

MINUTES OF THE SEPTEMBER 30-OCTOBER 1, 1971 MEETING OF THE
STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The meeting of the Committee on Rules of Practice and Procedure convened in the 7th floor conference room of the Administrative Office, Lafayette Building, 811 Vermont Avenue N.W. Washington, D.C. on September 30, 1971 at 10 a.m. The following members were present:

Albert B. Maris, Chairman
George H. Boldt
Mason Ladd
James Wm. Moore
J. Lee Rankin
Bernard G. Segal
Charles A. Wright
J. Skelly Wright

Peyton Ford was unavoidably absent due to a medical problem which required that he be hospitalized.

Also present were Albert E. Jenner, Jr., chairman of the Advisory Committee on Rules of Evidence and Professor Edward W. Cleary, reporter to that advisory committee.

The committee reconvened the following morning, October 1, 1971 at 9 a.m. and adjourned at 4.30 p.m.

ITEM 1. RULES OF EVIDENCE, REVISED DRAFT 1971

proposed

The revised final draft of the Rules of Evidence as approved by the advisory committee at its meeting September 3-5, 1971 was before the standing committee for consideration, possible further amendment, and report to the Judicial Conference.

Judge Maris and Mr. Jenner reported on the conference held with respect to these rules with Senator McClellan, Mr. Blakey and others.

Professor Cleary reported that the comments received from the bench and bar and others generally were reiterations of views considered at earlier meetings of the advisory committee. The revised final draft was considered in the light of suggestions from the Department of Justice, which suggestions were largely adopted, and the views of Senator McClellan were considered and adopted when appropriate. Judge Maris remarked that surprisingly few suggestions came in from the bench and bar.

RULE 103, NOTE

Professor Cleary explained there was no problem on

this rule but the Note would be expanded by adding a sentence thereto.

Vote: No objection, ALL APPROVE THE AMENDMENT TO THE NOTE BY ADDING THE SENTENCE TO SUBDIVISION (a) WHICH IS SET OUT IN THE MARGIN.

RULE 104

Certain language was deleted by the advisory committee from subdivisions (c) and (d) and from the Note. Mr. Jenner reported that the advisory committee, on reexamination of the cases, recommended the change. Clarifying language was added to subdivision (d) of the Note.

Vote: Judge Wright moves adoption of the Rule and Note as thus amended, Judge Boldt seconds, ALL APPROVE RULE 104 as amended, and approve the Note thereto as amended.

RULE 303

In subdivision (a) the final clause was transferred to the beginning of the sentence. A paragraph was added to the Note.

Vote: Mr. Rankin moved and his motion was seconded that the Rule and Note be approved as thus amended. No objection. ALL APPROVE RULE 303 and the Note thereto as amended.

RULE 402

The Advisory Committee rearranged the language to conform this rule to the other rules.

Vote: ALL APPROVE THE RULE AS AMENDED.

RULE 403

Following suggestions from the Department of Justice and the Senator, the standing committee redrafted Rule 403 to read:

"Although relevant, evidence may be excluded if its

probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

, Prof. Cleary,

The reporter/was instructed to conform the Note to the Rule as thus amended and substituted for (a) and (b) of Rule 403.

Vote: ALL APPROVE RULE 403 as amended.

RULE 404

To meet criticisms, the advisory committee added language to subdivision (a)(2) and changed the form of a phrase in subdivision (b), and added clarifying language in lieu of the word "rebut" in the Note.

Vote: It was moved and seconded that the rule, as thus amended, be approved. ALL APPROVE RULE 404/as thus amended and the Note thereto.

RULE 405

An additional paragraph was added to the Note [p.35a] by the advisory committee.

Vote: All approve the addition of this paragraph to the Note.

RULE 410

Critics of the Rule as it appears in the March 1971 revised Draft take the position that the exclusion should not extend to cases where the accused is not a party. Professor Cleary agrees with this view--namely, that the rule is all inclusive. The standing committee agreed that the language is too sweeping.

It was agreed that Rule 410 be amended to read:

"Evidence of a plea of guilty, later withdrawn, or of a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of

[Rule 410]

statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer."

Vote: ALL APPROVE Rule 410 as thus amended. The reporter will amend the Note to conform to the language of the Rule.

