[illegible] OF EVIDENCE
[illegible], 29 and 30, 1968

The ninth meeting of the Advisory Committee on Rules of Evidence convened in the Supreme Court Building on September 29, 1966 at 9:30 a.m. The following members were present:

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

Others attending the meeting were Judge Albert B. Maris, Chairman of the Committee on Rules of Practice and Procedure; Professor Charles Alan Wright, member of the Committee on Rules of Practice and Procedure; and William E. Foley, Secretary to the Rules Committees.

The Chairman stated that the members had received a progress report which had been submitted to the standing Committee and that he hoped the rules would be ready to go to the Bar in the fall of 1968.

Dean Joiner suggested that in the interim a report similar to the progress report which was submitted to the standing Committee be submitted to the members of the [illegible] Bar as well as to any other general distribution desirable, [illegible] of

the Committee's work. Judge Maris suggested that it would be well to have the standing Committee present the matter to the next Judicial Conference as he did not think the Advisory Committee had this authority. The consensus of the Committee was that a report of this nature would be beneficial to the bench and bar and that the matter should be presented to the next Judicial Conference for approval.

The following agenda items were discussed:

MEMORANDUM NO. 12

Rule 4-01. Definition of "relevant evidence."

Professor Cleary explained the background of this rule, stating it was the second draft. The rule had been approved at the July meeting and approval was reaffirmed.

Rule 4-02. Relevant evidence generally admissible.

A suggestion was made that the word "which" in the last sentence be changed to "that." After discussion, the Chairman stated that it seemed to be a matter of preference and it would be left to the Reporter to work out. The rule had been approved at the July meeting and approval was reaffirmed.

* * *

Professor Green called attention, or raised a point that the objective of the rule is to let evidence in as much as it is reasonable to let in and that the doctrine in his state is that relevancy of evidence that is doubtful is also admissible. He stated that there are some points where relevancy may be debatable but that he feels in such a situation it would be

desirable to let it in inasmuch as a jury that finds that the evidence has persuasive power can disregard it. Professor Green also stated he had not seen this mentioned or discussed in any other jurisdiction but he thought it might be a useful doctrine. Discussion ensued and Professor Cleary suggested that Professor Green submit a memorandum to the members on this subject, but Professor Green stated he did not have anything additional to offer on the subject and he did not feel the matter should be carried any further.

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At this point a discussion was held on the matter of showing the complete draft of each rule as the memoranda are prepared, but Professor Cleary was of the opinion that it is better to refer to the previous memorandum so that the full context of the rule could be presented. Mr. Haywood suggested that in the right hand corner of the first page of each memorandum there should be a reference to the previous memorandum on the same subject. This was agreed. Mr. Jenner stated that he thought the final draft should show the complete rule.

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Rule 4-03. Determination of preliminary questions of relevancy.

The Reporter stated that at the July 1966 meeting this rule was deferred for consideration at a later time. He felt that the difficulties encountered at the July meeting were ones of language and not of substance; that he had explored the matter and the treatment of the particular situation is clear. It is

a problem where the admissibility of evidence depends on the probative value and upon the existence of some preliminary question of fact. He explained situations of this nature. Professor Cleary thought it would be well to hold this rule in abeyance until the Committee approaches the over-all problem of judge-jury relationships, particularly in the area of preliminary fact where there are other rules. He stated that it is involved in privilege and that if the Committee finds that it can properly be broken down again and put out in sections of rules, in context of the rules where it is more likely to be stumbled over by somebody who is using the rule, then the Committee could take that action. He felt it is a question of language and location -- that the fundamental thought is sound -- and suggested the matter be deferred for the present. The Committee so agreed.

Rule 4-04. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Professor Cleary stated that at the July meeting the Committee was not in agreement as to the language to be used in this rule and that the Committee had suggested additional wording which was approved at that meeting. Discussion on the redraft ensued and Professor Cleary stated that the first paragraph is predicated upon a requirement of exclusion and not admissible if its probative value is outweighed by the danger of one of these things. The second paragraph, [illegible], may be excluded and this is certainly more in the direction of recognizing the additional discretion on the part of the trial judge

without saying it is completely at his discretion. Judge Sobeloff questioned the word "may" in the first line of paragraph (b) as to whether that would be reviewable for abuse. This point was discussed and Judge Sobeloff was satisfied that the draft took care of the matter. The rule was unanimously approved as drafted.

Rule 4-05. Character evidence not admissible to prove conduct; exceptions.

Professor Cleary explained the redraft and stated it resulted from the discussion of the July meeting but that he thought further changes were needed. Discussion ensued and the Committee agreed that the principle was sound but that revision of the terminology was needed. Mr. Jenner suggested that paragraph (d) be moved up to where paragraph (c) is and to have paragraphs (a), (b), and the relettered (c). His reason for this was that he felt the paragraph lettered (d) in the present draft, is more relevant to paragraphs (a) and (b) than the paragraph lettered (c).

Mr. Epton read his proposed draft for a revision of the entire rule and Professor Cleary thought the same thing could be accomplished by leaving the first sentence as he had drafted it and then attaching the except clause at the end, i.e., to list paragraphs (a) and (b) as drafted and the relettered (c), and then in a second paragraph or subsection to add the provision with respect to evidence of other crimes and preface this by saying "this rule does not require the exclusion of evidence of other crimes when offered for another purpose, etc." This

would still be in line with Mr. Epton's suggestion. Judge Sobeloff inquired about the term "for another purpose" as to whether there is another purpose which is not comprehended in proof of motive, opportunity, intent, preparation, etc. Professor Cleary stated he had great respect of the ingenuity of the legal profession and would hate to feel the Committee had made an exclusive itemization of all purposes for which evidence of other crimes might be offered. He said he tried to make this an inclusive list but he would hesitate to say there were not others. Judge Estes stated he was concerned about the last sentence of the first paragraph of exclusion. Professor Cleary said he thought this point would be met by putting in at the very beginning of the first sentence, before "Evidence," a subsection (1) and then adding a comma instead of the period, saying "except as follows" -- then striking out the second sentence ending with the semicolon and leaving in paragraphs (a) and (b) and the relettered (c). The present (c) would become subsection (2) and the text would say that this rule does not require exclusion. [Discussion ensued on the word "require" and Dean Joiner thought it should say "authorize" but Professor Cleary thought the word "authorize" would be too strong.]

After full consideration the Committee decided that subsection (2) should read: This rule does not require the exclusion of evidence of other crimes, civil wrongs, or acts, when offered for another purpose, such as proof of motive, opportunity,

intent, preparation, plan, knowledge, identity, or absence of mistake or accident; .

