunity to make his objection out of the presence of the jury." The motion was carried by a vote of 6 to 2.

Dean Joiner moved that Rule 6-06(a) as amended be approved. The motion was carried by a vote of 5 to 2, and Rule 6-06(a) as approved reads: "(a) At the trial. A member of the jury may not testify as a witness in the trial of the case in which he is sitting as a juror. If he is called to testify, the opposing party shall be afforded an opportunity to make his objection out of the presence of the jury."

In light of the previous action, Mr. Epton moved that the words "for review" be stricken from the last line of Rule 6-05, and there was unanimous approval.

(b) Inquiry into validity of verdict or indictment.

Professor Cleary explained the minor changes made in the first draft. Dean Joiner moved that subsection (b) be approved as submitted by the reporter in his second draft. Mr. Haywood seconded. There was unanimous approval, and Rule 6-06(b) as approved reads: "(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a

juror may not testify concerning the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith. Nor may his affidavit or evidence of any statement by him indicating an effect of this kind be received for these purposes."

PROPOSED RULE OF EVIDENCE 6-07. WHO MAY IMPEACH.

Professor Cleary read Rule 6-07 as submitted in his second draft. Dean Joiner moved approval. There was unanimous approval, and Rule 6-07 as approved reads: "Rule 6-07. Who may impeach. The credibility of a witness may be attacked by any party, including the party calling him."

PROPOSED RULE OF EVIDENCE 6-08. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME.

Professor Cleary read subsections (a), (b), (c), his comment on subsection (c), subsection (d), and his comment thereto.

(a) General rule.

Mr. Haywood moved that subsection (a) as submitted in the reporter's second draft be approved. There was unanimous approval, and Rule 6-08(a) as approved reads: "(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible but only if the crime, under the laws of the United States or

any State or nation, (1) is punishable by death or imprisonment in excess of one year or (2) involves dishonesty or false statement regardless of the punishment."

(b) Time limit.

After a short discussion concerning Dean Joiner's questioning the intended reference of the modifying clause at the end, Judge Sobeloff moved that subsection (b) be approved as submitted in the second draft. The motion was carried unanimously, and Rule 6-08(b) reads: "(b) Time limit. Evidence of a conviction under this rule is inadmissible if a period of more than 10 years has elapsed since the date of the release of the witness from confinement, or the expiration of the period of his parole, probation, or sentence, whichever is the later date."

(c) Effect of pardon, annulment or certificate of rehabilitation.

Dean Joiner moved approval of subsection (c) as submitted in the second draft. Mr. Haywood seconded. Mr. Epton suggested that the word "substantial" in line 15 be omitted, but after a very short discussion, it was decided that the word should remain. There was unanimous approval of Dean Joiner's motion, and Rule 6-08(c) as approved reads: "(c) Effect of pardon, annulment or certificate of rehabilitation. Evidence of a conviction under this rule is inadmissible if (1) the conviction

has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure, and (2) the procedure under which the same was granted or issued required a substantial showing of rehabilitation or was based on innocence." [Later action on this].

(d) Juvenile adjudications.

Professor Green suggested that the phrase "under this rule is generally inadmissible"in the first sentence be changed to read "is generally inadmissible under this rule." This was agreeable to all, and the same change was to be made in line 12 of subsection (c). [How about subsection (b)?]

Dean Joiner moved that the subsection be adopted. Professor Cleary asked the Committee if it wished to limit this rule to criminal cases. During the discussion, he stated that there was purportment to arbitrary distinctions in the situation where the juvenile was accused on subsequent occasions. He said that the Committee had decided not to give the accused in a criminal case slight ? reprieve ? in general, but he thought, however, that in the juvenile case there could be said that a juvenile conviction is never admissible to impeach the accused, whether he was a juvenile or an adult, but that it may be used, at the judge's discretion, in a case where the witness does not plead guilty. Mr. Haywood asked if the following language would take care of the problem:

"The guilt or innocence of a person other than the one who is testifying". Professor Cleary felt that that amendment would be helpful, and the Committee seemed to be in agreement. Mr. Williams suggested the addition of a sentence such as: "In no event,however, shall a juvenile adjudication be admissible against the defendant witness." He said that the present proposed rule admitted the prosecutor to offer against the defendant,who took the stand, a juvenile adjudication, and he did not think that was what the Committee wanted. Professor Cleary suggested as a revision, in light of the foregoing discussion, that in line 18, page 10, the words "the same" be stricken and there be inserted in lieu thereof "evidence of a juvenile adjudication of a witness other than the accused". Judge Sobeloff suggested that the words "the judge" be used in lieu of "he" in the fourth line of the proposed draft. Mr. Jenner stated that the proposal now was to have the second sentence of subsection (b) read as follows: "The judge may, however, allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the judge is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence." Mr. Epton moved for adoption of subsection (d) as amended. The motion was carried

unanimously, and Rule 6-08(d) as approved reads as follows:

"(d) Juvenile adjudications. Evidence of juvenile adjudications is generally inadmissible under this rule. The judge may, however, allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the judge is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence."

(e) Pendency of appeal.

Professor Cleary read subsection (e) and gave its background. Dean Joiner moved that it be approved as submitted in the reporter's second draft. The motion was carried unanimously, and Rule 6-08(e) as approved reads:

"(e) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible."