RULE 502

The advisory committee recommended the addition of the language set out in the margin of the Rule and to the Note.

It was moved and seconded that this recommendation be approved.

Vote: ALL APPROVE Rule 502 and the Note thereto as thus amended.

RULE 503

The advisory committee recommended that subparagraph (3) of subdivision (a) be deleted and that a phrase be added to sub-division (b), and that clarifying language be added to the Note and certain deletions made therein to conform the Note to the Rule as amended.

The standing committee approved the deletions and the amendments to the Rule and Note recommended by the advisory committee.

Vote: ALL APPROVE Rule 503 and the Note thereto as thus amended.

RULE 504

The standing committee was of the sense that the Rule as recommended by the advisory committee did not ^{clearly} cover drug addiction patients who, therefore, might not submit to treatment or diagnosis. Professor Cleary submitted a redraft of subdivision (a)(1) and (b), with changes in the Note to conform thereto. The redraft, after changes in the language by the standing committee, was approved in the following form:

(a) Definitions.

(1) A "patient" is a person who consults or is examined or interviewed by a psychotherapist.

(2) A "psychotherapist" is (A) a person authorized to practice medicine in any state or nation, or reasonably believed so to be, while engaged in the diagnosis or treatment of a mental

[Rule 504]

or emotional condition including drug addiction, or (B) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged."

Professor Cleary was directed to make changes in the Note to conform to the amendments in the Rule.

Vote: FIVE APPROVE (BOLDT, LADD, MOORE, SEGAL & JUDGE WRIGHT); ONE DISAPPROVAL (PROF. WRIGHT)

RULE 505

The standing committee voted to restore subdivision(a) as it read in the March 1969 draft, and to make changes in the language of subdivisions (b) and (c). Professor Cleary submitted a redraft in the following form, which included the advisory committee's recommendation of amendment to subdivision (c):

(a) General Rule of Privilege. An accused in a criminal proceeding has a privilege to prevent his spouse from testifying against him.

(b) Who May Claim the Privilege. The privilege may be claimed by the accused or by the spouse on his behalf. The authority of the spouse to do so is presumed in the absence of evidence to the contrary.

(c) Exceptions. There is no privilege under this rule (1) in proceedings in which one spouse is charged with a crime against the person or property of the other or of a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other, or (2) as to matters occurring prior to the marriage, or (3) in proceedings in which a spouse is charged with importing an alien for prostitution or other immoral purpose in violation of 8 U.S.C. § 1328, with transporting a female in interstate commerce for immoral purposes or other offense in violation of 18 U.S.C. §§ 2421-2424, or with a similar offense in violation of other statutes.

The Note will be revised to conform to the rule as amended.

Vote: FIVE APPROVED, ONE [Maris] OPPOSED. Rule 505 as thus amended was approved, with appropriate revisions in the Note to be made by Professor Cleary to conform with the amended rule.

RULE 506

The Note to this rule will be amplified to include a problem arising within the rule in Re Verplank Subpoena, 9 Cr.L.Rep.2417 (U.S.D.C.Cal.7/14/71). [a privilege with respect to draft counseling services]. *Sentence to be revised and of Note.*
appropriate

Vote: ALL APPROVE that/additions be made to the Note.

RULE 509

The advisory committee recommended amendment to the rule and Note to meet objections expressed by critics.

Judge Boldt moved for approval of the rule as recommended, motion seconded. No objections.

VOTE: ALL APPROVE RULE 509 as amended and the Note thereto as revised to conform to the amended rule.

RULE 510

The advisory committee recommended that this rule be amended by substituting a phrase in subdivision (a), by substituting a new subdivision (c)(2), and adding 2 phrases to subdivision (3), with appropriate additions and deletions in the Note thereto. Professor Cleary submitted a redraft of subdivision (a) at the meeting. The standing committee approved the recommendations of the advisory committee and the redraft submitted by Prof. Cleary of (a) above.

