MINUTES OF THE DECEMBER 1966 MEETING
OF THE
ADVISORY COMMITTEE ON RULES OF EVIDENCE

The seventh meeting of the Advisory Committee on Rules of Evidence convened in the Supreme Court Building on Monday, December 19, 1966 at 9:30 a.m. and adjourned on Wednesday, December 21, 1966 at 1:00 p.m. The following members were present:

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

Dean Charles W. Joiner was out of the country and scheduled for return in January 1967. Professor James Wm. Moore, member of the standing Committee, attended the second day of the meeting.

PROPOSED RULE OF EVIDENCE 5-04. LAWYER-CLIENT PRIVILEGE.

(a) Definitions.

Professor Cleary read subsections (1) and (2) which had been approved. He then proceeded to subsection (3) "Communications", which, he said, as the Committee had worked it, was really no longer a definition of communications but a definition of communications between client and lawyer. These communications

include those made by or to the representative of either.

Professor Cleary said that Mr. Raichle had raised the question of whether the Committee had or should cover the situation of communications between two or three lawyers, all representing clients on the same side of the same case. Mr. Raichle felt that things discussed between lawyers at a so-called strategy meeting - perfectly proper - should be privileged. Mr. Jenner said that he was under the impression that that had been covered in the rules in the definition of "representative." Professor Cleary stated that there is case law and some literature on the subject and that there was an area in here certainly in which conferences between lawyers representing different clients in the situation in which Mr. Raichle had mentioned would come within the privilege. Mr. Jenner asked that the Committee determine as an issue of policy whether they did or did not, as to that character circumstance, wish the discussions between the counsel representing the various parties, strategy meeting or otherwise. He said he thought they had covered it under the definition of "Representative of the client" under new subsection (4) under subsection (a). Mr. Spangenberg thought that the definition, "Communications includes statements by the lawyer directly or through his representative to the client or his representative.", under Proposed Rule 5-04(a)(3) did it. Mr. Jenner said he took it as the sense that it was the unanimous, or substantially so, view of the Committee that in meetings of lawyer representatives,

for example, clients under the circumstances which they were now discussing, the discussion or anything that occurred in such a confidential meeting was a communication which they desired to protect under the lawyer-client privilege. Mr. Haywood would put in the words "directly or through his representative." Professor Cleary, upon Mr. Jenner's request, read subsection (3) as it was approved as: "'Communications' between client and lawyer' include those made by or to a representative of either." Professor Weinstein said that there are a whole series of related problems in that area, where a number of different policies had to be faced up to explicitly, and he didn't think subsection (3) covers them: (1) the same lawyer jointly representing a number of clients and the communications from the number of clients to him as against the outside world and the problem of a falling out, (2) independent lawyers representing individuals at joint conferences of the lawyers and clients, and (3) just lawyers in which there may be a falling out. There was a lengthy discussion about subject matter discussed between lawyers being privileged. Professor Weinstein would close the door when one lawyer talks to another; he could not see them opening that door at all at any time for any purpose. Mr. Williams said if they put it in context of an adversary proceeding, and there were five lawyers having a conference about the conduct of defense in a criminal case and then by reason of the fact that one of the defendants pleaded guilty and separated himself from the other four, then the lawyer of that defendant was

called to testify with respect to the pre-trial conference, wouldn't the other defendants have a standing to say that, not withstanding that the defendant who pleaded guilty may have waived his privilege, they were not waiving their privilege, and their representatives were making disclosures at this meeting, and in order for the privilege to be effectively waived, it would have to be waived by all of the clients. Professor Weinstein did not think so and said that the civil rules were very clear on that - if you were representing a group of clients and there was a falling out between the clients - they tell you things together - there's no privilege - and one of them cannot block the other from using it. Professor Cleary said that what Professor Weinstein had said needed to be qualified a little more. The point to be made in the beginning was the case where the two clients went to one lawyer who represents them in a matter of joint interest; they then had a falling out; that did not mean that either one at will could make disclosure - it was only, Professor Cleary thought, if the falling out resulted in litigation between the clients - as regards to the particular matter. Professor Weinstein said that there were two problems - as far as their ability to disclose - they could - as they were under no professional obligation not to blab as much as they wanted - so the members were only talking about the litigation situation when you could prevent it - with that you couldn't prevent. Professor Cleary thought that either one could

continue to claim the privilege unless the litigation was between them and it involved the particular subject matter. He said that all they were really talking about was disclosure in court over someone's objection. Judge Van Pelt read a portion of the California Code and said that the reporter might be able to use it, if, as Judge Van Pelt had suggested, subsection (3) was left to be worked on by the reporter. Mr. Epton felt that it was absolutely essential to have confidentiality. Mr. Selvin said that the Committee's rule covers the case of the client communication in the presence of all these people [defending lawyers] but it does not cover the situation where nobody but the lawyers were there - discussing tactics. Mr. Jenner suggested that they consider subsection (3) at the next meeting, after Professor Cleary works on a definitive memorandum.

Professor Cleary's notes indicated that the Committee had completed subsection (c) at the last meeting, so they proceeded to

(d) Exceptions.

Professor Cleary read the subsection. Mr. Raichle felt that the word "fraud" was not as happy a description of that against which the Committee was aiming, and that if they left it with "fraud" - almost anything that a businessman consults a lawyer about in the realm of security could be considered a fraud.

A slight discussion concerning disclosure ensued.

Mr. Selvin thought the rules should make it clear that the lawyers could not go on fishing expeditions. Mr. Ratchle said that if they read the SEC regulations - everything was a fraud. Professor Cleary was asked by Mr. Maywood if the Committee had a rule comparable to 915 of the California Code. Professor Cleary replied that, as he remembered it, 915 was not a satisfactory approach. He then read parts of 915 and said that certainly when you required a disclosure it was substantial invasion of the privilege. He felt that only very specific questioning should be allowed. Mr. Selvin thought that the rule should provide that a disclosure could not be required until the information was claimed to be true. Mr. Spangenberg felt that there was a policy war in which two totally conflicting policies met head on. He said the purpose of the lawyer-client privilege is to encourage the client to go to the lawyer and discuss his problems freely and openly and to feel completely protected in a confidential relationship. Then there is the general public policy whereby plans to commit crime are not condoned. His feeling was that the exception was far too broad. There was a discussion on "reasonably should have known." Professor Cleary stated that the important thing was whether this kind of exception should, in general, be recognized. If it were answered in the affirmative, then they could proceed on to the questions of how it should be covered, its extent, etc. Mr. Spangenberg felt the rule was too broad, but Judge Estes felt that the rule narrowed the exception. Judge Estes asked what was wrong

with the test of reasonableness. Mr. Spangenberg wanted to know what was wrong with a simple statement that there was no exception if the client sought the services of a lawyer to commit or planned to commit a crime or what he knew to be a crime. He said he just was not sure about the fraud thing.

