MINUTES OF THE MAY 1965 MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES

The Advisory Committee on Civil Rules met in the Conference Room of the Supreme Court Building on May 15, 16, and 17, 1965 at 9:30 a.m.

The following members were present:

Dean Acheson, Chairman
William T. Coleman, Jr.
George C. Doub
Sheldon D. Elliott
John P. Frank
Arthur J. Freund
Albert E. Jenner
Charles W. Joiner
David W. Louisell
W. Brown Morton, Jr.
Louis F. Oberdorfer
Roszel C. Thomsen
Charles E. Wyzanski
Benjamin Kaplan, Reporter
Albert M. Sacks, Associate Reporter

Mr. Abraham E. Freedman, who was taken ill after arriving in Washington, was unable to attend.

Others attending all or part of the sessions were Judge Albert B. Maris, Chairman of the standing Committee; Professors Maurice Rosenberg and William Glaser of the Columbia University; Professor Charles Alan Wright, member of the standing Committee; Professor Brainerd Currie and Mr. Lee W. Colby, representing the Advisory Committee on Admiralty Rules;

Warren Olney III, Director, and William E. Foley, Deputy Director, of the Administrative Office of the United States Courts; Will Shafroth, Secretary to the Rules Committees, and Joseph F. Spaniol, Jr. of the Administrative Office.

Mr. Acheson called the meeting to order and introduced Mr. Coleman of Philadelphia who had been appointed to the Committee by the Chief Justice of the United States.

The Chairman turned the meeting over to the Reporter who stated that the first order of business would be the consideration of the amendments which had been published in the Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts, March 1964, for consideration of the bench and bar. He stated that the agenda also included consideration of several rules which would be affected by the admiralty practice, and the consideration of the topic of Discovery. He announced that the next meeting would be primarily on discovery.

The Reporter stated the response to the proposed amendments had not been large; that there had been communications from only approximately 30 sources and not less than half were concerning Rule 23.1. He thought the lack of response may have been due to the fact that the draft had received general approval. He also felt that the number of comments should not in any way be regarded as a census or a poll of the American Bar. The Reporter further stated that, with one exception, all comments received were ones that had been given prior consideration. The one exception was a suggestion concerning Rule 23.1 which would be discussed later.

TOPIC CC - Joinder of Persons Needed for Just Adjudication (Rules 19, 4(f), 12(b), 13(h), 41)

The Committee decided at its first meeting in 1960 to proceed with a re-evaluation of the rules on joinder of parties and claims. It was evident that this would have to be done because of multiclaims litigation. Present Rule 19 is defective in two ways. First, the language of the rule is greviously defective, and secondly, it is a nonfunctional rule. It does

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does not raise the proper questions and does not set out criteria for the solution of the problems encountered. The proposed amendment eliminates the defects of the text and corrects the textural statement of the rule.

Some comments which were received suggest that the Committee is uprooting 112 years of precedence and that there is no widespread dissatisfaction with the present rule. However, the Reporter stated that the best standards and criteria around which to build this rule had been considered. The substance of the reform proposed has already been adopted in Michigan and New York. Some of the arguments against the rule is that it does not provide for mandatory dismissals. Subdivision (b), however, is directed precisely to that point.

The Reporter stated that the proposed rule introduced the words "contingently necessary" which were intended to cover both the indispensable and old style conditionally necessary parties, but in consideration of the comments received he recommended the following changes as shown on page CC-5 of the Deskbook material:

Delete the words "contingently necessary" in line 40 of the Draft: make it perfectly clear that in the new draft there can be and will be mandatory dismissals; reintroduce the word "indispensable" in a conclusory sense so that it does not create the difficulty by the use of the term in the presently proposed rule.

The Reporter recommended approval of Rule 19 as circularized in the Preliminary Draft with the recommended changes and with any minor editorial revisions necessary in the Advisory Committee's Note. Mr. Frank expressed opposition to this rule, stating that the Committee was rewriting a rule in the absence of necessity for a change and that it was being forced on people who did not want it. He felt this was totally wrong and stated that he could not find any case in which injustice had been done.

Mr. Jenner also stated he too was troubled by this rule as there had been no complaint on the part of the bar. He felt that if the Committee

had asked the bar for suggestions, they would have reacted. He further stated he thought it unwise for the Committee to suggest a complete revision of the rule which will require interpretation and expense to litigants where the present rule, whether or not it is working in the sense desired, is at least not causing trouble. If the Committee feels that philosophywise it should venture forth, then he would be in favor of the rule.

Mr. Acheson expressed the thought that the Committee should not be bothered by the fact that the rule has gotten along all right. He was opposed to letting a rule stand if the Committee feels it can be improved. Professor Elliott concurred with Mr. Acheson, stating that if it is not a good rule it should be changed.

Professor Joiner stated that he is in favor of it. He did not think it would cause any problems. He further stated that if the Committee had drafted the rule as Professor Kaplan presented it in the amended form for

this meeting there would have been less opposition to it. Judge Thomsen stated he felt the lack of comment from the bar did not indicate they were against it. He inquired whether the objections of the College of Trial Lawyers had been met with the most recent proposed draft and the Reporter stated the revised version did take care of their objections. Judge Thomsen stated approval of the amended version. Mr. Coleman also approved.

Further discussion was held for any editorial changes to be made. Mr. Jenner suggested that the word "would" in line 42 of the printed draft and in several other places throughout the rule should be changed to "will." There was general consensus. Mr. Jenner also thought the words "property or transaction which is" should be stricken in line 55 of the draft as he thought this was imposing a limitation. Mr. Jenner also called attention to the words "as a practical matter" in line 58 of the draft and thought these should be deleted. Professor Kaplan stated that this should be left in to distinguish between the practicality of the matter and a possible res judicata or theoretical matter. After further discussion,

it was decided to leave it up to the Reporters to study and revise if need be. The Committee decided to strike the word "rather" in the fifth line of subdivision (b) of the proposed draft in the Deskbook. Upon motion duly made, the Committee approved the rule as circularized in the Preliminary Draft but to include the amendments approved at this meeting, and to include the bracketed portion in subdivision (b) of the reporter's draft. The Reporter was also asked to make any editorial changes necessary.

TOPIC EE - Class Actions; also Derivative Actions and Actions Involving Unincorporated Associations (Rules 23, 23.1, and 23.2)

A communication was received from the Securities and Exchange Commission which stated no objection to the substance of the amended Rule 23 and had only a series of related suggestions for Rule 23.1. Professor Kaplan stated that he felt everyone was of the opinion when they started dealing with the rule that the abstract classifications had to be eliminated and that provisions should be added dealing with administrative

procedural handling of the class suit. The rule in the Preliminary Draft was the result. Professor Kaplan stated that comments had suggested that subdivision (b) should stop with line 84. However, lines 84-97 connected with subdivision (c)(2) is basically the essence of the proposal.

In order to make this device workable the rule provides for a general reasonable notice to class in addition to a specific notice to any member known to be engaged in litigation with a party opposing the class. Notice so far as it can reasonably be given to the class followed by options on the part of the members whether to stay in or get out, and in a large number of these cases any request made optional -- sustained request to get out -- will be honored.