PROPOSED RULE OF EVIDENCE 6-09. RELIGIOUS BELIEFS OR OPINIONS.

Professor Cleary read Rule 6-09 as proposed in his second draft and stated that the words "on matters of religion" should be inserted after the word "witness" in line 2. Dean Joiner moved approval of the rule as submitted by the reporter. There was unanimous approval, and Rule 6-09 as approved reads:

"Rule 6-09. Religious beliefs or opinions. Evidence of the beliefs or opinions of a witness on matters of religion is inadmissible for the purpose of showing that by virtue of their nature his credibility is impaired or enhanced."

PROPOSED RULE OF EVIDENCE 6-10. CHARACTER OF WITNESS.

Professor Cleary gave the substance of the rule, read his comment thereto, and the text of Rule 6-10 as proposed in his second draft. Dean Joiner felt that "Character of witness" was too broad a title

[Chief Justice Warren dropped in for a short visit at this time.]

Following a general discussion, Mr. Williams said it seemed to him that there was a head-on collision between the old concept of character evidence and what was presented by this rule, because historically the defendant always had to open the door before the Government could start introducing evidence which went to the very issue of the case. Professor Cleary said that they had to keep in mind that the defendant could open the door in two directions: 1, by testifying or 2, by calling good character witnesses. Mr. Williams said that what bothered him about the proposed rule was that in order for a defendant in a perjury case to be a witness and defend himself, it was necessary for him to open up a Pandora's box of rumors, because the people whom he had called to testify to his truthfulness were open to

cross-examination about all the rumors concerning the defendant's truthfulness and veracity. Professor Cleary said that one possible approach to the problem is that an exception could be made if the charge was one which involved a charge of untruthfulness. Professor Williams said that, under the proposed rule, the defendant had to decide whether to take the stand and not only whether to be impeached by conviction but also whether to be impeached by even an arrest statement.

Mr. Epton suggested that the opening language of subsection (a) be: "Opinion evidence as to the character of a witness other than a defendant charged with crime an element of which is untruthfulness may be shown . . .". During the lengthy discussion which followed, Professor Cleary said that if an inquiry into the defendant's past was going to be allowed for the purpose of showing that he is a credible individual, he thought it was pretty hard to draw limits on it. Professor Green moved that there be approval of the draft of subsection (a) as submitted in the reporter's second draft. Mr. Williams said that the thing which troubled him was that he thought that Rule 4-04, if properly applied, would cover the situation. He felt that in a trial for perjury the probative value of the defendant's character for veracity as it affected his credibility as a witness was outweighed by the danger that the prejudiced ? nearest to him could start putting in opinion evidence that he was a liar.

Professor Cleary explained how he felt the proposed language had come about. Mr. Jenner read the following from the Minutes of the May 1967 Meeting:

> "Mr. Williams moved that Rule 6-10(a) read as follows: 'For purposes of attacking or supporting the credibility of a witness, evidence of his character is inadmissible.', and that subsections (b), (c), and (d) be stricken. After further discussion, Judge Weinstein offered an amendment to Mr. Williams' proposal and suggested following language: 'For purposes of attacking or supporting the credibility of a witness, evidence of his reputation for veracity is inadmissible.' He stated that this would eliminate subsections (b), (c), and (d). Mr. Williams accepted the amendment to his motion. Motion was carried by vote of 10 to 2. . . . Judge Weinstein moved to approve Rule 6-10 as amended. The motion was carried by vote of 11-0."

Following further discussion, Mr. Jenner suggested that the Committee pass over Rule 6-10 and that, in light of the discussion, the reporter look over the Minutes concerning Rule 6-10. Then later during this session of the Committee, the rule would be taken up again.

[Dinner recess from 5:27 to 7:40 p.m.]

PROPOSED RULE OF EVIDENCE 6-11. MODE AND ORDER OF INTERROGATION AND PRESENTATION; SCOPE OF CROSS-EXAMINATION.

(a) Control by judge.

Dean Joiner moved that subsection (a) of Rule 6-11 as proposed in the second draft be approved. Mr. Spangenberg did not like the words "as effective as possible" in line 6. He felt that all that was necessary was the word "effective". There were no objections to the deletions of the words "as" and "as possible". The revision was accepted by the maker of the motion, and the motion was unanimously carried. Rule 6-11(a) as approved reads: "(a) Control by judge. The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence, so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from undue harassment or embarrassment."

(b) Scope of cross-examination.

Dean Joiner moved that in lieu of subsection (b) as proposed in the second draft, there be restored original proposed Rule 6-14,

which left cross-examination wide open rather than limiting it. The motion was lost by a vote of 6 to 5.

Judge Weinstein moved that the words "as if on direct examination" be stricken from lines 12 and 13 of Rule 6-11(b). Dean Joiner seconded. The motion was lost by a vote of 6 to 5. Mr. Spangenberg moved for approval of subsection (b) as submitted by the reporter. The motion was carried by a vote of 7 to 3, and Rule 6-11(b) as approved reads: "(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness, but the judge may in the exercise of discretion permit inquiry into additional matters as if on direct examination."

[Later action on Rule 6-11.]

PROPOSED RULE OF EVIDENCE 6-12. LEADING QUESTIONS.