Recess was held at 11:00 a.m.
Meeting was resumed at 11:20 a.m.

Professor Green said that the question, as to why the Committee might support subsection (1) in the broad form that it is, goes back to the reason for the defendant-client privilege - that it is really to aid the court, and the court doesn't want to make the lawyer an instrument of immorality. He did not think the section should be limited to illegality but that it also should include the doing of such a thing as fraud.

There was a lengthy discussion about cases where clients went into lawyers' offices with the intentions of committing crimes or frauds, but the lawyers talked them out of it, and whether or not there should be a privilege in those instances. Mr. Jennor reminded the Committee that they had determined, at the last meeting, on the question of identity that if a client came in and confessed the commission of a crime, that the lawyer would not be required to reveal the client's identity. He said that all that subsection (1) directs itself to is "to enable or aid anyone to commit or plan to commit."

Mr. Williams felt that with subsection (1) the Committee was introducing a rather new concept to criminal justice, because with rare exceptions, what the defendant knew or should have known is irrelevant to his guilt. He felt the Committee should give careful consideration to putting "reasonably should have known" in. Professor Cleary asked Mr. Williams if his preference would be to simply make it "to commit or plan to commit a crime or fraud" and leave out "knew or reasonably should have known." Mr. Williams thought that would be preferable and was more consonant with the general law in the criminal field.

After further discussion, Mr. Spangenberg moved that "what the client knew or reasonably should have known to be" be deleted. Vote was taken on the motion. It was affirmed by 7; Judge Sobeloff was against; Mr. Raichle did not vote and explained that he was for narrowing the exception and willing to take the reporter's wording. [Chair did not announce the vote.] Professor Cleary said that as the Committee had voted to revise subsection (1), if the thing was a crime or fraud, then it made no difference whether the person in question knew or should have known - his moral position became wholly irrelevant. He said that if the client's moral position were important in evaluating this thing, then the language about which the Chair had not announced a vote, could be read only as making the exception

narrower than it is without it. If the language were out, the only inquiry would be whether it was a crime or fraud. If so, then the exception would be called into play. However, if the language were brought into operation, then there would be the further inquiry of whether the person know or could reasonably be expected to know whether it was a crime or a fraud. If it were not, in fact, a crime or fraud, the exception obviously did not apply, whether the language were in or out, because he couldn't know or reasonably be expected to know that it was a crime or fraud, when, in fact, it was not. Professor Cleary, therefore, did not see how it could be said that by striking the language, the exception had been narrowed. He felt that it had been broadened. Judge Sobeloff felt that the strength of the reporter's formulation of subsection (1) was that it avoided both extremes - it avoided the extreme of making the man guilty regardless of his knowledge or his state of mind and at the same time it avoided the other extreme of saying that the client was not bound, even though he did the act, because it had not been proven what was in his mind absolutely.

After a discussion about lawyers giving wrong information to clients, a vote was taken on the motion of deleting the words "what the client knew or reasonably should have known." Favored - 5. Opposed - 6. Motion was lost.

Next, there was a discussion on using the word "fraud." Professor Green moved for the approval of the inclusion of the word "fraud" as the reporter had it. Retention of the word "fraud" was approved by majority. Motion was carried.

It was moved that subsection (1), as submitted by the reporter, be approved. Favored - 10. Motion was carried.

(2) Claimants through same deceased client.

Professor Cleary read the subsection and the accompanying note. Mr. Jenner read Rule 957 of the California Code. Professor Cleary read Uniform Rule 26(2)(b).
Mr. Spangenberg moved for the adoption of subsection (2). Favored - Unanimously. Motion was carried.

(3) Breach of Duties by Lawyer or Client.

Professor Cleary read the subsection and gave an example of where the situation therein might arise.
Mr. Selvin said that as the rule was drafted it supplied no object or standard to which the communication must be relevant. Mr. Jenner stated that California language used is "relevant to an issue of breach by the lawyer or by the client." He remarked that where the Committee deviated from the language used in the Uniform Rules of Evidence or evidence rules of other states, something should be stated in a comment by the reporter - at least when the material was going to the country for the first time.

It was moved that subsection (3) be revised to ? import with the California Code and the Uniform Rules of Evidence by the addition of the words "an issue of" after "relevant" and the elimination of the word "a" before "breach."

There was discussion on the use of the word "inquiry."

A vote was then taken on the revision of subsection (3). Favored - Unanimously.

Mr. Selvin asked if they should limit an issue to some kind of a proceeding or an inquiry for which the client was responsible or at least in which the client was involved. Professor Cleary asked if the question raised could be met by the rephrasing of subsection (3) as follows: "As to a communication relevant to a claim by the lawyer or by the client that the other has breached a duty arising out of the lawyer-client relationship; or."

A vote was taken on Professor Cleary's motion to amend subsection (3) as read. Favored - Unanimously. Motion was carried.

(4) Document attested by lawyer.

Mr. Spangenberg asked how it was planned to find out whether the privilege existed without destroying the privilege. Mr. Jenner referred to the last paragraph of p. 37 and read: "The Uniform Rules requires a preliminary finding by the judge that sufficient evidence aside from the communication has been introduced to warrant a finding that the services were sought to enable the commission of

of the wrong." He stated that it could be applied to other subsections also and posed a problem. Since it was an issue of policy, Mr. Jenner asked for discussion. Mr. Spangenberg gave an example of where the only way you would know whether a communication was privileged or not was to find out just what the conversation concerned. You would, thereby, have to destroy the privilege in some way to find out that there was a privilege. Mr. Raichle was strongly in favor of a statement to the effect that you didn't determine the question of existing privilege by destroying it. Mr. Selvin stated that they had dispensed with the preliminary finding in California by putting in a flat rule (915(a)) that in order to determine a plaintiff privilege you can't require disclosure of a communication that is claimed to be privileged. There was further discussion, but then the chairman came back to subsection (4). Discussion ensued and Professor Cleary said it might be advisable to limit the rule to attesting a document that is required by law to be attested.

Meeting was adjourned for lunch at 1:08 p.m. It was resumed at 2:12 p.m.

