The sixteenth meeting of the Advisory Committee for the Rules of Evidence convened on Tuesday, December 10, 1968, in the Conference Room of the Administrative Office of the United States Courts, 725 Madison Place, N.W., at 9:30 a.m. Chairman Albert E. Jenner opened the meeting by welcoming the members and guests. The following members and guests were present for all or part of the sessions:

Chairman Albert E. Jenner
David Berger
Hicks Epton
Robert S. Erdahl
Joe Ewing Estes (absent Thursday through Saturday)
Thomas F. Green, Jr.
Egbert L. Haywood
Charles W. Joiner (absent Tuesday and Wednesday)
Frank G. Raichle (absent Thursday through Saturday)
Herman F. Selvin
Simon E. Sobeloff (absent Thursday through Saturday)
Craig Spangenberg
Robert Van Pelt
Jack B. Weinstein
Edward Bennett Williams (absentTuesday and Wednesday)
Edward W. Cleary, Reporter.

Judge Albert B. Maris, Chairman of the Standing Committee on Rules of Practice and Procedure, attended through the Friday session. Professor James Wm. Moore, member of the Standing Committee, was present on Tuesday and Wednesday. Professor Charles A. Wright, member of the Standing Committee, was present at the Thursday, Wednesday, and Friday sessions.

Chairman Jenner read a letter he had received from Edward Bennett Williams, Esquire, expressing his regrets at not being able to attend the first sessions of the meeting. Mr. Williams was out of town trying a case.

Mr. Jenner asked the Reporter if he had any opening remarks. Professor Cleary stated the deskbook included the last final draft for consideration by the Committee.

Mr. Jenner suggested going through the rules numerically. He stated he felt the rules should be read completely and out loud before asking for comments or suggestions from the members. If the rule was approved, the Advisory Committee Note would be included with the acceptance of its relative rule.

RULE 1-01. Scope.

Professor Cleary read the rule, changing "commissioners" in line 3 to magistrates". He stated the "Magistrates Bill" would be approved before the rules. Also, he added "Commissioners" in the title should be changed to "Magistrates".

Mr. Jenner asked if "all" should precede "proceedings" in line 1. Professor Cleary stated the type of proceedings was brought out in Rule 11-01, Applicability of Rules.

The reporter then turned the attention of the members to his memorandum of November 25, 1968. He read the memorandum.

Professor Moore then suggested abrogating all of Civil Rule 43 instead of only subdivisions (a), (b), and (c). Professor Cleary stated he felt the remaining subdivisions of Civil Rule 43 [(d) Affirmation in Lieu of Oath; (e) Evidence on Motions; and (f) Interpreters] were not matters of evidence but matters of trial procedure.

Mr. Jenner stated he did want to leave the one sentence in which was not to be abrogated from subdivision (a).

Professor Moore suggested leaving those decisions out of the evidence rules. Mr. Jenner said he wanted them included in the evidence rules because "a lawyer would turn to the Rules of Evidence to find them".

It was suggested by Judge Maris the decisions of the committee would be turned over to the standing Committee for referral to the Civil and Criminal Rules Committees.

Judge Estes moved reference to the title of "Evidence" [in open court] be left in the Criminal Rule 26.and Civil Rule 43 with a suggestion that further rules may be found in the Evidence Rules themselves. His motion was carried unanimously.

Referring back to Rule 1-01, Professor Cleary stated "Rule 11-1" in line 4 should read "Rule 11-01".

Professor Cleary then stated "all trial testimony should be taken in open court".

Mr. Berger stated everything included in Civil Rule 43(a) should be abrogated except the first sentence and the title. Also, in Criminal Rule 26, the title "Evidence" should be appropriately changed.

Professor Cleary felt further study should be made as to "Scope", "Application", and the use of the word "orally".

Judge Maris recommended the submission of the changes to the standing Committee to decide if any further work needed to be done.

Mr. Riachle read Rule 26 Depositions Pending Action. He stated "something had to be done".

Mr. Berger restated the motion to approve the recommendation of the reporter. The motion related to the rules of the Civil and Criminal Procedure being submitted to the standing Committee to determine whether or not the first sentence of Criminal Rule 26 should be subject to more study. It was mentioned these rules may not be entirely accurate.

q The motion was carried.

Professor Moore asked if Rule 1-01 referred to "all" courts of the United States or just district courts.

The reporter stated that question could be answered in Rule 11-01. He read the rule Applicability of Rules.

Judge Maris asked if Rule 11-01 was applicable to all district court decisions. The reporter answered yes.

It was suggested "United States Courts of Appeals" be added to subsection (a) of Rule 11-01. It will be added in line 5 after "District of the Canal Zone,". This was stated as a motion and carried.

Under subdivision (b) Proceedings generally, "actions" in line 9 was changed to "proceedings". Mr. Berger suggested line 10 read: "criminal cases, to contempt proceedings except those in which the judge may act summarily,". This was put to a vote and carried.

Subdivision (c) Rules of privilege was approved as drafted

Subdivision (d) Rules inapplicable was read by the chairman. Part (1) Preliminary questions of fact and the introductory clause were approved as drafted. Part (2) Grand jury was approved as drafted. Part (3) Miscellaneous proceedings, when read was changed by striking the second "criminal" in line 11 and line 12 through "by the judge;". There were no objections.

Subdivision (c) Rules applicable in part was changed by suggestion of Mr. Spangenberg to strike "only" in line 15. There were no objections.

Judge Weinstein drew the attention of the members to the Advisory Committee Note on Rule 11-01 [specifically page 467]. He suggested placing a comma after "1 WIGMORE § 4(5)" and striking the language through the period after "practical application". "The" was to be in lower case and the sentence was to read: " . . . 1 WIGMORE § 4(5), the Supreme Court has not accepted to this view." Judge Weinstein also suggested adding another sentence after the quoted language which was:"The rule as drafted does not deal with evidence required to support an indictment." In support of his suggestion, he cited 385 F.2d 132 and 269 F. Supp. 149. All of his suggestions were put to a vote and carried.

RULE 11-02. Title.

This rule was approved as drafted.

RULE 11-03. Effective date.

This rule was approved as drafted.

RULE 1-03. Rulings on evidence.