Professor Cleary read Rule 6-12 as submitted in his second draft. Dean Joiner moved for approval. Judge Weinstein moved that some alternate softer word for "necessary" be used in line 2. Mr. Spangenberg said that he had a note to the effect that the Committee had decided to delete the word "insofar". It was agreed that it was unnecessary. Judge Van Pelt moved that the second "him" be deleted from line 5. The motion was carried by majority approval. Judge Weinstein moved that the second sentence be amended to read: "Leading questions should be permitted on cross-examination of a hostile witness." There was a discussion

concerning the meaning of "a hostile witness" and the provisions of Rule 43(b) of Federal Rules of Civil Procedure. Judge Goldsborough moved that the word "ordinarily" be inserted at the beginning of the second sentence. The motion was carried by majority approval. Mr. Spangenberg moved that the word "insofar" in line 2 be stricken. Having been duly seconded, the motion was carried by majority approval. Judge Weinstein moved that Rule 6-12 be started with the words "Subject to subdivision (a) of Rule 6-11". Professor Cleary said he supposed that Rule 6-12 could be incorporated into Rule 6-11, because they dealt with the same subject. It was moved that Rule 6-12 be made subsection (c) of Rule 6-11. There was unanimous approval and Rule 6-11(c) as approved reads: "(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as necessary to develop his testimony. Ordinarily, leading questions should be permitted on cross-examination. In civil cases, a party is entitled to call an adverse party or witness identified with him and interrogate by leading questions."

PROPOSED RULE OF EVIDENCE 6-12. WRITING USED TO REFRESH MEMORY.

[This rule was proposed as 6-13 but renumbered in light of earlier action.]

Professor Cleary read Rule 6-12 as proposed in his second draft, and his comment thereto. During the discussion, Mr. Jenner

read that portion of the Minutes of the May 1967 Meeting which related to action taken on the first draft of this rule. Dean Joiner moved that the words "and to introduce in evidence those portions which relate to the subject matter of the testimony of the witness for the purpose of testing his credibility" be inserted at the end of the first sentence in the second draft. Mr. Spangenberg felt that the reporter's proposed language was entirely too broad. Mr. Williams suggested the following as an amendment to Dean Joiner's motion: "and to introduce in evidence those portions on which the witness is examined."

Following a very lengthy discussion during which was given many examples of cases in which writings were presented to witnesses before trial, in order for their memories to be refreshed with regards to certain portions of the writings, Dean Joiner restated his motion as being that the following wording be added after the word "thereon" in line 4 of the second draft of Rule 6-12: "and to introduce in evidence those portions which relate to the subject matter of the testimony of the witness as affecting his credibility." The motion was carried by a vote of 6 to 4. Judge Weinstein moved that the words "the subject matter of" be stricken from the language which was just passed. Professor Cleary asked Dean Joiner

if the following language would accomplish what he desired: "and to introduce into evidence any portions which are inconsistent with his testimony". Dean Joiner replied that that was too narrow. After a short discussion, a vote was taken on Judge Weinstein's motion, and it was carried by a vote of 7 to 3.

Mr. Haywood moved that Rule 6-12 as amended be approved. The motion was carried unanimously, and Rule 6-12 as approved reads: "Rule 6-12. Writing used to refresh memory. If a witness uses a writing to refresh his memory, either before or while testifying, an adverse party is entitled to have it produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce into evidence those portions which relate to the testimony of the witness as affecting his credibility. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the judge shall proceed as provided in 18 U.S.C. § 3500. If the writing is not produced the judge shall make such order as justice requires."

PROPOSED RULE OF EVIDENCE 6-13. PRIOR STATEMENT OF WITNESS. [Drafted as Rule 6-14 but renumbered because of earlier action]. Professor Cleary read his comment to the proposed rule.

(a) Examining witness concerning prior statement.

Judge Weinstein questioned the reporter on the usage of the words "so as to afford an opportunity to interrogate the witness thereon", and explained that he would understand them to mean that opposing counsel would not be allowed to see the document during the time the witness was being examined. He thought that that was wrong, because the examiner might be asking unfair questions, and the opposing counsel should be able to make objections. He moved that the phrase be stricken, and that a period be inserted after the word "counsel" in line 6. Following a very short discussion, a vote was taken on Judge Weinstein's motion, and it was carried by majority approval. Mr. Epton moved that subsection (a) as amended be approved. The motion was carried by a vote of 9 to 1, and Rule 6-13(a) as approved reads: (a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by him whether written or not, the statement need not be shown or its contents disclosed to him, but on request it shall be shown or disclosed to opposing counsel."

Dean Joiner moved for approval of subsection (b) as submitted. The motion was carried unanimously, and Rule 6-13(b) as approved reads: (b) Extrinsic evidence of prior statement of witness. Extrinsic evidence of a prior statement by a nonparty witness is inadmissible unless the witness is afforded an

an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon."

PROPOSED RULE OF EVIDENCE 6-14. CALLING AND INTERROGATION OF WITNESSES BY JUDGE.

[This was proposed as Rule 6-15 but it was renumbered because of an earlier action.]

Professor Cleary gave the background of the rule, as proposed in his second draft, and read the text thereof.

(a) Calling by judge.

Mr. Haywood moved that subsection (a) as submitted be adopted, and Dean Joiner seconded the motion. There was a suggestion that the word "so" be changed to "thus" in line 4. The reporter agreed and submitted the subsection with that change. A vote was taken on Mr. Haywood's motion, and Rule 6-14(a) as approved, unanimously, reads: "(a) Calling by judge. The judge may, on his own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called."