Mr. Jenner inquired that since they had put the words "an issue" in subsection (1) for valid reasons - one of which was that if they were omitted there would have to be an explanation of why they were departing from the

language of the Uniform Rules - should they not also be put into subsection (4). Professor Cleary said that the language of the Uniform Rules is "an issue concerning." Mr. Jenner read the California Code which says: "There is no privilege under this article as to a communication relevant to an issue concerning the intention or competence of a client executing an attested document of which the lawyer is an attesting witness, or concerning the execution or attestation of such a document." [959. Exception: Lawyer as attesting witness.] Professor Cleary pointed out that if they broadened the exceptions they narrowed the privilege and vice versa. He said there was an implication in the California provision, if that were being considered as an alternative, that evidence concerning intention is admissive. Mr. Raichle felt that it should be limited to that information that could be gotten from any other attesting witness - and not what the witness got as a lawyer. Professor Cleary said he thought the direction of Mr. Raichle's argument was that this waiver, by virtue of the lawyer being the attesting witness, ought to be limited to questions which were closely concerned with authentic cases. However, he said, when you look at the attesting witness to a Will, you certify that he signs the Will in your presence and that he was of sound disposing mind and memory when he did it. Mr. Raichle

would limit it to the authenticity of the document. He pointed out that the witness could be questioned, when the Will was offered for probate, about the facts or circumstances surrounding the attestation and he could give a lay opinion. Professor Cleary said that he supposed that when you attested a document, regardless of whether or not it was a Will, that in a sense you were certifying that it was regularly executed and that you were available to testify to that. He said he didn't know just where you put the cutoff point on this. He also stated that it ought not to be assumed that attesting meant witnessing a document that was required by law to be witnessed in order to be valid, because that had not been the history of attesting witness; it meant anybody who signed as a witness to anything.

Mr. Haywood moved the amendment of subsection (4) by adding the words "issue concerning an" after the first "an" in the second sentence. Favored - Unanimously.

There was a motion to approve subsection (4) as amended. Vote was taken. Favored - Unanimously. Subsection (4) was adopted thereby.

(5) Joint Clients.

There was a lengthy discussion on subsection (5) being limited to civil cases. Professor Cleary stated that he had drafted subsection (5) some months ago and would now like to return to the language of the Uniform

Rules of Evidence. Subsection (5) would read thus: "As to a communication relevant to a matter of common interest between two or more clients, if the communication was made to a lawyer retained or consulted in common, when offered in an action between the clients." He then added the words "by any of them" after the word "made."

Mr. Spangenberg moved for the approval of subsection (5) as amended. Favored - Majority. Judge Van Pelt opposed as he felt that the last "any" should be left in and that the deletion of it would be questioned. There was a slight discussion and it was decided, by unanimous approval, to add "any of" after "between" in the last part of the sentence. Subsection (5), as approved, now reads: "As to a communication relevant to a matter of common interest between two or more clients, if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients."

Mr. Jenner then reverted to the question of preliminary findings which they had earlier postponed. Professor Cleary suggested that they postpone consideration of the question until they had finished consideration of privileges. It was agreed to defer the question - but not beyond privileges.

Professor Cleary then proceeded to page 40 and read "Note on Policy Aspects of Physician-Patient Privilege" and highlights from the Appendix.

Professor Weinstein, after summing up his feelings on the New York provision and the provisions of other states regarding the physician-patient privilege, said that he would drop the privilege or take the North Carolina approach, which he would reverse, and say it comes in unless the judge finds that it is not of substantial probative force and the ends of justice did not require it. Mr. Raichle was in favor of keeping the privilege and suggested that they try to deal with the problems of it.

Mr. Selvin agreed with Mr. Raichle that they should try to struggle with the problem of physician-patient privilege. In giving his reasons, he pointed out that one was that there were certain relationships through which the free flow of communication is necessary for the successful operations and in the absence of the privilege that flow of communication would be deterred, and the other one was akin to the right of privacy. He felt that the Committee should not be in the position, without at least an effort to conform to what is preponderous state policy, of extenuating or distorting or even frustrating policies that so far as they go beyond the question of evidence are matters for the states - not matters for the Federal government.

In response to Professor Cleary's question as to when the judges required disclosure, Mr. Haywood replied that the judges, as a rule, keep up with the changes in medical problems and for the proper administration of justice, the judges could let the bars down and let information in at the time of the trial.

Various comments were made concerning the use of the privilege in the different states. There seemed to be a general agreement that the privilege was rarely used and really was not necessary.

Mr. Epton wondered if the Committee ought not to undertake the task, if for no other purpose than, to give some leadership in the field which hasn't had it except under pressure and under propaganda.

Mr. Spangenberg said he had not seen, in his practice, any need for the privilege. Mr. Jenner, too, said that he had not seen anyone raise the problem during his years of practice. Judge Van Pelt had run into the problem only 3 times in 9-1/2 years.

Mr. Spangenberg stated that the Committee was not really dealing with confidentiality but with rules of evidence, and once litigation had arisen in which what had been said may become relevant, then he would be happy to abolish the privilege in the rules of evidence sense of the privilege.

It was the reporter's recommendation that the Committee not have a physician-patient privilege.

A vote was taken on that recommendation. Favored - 7. Opposed - 4. Judge Van Pelt did not vote. The motion was carried.

PROPOSED RULE OF EVIDENCE 5-05. PSYCHOTHERAPIST-PATIENT PRIVILEGE.

Professor Cleary read the proposed rule down to Paragraph (a) on page 54. After a short discussion on the need for the rule, Professor Cleary then went through subsection (a) and gave the substance of the remaining subsections.

Mr. Selvin was strongly in favor of the privilege. He said that because of the awareness and suspicions of patients, who consult a psychiatrist, unless they know that whatever they tell the psychiatrist is not going beyond the psychiatrist's chest, they will not talk to him. Talking on the patient's part is most necessary in the field of psychiatry, and Mr. Selvin felt that the privilege is very essential.

Mr. Raichle felt it would look ridiculous to give the psychotherapist-patient privilege and not the physician-patient privilege.

There was a discussion on the differences between psychiatrists, psychologists, and psychotherapists.

(a) Definitions.

Subsection (1)

After considerable discussion, Professor Green suggested using "is examined" for "submits to an examination." Professor Cleary stated they could eliminate "a psychotherapist" in the first line. The sentence then would read: "A 'patient' is a

person who consults or is examined by a psychotherapist for purposes of diagnosis or treatment of his mental or emotional condition." Mr. Haywood moved for adoption of subsection (1) as revised. Vote was taken. Favored - Unanimously.