Judge Van Pelt suggested subdivision (d) Plain Error as being "appellate procedure".

Subdivision (a) Effect of erroneous ruling, (1) Objection and (2) Offer of proof was approved as drafted.

Subdivision (b) Record of ruling was changed by striking "clearly" in line 1 pn page 6. In line 7 on page 6 "that the matter or witness" is to be stricken. The purpose: a witness cannot be privileged. The title of subdivision (b) was changed to Record of offer and ruling. Subdivision (c) was changed to read: Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by such means as making statements or offers of proof or asking questions in their hearing."

The rewriting was approved.

RULE 1-04. Preliminary questions of admissibility. In subdivision (a) General rule, Mr. Haywood suggested changing the second "the" to "that". There were no objections. Subdivision (b) Relevancy conditioned on fact was proposed to be changed by striking "relevancy" to "probative value" and the title to read: "(b) Particular relevancy conditioned on fact."

Subdivision (c) Presence of jury, was changed as a matter of consistency: "Presence" in the title and "presence" in line 10 were changed to "hearing". No motions were made in regard to Rule 1-04.

[The meeting adjourned at 4:55 p.m.
until Wednesday, December 11, 1968
at 9:00 a.m.]

Professor Cleary opened the meeting stating he had redrafted portions of Rule 1-04. He suggested rearranging subdivision (a) by considering first qualification, privilege second, and then third, admissibility of evidence. He read his redraft: "When the qualification of a person to be a witness, or the existence of a privilege, or the admissibility of evidence, is subject to a condition except as provided in subdivision (b), and the fulfillment of the condition is in issue, that issue is to be determined by the judge."

Mr. Spangenberg felt the except clause should be at the end of the subsection. The reporter stated if the judge felt he should not admit more evidence, he could instruct the jury to disregard it. Mr. Spangenberg stated he thought the policy was on the relevancy issue that relevancy itself is condition, the jury does get a second look into it, under suitable instructions from the judge.

With regard to subsection (b), Judge Weinstein suggested changing "relevancy" to "probative force". Also, he suggested striking the remainder of the subsection following the first sentence. He stated after the terms of the first sentence, it was up to the jury to give the evidence whatever weight was necessary.

Mr. Berger stated he felt subsection (a) should be limited to qualification and existence of a privilege, which would be subject to a condition. He then proposed subsection (b) contain admissibility. The reporter felt if read that way, the rule would not take care of certain situations. In other words, Mr. Berger wanted to eliminate "admissibility" from subsection (a) and have it covered in subsection (b).

Mr. Epton stated he felt the trouble with this subsection was that the committee was trying to adopt _____ language for a situation where it is not ordinarily used. He suggested subsection (a) read: "Preliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege, or the admissibility of the evidence shall be determined by the judge. In making his determination, he is not bound by the rules of evidence except claims of privilege." Mr. Jenner did not like "preliminary questions". He stated it was not originally stated as such in subsection (a). He felt that as revised, subsections (a) and (b) eliminated the thrust of relevancy. Mr. Raichel stated once the evidence is in, it's there no matter how improper it may subsequently develop. The

chairman asked if the committee would accept subsection (b) as written. Judge Weinstein said he would be in favor of it the committee wanted to accept it. Mr. Jenner stated Mr. Epton's revision of subsection (a) and subsection (b) as drafted with a few language changes would be acceptable. He read Mr. Epton's motion. Mr. Spangenberg suggested "admissibility"of evidence shall be determined by the judge subject to the further provisions of subsection (b)."

Mr. Jenner asked the reporter to give the history of Rule 1-04. This session was the fourth time for consideration of this rule. The chairman read the motion. Mr. Erdahl asked Mr. Epton what he would propose for subsection (b) Mr. Epton suggested leaving subsection as drafted. The motion was carried with regard to Mr. Epton's suggestion. Mr. Spangenberg moved subsection (b) be approved as drafted. The motion carried.

Subsection (c) Hearing of jury. Judge Sobeloff suggested changing "outside" to "out of" in line 9. There were no objections. The chairman read the subsection. It was moved to approve subsection (c) as amended. The motion carried. Mr. Spangenberg wanted the title of

subsection (c) to remain as "Presence of jury." The chairman was in favor of the title remaining as drafted. He stated for the record it would remain as such.

Subsection (d) Preliminary hearings on confessions and evidence unlawfully obtained. Mr. Erdahl suggested inserting "allegedly" after "evidence" in the title. Mr. Jenner stated he would prefer the striking of "unlawfully obtained" from the title. There were no objections to the chairman's suggestion. For consistency, Judge Sobeloff suggested changing "outside" in line 16 to "out of". Mr. Raichle was not in favor of the last sentence beginning on line 16. His basic reason being that credibility is not another issue. Judge Weinstein suggested "except if credibility is involved." should be added at the end of the subsection. Mr. Spangenberg stated it would be dangerous to state the subsection in that way. Mr. Berger moved a period be placed after "at the trial on the issue of guilt", and striking the remainder of the subsection. After some discussion and the reporter reading the motions from a previous meeting, Mr. Berger withdrew his motion. Professor Cleary suggested changing the last phrase to "The accused does not by testifying at the hearing render himself liable to cross-examination . . .". The chairman asked that the

reporter read in full the proposed subsection (d) in light of the discussion. The reporter stated the second sentence beginning "Testimony" in line 16 on page 11 through ", and he" in line 1 on page 12 be stricken. A new sentence will read: "The accused does not by testifying at the hearing render himself liable to cross-examination as to other issues in the case and testimony given by him at the hearing is not admissible at the trial except for purposes of impeachment." Professor Green felt the only necessary change would be to reverse the clauses of the subsection. Mr. Spangenberg was in agreement with Professor Green's suggestion and added "testimony given by him at the hearing is not admissible at the trial on the issue of guilt." The chairman restated the motion: "The accused does not by testifying at the hearing subject himself to cross-examination as to other issues in the case. Testimony given by him at the hearing is not admissible on the issue of guilt at the trial." Mr. Erdahl moved to amend by adding "except for purposes of impeachment" after "issue of guilt". The reporter stated "on the issue of guilt" should be taken out if Mr. Erdahl's amendment were accepted. Mr. Erdahl agreed. Mr. Raichle suggested changing "render" to "subject". Mr. Jenner was

against "except for the purposes of impeachment". Mr. Spangenberg suggested: "Testimony given by him at the hearing is not admissible on the issue of guilt at the trial." The motion to add "except for purposes of impeachment." was lost. The motion to strike the second sentence and adding the new sentence as read by the chairman was carried.