Comments have been made that the (b)(3)-(c)(2) combination may be unfair to class members. However, the Reporter stated that in the drafting of the rule a provision had been made that if the court finds a suit is not appropriate for class action treatment, the court may order references to class action be stricken. In subdivision (c), lines 106-111, a reference

had been inserted, for symmetry, that if an action is commenced, as in a class action, it would be open to the court to announce it is to be run off as a class action. He stated there had been objection to this from the bar, which was quite understandable, as they had overlooked in drafting the rule that the court is the compelling party to serve as a representative when it did not want to. The Reporter recommended deletion of the sentence in lines 106-111, together with all references to it. The Committee approved the deletion.

The Securities and Exchange Commission also commented that the phrase "without limitation" in lines 139 of subdivision (d) was vague. They were afraid it may eliminate appellate review of orders coming within the compass of this subdivision and that it may enable the court to go well beyond the bounds of subdivision (b) which is procedural and proceed to impose a substantive requirement such as that to revert to the possibility that security of costs would now be required. The Reporter stated it is supposed to mean that this is a nonexclusive enumeration of orders. Also, he would like to see the Committee retain the concept of this phrase "without

limitation" because it expresses the proposition that the court's power is not limited to the protection of the limitation. He further stated that the SEC remark could be answered by saying in the Note that these other orders spoken of are intended to be of the same type as those enumerated -- purely procedural orders. Mr. Frank expressed the feeling that the Notes are too long at the present time and care should be exercised to avoid any additions to them. Mr. Freund pointed out that the Notes are not published in the ordinary pamphlets of the rules and the lawyer must go to other references for the Notes. Judge Thomsen and other members felt the Notes are indeed beneficial and not elaborated upon as much as they could be. Judge Thomsen moved that the words "without limitation" be deleted and insert therefor a new subdivision (5) with language to indicate otherwise regulating the procedure. Judge Thomsen's motion was seconded and carried.

Another comment of the SEC was that in Rule 23 the Committee had reserved the requirement that dismissal or compromise of derivative action must be by order of the court upon notice to shareholders or as the

court may direct. This had been qualified in the notice requirement by saying that this was to be at the court's discretion.

The Committee approved the deletion of the last sentence in Rule 23.1, appearing on lines 26 through 29, and the insertion of the following sentence in subdivision (e) of Rule 23:

> (d) DISMISSAL OR COMPROMISE. An action maintained as a class action may be dismissed or compromised only with the approval of the court upon notice to shareholders or members in such manner as the court may direct.

Some members thought it should read "members of the class." This was approved in principle and left to the Reporter to redraft as he sees fit.

Mr. Frank recommended deletion of subdivision (b)(3), lines 84-97, and (c)(2), lines 118-129 of the Preliminary Draft, stating that in lines 62-83 the Committee has covered every known type of class action and the insertion of lines 84-97 is the old kind of spurious class action which is particularly geared to mass torts on class basis and he is opposed to this.

Professor Kaplan felt that the great growing point of this reform lies

in the basis of (b)(3) and (c)(2) and if this is removed there would be nothing to present to the standing Committee. He reviewed the history of how the Committee had handled the subdivisions of this rule. Judge Thomsen recollected the Committee had put this in the rule, stating at the time that it was the best version the Committee could come up with at that time and that there would be an opportunity to review the rule before it was sent to the standing Committee. Judge Thomsen further stated that he felt the Committee had three alternatives: (1) to eliminate the two sections entirely; (2) to leave them substantially as they are; or (3) to make some radical amendment. He asked for comment on these three points. He felt that if these sections were eliminated it would mean eliminating all spurious class actions in the Federal courts and questioned the wisdom of this.

Mr. Frank said that in a sense spurious class actions had already been removed as this is an action which isn't really a class action but is

a device for tolling the statute of limitations so that people can come in late. He felt a new device, which is the spurious class action -- res judicata -- is being created and that saying these shall not be res judicata is the only alternative. Mr. Coleman thought (b)(3) might be retained by making it unapplicable to res judicata. Professor Louisell expressed the opinion that it seems to him the class suits of the type of the spurious suits have in the past generally operated in favor of the man on the street. He saw in it the possibility of curtailing the degree of the increased movement toward the administrative remedy by enlarging the judicial potential. Professor Kaplan stated that without a rule of this type the people are unprotected and that this is the small man's rule. Mr. Jenner, however, felt this rule is intimidable to the small man and against his favor -- that it is an impractical suggestion. He also felt that it will increase materially the congestion in the Federal courts. He suggested that if lines 120-123 are to remain at all that they be limited to classes of defendants and have no application to the classes opposed to the plaintiffs. As a possible compromise, he suggested

that an extension of an invitation by notice, or otherwise, that a suit is pending and persons may join in it if they see fit. He thought this would be less objectionable, but still feared that it would create problems.

Professor Joiner felt this would not increase the burden in Federal courts as there already is a class called cpurious class actions, which attract a certain number of cases. Also, the plaintiff is forced separately to settle and there is the common question of law and fact affecting civil rights. He felt this is a broader class than the class now under (d)(3) and felt that a fair reading of this section would conclude that this is more narrow than the other, with more protection arou·.d the people involved than any other single form.

The matter of mass torts was brought into the discussion and Professor Kaplan said this rule does not apply to mass torts but there was opposition to his statement. Professor Kaplan thought lines 118-123 might be properly revised to allow an absolute option-out for plaintiff members, but only a qualified option-out by defendant members. Professor Wright

stated that if (b)(3) is stricken the pressures will remain to handle these cases as class actions. If (b)(1) and (b)(2) are used they are broad enough for class actions but the procedure has not been regularized. The judge has not been told that in (b)(3) there are considerations to waive whether in a usual suit or the spurious class action, nor do you have the oped-out provision. It would be a class action to every member of the class whether or not he wants to be in it. The real issue, as Professor Wright defined it, is not whether to have these as class actions, but spelled out as class actions with protective provisions, or have them under (b)(1) and (b)(2).

Professor Kaplan recommended that beginning in lines 118 through 123 it might be advisable to provide for the member of a plaintiff class having an absolute right to op-out, whereas the right is qualified in the rare case of a defendant class. Professor Joiner thought this should come out completely. Mr. Oberdorfer inquired whether there is satisfaction with the remedy available to the plaintiff identified as not having notice but when the defendants win he claims for many reasons that he did not resign.

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Professor Sacks called attention to the fact that it is impossible to write a whole code into one rule. He stated the constitutional law shows two factors operating: (1) what is the system of notice used, and (2) in view of the cohesiveness of that group, even though one did not in fact get notice, what was the type of representation. He thought there would be cases in which the necessities are such that actual notice could not be served on them but the class is sufficiently cohesive to indicate that he was adequately represented. The New York Trust Case, Melaine, was a type of that balance. A personal injury case like thalidomyid is entirely different and did not feel that any court would, or would be allowed by an appellate court, to operate on the potential plaintiff without actual notice. It was mentioned that this could be done in the Advisory Committee's Note. Professor Joiner moved to strike out the clause beginning with "unless the court finds out . . . and states its reasons therefor.", which appears in lines 120-123. The motion was seconded and carried.