Subsection (2)

Professor Cleary read the subsection and suggested putting in "(i)" after "is" in the first line, and "(ii)" after the first "or" in the fifth line.

Mr. Haywood moved for the adoption of the reporter's proposal.

There was a lengthy discussion on professions and licenses.

Meeting was adjourned at 5:02 p.m.
It was resumed on Tuesday at 8:36 a.m.

Following a short discussion about the motion which was on the floor at the close of Monday's meeting, Mr. Haywood's motion, as agreed to by him, was restated by Mr. Spangenberg. Motion was to adopt reporter's proposed "(1)" in subsection (2). There was no vote taken at this time, as further discussion was desired.

Discussion was held on "a substantial portion of his time" in the fifth line. Mr. Erdahl felt that almost any internist engaged in some type of psychiatry but not necessarily a substantial portion of his time was thus engaged. He wondered if the wording should be simply "portion". Mr. Jenner felt that the Committee would not want to say "portion." Professor Weinstein liked the word because it was deliberately vague and would allow the judge to use his own discretion. Judge Van Pelt

felt that the word "portion" would allow any general practitioner to use the privilege, because he devoted some time to psychiatry. It would thus eliminate the very thing they had voted not to do [in Monday's session]. Mr. Erdahl felt that the privilege should be granted to a general practitioner only in the area of his particular treatment, which included some psychiatry.

Mr. Epton thought perhaps it would make it simpler to say that a psychotherapist is any one who specializes in psychiatry.

There followed more discussion on just what a specialist is and Judge Van Pelt suggested that the Committee pass on the language as it stood and let the reporter have discussions with a psychiatrist or two and see what terminology is used in their profession. Professor Cleary responded that the Connecticut statute was thought out very carefully by a group of law people and psychiatrists, and it uses the definition which he used.

Professor Weinstein would feel happier if the privilege were extended to non-specialists.

Mr. Jenner asked for a vote on the motion to approve subsection "i" of subsection (2). Favored - Unanimously.

Subsection (ii) of subsection (2)

A discussion once again ensued on just what is a psychologist.

Professor Weinstein asked why the reporter had not added "who devotes a substantial portion of his time to psychiatry"

in this sentence. He felt that it was important that they be included. The reporter agreed that it was an inconsistency. He also said that one did not have to be certified or licensed to be an experimental psychologist.

Mr. Haywood moved that subsection (ii) of (2) be eliminated. No vote was taken, because further discussion was wished.

Mr. Spangenberg related the benefits of psychology used in World War II by a Dr. J. M. Wetman, who is both a speech therapist and a clinical psychologist from the University of Chicago. Mr. Spangenberg stated that many neuro-surgeons send their patients to psychologists rather than to psychiatrists. Mr. Haywood felt that psychologists were a good adjunct to a fine profession but that to put them in front and leave the doctors, except for psychiatrists, out, would be sticking the Committee's neck into a real noose.

Mr. Jenner pointed out to the Committee that perhaps they were condemning a discipline, which was not in its confidence as a matter of fact, that psychologists - of the character and type reported by Mr. Spangenberg and the type which the California and Connecticut commissions had in mind - are Ph.D.s, sufficiently well regarded by the profession to be recognized as psychologists and licensed in several states. He felt that the Committee was saying, if they dropped subsection (ii) as a matter of policy, that the Judicial Conference of the United States does not think that this

discipline is one, or that it is entitled to the confidence of the Judicial Conference or to the bar, and that by saying this, they were going to chill that segment in this area. Mr. Haywood felt that they would be chilling the rest of the medical profession.

Judge Van Pelt felt that if the Committee were going to allow the privilege it was cutting the right arm off of the psychiatrist if they sustained the motion, and that if the privilege were going to be allowed, then subsection (ii) of subsection (2) should be left in.

A vote was taken on the motion of striking subsection (ii) from subsection (2) of proposed rule 5-05(a).
Favored - 2. Opposed - 10. Motion was lost.

Mr. Erdahl moved to amend (ii) by adding the words "and devotes a substantial portion of his time to psychotherapy." Professor Cleary suggested saying "clinical psychology" rather than "psychotherapy", and Mr. Erdahl agreed to the change.

Mr. Raichle thought it seemed rather funny to say that the doctor, who had sent one of his patients to a psychiatrist and had a continuing interest in him, did not have the privilege, but the psychiatrist did.

Mr. Epton narrated a recent incident in which a family doctor had spent a good deal of time with a patient, and, in an effort to help him had sent him to see a psychiatrist, who spent 7-1/2 minutes with the patient and in that time had made all of the observations which he wanted to make. He said he

did not see how the Committee could disregard all of the communications with the physician and yet grant the privilege to the 7-1/2 minutes of communication with the psychiatrist. Mr. Berger added that it is a common practice for a psychiatrist to work very closely with a non-psychiatrist in many cases. He didn't see how they could rule the non-psychiatrists out of the boundary of the privilege communication but hold that the communications between the patient and psychiatrist were privileged. Mr. Haywood felt that they were going to have to give the privilege to representatives of psychiatrists. Mr. Spangenberg was for extending the privilege only to the limited class of cases where it is really needed for effective therapy.

Mr. Jenner did not see how the Committee could frame a broad application in terms of a voluminous specific case instance.

Mr. Spangenberg drew attention to the fact that it was the patient's privilege over which the Committee should be concerned - not the psychiatrist's or psychologist's. His illustration involved instances in which the patient, during the course of treatment, may be drugged in order for the psychiatrist to have complete rapport with said patient. He submitted that a situation such as the one described does not usually exist in the office of a family doctor.

Professor Weinstein proposed adding to subsection (2) or "(iii) a physician authorized to practice medicine in any state or nation while he is receiving information or giving advice for the purpose of diagnosing or referring the patient for treatment of a mental or emotional problem."

Professor Cleary suggested that the same thing could be accomplished by dropping "a psychotherapist" from the first line in subsection (1).

A vote was taken on the principle of Professor Weinstein's motion. Favored - 4. Opposed - Majority. Motion was lost.

Professor Cleary then read subsection (2) as proposed with amendments as: "(2) A 'psychotherapist' is (1) a person authorized, or reasonably believed by the patient to be authorized, to practice medicine in any state or nation, who devotes, or is reasonably believed by the patient to devote, a substantial portion of his time to the practice of psychiatry, or (ii) a person licensed or certified as a psychologist, under the laws of any state or nation, who devotes a substantial portion of his time to clinical [?] psychology."