Subdivision (e) Weight and credibility. The chairman read the subdivision. Professor Green felt "This rule does not" rebutted subdivision (d). The chairman suggested "Nothing in this rule limits". Mr. Spangenberg stated it had been decided in subdivision (a) that once a judge had admitted evidence and having made his own determination, a party can nevertheless offer additional evidence. Mr. Epton suggested the government is a party. He felt this interpretation was too broad. The chairman stated his problem could be solved by striking "of a party". Mr. Raichle moved this subdivision be stricken. The vote was 4 for and 5 against. Judge Weinstein moved the whole rule be adopted as amended. The motion was carried.

RULE 1-05. Summing up and comment by judge. Mr. Raichle was against this rule. He felt it was not a rule of evidence. He stated the committee should not tell the judge what to do after all the evidence is in and the arguments have been made. Mr. Berger agreed. Mr. Raichle moved Rule 1-05 be omitted. Judge Estes stated this rule was necessary. Judge Maris stated the fact that this rule appears in the Rules of Evidence would not affect a judge's rights at all. The vote on Mr. Raichle's motion was 4 for and 6 against. It was lost. Mr. Epton moved approval of Rule 1-05. Mr. Raichle asked if "Review" could be used in lieu of "Summing up" in the title. Mr. Spangenberg moved "fairly" be added in line 3 after "the judge may". It was decided "fairly" would be a reflection upon the judge's discretion. The motion was lost. Mr. Raichle moved "sum up" be deleted and "review" be in its place. Judge Estes stated law books use "sum up". Professor Cleary stated "review" does not connotate "summing up all the evidence". He felt "review" was a one-sided point of view. The motion lost. The chairman suggested inserting "also" after "he" in line 5. The motion carried. The chairman then suggested "that they" be inserted in line 7 after "to the witnesses and". It appeared awkward as drafted. The motion carried. Mr. Selvin moved "summation or" be inserted in line 8 after "the judge's".

The motion carried. Mr. Raichle moved "sum up" be deleted from line 3 and "summarize" be in lieu thereof. The motion lost. Judge Van Pelt moved the approval of Rule 1-05 as amended. The motion carried. Mr. Raichle moved the last sentences of the Note be deleted, because it was disapproved in the House report. The motion carried.

RULE 1-06. Limited admissibility. Mr. Raichle moved the adoption of this rule as drafted. It was carried. Judge Weinstein questioned the last phrase in the Note. He felt it unclear. In accordance with Rule 6 of the New Jersey Evidence Rules, the reporter suggested "The wording of the present rule differs, however, in repelling any implication that limiting or currity instructions are sufficient in all situations." Judge Weinstein suggested citing Bruton.

RULE 1-07. Remainder of or related writings or recorded statements. Judge Weinstein felt this rule was limited by using "recorded". He thought it should be moved to Item X or made more general by striking "recorded". The chairman thought "recorded" was all right. The reporter stated "writings" were not dealt with generally. Mr. Selvin stated Rule 26d(4) of the Federal Rules of Civil Procedure dealt with this proposition in regard to deposition. There was a motion to approve this rule as drafted. The motion carried.

Regarding the Note, the chairman stated the first sentence was not phrased cleary. He did not feel the rule was an extension. The reporter suggested "The rule is an expression of the rule of completeness [case citations]. It is manifested as to depositions in Rule 26d(4) . . ." In the second paragraph of the Note, the chairman suggested "document" be used in lieu of Sstatement". It was then mentioned "when a writing or recorded statement" appeared in the rule. No definite motions were made with respect to the Note.

ARTICLE II. Judicial Notice.

RULE 2-01. Judicial notice of adjudicative facts. The reporter stated the change which was made pursuant to the August meeting of the Committee, i.e., the last sentence in subdivision (g). Judge Weinstein preferred subdivision (b) to begin affirmatively: "A judicially notices fact must be free of reasonable dispute . . ." The reporter then suggested "A judicially noticed fact must be either . . ." and "and therefore not subject to reasonable dispute." The chairman read the rule as amended for a vote. Mr. Selvin asked if the phrase "and therefore not subject to reasonable dispute" referred to sources or to fact. It was unclear. It was then suggested since the phrase was meant to refer to "the fact" the last phrase should read "so that the fact is not subject to reasonable dispute." The subdivision was approved as amended. Judge Weinstein stated "In all cases" in subdivision (c) was unnecessary. Mr. Spangenberg felt "discretion" was not the

proper word. His interpretation of "discretion" would be that one can or cannot do something. Mr. Berger suggested "may" on lieu of "has discretion to". He so moved. The motion carried. Judge Weinstein moved approval of Rule 2-01 as amended. The motion carried. With regard to the Note, the chairman suggested in the first sentence placing a period after "jddcial notice" and beginning a new sentence with "It deals . . .". Further, he suggested striking "to the article cited above" since the cited article was in the previous line. There would be no confusion as to which article. Mr. Selvin stated "foreign" should appear before "law" when it pertains to Rule 44.1 of the Federal Rules of Civil Procedure. This rule dealt with "foreign law". On page 38 of the Note, the chairman suggested "minimum recognition of the right" instead of "to the right". On page 43, "The judge instructs" was changed to "The judge will instruct". There were no motions with regard to the Note.

ARTICLE III. Presumptions.