Mr. Frank moved that lines 84-97 and lines 118-129 (ignoring the deletion already made) in subdivision (b) be deleted. Mr. Frank's motion was discussed and duly acted upon. The motion lost by a vote of 7 against it and 4 voting in favor of it.

Judge Thomsen moved that the Committee leave subdivision (b)(3) in and eliminate lines 118-129, substituting some appropriate language that would indicate that lines 114-117 would apply only to subdivisions (b)(1) and (b)(2), treating this as prohibitive but not binding. Mr. Oberdorfer commented that he would like to give the person who demonstrated that he lacked actual knowledge some recognition in the first paragraph of (c)(2). Judge Thomsen said he agreed in principle with Mr. Oberdorfer. Judge Thomsen's motion was restated to clarify that those matters under lines 84-97 not be res judicata and that the rule would require rewriting. The vote was cast with 5 voting in favor of the motion and 6 opposing. Therefore, the motion was lost. Mr. Frank stated that he would like to go on record that he is against the entire rule and dissents to its adoption.

Mr. Oberdorfer further suggested that the proposed rule be so amended that paragraph (c)(2), a judgment in the case of what is known as a spurious class action, would only be binding on those who have not preserved all rights that exclude him by having it binding only on a person of actual notice or presumptive notice defined by people who will examine him. The motion was seconded. Professor Kaplan prepared and presented another draft as a result of Mr. Oberdorfer's recommendation that the two thoughts be brought together. After lengthy discussion on the revised draft of the rule, Mr. Doub stated that he had no doubt that this proposed rule would be beneficial to the point of judicial administration but he had serious doubts as to paragraph (3) for two reasons. One being that he felt it is an invitation to corruption of the bar; and second, the court finds question of law or fact common to the members of the class predominating. He stated he thought had drafted the rule as well as it could be done and that he had come to the conclusion that there isn't any better way to do it, even though this

in his opinion, the subdivision remains vague.

Mr. Frank moved deletion of paragraph (3) of subdivision (b) and the contaminate portion, lines 118-129 of subdivision (c)(2). The motion was seconded but lost with 8 members opposing the motion and 5 voting in favor (the vote included Mr. Coleman's, by proxy, as he was absent during this session of the meeting).

Judge Wyzanski suggested that the Reporter redraft lines 84-97, subdivision (b)(3), concentrating on strengthening and tightening certain aspects of it; putting in the subdivision some encouragement to the court to keep the ethics of the bar high in this matter; and the desirability of having a district courtthink in terms of whether this particular form is an appropriate one for the concentration of litigation. He particularly emphasized the wisdom of putting language in the rule responsive to the idea that a district court may review a class action in a situation where it felt the members of the class had an important interest in individually controlling and promoting their own litigation.

Judge Wyzanski's suggestion was put in the form of a motion, duly acted upon and approved. Mr. Jenner and Judge Wyzanski were asked to help the Reporters in the redrafting.

Mr. Jenner stated that although he thought Judge Wyzanski's approach good he felt there were two other factos. One being that of ethics; and two, the reaching out through counsel who rush to the courthouse for jurisdiction by the Federal court and deprive the State courts of jurisdiction.

Mr. Oberdorfer presented a draft for revision of subdivision (c)(2) as follows:

> "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including specific notice to each member known to be engaged in the separate suit on the same subject matter with the party deposed to the class and to all other members who can be identified through reasonable effort. The notice shall advise that each member may by a specified date request that he be excluded and the court shall exclude those members who so request."

Upon motion made by Mr. Jenner, the Committee approved deletion of the phrase "including specific notice to each member known to be engaged in the separate suit on the same subject matter with the party deposed to the class". Mr. Oberdorfer suggested the notice could also tell the specific that he has a right to counsel. This was considered an excellent idea. The Committee also recommended that the words "as defined" in (c) be deleted from Mr. Oberdorfer's draft. Professor Joiner moved that the Oberdorfer draft be approved with the view that the drafting committee would perfect the language and present it for approval before the meeting ended. T

The Chair called for a vote for the adoption in principle of Rule 23 as amended. The motion was duly made and approved by the Committee.

The drafting committee (consisting of Professor Sacks, Professor Rosenberg, Mr. Jenner and Professor Kaplan) presented for adoption the revised draft of Mr. Oberdorfer's plan as follows:

Rule 23(b)(3) at page 96 of the Preliminary Draft, line 89:

The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Subdivision (c)(1) at page 97, line 103:

Delete "and before the decision on the merits".

Mr. Oberdorfer's Text -- In lieu of Subdivision (c)(2) at page 97:

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified

through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include by its terms all members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include by its terms all members of the class to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

After the redraft was presented, Mr. Jenner raised a question concerning the term "by its terms" appearing in the first and second sentences of subdivision (c)(3) as he felt this unnecessarily presented sources of controversy and litigation. After full discussion of this point subdivision (3) was revised as follows:

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action

under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

Mr. Oberdorfer thought there would be a need to give the legislative history on words of "specifics". Professor Kaplan stated he had not consider at this point what should go in the Note. Upon motion of Mr. Jenner, Rule 23 was approved unanimously.

The Reporter stated that in Rule 23.1 a drafting error had been made concerning thederivative action. Mr. Alex Elson of Chicago had written on this and had made the point that where you have a class shareholder one must make sure the representative plaintiff is represented. The Committee, upon recommendation of the Reporter, approved deletion of the sentence beginning

on line 20 through line 23, and the insertion of the following sentence therefor:

"The plaintiff may not maintain the action if he will not adequately represent the interests of the shareholders or members similarly situated."

The next matter discussed was the fact that lawyers are fearful that the sentence in line 23 through 26 of this rule is too broad and that too much will be drawn from Rule 23(d), as a good part of Rule 23(d) is in apposite to the derivative action. The lawyers feel it is so braod in its general signification that the reference to 23(d) may be used to require that a plaintiff in a derivative action shall comply with the state requirements on posting security for costs of counsel's fees and that this reference may require these plaintiffs to engage in costly circularization of the class, etc. Professor Kaplan felt it unnecessary to insert a provision with such a reference, and recommended that this sentence be stricken in the Note and that

the court administering a derivative action has the usual equity powers with respect to putting the various steps in the action that has the usual equity powers to require notice. The Committee approved the recommendation of the Reporter.

The Committee discussed the provision in lines 17 and 18 concerning the phrase "under the applicable law". Mr. Elson stated he thinks this phrase throws the weight of the Committee towards application of state law. After full discussion of this matter, the Committee approved deletion of these words.

The final suggestion of the Securities and Exchange Commission concerns lines 7-10 of this rule. SEC says they are willing to accept this section but want to go on and soften it by saying that the plaintiff should be competent to run the action to maintain the act even though he bought his share subsequent, if he did so without knowing of the fact giving rise to the complaint. Professor Kaplan felt this would substitute what is an understandable rule to a quite vague one,

and was not sure this was within the countenance of the Committee. He suggested this be done only after considerable deliberation. Mr. Jenner indicated this would destroy the rule. After further discussion, the Committee decided not to act on the suggestion but to leave lines 7-10 as stated in the Preliminary Draft. Professor Wright stated that if the rule were being drafted for the first time he would say the Committee did not have the authority under rulemaking power as it seems to be a provision of substance. The Supreme Court in 1882 said this is the law and therefore an equity rule was made to that effect and taken over into the Federal rules. If the rule is changed the slightest bit people will question the authority.