Vote was taken on the motion to adopt subsection (2) as read. Approved - Unanimously. Motion was carried.

Subsection (3)

Professor Cleary explained that in reviewing the matter of the definition of "communications" he felt that "communicatio was a fairly clear word and that they did not need to encumber the rule with the definition, and he suggested the deletion of subsection (3). He said, that in subsection (4) - in

connection with confidential - he would add the following language to cover those persons who worked with or under the direction of the psychotherapists: "or persons who participate under the supervision of the psychotherapist in the accomplishment of the objectives of diagnosis or treatment."

Mr. Jenner read California Evidence Code §1012. Professor Cleary felt that the California Code is not broad enough to cover the unlicensed psychologist. Professor Weinstein said that communications between patients and persons under supervision of psychotherapists was not included in proposed subsection (b). Professor Cleary stated that he had added, in his notes, the same addition to subsection (b) as the one made in subsection (4). Mr. Spangenberg suggested changing the word "supervision" to "direction" in both places and Professor Cleary agreed to do that.

After a short discussion on identity of the patient, Mr. Jenner asked Professor Cleary to read subsection (4) as it then stood. Professor Cleary gave it as "(4) A communication is 'confidential' if intended not to be disclosed to third persons, other than those present to further the interest of the patient in the consultation or examination or those reasonably necessary for the transmission of the communication or persons who participate under the direction of the psychotherapist in the accomplishment of the objectives of diagnosis or treatment."

Mr. Spangenberg moved for the adoption of subsection (4)

as amended and for the deletion of subsection (3), thereby making subsection (4) subsection (3). Favored - Unanimously. Motion was carried.

Subsection (b)

Professor Cleary read his proposed addition which was: "or persons who participate under the direction of the psychotherapist in the accomplishment of the objectives of diagnosis or treatment."

Mr. Spangenberg was concerned over the communications made between the psychiatrist and the psychologist. He felt that those, too, should be privileged. Professor Weinstein suggested that it be done by using the following language in the third line: "communications among himself, his psychotherapist, and a person who participates. . . ." There was discussion over the fact that the wording should be "or a person . . .." Professor Weinstein agreed. Subsection (b), with a few changes made by the reporter, then read: "General Rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications among himself, his psychotherapist, or persons who participate under the direction of the psychotherapist in the accomplishment of the objectives of diagnosis or treatment." Mr. Selvin couldn't see the need for the phrase "accomplishment of the objectives of." Professor Cleary agreed that it was verbose and should come out. Mr. Spangenberg moved for the adoption of subsection (b) as amended. However, he

agreed to defer for further discussion.

Mr. Selvin would like to see the privilege extended to the communications made to the psychotherapist group by persons,other than the patient, who were acting in the interests of the patient. Two large groups of cases included in this are (1) the case of the child patient and (2) those included in the environment of the patient, when the psychotherapist felt that the environment had a strong bearing on the case.

There was extensive discussion concerning family members being involved, communicatively, in cases where one member was undergoing psychiatric or psychological treatment, and the importance of the privilege being extended to those members. Some of the Committee members felt that it should, perhaps, be treated under subsection (1), definition of a patient, and others suggested the inclusion be under subsection (3), definition of a communication.

Mr. Epton moved that subsection (1) be amended to read: " A 'patient' is a person who consults or is examined or interviewed by a psychotherapist for purposes of diagnosis or treatment of his own mental or emotional condition or that of a member of his family." Vote was taken on the motion. Favored - 6. Opposed - 4. Two members did not vote. Motion was carried.

Professor Weinstein moved that subsection (b) be approved as amended earlier. Approved - Unanimously. Motion was carried.

Subsection (c) Who may claim the privilege.

Professor Cleary read the proposed subsection.

Mr. Williams moved for the adoption of subsection (c).

Mr. Selvin suggested that when the patient was not in court to protect himself, the psychotherapist must claim the privilege for the patient. Professor Weinstein stated that this is a rule of admissibility - not a rule that tells the psychiatrist what to do.

At this point, Mr. Jenner asked for a vote on the motion which was pending - the adoption of subsection (c). Approved - Unanimously. Motion was carried.

Subsection (d)(1) Need for hospitalization.

Recess was held at 10:55 a.m.
Meeting was resumed at 11:15 a.m.

Professor Cleary pointed out that, in light of the revised definition of patient, this subsection had a few drafting problems, which he would work out, but for present purposes, they would understand "patient" as being just that.

Professor Weinstein proposed that subsection (d)(1) read: "Necessity for hospitalizing. When the issue is the necessity of hospitalizing the patient for mental illness."

Mr. Jenner asked Professor Weinstein if his language, as submitted, meant that you may take the psychiatrist and that released the privilege to everything that had occurred up to that moment. Professor Weinstein replied that it meant everything that was relevant to whether or not the patient should be institutionalized. Professor Moore said the language seemed broad enough to cover both involuntary hospitalization and a recommendation by the psychotherapist that the patient should have hospital treatment. Professor Weinstein withdrew his motion.

Mr. Selvin moved to have the language read: "(1) Necessity for hospitalization. As to a communication relevant to the need for hospitalization, when the issue is the necessity of hospitalizing the patient for mental illness, and the psychotherapist in the course of diagnosis or treatment determines that the patient is in need thereof; or". Professor Moore felt that the proposed language covered the need for both involuntary as well as voluntary hospitalization. Professor Cleary felt that the issue really dealt with involuntary hospitalization and perhaps the wording should be: "As to a communication relevant to the need for hospitalization in a proceeding to hospitalize the patient for mental illness,. . .."

He felt that the important thing in subsection (1) is that the whole direction of the thing is that the privilege can be disregarded by the psychiatrist in this particular situation.

Mr. Epton felt that the substantial difference between subsection (1) and the Connecticut approach was what the Committee had agreed was undesirable - that the institution of any commitment proceeding or any application for a committee or conservator would involve a waiver of the privilege. He suggested: "As to a relevant communication in a proceeding to hospitalize the patient for mental illness, when the psychotherapist in the course of diagnosis or treatment determines that the patient is in need thereof;".

Judge Sobeloff was concerned over the fact that the Committee had been talking about the necessity for encouraging confidence on the part of the patient, and now it seemed that there was a breach of confidence. Professor Cleary said that the confidence extends to the welfare of the patient, and the patient was willing to entrust the decision [of hospitalization] to the psychiatrist.

Mr. Williams did not see how an involuntary commitment proceeding could be conducted without having the privilege non-existent.