Subdivision (a) was amended to read as follows:

(a) The government or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of an actual or possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

Professor Cleary also redrafted the box at the end of the first paragraph of subdivision (a) of the Note to read:

"The rule also applies to disclosures to legislative investigating committees and their staffs, and is sufficiently broad to include continuing investigations." This was approved by the standing committee. ~~Also~~ suggested the addition at the end of subdivision (a) of the Note:

"The rule does not deal with the question whether pre-sentence reports made under Criminal Rule 32(c) should be made available to an accused." This was approved by the standing committee.
Vote: ALL APPROVE Rule 510 and the Note as thus amended.

RULE 511

The advisory committee recommended the addition of the term "or communication" in two places in the rule. It was moved and seconded that the recommendation of the committee be approved.

Vote: ALL APPROVE THE ADDITION OF THE TERM "OR COMMUNICATION" AS SET OUT IN THE MARGIN OF RULE 511.

RULE 606

The Department of Justice recommended that Rule 606(b) be redrafted and submitted a suggested draft. The standing committee amended Rule 606(b), adding some changes to the language submitted by the Department of Justice, that subdivision to read as follows:

(b) Inquiry into Validity of Verdict or Indictment. Upon inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of any thing 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 process in connection therewith, except that a juror may testify on the question of whether or not extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received.

Professor Wright moved that the Department of Justice draft, as amended by the standing committee, be accepted. Mr Segal seconded the motion. Motion carried 5 to 1.

Vote: APPROVED AS AMENDED, RULE 606(b) TO READ AS SET OUT ABOVE.

RULE 608

The Advisory committee recommended that a phrase in subdivision (a)(2) be deleted and recommended certain deletions from and additions to the Note.

It was moved and seconded that the word "clearly" be stricken from the second sentence of subdivision (b). Five members voted in favor of striking "clearly", three opposed.

Vote: RULE 608 WAS APPROVED as amended, with the deletion of the phrase from subdivision (a) and the deletion of the word "clearly" from subdivision (b). The Note thereto as amended by the advisory committee was approved.

RULE 609

The advisory committee recommended that a phrase be deleted from subdivision (a) and all of subdivision (3) be deleted, and that the phrase "his most recent" be added to subdivision (b) preceding the word "conviction". Deletions from and additions to the Note were also recommended by the advisory committee to conform the Note to the Rule as amended.

It was moved and seconded that the recommendations of the advisory committee be approved.

Vote: Recommendations approved by 7 members, one member opposed.
RULE 609 AND THE NOTE THERETO APPROVED AS AMENDED BY THE ADVISORY COMMITTEE.

At 6 P.M. the meeting was adjourned to the next morning at 9 A.M.

At 9 A.M., October 1, 1971, the meeting reopened with the following members present:

Albert B. Maris
George H. Boldt
Mason Ladd
James Wm. Moore
J. Lee Rankin
Bernard G. Segal
Charles A. Wright
J. Skelly Wright

Also present was Professor Edward Cleary, reported to the Advisory Committee on Rules of Evidence.

Rule 609

Judge Wright made a plea that Rule 609 amendments be reconsidered and not to delete subdivision (a)(3).

After discussion of the Rule, Mr. Segal moved that Rule 609 as amended by the advisory committee be approved, subject to a change in the Note in respect to administration of the rule to read in the language proposed by Professor Cleary to make it clear that the rule is being amended to accord with the 1970 amendment to the District of Columbia Code.

as amended

Rule 609 and the Note thereto/was again approved by 7 members, Judge Wright opposing, with direction to Prof. Cleary to make the required change in the Note.

RULE 611

The advisory committee recommended that the word "may", in the first sentence of subdivision (a), be changed to read "shall".

Judge Boldt moved approval of the rule as thus amended. Seconded.

Vote: ALL APPROVE RULE 611 AS THUS AMENDED.

RULE 612

The advisory committee recommended the addition of a phrase to the first sentence, but the standing committee was not satisfied that this was sufficient to meet the problem.

It was moved and seconded that the first sentence begin with the following phrase:

"Except as otherwise provided in criminal proceedings by 18 U.S.C. § 3500 if a witness uses a writing to refresh his memory, either"

Vote: ALL APPROVE RULE 612 as thus amended. Prof. Cleary was directed to submit to Judge Maris a revised second paragraph in the Note thereto. Prof. Cleary then read the paragraph which he proposed to substitute for that now in the Note. The committee agreed that the Note will be approved in the form presented by Prof. Cleary.