After the coffee break, Professor Cleary stated that someone had called his attention to the fact that presently numbered subsection (2) "Evidence of other crimes" really is a situation where you are offering evidence of other crimes to prove conduct on a particular occasion. The difference between subsection (1) and subsection (2) of the revision is that in subsection (1) you are offering evidence of character for the purpose of proving that he acted in conformity with his character on a particular occasion, and that in subsection (2) we are not offering this evidence of other crimes for the purpose of proving he was a man of a particular character and therefore more probably acted in conformity therewith, but it is being offered for the purpose of proving he had a motive and therefore probably acted in conformity with his motive. He pointed out that this would require further consideration.

Mr. Jenner called attention to the fact that he did not like the word "specified" and that he would prefer "particular". Professor Cleary stated this would be acceptable. Therefore the revised subsection (1) would read:

> Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion except as follows:

Then in subsection (1) there would also be included the following paragraphs: (a) Character evidence by the accused, (b) Character of victim of crime and (c) Character of a witness.

Mr. Williams brought up a point that in the next rule the draftsman goes to great pains to describe what is meant by character evidence and that this rule is captioned "Character evidence." He stated it appeared to be about character evidence but when you read the next rule you see that subsection (2) has nothing to do with character evidence as it is neither reputation nor opinion. He thought there should be a separation. Discussion ensued and Mr. Williams moved that what is now numbered subsection (2) become Rule 4-07, ahead of "Habit of customary conduct." That way paragraphs (a), (b) and (c) would deal only with character evidence; Rule 4-06 would define character evidence; and Rule 4-07 would become what is now subsection (2) of Rule 4-05. Professor Cleary asked whether if the Committee decided to do this they would want it to refer back to Rule 4-05 or formulate it as a completely independent rule without any cross-reference to Rule 4-05. Mr. Jenner thought that since this would be immediately after the character rule that it would not be necessary to cross-reference it. Professor Wright thought that this matter is of great importance and should be put in as a separate rule.

The Committee, on motion duly made and acted upon, decided that this should be added in a separate section after Rule 4-06. This motion received majority approval.

Dean Joiner then moved that Rule 4-05 be approved as redrafted. Mr. Berger however raised a question about renumbered Rule 4-05, paragraph (c), as he did not think it logically follows subsection (1). Mr. Williams made a suggestion to meet

Mr. Berger's point: paragraph (a) to include character evidence and in paragraph (b) to carry through with the character of the victim of crime and then change the caption of paragraph (c) to "Character of Witness," as there are a lot of ways to impeach the credibility of a witness. Call paragraph (c) "Character of witness," and then say "the character evidence on the trait of truth and veracity to attack or support the credibility of a witness." This would tell the reader that the rule is concerned with only one thing; namely, his reputation for truth and veracity. Mr. Berger said this did help to reach his point but the caption, "Character evidence not admissible to prove conduct, exceptions" does not have any application whatsoever in showing the lack of truthful character of a witness. Mr. Williams explained where this does apply to the rule but stated it should have certain clarifying language. Professor Cleary suggested that in the text of paragraph (c) "Character of witness" to insert the words "of his character" after the word "evidence." Mr. Williams however thought this might open the door to show that a witness who testified had a reputation for being a wife beater and the evidence should not go in. The Committee, however, after motion duly made and acted upon, decided the first sentence should read: Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except as follows: . The word "particular" was approved in lieu of "specified." Subsection (c) was approved to read:

> Character of a Witness. Evidence of his character offered to attack or support the credibility of a witness.

Mr. Jenner then suggested "Evidence of the character of a witness offered to attack or support the credibility of a witness." Professor Cleary agreed and the motion was duly made and acted upon to approve Mr. Jenner's suggestion. [For further consideration of this rule, see page 22.]

Rule 4-06. Methods of proving character.

This rule was unanimously approved as drafted without further consideration.

Rule 4-07. Habit or customary conduct.

Professor Cleary explained the background of the rule. Mr. Berger suggested the wording of subsection (a) be changed to "Evidence of a person's habit or customary conduct of a person or organization, whether . . . ." Professor Cleary thought this might be good but questioned whether the word "person" was needed the second time. Professor Cleary suggested "evidence of a person's habit or the customary conduct of an organization." Mr. Berger said this was all right. He said he thought he understood there was a distinction between "habit" and "customary conduct." Further discussion ensued and it was decided that Mr. Spangenberg's draft should be read. The draft read as follows:

> For purposes of this rule habit or customary conduct means a specific type of conduct or activity in the behavioral pattern of a person or organization which is repeated in response to identical circumstances with such regularity as to indicate it was repeated on the occasion in question.

Mr. Haywood moved that a definition on habit or customary conduct not be incorporated in the rule. Dean Joiner felt there might be situations where a definition would be necessary and he felt the Committee should formulate the language rather than have the rule interpreted in different ways by different judges. The motion was duly acted upon and the Committee decided not to have a definition on habit or customary conduct in the rule.

Professor Cleary reminded the Committee that no formal action had been taken on the motion by Mr. Berger to amend the first sentence of the rule to read "Evidence of a person's habit or of the customary conduct of an organization, whether . . . ." Discussion ensued on this suggestion but Mr. Raichle stated he felt that proof of the conduct of an organization should not be admissible against the individual's conduct. He stated for example that because a person belonged to a special organization and it was the custom of the organization to perform a special act, then this individual did perform the act. He felt this would be wrong. Dean Joiner suggested that the problem raised by Mr. Raichle could be solved by having two sections, one dealing with the conduct of an individual and the second dealing with the customary conduct of an organization. Mr. Haywood stated he was also concerned with the problem raised by Mr. Raichle. Mr. Williams indicated that this problem did not bother him as he felt this might be of probative value in proving that the individual's membership in a particular organization would be the initial element in proving his guilt.

Mr. Maywood suggested, and Mr. Berger accepted a further amendment to the section that in line 3 the words "of a person or of the organization" be inserted after the word "conduct."

Mr. Spangenberg then made a motion that the words in line 3 "whether corroborated or not and regardless of the presence of eyewitnesses," be stricken from the text. Mr. Spangenberg stated in support of his motion that he felt this particular language could be included in the comment and that the language added nothing to the rule. Professor Green said in opposition to the motion that, as an example, the "Rules of Civil Procedure for the United States District Courts" which were amended as to July 1, 1963, if purchased from the Government Printing Office, did not include any comments. He felt that nothing should be taken out of the rule and put in the comment that could leave the rule meaningless. [See further motion for reconsideration made on page 14.] After a brief discussion, the Committee approved Mr. Spangenberg's motion by a vote of 8 to 7.

Mr. Spangenberg then made a motion to divide paragraph (a) to have two sections, one dealing with habit and the other dealing with customary conduct. The motion was duly acted upon and with a vote of 6 in favor to 7 opposed, the motion was lost.