TOPIC FF - Intervention of Right (Rule 24(a))

After discussion of this rule the Committee, upon motion by Mr. Jenner, approved the deletion of the phrase "property or transaction which is the" in lines 14-15 and the word "substantially" in line 17. The rule was adopted as amended. This was done to

correct a paradoxical situation reflected in Sam Fox case (360 U.S. 683 (1961)).

TOPIC DD - Joinder of Claims (Rules 18(a), 20(a))

Rule 18 as it now stands contains a confusing reference to the parties joined to the provisions. It is fundamentally a rule directed to joinder of claims. However, it also contains a reference to the joinder of parties rules and the result has been that courts have had to look also to the question of joinder of parties. The rule as proposed in the Preliminary Draft would relieve the ambiguity. After discussion the Committee approved the rule as ~~amended~~ circularized in the Preliminary Draft.

TOPIC W - Waiver of Defenses Omitted from Pre-Answer Motion, Etc. (Rule 12(g) and (h))

The purpose of the amendment as shown in the Preliminary Draft is to remove the ambiguity in Rule 12, particularly (g) and (h).

Rule 12 has always disfavored the making of successive pre-answer motions. The Reporter stated that if a person could make before answer a motion to dismiss for failure to state his claim and have that motion denied and then file a motion to dismiss for improper venue it would be wrong in the proposed amendment to the rule. It would be a disallowed successive motion. One comment had questioned the point that if a person who had omitted from his motion at a time that was available to him the defense or objection of improper venue, could he now, when he imposes his answer, come forward with the venue objecting. This factor has been dubious under Rule 12(h) and the amended rule provides that the point is waived. Consonant with that change the rule now states that if such a matter an an objection based on improper venue is not brought forward by answer or by an amendment of answer that is permitted under Rule 15 as a matter of course, then that point is likewise waived. This takes the sting out of the waiver provision. The waiver attaches to only the dilatory defenses which are enumerated in the proposed

amendment. Namely, lack of jurisdiction over the person, improper venue, insufficiency of progress, insufficiency of service of process. The waiver of possession does not extend to matters of substance to fairly state a claim or lack of subject out of jurisdiction. The purpose of this amendment, besides clarification of text, is to assure consolidation and early assertion and consideration of defenses or objections not known on the merits.

The Committee approved Rule 12 as circularized in the Preliminary Draft.

TOPIC AA - Practice on Preliminary Injunctions and Temporary Restraining Orders (Rule 65(a) and (b))

The object of this proposal is to firm up the old notion that with respect to a temporary restraining order informal notice is better than no notice at all, and further that a temporary restraining order should not be granted without notice unless irreparable injuries will result and unless counsel certifies that his efforts to give notice or the reasons why notice should not be required. This proposed amendment

does not eliminate the possibility of going to a district judge in an appropriate case, and getting a temporary relief without any notice at all. As to the preliminary injunction the rule states a practice that is well known to better equity judges. The court may in its discretion order the advancement of a hearing of an application for a preliminary injunction and the consolidation of that hearing with the trial on the merits. As to the preliminary injunction, the rule states a practice that is well known to better equity judges. The court may in its discretion order the advancement of a hearing of an application for a preliminary injunction and the consolidation of that hearing with the trial on the merits. Further , when the hearing or a preliminary injunction is not thus advanced and consolidated any testimony taken and evidence received on a hearing of the preliminary injunction which would be admissible upon the trial becomes part of the trial records and is not to be repeated upon the actual trial.

There was one comment to this in an unfavorable sense which was received from the Federal Bar Association's subcommittee objecting to the provisions about preliminary injunctions. They say the court already has power to advance and consolidate a trial on the merits with the preliminary injunction hearing and to call attention to it in the Rule proper will put pressure on judges to advance and consolidate in inappropriate situations. The Reporter did not think the danger of this amendment to be that the judges will overextend the use of the amendment but may under use it. Mr. Jenner thought it would be a more well rounded rule if the phrase "and, as far as feasible, shall not be repeated upon the trial", which appears on lines 14 and 15 were deleted. Judge Maris thought this could be accomplished by eliminating the words "as far as feasible, shall" and inserting the word "need" to read as follows:

"record on the trial need not be repeated upon the trial."

Mr. Jenner moved adoption of this and the motion was carried.

TOPIC GG - Relation Back of Amendment Changing Party Defendant (With Special Provision for Government Cases) Rule 15(c))

It is hoped that the proposed rule as circulated in the Draft will correct a casual injustice that has been going on for some time. It arises when a wrong defendant is named. This has particularly been occurring in government cases and the new language in lines 18-25 will remedy this. The New York City Bar raised a question as to why the amendment does not spread over to the case of the misnomer of the plaintiff -- why it is limited only to the defendant. The Reporter felt that the plaintiff cases have been found much easier for the court to handle. Also, that policy changes expressed in the proposed amendment will carry over to the defendant cases and connect with a proposal from Admiralty relative to real party in interest. The Reporter further stated that some of the worst of these cases have arisen in the Social Security Administration but they had adopted a regulation which will help out in situations of this sort even though it does not clear the whole situation. Mr. Jenner suggested the word "would" in line 13 be changed to "will." The Committee approved adoption of this rule as

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amended in line 13. Mr. Jenner suggested that the Reporter might want to consult Section 46 of the Illinois Civil Practice for a reference in the Note.

Discussion was held on the matter of the word "would" being used throughout the rule instead of the word "will" in the subjunctive mood. It was decided to leave this up to the Reporter to edit as he sees fit.

TOPIC HH - Extension of Applicability of Federal Rules in the United States District Court for the District of Columbia (Rule 81(a)(1)

Chief Judge Matthew F. McGuire of the District Court for the District of Columbia had called attention to the fact that the District Court for the District of Columbia no longer had jurisdiction over adoption matters; that "lunacy proceedings" are now characterized as "mental health." The District Judges would like to spread the beneficial role of the Federal Rules of Civil Procedure to probate proceedings. Professor Louisell questioned whether this could be done without consideration of the bar and particularly the Bar of the District of Columbia. The Reporter recommended that in order to comply with the request the third sentence should read as follows:

". . . they do not apply to mental health proceedings in the United States District Court for the District of Columbia except to appeals therein."

The Committee approved the adoption of the Reporter's recommendation and the Reporter further stated that Judge McGuire had said that the Court would take the necessary steps to promulgate local rules necessary.

TOPIC JJ - Provision for Interpreters (Rule 43(f))

Judge Maris stated this matter had arisen in the Judicial Conference pertaining to interpreters appointed by the court for a case and compensation is directly paid by one of the parties that the court should have authority to tax as costs that compensation in favor of the prevailing party. This gives the court more power to deal at leisure. The Reporter stated that a suggestion had been sent in asking if the word "interpreter" covered the case of a translator in a written document. Mr. Jenner suggested several minor changes to the rule as redrafted by the Reporter to read as follows:

> (f) INTERPRETERS. The court may appoint an interpreter of its own selection and may fix his

reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

The Committee approved the above subdivision for the rule.