DISCOVERY IN CRIMINAL PROCEEDINGS

Judge Maris read suggestions received with respect to discovery rules. It was agreed that this subject is within the province of the Advisory committee on Criminal Rules.

RULE 801

The advisory committee recommended the deletion of the word "soon" from subdivision (d)(1)(iii) and the change in style of identifying the subsections of subdivision (d) alphabetically, thus: (A), (B) etc., with conforming changes in the Note

Judge Boldt moved that the recommendations of the advisory committee be approved. Motion seconded.

Vote: ALL APPROVE RULE 801 AS THUS AMENDED.

RULE 804

The advisory committee recommended certain additions to and deletions from subdivision (b)(4) and the Note thereto.

The standing committee approved the addition of the sentence "A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated" at the end of subdivision (b)(4) and the deletion of the entire last sentence and the recommended addition thereto.

The standing committee agreed to insert the words "offered to exculpate the accused" in the 5th sentence of the 2d paragraph on page 130 after "third persons" and before "arising". [submitted by Prof. Cleary].

The standing committee did not approve the recommended two sentences to be added to the 2d paragraph on page 130 but accepted the redraft submitted by Prof. Cleary that the following 3 sentences be added at the end of that paragraph:

"The requirement of corroboration is included in the rule in order to effect an accommodation between these competing considerations. When the statement is offered by the accused by way of exculpation, the resulting situation is not adapted to control by rulings as to the weight of the evidence, and hence the provision is cast in terms of a requirement preliminary to admissibility. Cf. Rule 406(a). The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication."

Prof. Cleary also submitted a substitution for the last 2 sentences of the 3d paragraph of the Note, page 130, as follows:

"These decisions, however, by no means require that all statements implicating another person be excluded from the category of declarations against interest. Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest. See the dissenting opinion of Mr. Justice White in Bruton. On the other hand, the same words spoken under different circumstances, e.g., to an acquaintance, would have no difficulty in qualifying. The rule does not purport to deal with questions of the right of confrontation."

It was moved and seconded that these recommendations of the advisory committee and Prof. Cleary be approved.

Vote: The standing committee approved the recommendation of the advisory committee that a sentence be added to subdivision (b)(4) and approved the sentence in the form submitted by the advisory committee. The last sentence in subdivision (b)(4) was deleted entirely. The standing committee approved the changes in the Note as indicated by the Reporter and in other respects approved the recommendations of the advisory committee to the Note.

Professor Cleary was requested to add a sentence to the Note to Rule 803 to tie it up with Rule 804 as amended.

RULE 1101

The advisory committee recommended that Civil Rule 43(a) and Criminal Rule 26 be amended to conform with the proposed rules of evidence. [pages 156 and 158 of the Revised Draft of the Proposed Federal Rules of Evidence (March 1971)].

Civil Rule 43

"(a) Form and Admissibility. In all trial the testimony of witnesses shall be taken orally in open court; unless otherwise provided by an act of Congress, or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner."

Criminal Rule 26

"In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court. The admissibility of evidence and the competency and privilege of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

It was moved and seconded that these rules, as thus amended, be approved.

Vote: ALL APPROVE AMENDMENTS TO THESE TWO RULES AS RECOMMENDED BY THE ADVISORY COMMITTEE.

Judge Maris reports on the letter from Mr. Kleindeinst of the Department of Justice with respect to comments upon the proposed revised draft of March 1961 and reports that the advisory committee made changes in the light of these recommendations.

Professor Wright moves that the chairman of the standing committee resubmit to the Judicial Conference for approval and transmission to the Supreme Court the Evidence Rules approved by the standing committee together with such changes as the reporter to the advisory committee has been authorized to make. This motion was unanimously adopted.

Mr. Segal expresses for the committee the grateful thanks of the standing committee to the advisory committee and its reporter. Judge Maris states that Prof. Cleary is an assiduous worker and an able worker and quotes from Senator McClellan's letter that a wonderful work was accomplished. Prof. Cleary responds and thanks the standing committee for its assistance and rapport. Prof. Cleary sends he would make two copies of his changes and will get these in the mail by the end of next week.