RULE 3-01. Presumptions against accused in criminal cases. The reporter gave the history of the rule. The chairman questioned "criminal cases" being set out in the subdivisions since it is included in the title of the rule. The reporter stated this rule was not set out to cover presumptions in criminal cases which might be imposed against

the government. He further stated this rule was intenddd to give an accused the status of an inference. The chairman questioned "In all cases" in subdivision (c). He suggested striking "In criminal cases" in line 2 of subdivision (a) and "In all cases" in line 7 of subdivision (c). Judge Van Pelt felt "In criminal cases" could be retained. He felt it was legislative drafting. Judge Maris was in favor of retaining the phrase. There were no objections to striking "In all cases" in subdivision (c). The reporter suggested "Whenever" in lieu of "When" in line 7 of page 47. There were no objections. Mr. Selvin felt "is" in line 10 on page 46 was unnecessary. His reason beging that the same type of phrase is used on page 47 in line 14 without "is". The reporter stated "the presumed fact is an element". It was the consensus "is" be added in line 14 of page 47. Mr. Selvin questioned what the reporter meant by including "basic facts" in line 14 on page 46. The reporter replied "basic facts giving rise to presumption". There was a motion the rule be approved as amended. The motion carried. With respect to the Note, Judge Weinstein suggested some of the cases cited do not stand as being correct in the second circuit. The reporter suggested "While Second Circuit decisions have been held . . ." There were no definite decisions made regarding the Note.

RULE 3-02. Applicability of State law. Judge Weinstein questioned the capitalization of "State". The reporter replied it was the A.L.I. style. It was found in general to be uncapitalized. There was a motion to approve the rule as drafted. The motion carried. The chairman suggested with regard to the Note that in the fifth line from the bottom of the first paragraph, a period be placed after the word "defense" and the "and" be stricken. The next sentence would begin "Application of the state law . . ." Judge Van Pelt asked why "technical" presumptions. The reporter replied if one were trying to prove admission by virtue of failure to deny a letter or a submitted account -- one would have to prove the mailing of the letter. The "little gap" of proof has been given the term "tactical" presumption.

RULE 3-03. Presumptions in other cases. Judge Weinstein was in favor of "facts" being in the singular. The reporter replied most presumption requires more than one "fact". Judge Weinstein then suggested adding "necessarily" after "If reasonable minds would" in subdivisions (A) and (B) to conform with subdivision (C). There were no objections to his suggestion. It was decided if the term "basic facts" was used, "giving rise to the presumption" would not be necessary. This change was made throughout the rule. Judge Weinstein suggested "he" appearing on lines 7 and 12 on page 58 be changed to "the judge" for clarification. There were no objections. Judge Weinstein then suggested striking "depends

upon the evidence relevant thereto and" beginning one line 7 of page 59. There were no objections. There was a motion to approve the rule as amended. The motion carried. With reference to the Note, the reporter suggested deleting the last full sentence on page 63 of the last paragraph on page 62. It was the consensus of the committee to strike it. There was a typographical error in the spelling of Justice Southerland's name on page 67.

ARTICLE IVRULE

RULE 4-01. Definition of "relevant evidence". This rule was unchanged at the August meeting. Judge Van Pelt moved approval. The motion carried.

RULE 4-02. Relevant evidence generally admissible, irrelevant evidence inadmissible. There was a motion to approve the rule as drafted. The motion carried.

RULE 4-03. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. The reporter stated this draft appeared unchanged from the August meeting. There was a motion to approve the rule as drafted. The motion carried. Mr. Spangenberg suggested with regard to the Note, that "unfair" precede "prejudice" in the first line of the second paragraph on page 81. The members agreed.

RULE 4-04. Character evidence not admissible to prove conduct; exceptions; other crimes. The reporter stated the only change as a result of the August meeting was the addition

of "other crimes" in the title. Mr. Berger moved approval of the rule. The motion carried.

RULE 4-05. Methods of proving character. There was a motion to approve this rule as drafted. The motion carried.

RULE 4-06. Habit; routine practice. The reporter stated the title had been changed from "Routine conduct". Mr. Berger moved approval of the rule. Mr. Epton stated his position of opposition to this rule was as always. He felt "habitt'was dangerous evidence. The motion carried by a vote of 6 to 4.

RULE 4-07. Subsequent remedial measures. The reporter stated this rule was unchanged from the August meeting. There was a motion to approve. The motion carried.

RULE 4-08. Compromise and offers to compromise. The reporter stated this rule was assapproved at the August meeting except for the addition of "or" in the last line. There was a motion to approve. The motion carried.

RULE 4-09. Payment of medical and similar expenses. This rulo was unchanged as of the August meeting. There was a motion to approve. The motion carried.

RULE 4-10. Offer to plead guilty; nolo contendere; withdrawn plea of guilty. The reporter stated this rule was substantially changed at the August meeting. He read the original version of the rule. Mr. Epton stated he felt the revision was much better than the previous version. He moved approval. The motion carried.

RULE 4-11. Liability insurance. The reporter stated the only change in this rule was to limit reference of insurance to liability insurance. There was a motion to approve. The motion carried.

ARTICLE V. Privileges.

RULE 5-01. Privileges recognized only as provided. The reporter stated this rule was not changed at the August meeting. There was a motion to approve the rule as drafted. The motion carried.

RULE 5-02. Required reports privileged by statute. The reporter called the attention of the members to the fact that two drafts were submitted. The only difference between the two versions appeared in the last sentence. At the August meeting, Judge Estes stated he was not satisfied with the wording of the last sentence and would draft a proposal for the December session. The reporter read the proposal of Judge Estes. Mr. Raichle asked if this rule extended to a copy of a report. The reporter replied "it applies to the person making it". The person making a copy has the right to refuse disclosure. The reporter stated also that the rule was not meant to render privilege of reports which are not already privileged, but meant to require reports which were privileged. The rule would leave the question of

"privilege" up to the state court. Mr. Jenner stated his understanding of this rule. "The Committee in August, decided to limit the rule to say there is no privilege under the rule in actions directly involving false statements or fraud in the return or report." Judge Estes wanted to expand the rule to state that no privilege exists where the exercise of this privilege would aid or conceal fraud where disclosure is essential to a fair determination of a cause. It was stated the judge passes on whether it is essential to a fair determination or cause. Judge Estes added it depended whether or not the exercise of this privilege would aid or conceal fraud or the disclosure is essential to a fair determination of a cause.

Mr. Epton suggested the last sentence read: "No privilege exists under this rule and actions directly involving false statements or fraud in the return or report nor where it would aid or conceal fraud nor where disclosure is essential to a fair determination of a cause." Judge Estes accepted Mr. Epton's suggestion. Mr. Epton moved his suggestion be accepted. Judge Van Pelt suggested "or" in lieu of "nor". This was acceptable.