Mr. Jenner called for a voto to approve the entire rule with the amendments as suggested in paragraph (a). Mr. Epton suggested that the motion cover only paragraph (a) and that paragraph (b) be considered separately. The Chairman agreed and called for a vote on the motion [illegible] graph (a) read as follows:

(b) [illegible] Evidence of the [illegible] of an organization is relevant to prove that the conduct of the person or the organization on a particular occasion was in conformity with the habit or customary conduct.

The motion to approve paragraph (a) was duly acted upon and unanimously carried.

Dean Joiner then made the motion that the Reporter be instructed to redraft the rule to include group customs. Professor Cleary stated that the word "custom" in a rule is very confusing and that it would be better if some other word could be used. Mr. Berger, in this respect, suggested that the word "customary" be substituted by the word "routine." Mr. Jenner then called for a vote on the motion by Dean Joiner to redraft and broaden Rule 4-07 to include group customs. With a vote of 6 in favor to 7 opposed, the motion was lost.

The Chairman then called for a vote on the suggestion made by Mr. Berger, with the additional suggested by Mr. Spangenberg that the language read "routine practice" rather than "routine conduct." The Committee decided that in lines 1, 3 and 6 the language be changed from "customary conduct" to "routine practice."

Consideration was given to paragraph (b) of Rule 4-07. Discussion ensued as to how broad the Committee felt paragraph (b) should be. Mr. Epton made the motion that the rule read as follows:

> Habit or routine practice may be proven by testimony of specific [illegible] kind of routine [illegible] which is sufficient in number to warrant [illegible] that the habit existed or that the conduct [illegible] was routinary.

Dean Joiner opposed the motion because it was contrary to the Uniform Rules and to the Model Code. The motion was duly acted upon and lost.

Mr. Spangenberg then moved that subsection (b) read as follows:

> (b) Method of proof. Habit or routine practice may be proved by testimony in the form of opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.

The motion was duly acted upon and carried.

Mr. Epton then moved that in light of what had been changed in paragraph (b) that reconsideration should be made of the striking of the words in lines 3 and 4 of paragraph (a) of the language which read: "whether corroborated or not and regardless of the presence of eyewitnesses." The motion was carried. The Chairman called for discussion or motions with respect to the language and Dean Joiner made a motion that the words be stricken saying that inbhis opinion the whole purpose of the rule is specifically designed to improve the situation to make this proof admissible. The motion was duly acted upon and lost and the words were therefore restored.

There being no further discussion on Rule 4-07, the Committee approved the rule.

Rule 4-08. Subsequent remedial measures.

Professor Cleary reminded the Committee that consideration on this rule had been postponed at the July meeting until this meeting, not because there was disagreement on the basic idea that evidence of subsequent remedial measures should not be

admissible for the purpose of proving fault but the disagreement was over the examples of evidence admitted for other purposes such as ownership, control, feasibility of precautionary measures and impeachment. He introduced the "Brief on Admissibility of Subsequent Remedial Measures" prepared by Mr. Spangenberg and asked him to give a summary of the document.

Mr. Spangenberg replied that the main purpose for his document was to establish examples of contradiction of impeachment of witnesses but which had not resulted in actual impeachment because the situations were set forth in the pleading. He went on to explain the examples and situations outlined in his document.

Mr. Berger moved that Rule 4-08 be approved. The motion was duly acted upon and unanimously carried.

Rule 4-09. Compromise and offers to compromise.

Professor Cleary explained the changes made in the rule at the July meeting. Discussion ensued on whether the rule was too broad or not broad enough. Mr. Spangenberg stated that he felt the sentence "Evidence of conduct or statements made in negotiation thereof is likewise not admissible." was too broad. Judge Estes stated that he felt this rule was very good and would save lawyers and clients a lot of time and trouble about whether a statement had been an admission of fact or whether it was not. He, therefore, moved adoption of the rule as drafted.

Mr. Jenner stated that he could not see any purpose for the word "thereof" in line 3. The Committee decided that this word be stricken and the word "compromise" should be inserted in line 3 after "made in" and that the word "negotiation" should be made plural. These changes were adopted by consensus of the Committee.

Mr. Epton then questioned the use of the words "lack of diligence" in line 11. Professor Cleary used as an example an injury case where theddefendant tells the plaintiff not to worry about asserting a claim because he will settle the dispute. The defendant stalls long enough for the statute of limitations to expire and then says to the plaintiff that he will have to sue. However, when the suit is filed the defense pleads the statute of limitations. Professor Cleary stated this was an illustration of "lack of diligence." Further discussion ensued, and Mr. Epton stated he was troubled by the word "diligence." Professor Cleary agreed that "diligence" was ambiguous as used in the rule. Judge Sobeloff suggested changing the language to read "negativing lack of diligence in asserting a claim or defense." Professor Cleary stated in opposition that if the word "defense" was added to the rule this would make a claim mean filing a law suit. Dean Joiner made a motion that the phrase be changed to read "a contention of undue delay." Professor Cleary made a further suggestion that in line 6 the word "for" be inserted after the word "liability." The Chairman called for a vote on the two proposed changes. Both proposed changes were unanimously approved.

The Committee then voted unanimous approval of the proposed rule as amended.

Rule 4-10. Payment of medical and similar expenses.

Professor Cleary introduced the rule and made a suggestion that the words "occasioned by an injury" be inserted in line 3 after the word "expenses." He explained that at the last meeting "humanitarian motives" had been included in the rule but it had been decided that all references to this should be excluded. The Chairman called for any motions or any discussion on the rule. There being none, the Committee unanimously approved the rule with the insertion as suggested by the Reporter.

Rule 4-11. Offer to plead guilty or withdrawn plea of guilty.

The Reporter read the rule and stated that the rule as originally drafted did not contain the second sentence. He also stated that when the Committee approved the rule at the last meeting and added the last sentence there was reference to "the defendant." He stated that the withdrawn plea could be the plaintiff in a civil action and he had therefore made a substitution of the words "a party" in lieu of "the defendant." Discussion ensued as to whether this could be applicable in a civil action. Mr. Williams stated that he felt this rule was an extension of the Kercheval case and that the change made by the Reporter was very important and changed the meaning of the rule substantially. Professor Cleary stated that the discussion was being centered mainly on the second sentence and that the first sentence was really the main strength of the rule. Judge Van Pelt replied that the second sentence was

equally important merely because it had been included. Further discussion ensued and Dean Joiner made a motion that in line 4 after the word "admissible" the words "in that case" be inserted and the last sentence be stricken. He stated in support of his motion that this would limit exclusion of evidence to a defendant in the case in which he is on trial. Mr. Williams asked Dean Joiner to accept an amendment to the motion that lines 4 and 5 read: "to the crime charged or any other crime, is not admissible in the trial of the defendant who made the plea or offer." Dean Joiner accepted the suggestion by Mr. Williams and the motion was duly acted upon and carried. The Chairman called for further discussion or revisions. There being none, the motion was duly acted upon and carried to approve Rule 4-11 as amended.