(b) Interrogation by judge.

Dean Joiner moved approval of subsection (b) as submitted. Mr. Eyton moved that the second sentence be amended to read: "The parties may object to questions so asked and to evidence thus adduced at any time prior to the submission of the cause." The motion was carried by a vote of 7 to 2.

Dean Joiner moved that the last sentence be stricken. Having been duly seconded, the motion was carried by majority vote of 9. Dean Joiner moved that Rule 6-14 as amended be approved. There was unanimous approval, and Rule 6-14 as approved reads: "Rule 6-14. Calling and interrogation of witnesses by judge.

(a) Calling by judge. The judge may, on his own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by judge. The judge may interrogate witnesses, whether called by himself or by a party. The parties may object to questions so asked and to evidence thus adduced at any time prior to the submission of the cause."

PROPOSED RULE OF EVIDENCE 6-15. EXCLUSION AND SEQUESTRATION OF WITNESSES.

[Proposed as Rule 6-16 but renumbered because of earlier action]

Judge Weinstein suggested that in line 9 of the second draft of Rule 6-15 the words "or counsel" be added after "witnesses".

[Meeting was adjourned on Monday at 9:40 p.m. and resumed on Tuesday at 9:00 a.m.]

During the discussion which ensued, Mr. Jenner read the reporter's comment to the first draft of the rule on exclusion and sequestration of witnesses. Professor Cleary suggested that the last sentence read: "The judge may also make appropriate orders to assure that testimony already given not be communicated to other witnesses." There was a very lengthy discussion concerning the sequestration of witnesses by judges.

Mr. Berger said that it seemed to him that there were two separate problems - one, whether it was advisable to have witnesses present in the courtroom during the proceedings of the case; the other, with any inhibitions which might be placed upon counsel. He said he would support a rule which permitted the judge to sequester witnesses, but when it came to a rule concerning counsel, he felt that counsel had to be free. Professor Cleary stated, in light of the discussion which had shown that the Committee did not want the last sentence as submitted in the reporter's second draft, he had the following as an alternative: "The judge may make such appropriate orders as the furtherance of justice requires to assure that testimony already given not be communicated to witnesses who have not yet testified." Judge Weinstein suggested that "who have not yet testified" be changed to "who have not yet completed their testimony". He also suggested

that the words "or documents introduced" be added after the word "testimony" in the first part of the sentence. There were further language change suggestions. Dean Joiner moved that the last sentence be stricken. Mr. Haywood seconded the motion. The motion was carried by a vote of 9 to 3. Mr. Jenner wished to be recorded as being opposed to the motion. Dean Joiner moved that the rule as amended be approved. The motion was carried by majority approval and Rule 6-15 as approved reads: "Rule 6-15. Exclusion and sequestration of witnesses. At the request of a party the judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and he may make the order on his own motion. This rule does not authorize exclusion of a party who is a natural person, or of an officer or employee of a party which is not a natural person designated as its representative by its attorney, or of a person whose presence is shown by a party to be essential to the presentation of his cause."

Mr. Epton suggested that in Rule 6-12 at line 7 of the second draft, the words "in criminal cases and in civil cases shall make such orders as justice requires" be inserted after "§ 3500". Professor Cleary made a note to look into the matter, and he plans to submit a new draft of Rule 6-12 at the next meeting.

Agenda Item No. 3 - MEMORANDUM NO. 19 - ARTICLE VIII. HEARSAY.

Mr. Jonnor complimented Professor Cleary on Memorandum No.19 and said it was a great piece of work. He stated that there were questions of policy and asked the reporter to proceed with an explanation of the contents of the memorandum.

Professor Cleary gave the backgrounds of and reviewed proposed Rules 8-01, 8-02, 8-03, and 8-04. Mr. Jenner said that he would like to hear the professors' comments first. Judge Weinstein felt that there should be more flexibility in the civil cases than in the criminal ones, and he thought that the reporter's approach to the problem was admirable. Professor Green inquired as to how "admissions" as defined would be covered, and Professor Cleary replied that he would exclude admissions from hearsay by definition, because the rule which allows admissions by the opponent party is really the product of the adversary system rather than being an exception to the hearsay rule. He said that he would simply say that admission is not hearsay. Dean Joiner thought that the reporter had made a very constructive approach to the hearsay problem - in two respects in particular. First of all, he said, the reporter had been reasonably restrictive in his area of definitions. Secondly, he felt that the way

in which the reporter had used the broad statement of policy in Rules 8-03 and 8-04 and simply using illustrations as a way of getting to exceptions was most constructive. He would like to urge upon the reporter in general the getting rid of the idea of unavailability as being a requirement. He would tend to put all of the exceptions under number (1) and make the test at that point a test of the witness' availability, and where the witness is unavailable, make the test one of reasonable assurance of accuracy.

During the discussion which followed, several cases were cited in which it had been held that official records are an exception to the hearsay rule and the right of confrontation is inapplicable to the exception to the hearsay rule. Judge Van Pelt felt that the reporter's approach to the hearsay problem is an interesting one. Judge Sobeloff said he was wondering about what Judge Weinstein had said about not being sure that appellate control would be effective. He said that, in his observation, appellate control had not been effective; the general approach was that the courts did not concern themselves with sufficiency of evidence or questions of evidence, unless there was a bizarre situation. He questioned the promotion of a new approach on the part of the courts. Mr. Jenner replied that that was the one where the Committee was sworn. Judge Estes thought that the reporter had done a great job. Mr. Jenner stated that he

gathered from the discussion that the reporter's approach was one regarded as feasible by the Committee, and that it is a good avenue for entering into this area.