Mr. Spangenberg stated he felt the suggested revision of Judge Estes completely eviscerated the policy which appears in the Statutes, which requires that a report be made in the first place. It was suggested "or where the exercise of the

privilege would aid or conceal fraud or where disclosure is essential to a fair determination of a cause." be added at the end of the revision by Judge Estes. The purpose was to broaden the exercise of the privilege. The vote was 5 to 4. The motion carried. It was decided the final decision on the rule would await Dean Joiner and Mr. Williams. When Dean Joiner and Mr. Williams joined the meeting, Rule 5-02 was moved to be reconsidered. Mr. Epton moved broadening the scope by striking "directly" in line 10 on the first revision. The motion carried. There was a motion to approve the rule as amended. The motion carried.

RULE 5-03. Layyer-client privilege. The reporter stated this rule was unchanged from the August meeting save two commas in line 14. Mr. Raichle moved the adoption of this rule. The motion carried.

RULE 5-04. Psychotherapist-patient privilege. There was a motion to approve the rule as drafted. The motion carried.

RULE 5-05. Husband-wife privilege. The reporter stated this rule was amended at the August meeting with regard to the addition of a refesence to the Mann Act. There was a motion to approve the rule as drafted. The motion carried.

RULE 5-06. Communications to clergymen. There was a motion to approve this rule as drafted. The motion carried.

RULE 5-07. Political vote. Mr. Haywood moved the adoption of this rule. The motion carried.

RULE 5-08. Trade secrets. There was a motion to approve the rule as drafted. The motion carried.

[At this point, 5:00 p.m. the committee adjourned until Thursday, December 12, 1968, at 9:00 a.m.]

RULE 5-09. Secret of state. The reporter stated this rule had two very slight changes from the August meeting. In subdivision (c), line 15, "another party" was in lieu of "opposite party", and in the last line "or dismissing the action" was added. Mr. Epton suggested adding "by the officer authorized to exercise the claim." should be added after "knowledge" in line 8 of subdivision (d). Dean Joiner stated this would complicate the rule, because the rule is only a direction to the judge to give notice to the particular person. Mr. Epton withdrew his suggestion. Mr. Haywood moved approval of the rule as drafted. The motion carried. Mr. Epton questioned page 178 of the Note. The reporter stated he would check to see if there had been a typographical error.

RULE 5-10. Identity of informer. The reporter stated the only change in this rule was in subdivision (c)(3) dealing with the procedure to be followed when the inquiry

was into the legality of the means by which evidence was obtained. The language which was stricken at the August meeting was "In making his decision, the judge may consider whether the evidence required after the issuance of the warrant." There was a motion to approve the rule as drafted. The motion carried.

RULE 5-11. Waiver of privilege by voluntary disclosure. The reporter stated this rule was unchanged from the August meeting. There was a motion to approve the rule as drafted. The motion carried.

RULE 5-12. Privileged matter disclosed under compulsion or without opportunity to claim privilege. The rule as drafted was not changed in the last two previous meetings. There was a motion to approve this rule as drafted. The motion carried. With regard to the Note, Mr. Berger suggested expanding the last paragraph to include the example Mr. Epton brought up with regard to the rule itself, i.e., lawyer testifying without claiming the privilege. The reporter stated Mr. Berger's suggestion was not a very good illustration because there is a provision in the "Attorney-client" provision that the lawyer may claim privilege before the client if he is authorized and his authority is presumed.

RULE 5-13. Comment upon or inference from exercise of privilege; instruction. The reporter stated there were no changes in this rule as of the August meeting. Mr. Epton suggested the striking of "judge or" in line 6 of subdivision (a). Mr. Spangenberg disagreed stating the discussion of the committee in a previous meeting came to the conclusion that any comment about the exercise of the privilege would excite the jury and then the jury would be left to draw an inference. The reporter asked if the committee would accept the proposal that subdivisions (a) and (b) be limited to "claims by a party". Mr. Spangenberg suggested "by a party" be placed in subdivision (b) because it is a privilege claimed outside the presence of the jury. Mr. Erdahl was against this suggestion because he stated he had never seen a case where the party waited until the actual trial to claim privileges. Mr. Epton asked if there was a difference between the "claim" or "exercise" of a privilege. The reporter stated "exercise" of a privilege connotated a successful claim. For consistency, Mr. Epton suggested changing "exercise" to "claim" in line 3 and also changed in the caption. The reporter agreed. Dean Joiner moved the rule be approved as amended. The motion carried.

ARTICLE VI. Witnesses.

RULE 6-01. General rule of competency. There was a motion to approve the rule as drafted. The motion carried.

RULE 6-02. Lack of personal knowledge. The reporter stated this rule was unchanged at the August meeting. Judge Weinstein asked with regard to the phrase "evidence is introduced sufficient to support a finding that" if it wasn't inconsistent with the basic rule that "a judge may make a preliminary determination without proof of evidence". He moved striking the phrase in lines 2 and 3. The reporter disagreed. He stated if there was controversy over whether a witness had knowledge, it would be a jury question. The judge should not basically pass on the question of whether a witness had first-hand knowledge, but only whether enough evidence had been introduced supporting whether the witness had first hand knowledge. Mr. Epton agreed with the reporter. Judge Weinstein withdrew his motion. There was a motion to approve the rule as drafted. The motion carried.

RULE 6-03. Oath or affirmation. The reporter stated this rule was unchanged from the August meeting. There was a motion to approve the rule as drafted. The motion carried.

RULE 6-04. Interpreters. The reporter stated this rule was unchanged from the August meeting. There was a motion to approve. The motion carried.

RULE 6-05. Competency of judge as witness. There was a motion to approve the rule as drafted. The motion carried.

RULE 6-06. Competency of juror as witness. There was a motion to approve the rule as drafted. The motion carried.

RULE 6-07. Who may impeach. There was a motion to approve the rule as drafted. The motion carried.

RULE 6-08. Evidence of character and conduct of witness. There was a motion to approve the rule as drafted. The motion carried. Regarding the Note, Mr. Spangenberg asked if there was a conflict with the Note which accompanied Rule 4-05. The reporter supported the inquiry and stated he would put a cross reference into the Note of Rule 4-05. Mr. Spangenberg felt the cross reference would be appropriate. There were no objections from the members.