ITEM 2. ADVISORY COMMITTEES' PROGRESS REPORTS
CRIMINAL RULES

Judge Maris read the report from the Advisory Committee on Criminal Rules. The advisory committee reported that it had, at a meeting on September 24-25, 1971 approved Alternative Draft No. 1 of proposed amendments to Federal Criminal Rule 45.

Judge Boldt stated that fixed periods for the whole country is unrealistic and what this alternative draft proposes is fine.

Prof. Judge Wright stated there should be a definite time limit, there are a thousand persons in the District of Columbia jail awaiting trial.

Prof. Wright thinks that subdivision (f), "Plan for Achieving Prompt Disposition of Criminal Cases" is in the wrong place as part of Rule 45 and that it would be found more easily if it were part of Rule 50. All members of the standing committee agree that it should be transferred.

Prof. Wright moved that Rule 45 be amended by transferring subdivision (f) to Rule 50 as subdivision (b) of Rule 50. Seconded. Alternative Draft No. 1 of

It was moved and seconded that Rule 45 and Rule 50 of the Federal Criminal Rules of Procedure, as thus amended, be submitted to the Judicial Conference for approval and transmission to the Supreme Court for adoption.

ADMIRALTY RULES

The Advisory Committee on Admiralty Rules reported that about a year ago the reporter had circulated a tentative draft revision of the supplement rules but the advisory committee held no meeting to consider this draft and it appears that there is very little sentiment within the committee for any such general revision of the rules at this time, a view that seems to be shared by the Maritime Law Association.

It was the sense of the standing committee that the question is whether the advisory committee should now be discharged with thanks. Judge Maris stated he will discuss this with the Chief Justice.

BANKRUPTCY RULES

Judge Maris reported that the Advisory Committee on Bankruptcy Rules is operating in high gear, that a preliminary draft of proposed bankruptcy rules and official forms under Chapters I to VII of the Bankruptcy Act was submitted to the bench and bar in March 1971, and that the advisory committee has completed its preliminary draft of rules and forms for wage earner relief and rehabilitation cases under Chapter XIII of the Bankruptcy Act, and that the committee anticipates that it will transmit drafts of rules and forms for debtor relief and rehabilitation cases under Chapters VIII-XII of the Bankruptcy Act. A meeting is scheduled to be held at the end of October on Chapter X.

CIVIL RULES

Judge Maris reported that the Advisory Committee on Civil Rules, at its September 21st, 1971 meeting, unanimously approved the following resolution:

"Whereas, the Judicial Conference has approved in principle a reduction in the size of juries in civil trials in the District Courts of the United States and an accompanying diminution in the number of peremptory challenges to be allowed; and

"Whereas, the Conference has referred to the Committee on the Operation of the Jury System and this Committee the means of effectuating those objectives, i.e., whether by procedural rule or statute;

"Therefore Be It Resolved that in the opinion of the Advisory Committee on Civil Rules the better method of effectuating the proposals would be by statute, and that the Judicial Conference be so informed."

The Committee, under the chairmanship of Judge Elbert P. Tuttle, instructed the reporter to begin studies on the Operation of Rule 23, F.R.C.P.: the operation of Rule 16, F.R.C.P., and methods of accelerating judgments.

In respect to the question of the size of juries, the standing committee was of the opinion that it was within the power of the Supreme Court to fix the number of jurors in civil cases and the number of challenges, ^{but that} it would be a better policy to

leave this to Congress to act on. It was further stated that many courts have done this by mandatory rule, the Supreme Court possibly can do it since there is no constitutional limitation.

Judge Boldt stated he is in favor of a lesser number of jurors but in civil cases where trial by jury is requested, the clerk sends out a stipulation form asking the attorneys involved in the case to agree to a lesser number of jurors and challenges.

Prof. Wright stated that the Advisory Committee on Civil Rules is right and it would be an improper use of the rule-making power to change the number of jurors.

Dean Ladd expressed the view that he is in accord with the conclusion of the advisory committee that this is a legislative matter.

It was further stated that the Conference has approved the principle of a six-man jury recommended in Irving Kaufman's report. The question is: how to go about it. If by rule, it would be within the province of the Advisory Committee on Civil Rules.