PROPOSED RULE OF EVIDENCE 8-01. DEFINITIONS.

(a) Statement.

Professor Cleary explained the proposed rule and read his comment thereto.

Mr. Spangenberg suggested that the reporter add the following to explain just what a statement is: "A statement is an oral or written assertion or the conduct of a person intended as an assertion." Professor Cleary suggested: "The conduct of a person, either verbal or non-verbal, is a statement if, but only if, intended by him as an assertion." There was a discussion on whether a statement is the same as an utterance. Professor Green suggested that the reporter might use the definition of statement found in Rule 62(1) of the Uniform Rules of Evidence. Dean Joiner suggested the following: "A statement is (1) an oral or written expression and (2) non-verbal conduct intended by the actor as an assertion. Non-verbal conduct is not a statement unless intended by the actor as an assertion."

Following a short discussion, Mr. Spangenberg moved for approval of Dean Joiner's definition of statement. Dean Joiner agreed with the suggestion that the word "actor" should be changed to "person". Judge Weinstein questioned

the interplay of the words "expression" and "assertion". Mr. Jenner suggested that perhaps the words "expressed or" could be added after the word "matter" in line 8 of subsection (c). Professor Cleary suggested the following redraft of (a): "A statement is an oral or written expression or conduct of a person intended as an assertion. Conduct is not a statement unless intended as an assertion."

There was quite a lengthy discussion on whether to use the word "assertion" or "expression", and the outcome was the following language: "A statement is (1) an oral or written expression or is conduct of a person intended as an assertion. Conduct is not a statement unless intended as an assertion." A few members felt that the second sentence was unnecessary, but Professor Cleary stated that the sentence added an express dealing with the non-verbal conduct area. Mr. Berger felt that the second sentence was not a definition and should not be in the rule. Mr. Spangenberg said that the conviction was that the only kind of conduct the Committee intended to deal with as hearsay was conduct which was intentionally asserted. He said Mr. Epton suggested that it be done with the following language: "A statement is an oral or written expression or is conduct of a person if, but only if, it is intended as an assertion." Following a few comments, Mr. Spangenberg resubmitted suggested language as follows: "A statement is (1) an oral or written expression, or (2) non-verbal conduct of a person if, but only if, it is intended as an assertion. Judge Van Pelt moved approval of

Mr. Spangenberg's suggested language. Dean Joiner withdrew his earlier motion. Judge Van Pelt's motion was carried unanimously, and Rule 8-01(a) as approved reads: "(a) Statement. A statement is (1) an oral or written expression, or (2) non-verbal conduct of a person if, but only if, it is intended as an assertion." [later action on this]

(b) Declarant.

Mr. Epton moved that subsection (b) be approved as submitted. Dean Joiner seconded. The motion was carried unanimously, and Rule 8-01(b) as approved reads: "(b) Declarant. A 'declarant' is a person who makes a statement."

(c) Hearsay.

Professor Cleary read the text of subsection (c), as written in the first draft, and stated that the word "the" before "matter" in line 8 should be deleted. During the discussion, Mr. Berger suggested that line 8 read: "to prove the truth of the assertion". Professor Cleary suggested: "to prove the truth of the matter asserted", and Mr. Berger accepted that amendment. Judge Weinstein felt that since the reporter was particularly emphasizing the expression rather than the conduct, the wording should be "asserted or expressed" to make it clear that it relates back to the oral expression. Mr. Haywood moved that line 8 be amended to read: "to prove the truth of the matter expressed or asserted". Judge Estes suggested: "Hearsay is a statement offered in evidence to prove the truth of the matter stated."

Mr. Haywood amended his motion to one that line 8 be amended to read: "to prove the truth of any matter asserted". Mr. Upton seconded. Judge Estes moved, as an amendment to Mr. Haywood's motion, that the word "any" be changed to "the". Judge Estes' motion was carried unanimously. A vote was taken on Mr. Haywood's motion and the motion was carried by majority approval. Three members abstained from voting. As approved, Rule 8-01(c) reads: "(c) Hearsay. 'Hearsay' is a statement offered in evidence to prove the truth of the matter asserted."

(a) Statement.

Professor Green moved that subsection (a) of Rule 8-01 as approved earlier be amended by having the word "expression" changed to "assertion". During the discussion concerning the meanings of "expression" and "assertion", Professor Green withdrew his motion. After further discussion, Mr. Erdahl moved that the word "assertion" be used in lieu of the word "expression" in subsection (a) as it had been approved earlier, and that a comment to the rule explain why the word "assertion" was being used. Mr. Spangenberg moved to amend Mr. Erdahl's motion to the effect that there be no comment explaining the usage of the word "assertion". Mr. Jenner stated Mr. Erdahl's motion as being that the word "assertion" be substituted for the word "expression" in subsection (a) as approved earlier. The motion was carried by vote of 8 to 5. Mr. Jenner stated that the word "assertion" was

being used in subsection (a) so that it would coincide with the language of subsection (c). Rule 8-01(a) as approved by this later action reads: "(a) Statement. A statement is (1) an oral or written assertion, or (2) non-verbal conduct of a person if, but only if, it is intended as an assertion."