RULE 6-09. Impeachment by evidence of conviction of crime. Mr. Williams moved the adoption of this rule as drafted. The motion carried. Professor Wright questioned if the reference to the laws were of the jurisdiction where the crime was committed. Mr. Berger suggested striking "under the laws of the United States or any State or nation," . Judge Van Pelt questioned "is" in line 7. He asked if the committee was

concerned with whether the crime committed is punishable or was punishable at the time the crime was committed. He also suggested adding "at the time of the conviction". Mr. Epton moved subdivision (a) be amended to read "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 of which he was convicted was at the time of conviction punishable by death or imprisonment in excess of one year or involved dishonesty of false statement regardless of the punishment." The chairman suggested Mr. Epton's motion be divided into two parts as the drafted version. Mr. Epton had no objection. Mr. Spangenberg stated it did not answer the questions raised if redrafted. The reporter then suggested adding "under the laws of the convicting sovereignty" to line 8 after "one year". The reporter then read subdivision (a) as amended. Mr. Epton was in agreement. Judge Maris suggested "under the law under which he was convicted" be in lieu of the reporter's suggestion. The reporter agreed. The chairman read the subdivision for a vote. The motion to amend carried. [The remainder of the rule having already been adopted, the chairman stated it would stand as approved.]

RULE 6-10. Religious beliefs or opinions. The reporter stated the only change from the August session was the changing of "virtue" to "reason" in line 4. Mr. Epton moved approval of the rule as drafted. The motion carried.

RULE 6-11. Mode and order of interrogation and presentation. The reporter stated the only change from the August session was the addition of "but only" in line 14. Mr. Williams moved line 13 have a period after "witness" and begin "the" as a new sentence. The chairman stated Mr. Williams' motion. It carried. Mr. Spangenberg moved to strike "but only" in line 14. The motion carried. Mr. Epton moved approval of the rule as amended. The motion carried.

RULE 6-12. Writing used to refresh memory. There was a motion to approve the rule as drafted. The motion carried.

RULE 6-13. Prior statements of witnesses. The rule was unchanged as of the August meeting. There was a motion to approve the rule as drafted. The motion carried.

RULE 6-14. Calling and interrogation of witnesses by judge. The rule was unchanged from the August meeting. Mr. Haywood moved approval as drafted. The motion carried.

RULE 6-15. Exclusion and sequestration of witnesses. The chairman stated the rule was unchanged from the August meeting. There was a motion for approval. The motion carried.

ARTICLE VII. Opinions and Expert Testimony.

RULE 7-01. Opinion testimony by law witnesses. Dean Joiner moved the rule be approved as drafted. The motion carried.

RULE 7-02. Testimony by experts. Mr. Berger moved approval of the rule as drafted. The motion carried.

RULE 7-03. Opinion testimony by experts. Mr. Berger moved approval of the rule as drafted. The motion carried.

RULE 7-04. Opinion on ultimate issue. Mr. Berger moved approval of the rule as drafted. The motion carried.

RULE 7-05. Disclosure of facts or data underlying expert opinion. The reporter stated this rule proceeded on the theory that one doesn't need to use a hypothetical question for bringing out the basis or data on which the expert witness's opinion is based, provided there is opportunity to obtain the information in other ways. The reporter wanted to know if the language was clear. He felt if discovery were the subject, it should be stated so in the rule. Dean Joiner felt subdivision (b) covered the doubt. Mr. Spangenberg moved to strike "at or" in line 6. Mr. Berger stated "once the witness is testifying, the opportunity is there no longer". The reporter stated subdivision (a) meant the expert, under certain circumstances, may give an opinion without disclosing either in his own testimony or by the use of hypothetical questions the data on which his opinion was based. Judge Weinstein moved lines 3 through 6 save subdivision (a)

and line 7 through "the expert testifies" be deleted. By striking the introductory of subdivision (a), it was decided "other" in line 9 was unnecessary. It was then suggested "underlying" be placed before "facts". Judge Van Pelt stated this rule was in practice all across the country and working well. The motion to amend was carried. There was a motion to adopt the rule as amended. The motion carried.

With regard to the Note, the reporter suggested striking "The rule leaves it undisturbed except when a better substitute is given in the form of a written statement or the result of discovery". Everyone was in agreement. Judge Weinstein moved the reporter have the authority to change the style of the rules wherever he feels it necessary. Everyone was in agreement.

RULE 7-06. Court appointed experts. The chairman stated this rule had not been considered in August. With regard to subdivision (c), Professor Green stated if one gives the jury a good expert the jury will weigh what the expert says not to just an expert's standing. There was a motion to strike subdivision (c). The chairman disagreed. He stated the subdivision did not state that credibility and weight of an expert's testimony applied "all the time". There was a motion to insert "not" in line 11 after "the judge may", and striking "as relevant to his credibility and the right of his testimony." The motion lost.

Judge Maris suggested striking "trier of the facts" and placing "jury" in lieu thereof. Judge Weinstein moved subdivision (c) read: "The expert witness so appointed may be called as the court's witness but the fact of his appointment by the court may not be revealed to the jury." With regard to not revealing the appointment of an expert witness, the reporter stated the preceding paragraph already contained an authorization to the court or to either party to call the witness. He also stated the jury did not really weigh who appointed an expert witness. Mr. Epton moved the approval of the entire rule stating he was not in favor of the language in the draft of subdivision (c), but he favored even less any suggestions which had been offered. The motion carried. Professor Cleary returned to Judge Maris' suggestion of "jury" in lieu of "trier of the facts". This was carried.

ARTICLE VIII. Hearsay:

RULE 8-01. Definitions. Mr. Berger moved for reconsideration of subdivision (c) of Rule 7-06. His reason was to give the judge discretionary power to reveal the fact of the appointment of the judge's expert witnesses. The rule as adopted makes it mandatory upon the judge to do whatever a litigant desires. He moved "Within the court's discretion" be placed at the beginning of the subdivision. Judge Van Pelt acting as chairman, asked for a vote on the motion for reconsideration. The motion carried. Mr. Berger then moved "Within the discretion of the judge" be inserted at the beginning of subdivision (c). The motion carried. This rule was again

reconsidered with Mr. Jenner present. Mr. Berger suggested: "In the exercise of his discretion, the judge may authorize the fact that he appointed an expert witness to be revealed to the jury". Judge Weinstein suggested "he" be in lieu of "the court". The motion carried.