Rule 4-12. Liability insurance.

Professor Cleary introduced Rule 4-12 to the Committee and stated that he felt the rule was too narrow and presented the following first sentence for the Committee's consideration:

> Evidence that a party was or was not insured against liability is not admissible upon the issue whether he has acted negligently or wrongfully.

He felt this proposed revision would be broad enough to cover questions of contributory negligence as well as negligence on the part of the defendant. Dean Joiner stated that he preferred the word "person" rather than "party" in the first line. Mr. Raichle felt that the language would be improved if the word "otherwise" were to be inserted before the word "wrongfully" in the last line. Mr. Joiner then stated he felt the word "has" before the phrase "acted negligently or wrongfully" was

unnecessary. Professor Cleary agreed to all these changes and Mr. Berger suggested that the draft be typed and submitted to the Committee at the next morning's session. The Committee agreed.

The meeting adjourned at 5:10 p.m. and reconvened on Friday, September 30, 1966, at 9:15 a.m.

Mr. Jenner was unavoidably absent from the meeting and Judge Maris acted as Chairman.

The Reporter's draft was presented to the Committee on Rule 4-12 and to the question raised as to whether "Workmen's Compensation" was a form of insurance against liability as presented in the draft, Professor Cleary replied that it was. Dean Joiner stated that he felt the phrase "insured against liability" was too restrictive. Professor Cleary stated that he did not see how the draft could cover every type of insurance but felt that if the draft simply read "insurance" this would broaden the rule unduly and felt the phrase "liability insurance" described the kind of insurance upon which the whole problem was focused and should be left in. Judge Van Pelt pointed out that there was great uniformity in the New Jersey Evidence Rules, the California Evidence Rules, the Uniform Rules and the Model Code in this field and that everyone of the various rules qualify "against liability insurance" by using the words "for that harm." Mr. Haywood made a motion that the words "against liability" be stricken from the draft. With a vote of 3 in favor to 7 opposed, the motion was lost.

Mr. Haywood felt the phrase "or upon the issue of damages" should be inserted at the end of the first sentence for clarifi-

cation purposes. Mr. Selvin, however, felt this language was unnecessary and that this was covered under the definition on "relevancy." Mr. Williams argued that if these words were added this would indicate that it would not be admissible to show the intent of damages incurred by nominal party and the clear party. Discussion ensued on the motion and Judge Maris called for a vote. The motion was duly acted upon and lost.

Judge Sobeloff stated that he had originally voted to retain the words "against liability" in the first line but was now inclined to feel that these words should be stricken. He, therefore, made a motion that the words be stricken from the language of the rule to make the language broad enough to include both the plaintiff and the defendant and to avoid any possibility that a defendant could show that the plaintiff received some collateral benefits from the insurance company by the virtue of his injury. Discussion ensued and Judge Maris called for a vote on the motion. With a vote of 8 to 2, the motion was carried to strike the words "against liability."

Mr. Williams requested that the motion to insert at the end of the first sentence the words "or upon the issue of damages" be voted on again by the Committee. He made this a formal motion but with a vote of 4 in favor to 7 opposed, the motion was again lost.

Judge Van Pelt moved that the Committee adopt California Rule 1155 instead of the language proposed by the Reporter. He stated in support only that he felt California Rule was better language. Professor Cleary stated in opposition that

the California language did not cover the problem of contributory negligence. Judge Maris called for a vote and the motion was lost.

Dean Joiner made a motion that the first sentence of Rule 4-12 be approved as follows:

> Rule 4-12. Insurance. Evidence that a person was or was not insured is not admissible upon the issue whether he acted negligently or otherwise wrongfully.

The motion was duly acted upon and carried.

The Committee then went on to consider the second sentence. Professor Cleary read the second sentence and stated that in accordance with the action taken by the Committee on the first sentence the word "liability" in line 5 should be stricken. Mr. Haywood pointed out that "for another purpose" is dealing with the question of damages and the implication is that the issue of insurance would be admissible on the question of damages. Mr. Spangenberg stated that if this implication is in the rule, he would not approve it. Professor Cleary suggested the phrase "another relevant purpose" rather than "another purpose." He felt this would solve the problem. Mr. Selvin stated he would solve this by inserting in lines 6 and 7 the words "to prove any other relevant fact" and delete the language "for another purpose" and strike the illustrations at the end of the rule of "such as proof of agency, ownership, or control, or bias or prejudice of a witness." Judge Sobeloff liked Mr. Selvin's original phrase but stated that he thought the illustrations should be left in as they were helpful in determining the full meaning. Mr. Raichle stated he agreed that illustrations were

helpful but that they should be in the comment and not in the text of the rule. Discussion ensued and Judge Maris suggested striking the word "offered" in line 5 and insert the words "it is relevant." The general consensus of the Committee was to accept this language as suggested by Judge Maris.

Judge Maris asked whether anyone had any definite motion on the question of illustrations. Mr. Selvin replied he had been the only one talking about the illustrations but had made no definite proposal. Judge Van Pelt suggested leaving the question of the illustrations alone until all the rules had been discussed and amended by the Committee and suggested that one vote be taken as to whether to leave the illustrations in the rules or insert them in the comments. It was agreed by the Committee.

Dean Joiner made a motion that the rule be approved as amended with the deletion of the word "liability" in line 5 and the insertion of the words "it is relevant." The motion was duly acted upon and carried.

Mr. Maywood stated he would like to be recorded as voting against the second sentence as he felt the sentence would weaken the initial rule on relevancy.

Rule 4-05. Character evidence not admissible to prove conduct.

Professor Cleary presented for further consideration of this rule three alternatives which are in conformity with the decision of the Committee that Rule 4-[illegible](c) be a separate rule. He stated that he had drafted the alternatives as Rule 4-05a in view of his feeling that the Committee might want to reconsider

its action of the prior days' meeting of making this section follow Rule 4-05. He read the three alternatives and explained their differences.

Discussion ensued on Alternative (3) and Mr. Berger questioned the phrase "when relevant" at the end of the rule. Professor Cleary replied that this phrase was really an afterthought of his and that it would be abbetter rule if the phrase were stricken. The Committee agreed.

Further discussion ensued on the three alternatives and Mr. Selvin pointed out that the Committee is trying to make sure that Rule 4-05 will not be misinterpreted to exclude the types of evidence illustrated in the rule and that in this respect he felt Alternative (1) was the most appropriate. He suggested the Committee approve in principle Alternative (1).

Dean Joiner indicated that he felt Alternative (3) could be included as one of the middle paragraphs of Rule 4-06 because it was dealing specifically with the problem of proof. Mr. Selvin and Mr. Erdahl agreed and Mr. Erdahl further stated that this was a rule with affirmative aspects, even though it does deal with character and they agreed that the consensus of the Committee at the prior days' meeting was correct.