[There was recess for dinner from 5:27 to 7:50 p.m.]

(c)(1) Testimony at hearing.

Professor Cleary gave the background of subdivision (1) of subsection (c) of proposed Rule 8-01.

During the discussion, Professor Cleary pointed out that the Committee was not intending to exclude from the operation of the hearsay rule a situation in which a witness is testifying to a statement made outside of the courtroom. Judge Estes suggested the following language: "A statement is one made by a declarant while testifying at the hearing." Mr. Jenner did not see any need for lines 10 and 11, but Dean Joiner stated that the lines were intended to provide that the testimony of the witness is not hearsay. Mr. Haywood moved for the adoption of subdivision (1) as drafted. There was unanimous approval and Rule 8-01(c)(1) as approved reads: "(1) Testimony at hearing. The statement is one made by a witness while testifying at the hearing; or".

(c)(2) Declarant present at hearing.

Professor Cleary read the text of subdivision (2) of subsection (c) of proposed Rule 8-01 and a part of his comment thereto. Mr. Berger thought that it was horrendous that confession by a third party who was present in court could be put into evidence against the defendant. Judge Weinstein said that there are a whole series of cases allowing a severance in situations like the above because of the prejudice involved. Professor Cleary continued with the reading of his comment. There was a short discussion concerning persons self-incriminating themselves by making certain statements in court. Then, Professor Cleary resumed his reading of the comment.

Following discussion, Professor Cleary asked: "Assuming that the rule as drafted would permit everything that has been suggested as being horrible, is this the way that you would proceed to try the case?" Mr. Spangenberg said that if what was proposed was the rule, he would be tempted to write up a beautiful, concise, one-page statement of the witness and have him read it over and sign it. Then if the witness were not too bright, he would put him on the stand, have him acknowledge that the statement was his, and then offer it in evidence. Mr. Raichle pointed out the factors of re-examination. Judge Weinstein read Rule 63(1) of the New Jersey Rules.

[Meeting was adjourned on Tuesday at 9:30 p.m. and was resumed on Wednesday at 9:00 a.m.]

PUBLISHER'S NOTE

Page(s) 41 is/are missing.

Mr. Jenner and Professor Cleary had a short discussion on the provisions of the proposed rules of hearsay and the anticipated effects in general. Professor Cleary read Sections 1235, 1236, and 1238 of the California Code of Evidence. Dean Joiner thought that Rule 8-01 is one of the most important rules that the Committee has faced so far. He suggested that the Committee consider the function which it was to perform and to bring the principle of whether this evidence is relevant and whether it is then subject to the usual safeguards applied to relevant evidence. If it is, he felt that the Committee should take the next step, i.e., to get rid of the technicalities which exist.

During the ensuing discussion, Mr. Jenner gave the following example of how he thought this rule would work: B has made the statement; A is put on the stand; B is examined and shown the statement and given the circumstances under which it came into existence and his knowledge of the statement, and he is able to prove that it is his statement; unless rules prohibit, Mr. Jenner puts the statement into evidence; it is very damaging to his opponent, and he turns to him and tells him that he may examine witness A or he may put B on the stand and examine her. Mr. Jenner said this is the thing which shocks the trial lawyers. He felt that when B was in the courtroom, there should be allowed only

examination of B by the opponent - not examination of A.

Mr. Spangenberg presented the following hypothesis: The first witness is very impressive looking. The plaintiff is in the courtroom. He had been told to go out and tell a lot of people about the accident in a way which would be favorable to him; a succession of witnesses is brought on, and the plaintiff is subject to cross-examination. Mr. Spangenberg said that under this rule, as he saw it, all of the aforesaid actions would be permissible. Dean Joiner said he felt the same way. Judge Weinstein said that he would not allow the evidence in, and he pointed out that hearsay was not let in because the declarant was not there subject to cross-examination, and there could be no evaluation of the probative force of the extrajudicial declaration. He said that if the declarant was present for cross-examination, there was no real reason for keeping the hearsay evidence out.

Mr. Raichle was very much opposed to the proposed rule regarding the cross-examination of the declarant.

Professor Green said that in this discussion, as is so often the case, there were applications of the proposed rule which created difficulties in peoples' minds and then there were others which did not involve objections to the proposed rule. He presented the following example: A witness is talking to a lawyer or to anyone interested in the case but simply makes a statement about something which later becomes relevant in

the litigation. That has a great advantage over what he says later. Common sense dictates that the passage of time causes the memory to weaken. The point about the statements is that every one of them was made before the testimony. Professor Green felt that Judge Weinstein had suggested that the rule be drafted so that statements which were made for the lawyer, who wanted to use the statements, would be inadmissible. He felt that one of the strongest arguments in favor of the proposed rule is the part that memory plays in testimony. So often, he said, by the time a witness testifies, his memory has become weak and a statement made at an earlier time will be less subject to the danger of the damage done to memory by the passage of time. He said that if something could be worked out to get the benefit of the good, sharp, clear memory, he thought that it was one of the principle objects of the proposal. Also, he said, it is not always possible to jog the witness' memory because, at the time of the trial, he may be unwilling to have it jogged as a result of prejudice or being influenced.