TOPIC KK - Alternate Jurors (Rule 47(b))

The most important amendment in this rule has been to raise the maximum number of alternate jurors to six rather than two. However, it had been suggested to the Civil Rules Committee, as well as to the Criminal Rules Committee, that it is unfortunate that a case has to be declared a mistrial because after deliberation one juror drops out with no alternate to take his place. The Committee discussed the alternate amendment which was adopted by the Criminal Rules Committee to allow for stipulation by the parties that an alternate juror may be used anytime before verdict. Upon motion of Mr. Frank, the Committee approved the rule as circularized in the Preliminary Draft.

TOPIC V - Amendment of Timely New-Trial Motions (Rule 59(b))

Under the present rule a new trial motion has to be lodged not later than 10 days after entry of judgment. In a case where a man for legitimate reasons finds that he has omitted from his new trial motion an important ground and comes back seeking permission to amend this motion before it has been passed on by the judge, the rule, as interpreted, says this cannot be done. The rule has also been interpreted to limit and define the powers of the trial judge himself. The proposal in the Draft has taken into account these two factoss and states that if a new trial motion has been timely made and is pending, it is open to the person making the motion to apply for leave to add additional grounds to his motion. The judge has the power to grant this if he so desires. Professor Kaplan stated that looking at the Hulson and Nugent cases he prepared an amendment which would say that in its openess to the cause it would raise a possibility of entrapment. An amendment was prepared saying it was open to the party within 10 days to apply for an

extension of time and the judge could grant this in his discretion. The same principle was applied to cognate rules such as findings, etc. This was brought before the Committee but the Committee seemed to take the view that there snould be a definite and final period within which a new trial motion should be made and that the party who won the verdict is somehow entitled to this full motion made and delivered within 10 days. The Supreme Court denied certiorari in the cases of Hulson and Nugent which seemed to show the urgency of the amendment put before the Committee but the Committee turned it down. The subsequent history is that in at least two later cases the Supreme Court had indicated that it will not permit a situation of entrapment to arise again, and that it would do everything it could in a case where the judge has misled the party so that the entrapment in the Hulson and Nugent cases has been somewhat erased. In considering all this, Professor Kaplan said there are several possibilities: (1) to revert to the initial proposal of the Reporter to provide that it would be open to a party to apply to the district court within the 10 days for an extension

of time to file a new trial motion; (2) to forget about that avenue and hold to what is in the Draft; and (3) to cancel the whole thing. Mr. Jenner felt that the Committee should amend the rule in accordance with proposal (1). Mr. Frank was opposed to this and felt the Committee should adopt proposal (3) discarding it completely. Mr. Jenner felt the real issue was not in how many cases motion had been denied, but in how many cases relief on appeal was denied to the defendant or plaintiff. After discussion, Mr. Frank moved that the Committee table the discussion on Rule 59, without prejudice, and request help on how to codify the Wolfsohn case. The motion was lost by a vote of 5 against the motion to 4 voting in favor (the vote in opposition included the presiding chairman, Judge Thomsen).

Professor Wright stated that he had again consulted the Supreme Court cases and had reached a conclusion for a rule that would codify the three Supreme Court cases. He agreed to prepare a draft for consideration.

Mr. Frank moved that in addition to the entrapment that all discussion on Rule 59 as circulated be tabled. Mr. Acheson inquired why this was

being recommended and Mr. Frank stated that there are situations in entrapment where there is so much injustice that he did not feel the rule would solve the problem. Professor Louisell felt that we should squarely meet the problem of Rule 59, decide it on its merits, and not bury it under the assumption that it is taken care of by the entrapment problem. The two problems are not the same. He felt the Committee should decide whether it believes in the proposed amendment of Rule 59. Judge Wyzanski thought the rule should permit the judge to declare a new trial if he had discovered an error. Mr. Frank felt that this would put an immense incentive on counsel to file something with the judge for a new idea. Mr. Doub, as well as Mr. Frank, felt that the real reason beyond those expressed was that 10 days are enough and that a case should be finished at that time.

Professor Wright presented his draft for the solution of the entrapment problem but stated it was a matter for the Appellate Rules Committee. He hoped that this Committee present it to the Appellate Committee as a

recommendation for the solution to a problem of concern. Professor Wright stated his draft covered the three Supreme Court cases, plus the Hulson and Nugent cases. The draft would amend the second sentence of Rule 73(a) as follows:

> The running of the time for appeal is terminated by a ~~timely~~ motion held timely by the district court made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon such a ~~timely~~ motion under ~~such~~ these rules: * * *.

Mr. Jenner felt the running of the time is terminated when the court holds something to be timely but does this also apply that the scope of the appeal is as though a motion wer filed within the propers. He suggested that the phrace include the word "entertained". Professor Wright said he would be satisfied with the word "entertained." The phrase as amended would read "terminated by a motion entertained or held timely by the

district court." After further discussion the Committee approved the phrase to read as follows:

> "terminated by a timely motion or a motion entertained or held timely by the district court."

The Committee approved Professor Wright's draft as amended, subject to the approval of the Appellate Rules Committee.

Professor Kaplan stated there was one more problem in Rule 59(d) which he would like to see cleared. This is the situation where a timely new trial motion is served; the party loses the case and within 10 days serves a timely motion specifying (a) and (b). The motion is pending, the judge considers it, and finds a ground not specified by counsel and in his opinion is thoroughly notorious. There are cases saying the judge does not have power to do this. This is offensive and was one of the purposes of the draft was to enlarge the power of the trial judge so that he would grant a timely, properly served new trial motion upon a ground not specified in the motion.

The Reporter distributed a proposed amendment to Rule 59(d) which was discussed by the Committee and read as follows:

> (d) ON INITIATIVE OF COURT. Not later than 10 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for [upon any ground on] which it might have granted a new trial on motion of a party. The court may grant a motion for a new trial, timely served, upon grounds not stated by the moving party. In either case, the court shall specify the grounds in its order.

Judge Maris stated he thought the words "in his motion" should follow the second sentence as you would get into a technical situation where if upon argument of the motion counsel didn't mention the ground the court could grant it on that ground,and if counsel did mention the ground, the court could not. Mr. Doub questioned the bracketed portion of the proposed amendment and Professor Kaplan stated it might be advisable to conform the two sentences. Professor Joiner suggested that the second sentence be conformed with the first. Professor Kaplan said this could be done and

it would read as follows:

> for a reason not stated by the moving party in his motion and in either case the court shall specify the grounds in its order.

The subdivision, amended to read as follows, was approved:

> (d) ON INITIATIVE OF COURT. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. The court may grant a motion for a new trial for a reason not stated in his motion and in either case the court shall specify the grounds therefor.

TOPIC U - Rescission of Special Copyright Rules (Rules 81, 65(f); Proposed Order of Court)

The Reporter stated that the outstanding set of copyright rules were set out by the Supreme Court in 1909 and comprise two things: (1) a paragraph or two dealing with pleadings making special provisions about annexing infringing works to the pleading; and (2) a rule procedure having to do with impounding interlocutory matters.