Mr. Berger discussed Alternative (1) and suggested that the language be changed from "Rule 4-05" to read "This rule." There was general consensus and this was changed.

Mr. Williams pointed out that he had originally made the motion to separate this section from Rule 4-05 and had now decided that it was the wrong thing to do. Mr. Selvin, in this

rupert, made a motion to make Alternative (1), in substance, the final subsection of Rule 4-05. Professor Cleary voiced his preference of the three alternatives to be Alternative (1) and agreed with Mr. Selvin's motion. Dean Joiner, however, pointed out that the last two lines "or for any purpose other than the character of a person and that he acted on a particular occasion in conformity therewith" were not necessary. The Committee agreed and the Reporter suggested striking that language and inserting in line 3 after the words "when offered" the phrase "for another purpose such as" and continue with the illustrations. The motion by Mr. Selvin was unanimously carried that the following language be approved in substance as subsection (2) of Rule 4-05:

> (a) Evidence of other crimes, wrongs or acts. This rule does not require the exclusion of evidence of other crimes, wrongs, or acts when offered for another purpose such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

Professor Cleary then made the following changes: The original introductory phrase of the rule should be paragraph (a) with the subsections as (1) Character evidence by accused; (2) Character of victim of crime; (3) Character of a witness; and the language stated above would become paragraph (b).

Dean Joiner questioned the need for the words "Evidence of" in the title of the new paragraph (b). Professor Cleary indicated that these words should be stricken.

Professor Green was concerned with the reintention of the words "for another purpose" in the new language and stated that the Committee had discussed this language at the prior days' meeting and thought the language was ambiguous as now written. Professor Cleary stated this point could be accomplished by restoring the last two lines of the draft or rearranging the language and suggested the best solution might be to take out the phrase "for another purpose such as" which had just been inserted and restore the last two lines.

Further discussion ensued and Mr. Spangenberg stated that upon further consideration he was inclined to now favor Alternative (3) of the Reporter's drafts. The suggestion was made by Mr. Selvin that perhaps the best procedure to follow would be to combine the principles of both Alternatives (1) and (3). Professor Cleary suggested that perhaps the Committee should go back to Alternative (3) and start the subsection by saying "Although evidence of other crimes . . . ."

After the coffee break, Professor Cleary suggested in view of the discussion that he preferred Alternative (3) and would like to suggest the Committee work on this alternative with the last two words "when relevant" stricken.

Dean Joiner made the suggestion that in line 15 something should be inserted to indicate that there was evidence "to show" that he acted in conformity with his character. Also, in line 16, he disagreed with the statement "It is, however, admissible" and felt it would be better phraseology to say "It may, however, be admitted for the purpose of proving . . . ." Judge Van Pelt

suggested in this respect that it be felt it should read "It may, however, be admitted for other purposes to prove . . . ." Judge Sobeloff disagreed with the word "admitted" and suggested that the word should be as the Reporter submitted, which was "admissible." The members agreed with Judge Sobeloff.

Judge Maris, with respect to the idea presented by Dean Joiner, suggested that line 15 should read "character of a person in order to show that he acted in conformity therewith." The Committee then voted and unanimously approved the following draft to be included as Rule 4-05, paragraph (b).

> Other Crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes such as the proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

MEMORANDUM NO. 11

Rule 5-01. General abolition of privileges not specifically granted.
Rule 5-02. Constitutional privileges; self-incrimination, involuntary confession, evidence obtained unlawfully.
Rule 5-03. Privilege against disclosures in contravention of Act of Congress.

Professor Cleary introduced these rules for discussion and suggested an addition of the words "or in the Constitution of the United States or by Act of Congress" in line 1 after the phrase "provided in these rules" in Rule 5-01. He stated this would solve the problem of including in the rules the Constitutional doctrine. Discussion ensued and Judge [illegible] Pelt, with the same problem in mind as Professor Cleary [illegible]ion to leave

to the Reporter the task of redrafting Rule 5-01 to take the place of Rules 5-01, 5-02 and 5-03. Judge Maris reminded the Committee that there might be areas where the court has presented some exclusionary rules and certain privilege rules b which are not founded directly upon the Constitution or on the statutes but upon the court's general supervisory power. These he felt need to be dealt with but the Committee, he stated, was not in a position to do anything about them. Judge Maris called for further discussion. There being none, he asked for a vote on Judge Van Pelt's motion that the proposals now contained in Rules 5-01, 5-02 and 5-03 be consolidated in Rule 5-01 with some reference, to be formulated by the Reporter, to the Constitution and Acts of Congress. The motion was duly acted upon and unanimously carried.

Dean Joiner inquired of Professor Cleary whether recognition of state privileges would be acknowledged in the rule. Professor Cleary stated he did not feel they could be recognized. Discussion ensued and general consensus was that something should be said with respect to state privileges. Dean Joiner stated he did not want to press any kind of Committee action but this was a problem that bothered him. Professor Cleary explained that it is difficult to draft a rule to conform to all aspects of state policies but the only thing which could be done would be to simply state in rules that these rules should follow the policies set forth in the local rules.

Rule 5-04. Lawyer-client privileges.

Professor Cleary read the rule and explained the use of the term "lawyer-client" in the rule as defined in the comment. He explained that substantially the definition of "client" in subsection (1) is the language of Uniform Rule [illegible](3)(a). He stated that one important change from the Uniform Rule was the inclusion of the language in lines 1 and 2 of "or other organization (including a public entity)" to make it clear thategovernmental bodies are not to be excluded from claiming privileges. He stated that he had extended the rule to cover privileges of corporations.

Mr. Berger expressed his approval of Professor Cleary's technique of including corporations and public entities, but felt the rule should be narrowed so to restrict the public from being informed of confidential matters with respect to public entities. Mr. Selvin did not agree and stated that he felt the public should knowlexactly what is being said and what is going on. The general consensus of the Committee was that Mr. Selvin's view was wrong. After further discussion,,Mr. Selvin moved to strike the phrase "(including a public entity)" in line 2 of subsection (1). The motion was duly acted upon and with a vote of 4 in favor to 9 opposed, the motion was lost.

Judge Maris raised a drafting problem that inasmuch as the term "corporation" was used, he suggested using the word "individual" rather than "person." [illegible] however, any action taken [illegible] had [illegible] by [illegible].