There was a short discussion on state and federal court proceedings with regard to commitment.

Professor Cleary suggested changing the caption of (1) to read: "Proceeding for Hospitalization" and the wording thereunder to "As to relevant communications in a proceeding to hospitalize the patient for mental illness, when the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need thereof;." Mr. Selvin, who had made the pending motion on the subsection, agreed to accept the reporter's amendment of it.

Mr. Berger moved that subsection (1), as amended by the reporter, be adopted. Favored - Majority. Subsection (1) thereby was adopted.

(2) Examination by court order.

Mr. Selvin asked if it were intended that there should be no privilege under the subsection for any purpose or only for the purposes of the proceeding in which the examination is ordered. He felt that it should be used only for the purpose of the particular proceeding.

Mr. Spangenberg moved that proposed subsection (2) end with the word "court" and that all words thereafter be stricken. Professor Cleary suggested a revision of Mr. Spangenberg's motion by adding "but only with respect to the particular purpose for which the examination is ordered." Mr. Jenner said the chair would have to rule that Professor Cleary's motion was irrelevant to

Mr. Spangenberg's motion. He stated it would be entertained later.

Vote was taken on Mr. Spangenberg's motion. Favored - 9. Motion was carried.

Professor Cleary suggested adding to subsection (2), as amended, the words ;but only with respect to the particular purpose for which the examination is ordered." Judge Sobeloff moved for the adoption of the language suggested by the reporter.

After a considerably lengthy general discussion on pros and cons of specific communications being privileged, there was a vote on Judge Sobeloff's motion. Favored - 9. Messrs. Williams and Spangenberg dissented. Motion was carried.

Judge Estes moved that subsection (2) as amended be adopted. Approved - Majority. Two members did not vote.

Meeting was adjourned for lunch at 1:05 p.m.
It was resumed at 2:10 p.m.

Subsection (3) Condition put in issue by patient.

Mr. Berger moved to adopt subsection (3) as written. Vote was taken. Approved - Unanimously.

At this point, Mr. Spangenberg brought to the floor the problem raised in regards to psychiatrist-patient privilege. He said that there would be no problem, in the given situation - which was the case where the patient's family had had him committed under false pretenses - except that the Committee had extended the

word "patient" to include members of the family. Thereby, the members would be able to claim the privilege, and the patient, who had been falsely committed, would be at a loss to prove anything. Mr. Jenner said that there was no privilege if it were being applied for purposes of fraud. However, it was pointed out that that was within the lawyer-client privilege. Mr. Jenner felt that it should apply in all of the privileges. Professor Cleary said that in the initial drafting of the psychotherapist-patient privilege, where privilege of the "patient" was used, it meant just "patient". Also, he did not think there was really a fraud problem. Mr. Jenner said that his understanding of the common law is that the attorney-client privilege did not extend to those who engaged in a crime. He felt that would seemingly carry over into this. Mr. Berger wanted to know, assuming that "patient" were redefined, how it could be said that the conspiratorial members of a family were making communications to a psychiatrist to further the interests of the true patient, when in reality they were making those communications to harm the patient. Therefore, the question of privilege would never arise. Mr. Epton did not think they ought to have a rule of evidence on the subjective determination of motivation of the problem. Mr. Spangenberg said the problem arises when you extend the privilege to members of the patient's family.

It was decided that the whole issue was going to require much more thought and discussion than time allotted at this meeting, so the subject was dropped.

PROPOSED RULE OF EVIDENCE 5-06. HUSBAND-WIFE PRIVILEGE.

Subsection (a)(1)

Mr. Berger raised the question of whether they should afford the privilege to confidential information gained through the marriage. He felt it covered everything and was very broad, because the information obtained by the wife from her husband usually can be shown to have either direct or indirect relationship to the marriage. He wanted to know, why, as a matter of policy, they should go beyond communications. Professor Cleary pointed out that there were two reasons: (1) the difficulties of drawing the line between what is a communication and what is not, and (2) the justification for the privilege, if there is one.

Mr. Williams said that if they adopted this rule they would be abolishing spouse-party privilege.

Mr. Jenner stated that the question to be decided, before they could go any further on this rule, was whether they wanted to retain the spouse-party and/or spouse-witness privilege.

Professor Weinstein was in favor of narrowing the privilege on the theory that if either party wanted to testify, one party could not block the other from

testifying, but together, operating as a unit, they could block testimony.

Recess was held at 3:50 p.m.
Meeting was resumed at 4:00 p.m.

Mr. Berger moved that they abolish the husband-wife witness and party privilege.

Mr. Williams wanted an amendment, because he thinks there is merit to spouse-party rule in criminal cases. Mr. Berger agreed and restated his motion as now being to abolish all kinds of husband-wife privilege, except in criminal cases. Mr. Williams explained his stand as being for the spouse-party portion of the husband-wife privilege to be retained in criminal cases. In order to make the issue a clear one, Mr. Berger then restated his motion as being to abolish all kinds of husband-wife privilege. Vote was taken. Favored - 5. Opposed - 7. Motion was lost.

A vote was then taken on Mr. Spangenberg's motion to abolish husband-wife privilege in civil cases. Favored - 7. Opposed - 6. Motion was carried.

Mr. Williams moved that the Committee adopt a rule, following substance of Hawkin's case - in effect - that a party defendant in a criminal proceeding may block testimony, of his spouse, offered by the prosecution, during the marriage.

Professor Green said he wanted to preserve the privilege of the witness in the husband-wife privilege.

Vote was taken on Mr. Williams' motion. Favored - 8. Opposed - 5. Motion was carried.

Judge Soboloff moved that the passed motion be amended by striking the limitation that preserves the privilege only during the existence of the marriage, because he felt that anything learned by reason of the marriage ought to be excluded.

After a short discussion, a vote was taken on Judge Soboloff's motion. Favored - 3. Opposed - 9. One member did not vote.

Mr. Spangenberg moved that Mr. Williams' motion be limited to the situation where the testimony has to do with facts concerning happenings only within the marriage period itself.

Vote was taken. Approved - Unanimously.

Subsection (d) Exceptions.

Professor Cleary read the subsection and Mr. Berger asked why exceptions are needed here, since they had eliminated the whole area of communications.

Professor Weinstein felt that the only exception now applicable is subsection (4). He, therefore, moved that subsection (d) read: "There is no privilege under this rule in an action in which one spouse is charged with a crime against the person or property of the

other or of a child of either, or a crime against the person or property of a third person committed in the course of committing a crime against the other."