The Reporter stated that the extraordinary feature of the impounding rule is that there is no conventional requirement of a showing of the irreprable injury and in theory, at least, this can be the most drastic of all possible preliminary and interlocutory orders. First, as a matter of theory outstanding particularized rules which do not stand on some very special functional basis are not wanted. The whole theory of civil procedure is that there are uniform rules covering all civil litigation to the extent that that is possible. Secondly, there is objection in the form of substance to this draatic seizure product without a showing of irreprable injury without notice, even when notice is feasible. That is in direct collision with the standards in Rule 65. This is a special form of injunctive relief which takes the form of impounding, but for all practical purposes it is injunctive. A subparagraph (f) was inserted under Rule 65, entitled "Impounding Under Copyright Law." In addition to this the rescinding of the order establishing the special copyright laws is necessary. The objections to the proposed rule to bring the copyright cases under Rule 65 are (1) it has been

assumed that the rule is proposing that the copyright plaintiff has to comply under the law of each of the several states as there is confusion here about whether Rule 64 is involved; and (2) that a state of affairs will be attained where no impounding without notice is possible.

The Reporter thought that impounding should be treated as other interlocutory relief. He stated that there is presently an attempt on the Hill to revise the copyright law and it seems conceivable that the Act will not be revised. After discussion of this rule, Mr. Morton recommended that inasmuch as Title 17 is up for Congressional scrutiny and since it does contain a provision relating to this that perhaps it would be best not to change the law with respect to the present statute but to wait until Congress enacts the new statute. He stated that the Register of Copyrights concurs with the Committee's proposals. Professor Kaplan suggested that the Committee express itself as being in favor of this, on principle, with the understanding that there is a political question which had to be considered and determined by the standing Committee. Judge Maris

suggested that the possible middle ground is to make changes to Rules 65 and 81 and not appeal the other rules, giving the benefit of the civil rules to anyone who wants them temporarily until this is worked out but leaving the old rules outstanding. Mr. Doub was opposed to Judge Maris' suggestion. Mr. Jenner moved that the Reporter's recommendation be adopted and that the matter go to the standing Committee for determination of the policy matter. The motion was seconded and carried. Mr. Frank asked the record to show that because he was so troubled by this, he refrained from voting.

TOPIC S - Determination of Foreign Country Law (Rule 44. 1)

Since the circulation of the Deskbook two minor suggestions were received from the Federal Bar Association. One stating that the precise issue of foreign law should be singlely under 44. 1 instead of general notice. However, Professor Rosenberg stated that Professor Hans Smit who is an authority on International Law at Columbia University is against precisifying the rule as it was kept vague on the ground that rule of reason would be relied on by the court in connection with the notice.

Furthermore, the language which appears in 44.1 is now embodied in the uniform proof of the Foreign Law Act and this suggestion would put us out of faith with the Uniform Act. Two, a suggestion is to eliminate the second sentence of this rule. Professor Rosenberg thought this was the heart of the rule and recommended that this not be done. After discussion, the Committee approved the rule as circularized in the Preliminary Draft.

TOPIC T - Proof of Foreign Official Records (Rule 44)

The Ninth Circuit suggested that the rule should make clear that an official publication which appears to be an official publication need no further proof of authenticity. The Reporter recommended that a reference be made in the Committee's Note, after the present reference to the Aluminum Company case on page 125 of the Draft. The reference to be applicable to both domestic and foreign cases and would read as follows:

> Under the Rule, a document that, on its face, appears to be an official publication is admissible, unless a party opposing its admission into evidence shows that it lacks that character.

The Reporter's recommendation was approved by the Committee.

The Ninth Circuit also suggested that the certificate process be abandoned in Rule 44(a)(1) and that it be confined to a statement that an attested document by that very fact becomes admissible. This proposal to abandon has great merit but the difficulty is that the Uniform Interstate and International Procedure Act, has already been adopted in one state, and possibly elsewhere, contains the older procedure. It was felt that it would be unwise to eliminate this certificate process until conformity could be reached with the Uniform State Commissioners and, also, that it would probably be dealt with by the Evidence Committee in due course.

Mr. Jenner suggested that lines 11-24 be deleted and the insertion of a period after the word "deputy." Professor Wright, however, stated that Title 17, §39, of the Judicial Code stated that attestation and certification are both necessary. After discussion of this point, the Committee decided not to delete lines 11-24.

Colonel Gilbert Ackroyd, Chief, Military Justice Division, OJAG, suggested that the words "United States foreign service officer" be added to the list of certifying officers in lines 45-50 of the Draft. However, the Committee stated that officially there is no officer by that title.

ADMIRALTY

Professor Currie attended the meeting to present the Admiralty Rules where "civil' interest may be affected and presented a document entitled "Comments on Latest Admiralty Proposals to Effect Unification", dated May 12, 1965, which was the recommendations of the Reporters, Professors Kaplan and Sacks. The rules which were affected by the admiralty practice were Rules 9(h), 14(c), 17(a), 42(b), and 73(a), and Forms 2 and 15. Professor Kaplan called attention to the Note on page 2 of the document which he and Professor Sacks had prepared and which concerned Professor Wright's question about proposed Rule 43(a), referring to "the rules of evidence heretofore applied in the courts of the United States," omitting the further phrase "on the hearing of suits in equity." It was the decision of the Committee that since there is now a Committee on Evidence that the Committee leave this and let that Committee deal with it. The Committee decided to leave Rule 43(a) as circularized in the Preliminary Draft.

Consideration was then given to Rule 17(a) to the old admiralty view that 17(a), as broadened, should be adopted. This was unanimously approved.

Rule 42(b) deals with the provision that "separate trials" is restated to add the criterion "or when separate trials will be conducive to expedition and economy," and the whole subdivision is qualified by a statement that the right to trial by jury is to be preserved inviolate. Judge Maris stated he thought there was something to be said for the proposition that this might be helpful in the adoption of the amendment; particularly if there is agitation that this will open the way to have general division of the issues in the trial of cases which would make it clear that this is primarily to preserve the admiralty practice. Mr. Jenner moved that any reference to jury trials be eliminated but to leave in separate trials when conducive to expedition and economy. The motion, however, was lost.

Upon suggestion of Professor Louisell, Professor Elliott moved that the rules with the suggested amendments of the Admiralty Committee be approved and sent to the standing Committee. The motion carried unanimously.

Mr. Frank presented the following resolution and requested that it be transmitted by the Chairman of the Advisory Committee on Civil Rules to the standing Committee and to the Chief Justice of the United States:

> RESOLVED, That the Advisory Committee on Civil Rules expresses admiration and gratitude to Professor Brainerd Currie and the Advisory Committee on Admiralty Rules for distinguished public service in the unification of the admiralty and the general federal procedure.

The resolution was unanimously adopted.

DISCOVERY

At the February meeting of the Committee a variety of proposed changes in respect to Sanctions (Rule 37) ; a set of related changes in respect to medical examinations(Rule 35) ; and two problems, one of which involves the mechanics of discovery -- a shift in the way in which objections are taken, the whole procedure by which discovery is sought and objected to and discovered -- in relationship to Rules 33 and 34 was discussed.

In Rule 33 the Committee agreed on a preliminary basis that a change of this sort was in order. In Rule 34, where the existing rule has a requirement of an order as a preliminary prerequisite, the Committee decided to reexamine the problem along with various other matters of discovery. Professor Sacks stated the two most important features of the proposal are to eliminate good cause as a general requirement and to have a qualified protection for materials obtained in preparation for trial whether by lawyers or not.