Dean Joiner raised the question of the use of the words "or the lawyer's representative" in line 4. He felt this phrase held application only to a lawyer who was being employed at present and felt the client should not have to consult a lawyer through his representative in order to obtain legal service. Mr. Williams raised the point that every law office of any size employs law school graduates who have not yet been admitted to the bar and if these graduates cannot be used to interview clients or prospective clients, then they are being deprived of very valuable experience. He also felt that the time that a lawyer took in interviewing every prospective client would not be used to any great advantage because a law student (or other representative) could interview the client and give a summarization to the lawyer and this would be to better advantage to all concerned. Discussion ensued and Dean Joiner made a motion that the phrase "or the lawyer's representative" be stricken from line 4. The motion was duly acted upon and lost.

Mr. Jenner resumed Chairmanship of the Committee at 2:40 p.m.

Judge Van Pelt then raised the question that if the phrase "of the lawyer's representative" is to be left in the test of the rule it should be defined. Mr. Selvin voiced his opinion that it would be difficult to phrase a definition which would be more appropriate than "a lawyer's authorized representative."

Discussion ensued as to the problem of communications between the lawyer and the client and between the lawyer's representative and the client. In this respect, Professor Cleary decided to broaden the scope of the discussion for the Committee to include subsection (2), a definition of lawyer, subsection (3), defining communications (at this point, Professor Cleary read the complete comment on this subsection) and subsection (4) dealing with confidentiality.

Discussion ensued on the scope of the four subsections and Mr. Selvin stated that, in relation to the problem of confidential communications, he would like to point out the distinction made in the California Rules between what the witness knows from the facts that he has acquired as being admitted in evidence only by expressing his opinions and judgments rather than the actual facts of the communication. This he felt put the witness in the correct perspective as the lawyer's representative but did not put the confidential facts that the representative acquired during the interview with the client in the realm of admissible evidence. Professor Cleary further read the comments in connection with "confidentiality."

Discussion ensued as to situations where the client asks that his identity be kept confidential and Mr. Williams pointed out that there may be situations where the disclosure of the name of a client by a lawyer would be a breach of the relation because it is giving information that was given during a confidential conversation. Specific instructions that the client's identity be kept secret.

Mr. Haywood pointed out that there may be situations where a social worker would be believed to be a person authorized to practice law whereas in reality he is merely an interviewer to determine whether the person actually needs the assistance of a lawyer. Mr. Jenner replied that this would be covered by the phrase "reasonably believed by the client to be authorized, to practice law." Mr. Berger, however, agreed with Mr. Haywood that this phrase would not be applicable. Dean Joiner stated the problem was solved in subsection (1) because the social worker would be interpreted as a "lawyer's representative." This then satisfied Mr. Haywood.

Dean Joiner questioned the use of the word "him" in line 5 of subsection (1) and indicated that he did not know whether this word referred to the lawyer or to the representative. Professor Cleary suggested that for clarification purposes, the word "him" be stricken; that the phrase "the lawyer" be inserted in this place. Mr. Spangenberg presented Professor Cleary's suggestion as a formal motion. The motion was duly acted upon and unanimously carried.

Mr. Berger made a motion that subsection (1) be approved as amended. The motion was duly acted upon and unanimously carried. [For further action by the Committee, see pp. 34 & 38.]

Mr. Spangenberg stated he was impressed with the language of subsection (2) defining "lawyer" and made a motion that it be approved as submitted by the Reporter. The motion was duly acted upon and carried.

Dean Joiner questioned the Reporter's reason for including the definition of "communications" and "representative of the client" in subsection (3) rather than having two subsections. The Reporter replied that if it would simplify matters, that "representative of the client" would now be considered as subsection (4) and change subsection (4) to subsection (5) (a definition of "confidential"). The Committee agreed to this change.

To Professor Weinstein's question of whether the language of subsection (3) (defining "communications") included advice given by the lawyer's representative, Professor Cleary replied that it did not. Professor Weinstein felt there should be some provision in the rule including a lawyer's representative because he did not feel that the lawyer would do all the communicating with the client. Mr. Spangenberg made a motion with respect to this problem that in line 1 after the word "lawyer" the phrase "directly or through his representative" be inserted and commas inserted before and after the language. The motion was duly acted upon and carried.

Mr. Selvin felt the word "advice" was too restrictive and should be broadened to include not only the lawyer's advice but also the lawyer's reasons for arriving at his conclusions in giving this advice. A brief discussion ensued and Mr. Spangenberg made a motion that the subsection be amended to read "Communications include statements by the lawyer, directly or through his representative, to the client or his representative, and disclosures to the lawyer or his representative by

the client or by a representative of the client." After noting the general disapproval of the Committee, Mr. Spangenberg withdrew his motion and submitted in lieu thereof the language "Communications include the communications by the lawyer, directly or through his representative, to the client or his representative and the communications to the lawyer or his representative by the client or by a representative of the client." This he felt would clarify the intent not to simply define communications but to define the personnel authorized to make the communications. (Mr. Spangenberg's language did not receive the approval of the Committee and it was dropped.)

Judge Maris suggested the following be substituted for subsection (3):

> Communications between client and lawyer include those made by or to the representatives of either.

Professor Cleary stated that the only problem concerning this proposed language is that there is no reference to communications between the principals directly. However, a brief discussion ensued, and the motion was unanimously carried.

> The meeting adjourned at 5:00 p.m. and reconvened on Saturday, October 1, 1966 at 8:30 a.m.

Professor Cleary raised the question as to whether the phrase "(including a public entity)" in subsection (1) covered the single public official or a group of officials. After several suggestions were made, [illegible] stated he felt the drafting problem should be left to the reporter. Mr. Jenner put to a vote the question of [illegible] the Committee felt sufficiently doubtful that [illegible] would cover a

single public official. The motion was acted upon and carried and left to the Reporter for redrafting to cover single public officials.

Professor Cleary then read the last sentence of subsection (3) as drafted in his memorandum regarding "representative of the client" and stated he felt this was inconsistent with the prior days' discussion with respect to the representatives of the attorney. Professor Cleary further stated there were questions with respect to this rule that the Committee must decide as whether it would accept the definition as one giving authority to participate in the decision to obtain legal services or advice.