Mr. Berger asked if, under the proposed rule a witness testifies to facts a,b,c, and d, may the proponent of that witness then call a series of witnesses to prove that the witness made prior consistent statements five years before the trial. Professor Cleary replied that in the hypothesis presented, he supposed that the judge would, in his discretion,

not allow the evidence to come in. Judge Van Pelt asked if the Committee were saying that payment of a note could be proved by calling 10 or 15 people to whom the declaration of payment had been made. Professor Cleary replied that it seemed to him that that would be admissible under the proposed rule. Judge Soboloff asked why a man should be permitted to manufacture evidence for himself by self-serving statements which would serve just as well as sworn testimony. Professor Cleary gave a background of The English Act of 1938 in which the English had expressly excluded the kind of statement which was bugging the Committee, i.e., the statement made in preparation for court.

Mr. Berger said that it seemed to him that in terms of an adversary proceeding, there is no substitute for a trial in a courtroom. He said that what the Committee would be doing, if the proposed rule was put through, was substituting a short-cut to enable instant trials. Professor Cleary felt that what Mr. Berger had raised was extremely pertinent and cut right down into the heart of the whole situation. He said Mr. Berger had asked what fundamentally is the justification for allowing in these obviously hearsay statements by most of the case law. In summing up his reasoning for the provisions of this rule, Professor Cleary said that he thought that a broad rule of this kind got

rid of a lot of nit-picking requests. At this point, Dean Joiner reported that in his search for cases in which the early Model Uniform Rules had been adopted, he had found a 1967 Kansas case in which the court had said that certain evidence was admissible as an exception to the hearsay rule. The court had said that subparagraph (a) prescribes as such: "An exception - a statement previously made by a person who was present at the hearing and available for cross-examination with respect to the statement." Dean Joiner pointed out that the cited case demonstrates that that provision in the Kansas statute is being applied. He said that it is one in which the court recognized the existence of functioning rules.

Mr. Jenner said that the note in the New Jersey rule - equivalent to what was being presented by this proposed rule - summarizes what had been said at this meeting on the previous evening and at this morning's session. He felt that there had been a very full discussion by illustrations and that everyone understood the issues presented and the questions of policy involved. He explained how rules are presented to the bench and bar, and suggested that with an appropriate note along the lines of the fine note to the New Jersey rules as well as the Evidence Committee's reporter's notes to the members, that the Committee have placed before the bar what it thinks would seem to be reasonably workable rules.

Judge Van Pelt said the thing which bothered him was not the prior statements of a witness but the statements of someone who was not a witness, but who was just sitting in the courtroom. During the discussion which followed, Mr. Erdahl moved that paragraph (2) of subsection (c) of Rule 8-01 be amended as follows: strike out "is present" in lines 12 and 13; substitute therefor the words "has testified"; and insert the word "is" between the words "and" and "subject", so that it will read: "The declarant has testified at the hearing and is subject to cross-examination concerning the statement;".

Judge Sobeloff said that some of the members may be agreeable to loosening up the rule provided that the prior statement is not given the force of affirmative testimony. Mr. Erdahl said that his purpose was to make the prior statement admissible as substantive evidence - not for limited purpose of impeachment or for corroboration, etc. He restated his motion as being that paragraph (2) of subsection (c) of Rule 8-01 read as follows: "The declarant has testified at the hearing and is subject to cross-examination concerning the statement;". Judge Weinstein suggested using the word "testifies" instead of "has testified" and saying "cross-examination concerning the statement by the opponent of the statement". Mr. Spangenberg said he

believed that prior consistent statements should be admitted as affirmative evidence and, if a prior consistent statement was admitted then all other prior statements, whether consistent or inconsistent, should be admitted. He said that if buttressing self-serving statements were going to be allowed, he felt that the proponent of such statement should have the affirmative burden of putting the declarant on the stand some time during the trial. Mr. Berger moved to amend Mr. Erdahl's motion by having the following language added to it: "and (1) the statement is not merely cumulative and (2) that its probative force outweighs its possible tendency to prejudice or bias." Mr. Erdahl moved to amend his own motion by substituting the word "testifies" for "has testified". Mr. Berger then stated his motion as being that the language of paragraph (2) of subsection (c) of Rule 8-01 read: "The declarant testifies at the hearing and is subject to cross-examination by the opposing party concerning the statement and, (1) the statement is not merely cumulative and (2) that its probative force outweighs its possible tendency to prejudice or bias." Dean Joiner felt that Mr. Berger's motion should be voted down, because the subject matter is already covered in Rule 4-04, and Mr. Erdahl agreed. A vote was taken on Mr. Berger's motion, and the motion was lost by 6 to 5.

Mr. Jenner stated that Mr. Erdahl's motion was that subdivision (2) be amended to read: "The declarant testifies at the hearing and is subject to cross-examination by the opposing party concerning the statement." Mr. Haywood questioned the title of the subdivision, and Mr. Erdahl included in his motion that the title be changed to: "Declarant testifies at hearing". There was a short discussion centered around the word "hearing". The consensus was that "hearing" was the word to be used. Following another short discussion, a vote was taken on Mr. Erdahl's motion. The motion was carried by a vote of 7 to 5, and Rule 8-01(c)(2) as approved reads: "(2) Declarant testifies at hearing. The declarant testifies at the hearing and is subject to cross-examination by the opposing party concerning the statement; or".