Mr. Acheson thought the best way to proceed during the meeting for this discussion of Discovery was to start with areas where there is almost general agreement and then narrow it down to more difficult areas. Professor Joiner stated that he ghought the draft rules prepared by Professor Sacks for Rules 34, 36, 26(b) and 16 contained a lot of good material but felt that the Professor had been overly cautious in his approach. He stated three reasons as follows: (1) the Committee should have requirements that permits in blanket form the discovery of witnesses within the agreement. He felt this should be done as a matter of right; (2) feels the draft is overly cautious on the method by which it approaches the discovery of the documents by requiring motions and court orders. He felt that it should allow use of a notice of procedure at least to written documents and eliminate going through a motion which does not require any grounds and then an order; and (3) the additional paragraph of Rule 26(b) destroys a lot not meant to be destroyed and would deprive discovery of a great many things which can presently be discovered.

Mr. Frank stated that he is glad the Committee is approaching this problem in terms of general principle. He felt there is an underlying problem in these rules; that there is an uneveness in the drafting of how good cause should relate to various phases in discovery, and a goal to be undertaken is to make it uniform throughout. He also felt that all of these things, written interrogatories, oral depositions and requests for documents should have some impact on the problem of half discovery and half pretrial. He strongly believes that the opinions in Alltmont by Judge Maris and in Guilford by Judge Sobeloff in the interpretation of good cause gives the bar a liveable formula and way to do business under the good cause rule and his approach would be to codify Judge Maris's opinion and Judge Sobeloff's opinion and extend them to all the rules with plenty room for growth.

Professor Sacks stated the rules as drafted do not provide a good cause requirement and if thereis to be a protection it should be on the basis that impeaching evidence is a special character.

Professor Louisell felt that a definite decision should not be formulated on the problem of surprise and impeachment as these matters have been debated for many years. He suggested that the Reporter be asked to prepare a draft on these matters.

At Judge Thomsen's suggestion, the Reporter phrased questions to which he wanted a consenus of the Committee. The questions and discussion thereon are as follows:

Question No. 1: That aparat from the problem of trial preparation is there any objection to eliminating good cause as a general requirement for the documents that accumulate in the ordinary course of peoples affairs before they think about litigation, bearing in mind that an exception is taken to those materials prepared for trial or prepared in anticipation of litigation, or general elimination of requirement of good cause.

Discussion: The Committee thought that the general approach taken in Rule 34(a) of the draft, which eliminates good cause from a procedure that

contemplates a motion to produce as a general requirement for all documents reserving the separate treatment documents that are involved in trial preparation should be eliminated.

Discussion: Professor Rosenberg questioned whether this takes good cause out of existing Rule 34. He said that existing Rule 34 requires that the documents discovered which now do not have to be discovered for good cause must constitute or contain evidence and not hearsay. He asked if Professor Sacks had this in mind. Professor Sacks stated that it says now "which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b)." He asked if this was objectionable to anyone. Mr. Doub felt that it was as it is time consuming to have these cross references to other sections in a rule as important as this one. He felt it should be self-contained so that the lawyers do not have to check back and forth. Judge Thomsen replied to Mr. Doubt by saying that there must be protection and that it would be impossible to write it into every rule. The protection in Rule 30(b) applies to every one of the discovery rules.

Mr. Acheson thought the discussion should be confined to discovery procedure -- Rule 34 with a notice procedure.

Professor Sacks stated that a notice procedure tying to carry this out would involve a notice to produce documents, Assuming that the problem of preparation of documents is being dealt with. The next step would be for the person, against whom discovery is sought, to make objection and the objection would be on the grounds of irrelevance, privilege, or any grounds under 30(b) which would be essentially the grounds of burden. In effect he would do it in the form of filing an objection which is now the procedure under Rule 33. As the Committee worked out last time for Rule 33 this would be done by the discoveree party and then it would be up to the discovering party to move the court for a motion to overrule the objection and order the document. That would be the basic procedure.

Mr. Oberdorfer inquired why the draft of the Reporter on Rule 34 was on an order basis. Professor Sacks said it was probably a minunderstanding

on his part. That at the last meeting the notice procedure was discussed in relation with Rule 33 and it was accepted in principle. Then he also put a draft of Rule 34 on a similar basis and at that time it was decided, after some discussion, to hold this up and work out something on discovery.

Judge Thomsen moved that the procedur suggested by Professor Sacks be the sense of the group for him to work on. Professor Sacks clarified this to be sure that both the notice procedure and the elimination of good cause from this as a general point was the intention of Judge Thomsen's motion. Judge Thomsen agreed.

Another question asked was whether there was good cause on the part of the discoverer. This was confirmed. Another question asked was whether the discoveree would be able to challenge the notice on the ground that there is no good cause for discovery. Someone stated they would like for this to be preserved. Professor Sacks, however, suggested that insofar as the general run of documents is concerned, he should challenge basically under relevance, privilege and Rule 30(b). Good cause is not

to be included in these documents. The motion was seconded and carried.

Professor Sacks stated that Rule 26(b) refers to relevance, what discovery is allowable, particularly to the power to discover matters not privileged relevant to the subject matter in the pending action;therefore objection can be made on the grounds of irrelevance and privilege. He further stated that Rule 30(b) includes that the court may protect him from annoyance, embarrassment or pressure. The Committee was in general agreement that this should be amplified by undue expense and that he can request protection in terms of Rule 30(b). Rule 34 refers to both of those, explicitly, states it is subject to Rule 30(b) and requires anything within the scope of the examination permitted by Rule 26(b) so that what the rule would provide for is that an individual operating under Rule 34 would have a reference to those sections that raise these specific issues of relevance, privilege and oppressiveness.

Mr. Frank stated that he would like the Reporter to attempt to give

the Committee a memorandum before the members have to vote on this. The draft exempts from discovery under the rules certain things which relates to tort cases, but it really isn't orientated to the commercial cases. The upshot is that if this approach is followed then the approach taken to proceed on notice provided little protection in the commercial cases. Mr. Frank wanted to know specifically by a memorandum exactly what protection is being allowed now under Rule 34 in commercial cases and the extent to which the same things would be protected under Rules 26 and 30. He also asked for specific case references so the Committee would know whether it is leaving a hole there and whether or not there are in the commercial area protections which would not transfer successfully.

Professor Sacks said he would prepare a memorandum in terms of notice mechanism, with good cause removed, but with specific protection to Rules 26yand 30. He would accompany it with a memorandum that would attempt to show the kind of protection now covered in cases and the kind of protection.

Mr. Oberdorfer suggested that in the reconsidering of whether there is need to embroider Rule 30(b) that consideration should also be given to whether attention should be alerted to give the judge occasion within the claim under the rule to refer to the rights and needs of the discoverer.

CONSENSUS OF THE COMMITTEE: That Professor Sacks should prepare a notice form of mechansim with the good cause eliminated but a further look to verify what is already the case and is referred to herein, that this leaves the necessary protection in terms of balance of need against burden, but that there may be a good deal of virtue in spelling out the language of Rule 30(b) to make it clear that the judge is supposed to balance.