Mr. Epton questioned whether the Reporter deliberately used the word "and" rather than "or" in the first line on page 17. He stated that one pesson might come to the lawyer for legal advice but he might not be the person who actually actssupon the advice. Professor Cleary agreed with Mr. Epton's point and the word was changed to "or." Mr. Williams stated he felt this rule submitted by the Reporter did not include the menial employees such as the motorman or the cab driver, etc. Professor Cleary agreed and states that this was something that the Committee would have to work on. A suggestion was made to end the definition of "Representative of the client" with the phrase "to act thereon" on page 17 and leave the remaining language for separate consideration. The Committee agreed and the words "or an expert employed by the lawyer to assist in the management and direction of the case and not to testify" were added to this sentence. [Further

Dean Joiner questioned what the phrase "or to act thereon" meant, and stated in his opinion that everyone was authorized to act on legal advice and this phrase was not necessary. Professor Cleary replied that something was needed because he did not feel that anyone in a corporation (such as the bus driver of the bus involved in the accident) should be authorized to speak on behalf of the corporation. He explained the phraseology was not the best possible but that it was difficult to put in the rule what was actually intended and was looking for help from the Committee with respect to this problem. Discussion ensued and Mr. Haywood stated he would accept the draft provided it would not limit its provisions to the higher officials of a corporation as he felt it should be applicable to the menial personnel also. Discussion ensued as to what the Committee actually wanted the rule to encompass with respect to this problem and it was the general consensus that the rule needed redrafting. Mr. Spangenberg stated that the phrase "to participate in the decision" on page 16 should be stricken as he felt this language was confusing. Mr. Erdahl suggested, and Mr. Spangenberg, accepted, a further amendment to add after the words "to act thereon" the phrase "on behalf of the client." The rule would then read as follows:

Subsection (4)
Representative of the client means one having authority to obtain legal services or advice or to act thereon on behalf of the client.

Judge Van Pelt stated that he felt this would limit the rule unduly. Mr. Selvin agreed and requested that Mr. Spangenberg accept a further amendment ... the words "or received" be

inserted after the word "obtain." Mr. Spangenberg had no objection. Mr. Epton entirely disagreed with the approach of Mr. Spangenberg's draft and made the following submission to the Committee.

> Representative of the client means one who has authority to or obtains legal services or acts thereon on behalf of the client.

The general consensus of the Committee was that this language would not meet all the requirements and no action was taken on it. Mr. Epton later withdrew.

Professor Cleary stated he did not see where the word "received" as suggested by Mr. Selwin, did anything to the rule except include every menial individual in the corporation. Several suggestions were made as to the appropriate word and Professor Cleary suggested the phrase "consult the lawyer for legal advice." Mr. Spangenberg then accepted this language and his motion would read as follows:

> Subsection (4)
> Representative of the client means one having authority to obtain legal services or to consult the lawyer for legal advice or to act thereon on behalf of the client.

Dean Joiner questioned how Mr. Spangenberg's language would cover the person actually involved in the accident (he used as an example the bus driver). Mr. Spangenberg replied that when the bus driver is telling the circumstances of the accident, he is not obtaining legal advice, he is merely conveying information to the individual who will obtain legal advice. Judge Van Pelt felt the change of the word "and" to "or" made the language cover the bus driver as acting upon legal advice.

Professor Cleary did not agree and stated that an order to the bus driver to inform the attorney of the circumstances of the accident is not acting upon legal advice. He felt this language meant a decision-making type of action by management. Judge Sobeloff stated he would feel better if this idea were inserted in the comment. Mr. Jenner stated that he [illegible] the Committee would not put anything in the comment that was absolutely necessary to make the rule clear; in other words not to rely on the comments to indicate the intention of the Committee. Dean Joiner then questioned whether the term "Representative of the client" in subsection (4) indicates the same person as "authorized representative" in subsection (1) and "representative" in subsection (3). Professor Cleary replied that it was. There being no further discussion, Mr. Jenner called for a vote on the motion. With a vote of 6 to 6, the Chairman decided that further discussion was necessary. Mr. Selvin stated he did not accept the proposal because he was not entirely satisfied that it would cover the menial personnel (as the bus driver) and Judges Sobeloff and Van Pelt agreed indicating they felt some additional clarifying language was necessary.

To pacify the concern over the bus driver not being covered in the rule, Mr. Spangenberg explained that if the bus driver said to the attorney that he had gotten a ticket and wanted to know whether or not to plead guilty, then he would be covered because he was consulting for legal advice and if he is doing something because the lawyer told him to, then he would be covered.

This was unsatisfactory to the [illegible] and Mr. Jenner called for another vote. With a vote of 6 in favor to 5 opposed, the motion was carried.

Judge Bobleoff questioned whether there would be any clarifying statements at all inserted in the comment as to when the bus driver is authorized to receive legal advice. Mr. Jenner directed the Reporter to include something in the comment to clarify the various situations where the bus driver would be covered in the redrafted rule.

In view of previous action, Professor Cleary returned to subsection (1) and suggested striking the word "authorized" in line 3. He felt this would be consistent to conform with the uses of the word "representative" in the other subsections. The Committee unanimously agreed and the word was stricken.

Professor Cleary felt the phrase which had been taken out of the definition of "Representative of the client" which reads "or an expert employed to aid in the management and direction of the case and not to testify" should be considered as a definition of a "Representative of the lawyer." Mr. Erdahl suggested that subdivision (4) be renumberdd (2) because subsection (1) defines "Client" and he felt that the definition of "Representative of the client" should be next. The Committee agreed to this and the paragraphs were renumbered as follows: (1) "Client"; (2) "Repr[illegible]tative of the client"; (3) "lawyer"; (4) "Communications"; (5) "Representative of the lawyer"; and (6) "confidential."

Dean Joiner did not agree with Professor Cleary on the

language to be considered as a definition for "representative of the lawyer." He stated that anyone, whether an expert or not, who aids the lawyer on behalf of the client should be privileged to have communications between the lawyer and the client. Professor Cleary suggested the following language (which had originally been part of subsection (2) for consideration: Striking the word "or" and beginning as follows:

Subsection (5)
"Representative of the lawyer" includes an expert employed to aid in management and direction of the case and not to testify.

Mr. Raichle questioned the words "and not to testify." Professor Cleary replied that if the person is going to testify then there is no confidence about his contacts with the lawyer and stated that an attorney-client relationship should not exist if the expert is going to be a witness. Mr. Selvin made a motion to strike the words "and not to testify." Mr. Berger stated that he agreed with Mr. Selvin because he did not feel that at the time of the employment of the expert that a factor should be whether or not the expert will testify. Judge Sobeloff replied that if the expert is employed to testify then he would not be treated as a representative of the lawyer.

Mr. Berger suggested, and Mr. Selvin agreed, that the words "who aids" should be inserted after the words "an expert" and strike the words "employed to aid." He stated in support merely that he felt this would be better phraseology.

Professor Cleary felt that no determination should be made as to the status of the expert and suggested a statement

should be included to the effect that the status as a representative of the lawyer is waived or ceases to exist if he takes the witness stand. Mr. Conner stated this was a separate problem and should be considered later.

Mr. Selvin's motion to strike the words "and not to testify" and Mr. Berger's suggested revision to insert the words "who aids" after the phrase 'an expert" and strike the words "employed to aid" was duly acted upon and with a vote of 8 to 4, was carried.