ARTICLE VIII. Hearsay.

Regarding the reporter's Introductory Note, Professor Wright pointed out the case citation on page 289 should appear as Brookhart v. Janis.

RULE 8-01. Definitions. Judge Weinstein moved the deletion of ", but only if," in line 5. The motion carried. Mr. Williams moved the rule be adopted as amended. The motion carried. Professor Wright read from 390 U.S. 719, regarding the rule. Judge Weinstein suggested "power" be placed in lieu of "jurisdiction" and "obtain" in lieu of "compel" in line 1 on page 295, and striking "by its process" in line 2. The reporter favored saving "compel" in the subdivision. Judge Weinstein agreed. His motion carried. Judge Weinstein moved "by process" be stricken from subdivision (5). Judge Van Pelt felt the rule was too broad if left as Judge Weinstein recommended. Judge Weinstein moved "by such diligence", be in lieu of "by process". The motion carried. The rule having already been approved, the approval stood.

RULE 8-02. Hearsay rule. The chairman stated this rule was not considered at the August meeting. Dean Joiner moved approval. Judge Weinstein suggested striking "in evidence" from lines 1 and 2. This was amended by consensus. Judge Weinstein stated "otherwise" in line 2 was unnecessary. The reporter agreed. There was a motion to approve this rule as amended. The motion carried.

RULE 8-03. Hearsay exceptions: availability of declarant immaterial. The chairman stated this rule was not considered at the August meeting. There was a motion to approve the rule. The motion carried. The reporter stated the "unless" clause in Rule 8-03(b)(3) was an addition to the rule to cover will cases. The reporter also stated he had added it as a model to the state courts. Mr. Spangenberg interpreted the addition as a separate rule saying that memories to former conditions is admissible in the special class of rule cases. Judge Weinstein felt the addition of subdivision (3) should be separate. Mr. Berger suggested a period be placed after "bodily health)" in line 9. Judge Weinstein moved the deletion of the additional language. In addition, Judge Weinstein moved a separate subdivision be added stating: "Statements relating to wills. A statement relating to the execution, revocation, identification or terms of the declarant's will unless the source of information for the circumstances under which it was made indicates his lack of trustworthiness." Mr. Williams

questioned if it would make a judge have to make a finding as to credibility of a witness before he decides whether he can admit it or not. Judge Weinstein replied to some extent, yes. Mr. Selvin stated the California rules of handling "will" cases. Judge Weinstein's motion was lost.

Judge Van Pelt moved the striking of "or terms" in line 12 and placing "or" between "revocation" and "identification". The reporter replied his understanding of Judge Van Pelt's motion was where there was uncertainty as to the meaning of the will. Mr. Selvin was against Judge Van Pelt's motion. Mr. Berger felt "or terms" was necessary in the rule. Judge Van Pelt's motion lost.

The reporter stated another change in this rule was subdivision (8) on page 321. He added "and against the government in criminal cases," in lines 5 and 6. This was agreeable with the members.

RULE 8-04. Hearsay exceptions: declarant unavailable. The chairman stated this rule was not considered at the August meeting. The reporter stated he had added the last sentence of subdivision (b)(4). He stated the example dealt with declaration against interest. In Douglas v. Alabama, there was a clear case presented where admissibility, had the court been inclined to go along with it, might have been justified on the grounds of a declaration against interest. The case had a confession of a co-defendant who was not on trial being offered and he claims the privilege of self-incrimination. The court ruled against

admissibility. The situation came up again in Bruton. It is a situation in which the motivation of the declarer at the time he confesses in which he implicates his co-defendant is such that the declarant does so because he feels it is to his advantage. The reporter thought the committee would be remiss(?) in eliminating penal interest. It was then moved by the reporter "implicating both himself and the accused" be in lieu of "charged with the crime, implicating the accused." in lines 10 and 11. The motion carried. Mr. Berger moved the approval of Rule 8-04, as amended. The motion carried.

RULE 8-05. Hearsay within hearsay. Judge Weinstein questioned the "hearsay" rules. The reporter stated there were only two "hearsay" rules. The chairman suggested striking "as" in line 4. It was suggested "any" be in lieu of "either" in line 4. The motion to adopt Rule 8-05 as amended carried. The reporter suggested "an" in lieu of "any" in line 4. There were no objections.

RULE 8-06. Attacking and supporting credibility of declarant. Dean Joiner moved approval of the rule as drafted. The motion carried.

ARTICLE IX. Authentication and Identification.

RULE 9-01. Requirement of authentication or identification The reporter stated subdivisions (a) and (b) of this rule were originally two separate rules. Following the technique of the

"hearsay" rules, he combined the general provision and illustration into the same rule. Regarding subdivision (b)(1), it was moved "of a person with knowledge" be deleted from line 13. The motion carried.

[At this point, 5:15 p.m. the committee adjourned until Friday, December 13, 1968 at 8:30 a.m.]

Dean Joiner drafted a subdivision to replace subdivision (9) of Rule 9-01. His proposal was: "Testimony of a person with knowledge describing a process or system used to produce a result together with the opinion of an expert witness that the result provided fairly represents or reproduces the facts which the process or system perports to represent or reproduce." Judge Weinstein felt "Evidence" could replace "Testimony of a person with knowledge". He also suggested "accurate" should modify "result". The chairman read the redraft as amended: "Evidence describing a process or system used to produce a result and showing that the result is accurate". Mr. Berger moved approval. The motion carried. It was suggested by Judge Weinstein the title of the new subdivision be "Process or System". Everyone was in agreement.

On subdivision (b)(2) Judge Weinstein felt "testimony of witnesses not testifying as experts," was unnecessary. Mr. Berger suggested "Non-expert" modify "opinion" in subdivision (b)(2). It was also decided "Non-expert" would be in lieu of "Lay" in the title of subdivision (b)(2). The chairman read the subdivision as amended. There was a motion to approve Dean Joiner's draft of Rule 9-01, as amended. The motion carried.