Mr. Epton moved that Rule 8-01(c)(2) be redrafted so as to limit it to previous inconsistent statements, (2) identification, and (3) previous consistent statements of substantive evidence for the purpose of rehabilitation. Judge Sobeloff asked if a man could be convicted on the out of court testimony alone - where the witness denies the prosecution's version on the stand and is confronted with a prior statement that convicts the defendant. The answer was "No".

Following a short discussion, Professor Green suggested that Mr. Epton amend his motion with regard to the last phrase so that it would read: "previous consistent statements only in the instance of rehabilitation". Mr. Epton accepted the amendment.

Mr. Erdahl said he wondered if the need for the last phrase of Mr. Epton's proposal was not obviated by falling back on Rule 4-04, on excluding relevant evidence which is inflammatory but mostly excluding cumulative evidence. Mr. Epton said he did not so consider, and he would rather have the language in this rule. A vote was taken on Mr. Epton's motion, and the motion was carried by 6 to 5. Rule 8-01(c)(2) was, thereby, to be redrafted as suggested.

(3) Deposition.

Professor Cleary read the text of Rule 8-01(c)(3), as proposed in his first draft, and his comment thereto.

Dean Joiner said it seemed to him that if it is carefully drafted, there is just as much reason for signing that a statement that has been subject to cross-examination and all by the party, etc., in a previous trial is just as much as not hearsay as is a deposition not hearsay. Professor Cleary felt that this was quite true. However, he said, other problems

had to be dealt with: 1, how far the Committee was prepared to go in admitting testimony taken in another case involving another party where the witness became available, and 2, assuming that the Committee was prepared to go so far as to say that it is admissible if the testimony taken in the other case was offered against a party with a motive similar to the motive of the present party against whom it is offered, so that he is motivated to cross-examine adequately. He said it seemed to him that if the extreme position were taken, it was perfectly difficult under any view not to call it hearsay. It seemed to him that, in the interest of convenience, former testimony as a topic ought to be treated in one place, and that place was not here. He felt that it belonged in the exceptions to the hearsay rule. Judge Weinstein felt that the rule was not necessary, as it was simply a cross-reference to rules of civil and criminal procedure. Mr. Jenner said that what was bothering him was that, assuming that paragraph (3) was out, the rule was cast largely on terms of unavailability and pretty much of what has happened in the course of the trial, depositions taken in the action, depositions taken in some other action prior to the trial, and testimony either in the previous trial or this action. Assuming that the testimony is relevant, he said, should it not be treated in Rule 8-01 as being admissible?

Judge Weinstein said he preferred that it be treated as hearsay. He felt that there were two separate kinds of problems - one, those depositions (covered in civil and criminal rules) that would come in even if there were nothing further done in rules of evidence, and two, the other depositions which might not come in under the civil rules but which one might want to let come in as a hearsay exception (such as state court depositions and related proceeding). He would prefer to treat it as hearsay to give the court some discretion. Professor Moore said he had trouble on this point, i.e., that the reporter started out with the definition of "hearsay", and then the third exception said, "The statement was made by a deponent in the course of deposition . . .." He said that there will be instances where the evidence definition will contain hearsay statements themselves which will be admissible under the hearsay rules. He said that there was a little circularity in the definitions.

Mr. Jenner asked if there were a motion or suggestion with respect to subdivision (3). Mr. Berger moved that the Committee approve subdivision (3) as worded with a suggestion that there be a comment that any use of the deposition is governed by the rules of civil and criminal procedure. After

re-reading subdivision (3), however, he decided that a comment was not necessary. He said he thought that the Committee had agreed that it meant to say whenever a hearsay statement is made by a person in the form of a deposition, it is treated for the purposes of the rule of evidence as though it were taken in testimony in open court. Professor Cleary asked Mr. Berger if he felt that the situation would be clarified by the elimination of the word "statement" in subdivisions (1) and (3). Following the discussion which ensued, Professor Green moved that subdivision (3) be stricken. Judge Weinstein supported the motion as he felt that the Committee should go further than the civil and criminal rules permit, and that the catch-all for other depositions ought to be handled as a separate hearsay section or in connection with trial testimony. A vote was taken on Professor Green's motion, and the motion was carried by majority approval. There was one negative vote.

Professor Cleary understood that in a new draft nothing need be said about depositions offered in this action because that was covered in other rules, and the fact that it may be omitted from hearsay does not make any difference. He said that left the Committee with the problems of former testimony and depositions taken in any other action. Mr. Joiner moved that the reporter be requested to prepare a rule as an

exception to the hearsay rule dealing comprehensively with depositions and prior testimony. Judge Estes said he would like to add that testimony at former hearings and deposition be treated as an exception to the hearsay rule. Dean Joiner's motion was restated as being that the reporter be requested to prepare a rule as an exception to the hearsay rule, as distinguished from what the Committee had, dealing comprehensively with the admission of depositions and former testimony. Professor Green felt that depositions which were covered by the federal civil and criminal rules should not even be mentioned except in a comment to the effect that the depositions were being left to the civil and criminal rules. Dean Joiner's motion was lost by a vote of 6 to 5.

Professor Cleary said he would not construe the vote as meaning that he should forget about former testimony, and that he would submit another draft at a future meeting.

(4) Admission by party-opponent.

Professor Cleary read the text of Rule 8-01(c)(4), as proposed in his first draft, and a portion of his comment thereto.

It was announced that the next meeting would begin at 9:00 a.m. on December 14, 1967.

[The meeting was adjourned at 3:45 p.m.]