The Committee then went on to consider the problem raised by Professor Cleary as to the determination of the status of the expert. Judge Estes suggested the language read "This does not apply to an expert who is also a witness." Professor Cleary inquired of Judge Estes whether he would require the lawyer to decide at the time of employment what the individual's status would be (either expert or witness) and the Judge replied that he would. A discussion ensued on whether a lawyer should be required to determine at the time of employment what the individual's status should be, and the general consensus was that the lawyer should be required to make this determination. Judges Van Pelt, Sobeloff and Estes indicated their confusion as to exactly what the rule is intended to do and Professor Wright pointed out that if the three federal judges at the meeting were disturbed as to the meaning of the rule then how could the judges who had not had the benefit of the discussion be expected to understand the full scope of the rule. He felt therefore that some additional drafting was necessary.

Professor Weinstein suggested that the language in effect read "but where the privilege is relied upon to prevent such an expert from testifying, he shall not be permitted to be a witness." No definite language could be formulated at that time.

Mr. Spangenberg stated that in view of the judges' obvious confusion with the new subsection (5), and the general disapproval of the Committee members, he moved that the Committee reconsider its adoption of the language. The motion was duly acted upon and carried. Mr. Spangenberg then moved that the Committee not include a definition for "Representative of the lawyer". The motion was carried.

In view of the action by the Committee to exclude a definition of "Representative of the lawyer" the renumbered subsection (6) defining "confidential" would now become subsection (5).

The Committee then considered the first sentence of the definition of "confidential" communications contained in subsection (5). Professor Cleary read the rule and made the suggestion that the word "not" be stricken after the word "intended" and inserted immediately before "intended" so the language will read "A communication is 'confidential' if not intended to be . . . ." The Committee agreed to make this change. There was a brief discussion and Mr. Spangenberg moved that the first sentence of subsection (5) be approved with the amendment as suggested by the Reporter. The motion was unanimously carried.

The Committee then considered the second sentence of subsection (5). Mr. Jenner stated this sentence presented the problem of being required to reveal the identity of a client and stated it solved the problem by having the identity of the client be revealed. Mr. Epton stated he was not in favor of this and stated he could not understand the point of spelling this out in the rule. Mr. Spangenberg stated that he felt the retaining fee, otherwise the lawyer would be put in an impossible situation and he felt this would be unfair to the public who thinks this is a confidential matter.

Professor Cleary noted several situations where the information could be withheld as (1) where A hires a lawyer for B - the representation of B has to be disclosed but the connection with A does not; (2) the case of the anonymous taxpayer and the attorney-client relationship is relied upon to prevent the disclosure of the identity; and (3) the situation in which the client discloses in the course of the consultation with a lawyer that someone else is guilty of a wrongdoing and the attorney discloses this information to the authorities but tries not to disclose the identity of his client. Mr. Williams did not agree with the language and he did not feel that a rule could say that the identity is never the subject of a confidential communication. He stated there were situations where the disclosures of the identity of the name of the person that consulted the lawyer totally destroyed the privilege because other information is known which when put together with the identity of the person completely establishes his position in the situation.

Mr. Williams did not feel the second sentence was necessary stating that he felt that each case would have to be decided separately and felt that it was not necessary to formulate a universal rule on this problem. He moved, therefore, that the second sentence of subsection (5) be stricken. Mr. Selvin stated in support of the motion that the courts have set standards for the various situations and felt that the courts should determine when the identity is privileged. The motion made by Mr. Williams was duly acted upon and carried.

Mr. Williams felt that some legislative history should be included in the comment stating this provision had been stricken from the rule. Professor Cleary was told that this would be left to his discretion when redrafting the rule.

The Committee moved on to consider paragraph (b). Professor Cleary suggested that the last line of the draft be amended to read "between himself or his representative and his lawyer or his lawyer's representative, or between the lawyer and the lawyer's representative, in the lawyer's official capacity." Mr. Selvin had raised the question of whether this language as originally drafted would adequately cover the various types of communications and Professor Green had raised a question on the language originally submitted as to whether the draft might not include communications concerning non-professional matters. Mr. Selvin stated that the new language met his problem. Professor Green stated that the new language suggested by the Reporter met his problem but the sentence was so long, he thought something should be put in an additional sentence which would interpret "lawyer" and "client."

Professor Wright questioned the need for the "Representative of the client" and the "Representative of the lawyer" in light of the definition on communications adopted by the Committee at the prior days' meeting which read "Communications between client and lawyer include those made by or to the representative of either." Professor Cleary stated he had not gone over what had been done with respect to communications and he agreed that this additional language was therefore unnecessary.

Professor Cleary decided to strike the previously entered language and have the language read "Between himself and his lawyer, or between the lawyer and his lawyer's representative in his professional capacity". Judge Van Pelt could not see how the phrase "in his professional capacity" added anything to the rule. There was general consensus of the Committee that this phrase was unnecessary and Judge Van Pelt made a motion that this be stricken from the language. The motion was duly acted upon and carried. There being no further discussion, the Committee approved subsection (b) as amended.

Professor Cleary introduced subsection (c) "Who may claim the privilege" to the Committee. Mr. Epton raised the question that if the client is away and the lawyer has no way of contacting him, the rule would require the lawyer to disclose information that should be privileged. The general consensus of the Committee was that the last sentence of the rule which read "His authority so to do is presumed in the absence of evidence to the contrary." would take care of this problem. Mr. Epton, however, was not entirely satisfied th[illegible] his problem

completely. Further discussion ensued and Mr. Epton made a motion that the phrase "and the lawyer must, in the absence of his client or instructions to the contrary, claim the privilege" be added to the last line of this subsection. He felt this would solve the problem but he was not pressing this particular language, although he felt this situation should be covered in the rule inasmuch as the California draftsmen felt it important enough to put in their rules. Judge Van Pelt stated that he understood the distinction between the California Rules and these rules to be that the California Rule said the lawyer "shall claim" and these rules leaves this to the discretion of the lawyer whether to claim this as a privilege and felt there was a very broad difference. The motion was duly acted upon and lost.

Mr. Berger asked whether the Reporter intended by the language in the first sentence not to cover a trustee in bankruptcy or a trustee in reorganization, and stated the language in the third line of a "trustee in dissolution" and the language in the first line which read "organization that is no longer in existence" indicated that he did not intend to cover these situations. Professor Cleary stated he had intended to cover these situations and Mr. Berger, in view of Professor Cleary's answer, stated that some changes should be made in the text. He moved that in line 5 the phrase "that is no longer" be substituted by the phrase "whether or not." The motion was duly acted upon and unanimously carried.

Judge Van Pelt questioned whether the words "in dissolution" was necessary even though it was taken from the California Rules and he felt it needed to be stricken to coincide with the action taken on the point raised by Mr. Berger. He made a formal motion that the words "in dissolution" in line 3 be stricken. The Committee approved the motion.

The Committee scheduled their next meeting to be held on Monday, Tuesday and Wednesday, December 19, 20 and 21, 1966.

The meeting adjourned at 1:30 p.m. on Saturday, October 1, 1966.