Judge Wright expressed his view that it is not within the rule making power of the Court.

Mr. Segal moved that the chairman of the standing committee, if he determines that a report is expected from this committee and that it would be wise to do so, is authorized to report that the standing committee agrees it is not within the rule making power of the Supreme Court.

It was moved and seconded that the Resolution of the Advisory Committee on Civil Rules be forwarded to the Judicial Conference in answer to the request for its opinion.

ITEM 3. S.2432, 92d Cong., 1st sess.

The views of the Judicial Conference have been requested by the Senate Judiciary Committee and the Conference, through Mr. Foley's office, has referred the bill to this committee for report to the Judicial Conference.

This bill would amend all of the rule making statutes-criminal rule making, bankruptcy rule making, all of the enabling statutes-and would provide that rules or portions thereof submitted by the Supreme Court shall not take effect until the close of the session or such time as Congress shall fix. This would delay the rule making procedure and delay rule amending. A specific provision is made that either House by resolution may disapprove a rule or a portion of a rule. At present both Houses must act, jointly or separately.

Senator McClellan's view is that Congress has a responsibility in respect to these rules but it is impossible for it to act within three months. While the three months period is written into the statute, usually the Supreme Court gives more than three months time, usually six months.

Judge Maris thinks it can fairly be said this procedure is different than executive reorganization which is a statutory matter but that rulemaking is a judicial function; and that Congress is not limited to the three months period.

Judge Maris also suggests that a closer liason with members of certain Congressional committees should be encouraged-perhaps inviting these members to be present at committee meetings.

Mr. Segal suggests that Scott and Hruska should be contacted.

Judge Maris is willing to extend the time of adoption giving Congress additional time to study the Evidence Rules.

It was moved and seconded that the chairman report to the Judicial Conference the recommendation that it disapprove this bill, setting forth the reasons upon which the standing committee based its conclusion. Motion Unanimously Adopted.

Mr. Segal stated he will give Judge Maris information as to the state legislatures which have given to the courts of that state the power of rule making. Mr. Segal stated he will get this information from the Council of State Governments model of state constitutions.

ITEM 4. PROPOSED REVIVAL OF ADVISORY COMMITTEE ON APPELLATE RULES.

It was moved and seconded that the standing committee recommend to the Judicial Conference that the Advisory Committee on Appellate Rules be reactivated and that the Conference act upon this recommendation.

The chairman was authorized to report this to the Judicial Conference.

ITEM 5. SUGGESTED MODIFICATION OF LIMITATION ON APPROPRIATION

In each annual appropriation act for the Judiciary, the appropriation for the Administrative Office has contained the following proviso:

"Provided, That not to exceed \$90,000 of the appropriations contained in this title shall be available for the study of rules of practice and procedure." [see 83 Stat.420]

The broad language of this proviso limits the use of all appropriations to the Judiciary including those for travel of judges and referees and not merely expenditures from the Administrative Office appropriation. If it were limited to the latter, additional funds approximating \$10,000 would become available for the work of the rules program.

It was moved and seconded to recommend to the Judicial Conference that in the next annual budget for the Judiciary the proviso be modified by substituting the word "paragraph" for "title", the proviso to read:

"Provided, That not to exceed \$90,000 of the appropriations contained in this paragraph shall be available for the study of rules of practice and procedure."

Vote: ALL APPROVE THE MOTION THAT THE CHAIRMAN REPORT TO THE JUDICIAL CONFERENCE THE STANDING COMMITTEE RECOMMENDATION.

ITEM 6. PROPOSED AMENDMENTS SUBMITTED BY ADVISORY COMMITTEE ON CRIMINAL
RULES.

At its September 24-25, 1971 meeting, under the chairmanship of Judge J. Edward Lambard, the Advisory Committee on Criminal Rules gave final approval only to the proposal before the public with respect

to the alternative drafts of proposed amendments to Criminal Rule 45. The recommendation of the advisory committee that Alternative Draft No. 1 of Criminal Rule 45 amendments be approved by the standing committee is herein reported under Item 2. This was the only matter acted upon by the standing committee and the other remaining sets of proposals will be considered by it at another meeting.

The meeting of the standing committee adjourned at 4.30 P.M. until further notice.