Vote was taken on the motion. Favored - Unanimously.

Subsections (5) and (6).

There was a short discussion on these and it was agreed that Professor Cleary would report on them at a later date.

Meeting was adjourned at 5:02 p.m.
It was resumed on Wednesday at 8:34 a.m.

PROPOSED RULE OF EVIDENCE 5-07. COMMUNICATION TO CLERGYMEN.

Professor Cleary read subsection (1); deleted subsection (2) in keeping consistent with what had been done with other communications rules; and thereby changed subsection (3) to (2) and read the subsection; read subsection (b) and gave a very brief summary of subsection (c).

Mr. Jenner asked the Committee to vote on whether or not they wanted the clergyman-penitent privilege. Favored - Unanimously.

Mr. Berger asked if the reporter thought that communication as described in proposed subsection (3) had sufficient limitation in that it could be a communication which a person might make to a clergyman simply because the clergyman happened to be a friend. He pointed out that there are many clergymen who are

involved in the business of church property. Judge Bates suggested putting words in to the effect that the communication was in the course of seeking spiritual advice. Judge Sobeloff suggested saying "in his professional capacity." Mr. Selvin felt that the justification of the privilege is that it prevents government, through the use of its power to compel testimony, from compelling either the priest or the penitent to do something that is contrary to their religious belief and to the discipline of their religious faith. It seemed to him that the test ought to be whether or not the religious faith in question requires the communication to be kept secret; if it does, it ought to be protected.

Mr. Haywood moved for the adoption of Professor Cleary's suggestion, which was the addition of the words "as spiritual advisor" at the end of line 17 on page 81. Mr. Williams said that the proposed wording did not cover the case of a Catholic confession. Professor Cleary proposed inserting, in line 16 after "incidental" the words "to a doctrinally required confession." Mr. Erdahl moved that lines 16 and 17 read: "confidential communication to his clergyman in his professional capacity as spiritual advisor." Mr. Epton moved for the adoption of Mr. Erdahl's amended wording. Approved - Unanimously.

Mr. Selvin moved that there be added to line 17, after the word "advisor" the words "which under the discipline or tenets of his church the clergyman has a duty to keep secret." A vote was taken. Favored - 1. Opposed - 12. Motion was lost.

There was a motion for the approval of subsection (b) as modified. Approved - Unanimously.

Professor Cleary wanted to go back to subsection (a) as no decisions had been made on it.

Professor Weinstein felt that it was unnecessary for the Committee to get involved with a definition in this area and moved that subsection (a) be stricken. Mr. Spangenberg spoke against the motion, because it would require the rewriting of the rule, since "clergyman" is referred to in subsections (b) and (c). A vote was taken on Mr. Weinstein's motion. Favored - 5. Opposed - 7. Motion was lost.

After general discussion, Professor Cleary resubmitted subsection (1) to read: " A 'clergyman' is a minister, priest, rabbi, or other similar functionary of a religious organization or reasonably believed to be such by the person consulting him." Judge Ested moved for the approval of (a)(1) as resubmitted by the reporter. Vote was taken. Approved - Unanimously.

Professor Cleary, having withdrawn the typed subsection (2), now proceeded to lines 10-13, which are now subsection (2). Mr. Jenner felt that the lines should be stricken. Professor Cleary felt that they were necessary because there are instances in which there is a third person involved, such as in a case where an interpreter is needed.

Judge Van Pelt suggested that lines 12 and 13 be stricken. Mr. Epton moved that words in line 10 be changed to "not intended" in lieu of "intended not." Vote was taken. Approved - Unanimously.

Judge Van Pelt moved that line 12 be stricken. Professor Cleary felt that if the language were left in, it would avoid arguments over what constitutes "persons who are present." [There was no action on Judge Van Pelt's motion.]

Mr. Spangenberg moved that a period be inserted after the word "persons" in line 11 and that the remaining words in line 11 andall of lines 12 and 13 be stricken. Mr. Berger was troubled over the words "third persons," because he felt that in the parent-child situation, it would be opening up the door to disclosures or statements made by the parent to the clergyman in the presence of the child. He felt that the Committee wanted to protect those communications, and therefore, "third persons" would have to be defined.

For that reason he thought the words, which Mr. Spangenberg moved to have stricken, were really necessary. Professor Weinstein also felt that it was necessary to include the aforementioned words. Mr. Erdahl suggested that they say "not intended to be disclosed to persons not parties to the communication." Mr. Spangenberg said he would accept the suggestion, if the Committee desired it, but he did not have any particular problem with "third persons."

Mr. Jennor reminded the Committee that they were following parliamentary procedure, and therefore, they would have to stick to motions and act on the motions as submitted. Then there could be further discussion.

A vote was then taken on Mr. Spangenberg's motion, which was that a period be inserted after the word "persons" in line 11 and that the remaining words in Line 11 and all of lines 12 and 13 be stricken. Favored - 4. Opposed - 9.

Mr. Erdahl moved that subsection (2) read: " A communication is 'confidential' if not intended to be disclosed to persons other than those present." Vote was taken. Favored - 3. Opposed - 10.

Mr. Williams moved that the language read: " A communication is 'confidential' if not intended to be disclosed by the clergyman." Mr. Berger suggested an amendment, to Mr. Williams' motion, to have the sentence read:

" A communication is 'confidential' if stated privately and not intended to be disclosed by the clergyman." Following comments as to the exact meaning of the wording, Mr. Berger withdrew his suggestion.

Judge Van Pelt gave a modification of the language so that it would read: "A communication is 'confidential' if stated privately and not intended for further disclosure." Mr. Williams, who had made the initial motion, said he would accept Judge Van Pelt's modification and restatement of the initial motion. Vote was taken on the motion. Favored - 9. Opposed - 1. Three members did not vote.

(c) Who may claim the privilege.

There ensued a general discussion as to certain clergymen being unable to testify by reason of their churches' doctrines. Judge Van Pelt moved that subsection (c) read as follows: "The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased or by the clergyman." Mr. Selvin said he would vote against the motion, because he thought it went too far having regard to the nature of the privilege which was being adopted.

Professor Cleary suggested, as an alternative, to leave the first sentence of subsection (c) as is and then make the second sentence read: "The clergyman may claim the privilege in his own behalf if disclosure is prohibited by the tenets of his religion. In any event, he may claim

it on behalf of the person and his authority so to do is presumed in the absence of evidence to the contrary."

There was a vote taken on Judge Van Pelt's motion. Favored - 2. Opposed - 11.