RULE 9-02. Presumptions or authenticity. The reporter stated there were a few changes in this rule. In subdivision (d), line 10, "official" was in lieu of "public". He stated "public" implicated "open to the public". In line 14 he had restored "by the custodian". He stated that in an earlier session the committee had stricken it. He felt without the phrase it left the question of "who made the certificate". Judge Weinstein questioned if "by the custodian" was helpful. The reporter stated the authenticity of the certificate should be taken as established under subdivisions (a) or (b). Mr. Epton stated "by the custodian" was previously stricken because "data compilations" appeared in the same subdivisions. It was then stated the person certifying a form as correct was complete; therefore,"by the custodian" can be deleted. Mr. Spangenberg suggested adding "certifies under seal that the signer has the official capacity and that

the signature is genuine" be added at the end of subdivision (b). He also suggested striking "certified as authentic under seal by" on lines 14 and 15 on page 412. Mr. Spangenberg's suggestions were adopted. Judge Weinstein moved striking "by the custodian" in line 14 on page 414. It was discussed that some certification would have to be made. Hence, Judge Weinstein amended his motion to state line 14 of page 414 read: "correct by the custodian or other person authorized to make the certification, by certificate complying with". The motion carried. Dean Joiner did not think "all" in line 12 was unnecessary. The chairman agreed. The "all" was deleted by consensus. It was the consensus of the committee that the comma in line 13 following "compilations" be deleted. The two revisions were approved by a vote. There was a motion to approve Rule 9-02, as amended. The motion carried.

RULE 9-03. Subscribing witness' testimony unnecessary. The reporter stated this rule was considered at the first meeting. Mr. Berger moved approval of the rule as drafted. The motion carried.

With regard to the Note on page 424, Mr. Epton felt the illustration of "wills" in the fourth line did not take into consideration the uniform self-proving statutes. He felt "wills" was not appropo. Mr. Selvin suggested substituting "e.g." for "i.e." and adding "in some states" after "wills". There were no objections.

ARTICLE X. Contents of Writings, Recordings, and Photographs.

RULE 10-01. Definitions. The reporter stated he still felt as he had stated in previous meetings to be against this rule having "photographs" included. On line 7 of page 425, Dean Joiner suggested striking "sound". Mr. Selvin suggested "printing" be included on line 5 of subdivision (a). Mr. Berger moved the rule be approved as amended. Mr. Haywood moved subdivision (b) be stricken. Professor Green suggested retaining subdivision (b) and putting in an exception similar to the one in "Hearsay", which states "summaries may be used". The reporter replied this was included in Rule 10-06 Summaries. Professor Green was satisfied with Rule 10-06. The motion to strike subdivision (b) in its entirety was lost. Mr. Spangenberg moved to exclude "medical X-rays". The motion lost. He then moved subdivision (b) be amended to read: "'Photographs' include still photographs, X-ray plates, or other films exposed by radiation and motion pictures." The motion lost. The rule having been adopted to approve the rule with the two amendments: adding "printing" in line 5 and striking "sound" from line 7, remained.

Mr. Spangenberg suggested subdivision (d) line 9 should be amended by adding "chemical" in lieu of "mechanical". The reporter stated it was not a chemical re-recording. Mr. Berger moved "or by chemical reproduction" be included after "or electronic re-recording". This amendment was agreeable to the committee. It was so amended.

RULE 10-02. Requirement of original. The reporter stated there are some "Acts of Congress" that provide that a photographic copy has the status of the original. Mr. Berger moved approval of the rule as drafted. Mr. Haywood asked if Xerox copies were included in this rule. Copies are covered in Rule 10-03. The motion was approved as drafted.

RULE 10-03. Admissibility of duplicates. Mr. Haywood moved approval of the rule as drafted. The motion carried.

RULE 10-04. Admissibility of other evidence of contents. The reporter stated this rule was considered at the second session of the committee. Judge Weinstein moved approval of the rule as drafted. The motion carried.

RULE 10-05. Public records. The reporter suggested striking "all" in line 3 and/inserted "data compilations" for consistency, stating he had Mr. Berger moved approval of the rule as drafted with the amendment of the reporter. The motion carried.

RULE 10-06. Summaries. The reporter stated there were no changes to this rule since considered by the committee. There was a motion to approve. The motion carried.

RULE 10-07. Testimony or written admission of party. The reporter stated he had added "without accounting for the non-production of the original." The reporter further stated he felt the rule was incomplete without the additional phrase. Mr. Berger moved approval of the rule as drafted. The motion carried.

RULE 10-08. Functions of judge and jury. The chairman suggested "whether" be stricken in lines 7 and 9 because the modifying "whether" was in line 6. The reporter wanted to leave the "whether[s]" in the rule and move the "(a)" between "raised" and "whether" in line 6 because each subdivision is a distinct question. Mr. Berger moved approval of the rule as amended. The motion carried.

Judge Maris, returning to Rule 8-03, questioned subdivision (b)(10). The reporter agreed it should be amended to conform with the "authentication" provision. He suggested "or other person authorized to make the certification" be inserted in line 6 on page 322, and then a comma be added after "testimony". The committee adopted his suggestions.

With regard to the Note of Rule 10-02, Mr. Spangenberg suggested "Hospital records which may be admitted as business records under Rule 8-03(6) commonly contain reports interpreting X-rays by the staff radiologist, who qualifies as an expert, and these reports need not be excluded from the records by Rule 8-02." be inserted at the end of the partial paragraph beginning on page 433.

Judge Maris stated the District Court of Puerto Rico is a constitutional court not a legislative court. The court is set out in Title 28 as a United States Court. He suggested the first sentence on page 458 be deleted. He stated "the District Court of the District of Columbia" should appear as "the District Court for the District of Columbia" on pages 457 and 458.

RULE 11-02. Title. There was a motion to approve the rule as drafted. Judge Maris was against the title of the rule. He felt the Evidence Rules should conform with the other Committee Rules titles. It was moved and carried that the rules be titled "Federal Rules of Evidence".

RULE 11-03. Effective date. The chairman stated he felt the rule being left tentative was not good. The rule should be stated as "The effective date will be provided by the court."

[The committee adjourned
its final meeting at 1:30 p.m.]