Mr. Selvin moved that the wording, following the first sentence of subsection (c) be as follows: "The clergyman may claim the privilege in his own behalf if disclosure is prohibited by the tenets of his religion. In any event he may claim it on behalf of the person and his authority so to do is presumed in the absence of evidence to the contrary."

Mr. Spangenberg preferred to have subsection (c) read: "The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman may claim the privilege in his own behalf if disclosure is prohibited by the tenets of his religion. Otherwise, the clergyman may claim it only on behalf of the person. His authority so to do is presumed in the absence of evidence to the contrary." Mr. Selvin accepted the amendment of his motion.

After a general discussion on usage of words "tenets", "religious beliefs", and "convictions", Mr. Spangenberg amended his motion so that the words now would read: "The privilege may be claimed by the person, by his guardian or conservator, or by his personal representative if he is deceased. The clergyman may claim the privilege in his

own behalf if disclosure is prohibited by his religious convictions. Otherwise, the clergyman may claim it only on behalf of the person. His authority so to do is presumed in the absence of evidence to the contrary."

Vote was taken. Favored - 12. Opposed - 1.

Recess was held at 10:45 a.m.
Meeting was resumed at 11:10 a.m.

PROPOSED RULE OF EVIDENCE 5-08. RELIGIOUS BELIEFS OR OPINIONS.

Professor Cleary read the proposed rule and accompanying comment.

Professor Weinstein moved to strike the rule. He felt that it was unnecessary and even harmful in its implications that the judge ought not to exercise his discretion where prejudice would more than overcome the possible probative force. He stated at this point, that except for the fact that he had to leave shortly, he would make the same motion for proposed rules 5-09 and 5-10. He felt that the Committee was getting involved in a picayune kind of rule making that didn't serve any substantial purpose in making policy or making change or giving much direction to the judge. Professor Cleary pointed out that this rule is one of competency - not of credibility.

Mr. Spangenberg said he would so move that the rule be held in the credibility section and ignored in this area. Judge Estes moved that the rule be kept in the privilege section. Mr. Selvin said that if religious belief were

relevant to an issue of a case it is admissible unless expressly made inadmissible by some other rule. He felt that the effect of the privilege section is to make that type of evidence inadmissible on one particular kind of an issue - credibility - but inadmissible at the discretion of the witness rather than upon the ruling of the judge or objection of the party. He felt that the rule really belongs in the inadmissibility section.

Professor Cleary said that the proposal, as drafted, does not deal with the situation in which it is sought to prove the religious beliefs of the witness by the testimony of another witness. He thought that perhaps it was more appropriate to deal with the rule under the impeachment of witnesses rather than as a privilege.

A vote was taken on Professor Weinstein's motion to strike proposed rule 5-08. Favored - 2. Opposed - 9. [Three members had left early.] Motion was lost.

Mr. Selvin moved that the proposed rule not be treated as a privilege but that it be treated under credibility or impeachment or some other place in the rules. Mr. Spangenberg thought the rule belongs in the impeachment section. A vote was taken on Mr. Selvin's motion. The Chair announced the result as unanimous approval by those present.

PROPOSED RULE OF EVIDENCE 5-09. POLITICAL VOTE.

Professor Cleary read the rule and comment.

There was a short discussion on the meaning of the word "political."

Mr. Berger moved for the adoption of 5-09.

Favored - Unanimously.

PROPOSED RULE OF EVIDENCE 5-10. TRADE SECRET.

Professor Cleary read the proposed rule and his comment thereto.

There was a lengthy discussion on the defining of "trade secret."

Judge Van Pelt moved that the Committee strike the proposed rule and that subject matter not be treated at all. He felt that it should be left to the laws of property, trade secrets, or unfair practices, and that they not deal with it as a rule of evidence at all.

Professor Cleary felt that if the motion were carried, it would leave the Committee with a situation which is covered in the discovery rules but is not covered with reference to how it is to be handled at the trial. He felt that there is a difference between the theoretical substantive basis of a lawsuit and the handling of the admissibility of evidence in a situation of the kind he described, and that when a judge was confronted with that kind of a problem, he might very well be helped by a rule from

which he could get some guidance. He said that the Committee, when it did this, was not legislating in the property area; they were merely saying, that when the questions arose where a property issue was at stake, to protect the property right up to the point of feasibility; if, however, it involved a fraud or an injustice - not to conceal it - then go ahead and require disclosure but under appropriate safeguards. He felt that the Committee was required to make some treatment of the problem.

Vote was taken on Judge Van Pelt's motion that the proposed rule be stricken and the subject matter not be considered under proposed rules. Favored - 4. Opposed - 5. Motion was lost. Mr. Spangenberg did not vote.

Mr. Erdahl suggested passing over proposed rules 5-11 and 5-12 since several members were absent. Mr. Jenner felt that since there was a quorum, the Committee should go ahead with the rules as usual.

Mr. Spangenberg was quite concerned over the "trade secret" question. It was felt that proposed rule 5-10 should be held over for the next meeting, since several members had had to leave early, and the matter concerned them a great deal, too. However, more discussion on the rule was held.

Mr. Jenner pointed out that in a trade secret case, where the trade secret is the subject matter of the litigation, of course the court did not want the fact that the trade secret is involved to serve to destroy the trade secret. Therefore, the rule provides in the discovery phase that the trade secret not be destroyed, but that certainly during an inquiry made into it under the protective orders that will to the best of the ability of the district judge prevent the trade secret from being destroyed.

Professor Cleary told the Committee that one thing, they might want to think about a little bit more, that is of significance in the proposed amendment to Rule 26 of the Federal Rules of Civil Procedure is the language "trade secrets or other matters of similar confidential nature."

Mr. Spangenberg felt that "trade secret" were the right words to be used in the rules of evidence, but he suggested that in line 7 of proposed rule 5-10, the protective measures should cover "the witness" also. He would say: "the interests of the owner and the parties and the furtherance of justice may."

Mr. Spangenberg moved for the adoption of proposed rule 5-10, as written by the reporter, with Mr. Spangenberg's amendment, whereby lines 1-6 remain the same, and lines

7 and 8 now read: "the interests of the owner and the parties and the furtherance of justice may require." Vote was taken. Favored - Unanimously.

After full discussion on the dates for the next meeting, it was scheduled to be held on Thursday, Friday, and Saturday, March 2, 3, and 4, 1967, with the understanding that it would be adjourned at 1:00 p.m. on Saturday. There was also talk of a possible May meeting.

Meeting was adjourned at 1:00 p.m.