MATERIALS ON PREPARATION FOR TRIAL - Item VII

Professor Sacks stated that protection would be provided against the discoveree of these writings or other documents prepared in anticipation of litigation or preparation of trial. One of the objections he anticipated in the notice of discovery would be that it was material of this character and

the judge would have to rule. If it was, it would not be producable unless the justification were made up, i.e. unless the denial of it would unfairly prejudice the party seeking production or inspection or undue hardship or injustice. But with reference to the scope question, the matter is whether this is a good way to handle the discoverability of these documents. Two important features of the scope problem are: (1) that it applies to writings obtained or prepared by the adverse party, his attorney, assurety, indemnitor, or agent in anticipation of litigation or in preparation for trial; and (2) that it is the statement of justification; namely, that it would unfairly prejudice the person seeking it if he did not have it or that it would cause him undue hardship or injustice.

Mr. Freund questioned the word "immune" in subdivision (b) of the draft Rule 34, and Professor Sacks stated this was incorrect.

Professor Joiner raised the question about witness' statements as the draft would prohibit this unless there is a showing of unfair prejudice or undue hardship. He read an excerpt from the report prepared by the

Michigan Supreme Court entertaining recommendation that the statement of a witness, signed by him, shall be available for discovery. Professor Joiner thought this should be adopted in principle.

Mr. Frank felt that this would repeal the decisions of Judge Maris in the Third Circuit, and Judge Sobeloff in the Fourth Circuit, which all had referred to and used. There was concurrence to this statement.

Professor Louisell stated he thought Professor Joiner's idea was worth pursuing. That most of these statements are procured on motions in the State of California, and it is a rare situation except when the problem is integrated into the work product of the lawyer's own mental function. It requires a hearing and therefore he felt Professor Joiner's idea had merit.

Mr. Morton mentioned that in the draft the heading states "documents" and in subdivision (b) it states "writings". He wondered if there was any intention in the latter instance to exclude other materials such as objects and tangible things. He thought "documents" would be sufficient.

Professor Wright questioned the final sentence of draft Rule 34(b) which protects the mental impressions, conclusion, opinions, or legal theories of an attorney and that on page 23 of the materials the present law protects mental impressions of anybody whotakes a statement whether an attorney or not. Professor Sacks stated this was done primarily because he was uncertain of different kinds of cases which would come up. Some of the members said this was correct .

Professor Sacks stated that in the addendum to Rule 26(b) he was ~~trying~~ responding to two problems: (1) That if a particular document is protected by the qualified immunity it need not be produced; the court so rules. The Reporter stated that he was worried about what would prevent the individual simply from deposing the individual who had the document and asking for its contents. He did not feel this should be permitted. (2) The need to protect discovery. It is necessary to have discovery of the facts of the case. The Reporter was attempting a form of words which on one hand would permit discovery in which you could ask the other party to

give you facts in his possession but at the same time this would not permit disclosure of the precise contents of the document. Professor Joiner thought Professor Sacks had gone too far, and cited an automobile case to show his point.

Professor Wright stated the authority is certainly clear that the same standard applies under Rule 45 that applies under Rule 34. He wondered what would be done under Rule 45 if a man were to say that he had the document but would not let anyone see it. Would it be necessary to make a showing that this is a document which you cannot get under Rule 34 and if so where is the burden and who makes the motion. The rules are blind on this question.

Mr. Jenner moved that the addendum to Rule 34 be abandoned. Judge Thomsen felt the principle which Professor Wright wants to accomplish should not be abandoned. Mr. Jenner suggested that Professor Wright draft a rule to cover the point.

The draft of Rule 16 was presented by Professor Sacks who stated that it was more of an approach to the problem than it was a draft. The approach he had taken assumes that what the courts have been working out with respect to obtaining discovery of the expert witnesses as a general matter, whether he is to testify or not, is basically a sound approach. The basic approach has followed several lines including border efforts to assign a notice of privilege to it, which seems to have died out, and an effort by some courts to lable it as a work product. Essentially it is applying two things: (1) the kind of test that has been mentioned under proposed Rule 34(b) and to what extent will its absence prove to be prejudicial; and (2) is it possible for the party to get the material another way including the hiring of his own experts and the additional factor of money. This generally works out well when applied to discovery of experts. Professor Sacks discussed the problems involved in cases of witness and experts and stated this had proved to be the underlying factor in this line of cases

which are typically condemnation, patent and trademark cases if discovery against the experts testifying at the trial is barred. He felt that the Committee should preserve, in principle, the protections of the adversary system; protect against free-wheeling discovery against everyting the other side does; and at the same time try to meet the problems which these cases expose by permitting a form of discovery of a particular and peculiar sort. Ways of doing this would be to have discovery against those experts who are going to testify at the trial, and the theory would be to have it occur late in the preparation of the case so that it takes the form to maxmimize the likelihood of an exchange. He stated that his draft had been in the form of an order of the court but because he had put it in the context of Rule 16 by no means meant that he was convinced that this was the proper place for it. He also felt there should be power in the court to order the payment of fees if the exchange is one sided and this had been placed in brackets. He felt the courts are moving in this direction.

Mr. Doub felt the objectives of the Reporter were sound. The district court cases in the federal system are in turmoil, the majority of the condemnation cases seem to deny discovery of the presonal report of the expert, some of the most recent cases have taken the position that this is not a work product of counsel and denial could be on the basis of fairness or unfairness. He was undecided whether it should be in Rule 16 or some of the discovery rules but would hate to see it passed by. He commented on the fee question stating that when courts permit depositions of experts to b e taken they have ordinarily required the party taking the deposition to compensate the expert since he was not employed to give his deposition. He thought this was sound but did not think compensation should be paid when an order requires parties to exchange the written reports of experts. He thought this should arise only in fee or compensation problems when the time of the epxert is required for taking a deposition.

Mr. Jenner was concerned about putting anything in Rule 16 as it

would classify it as something special. He suggested it be made a part of Rule 34, perhaps as subdivision (l).

Professor Sacks mentioned two points to see if he had the consensus of the members, namely, that there is a general notion that once an expert is to testify his opinion, conclusion, etc. should be fully discoverable as a matter of course and an exchange should be arranged; and is there any notion that more than this should be discoverable against an expert. Professor Sacks also stated that he had not provided for the latter in the draft rule. Mr. Jenner favored this and Mr. Frank said he would like to see a more liberal practice of interrogating than the draft rule allows. He thought the draft would cut down the liberty to do so rather than expand it.

Mr. Morton stated that in some cases two experts are used. One to find cut the facts and one to testify. He felt serious questions should be permitted as to whom was consulted and whether they told anything.

Consensus of the Committee: That there is universal agreement of discovery of those who will testify at trial; a general feeling that it should

come earlier than provided in the draft; but it was not completely clear whether there needs to be some mechanism for assuring an interchange or just leave it alone to take its own course on the theory that there will be an interchange; these was not any clear agreement on how far one should allow the discovery of the opinions of the expert who will not be called.

Mr. Jenner suggested that it include the identification of all consulted. This was supported from the floor. Restriction would be in terms of forcing discovery of what the expert told counsel and whether to call him as a witness. The Reporter was asked to work on this, preparing something on the last step to see how the Committee reacts.

Professor Joiner moved that the Committee recommend to the standing Committee that the report prepared by the Columbia University entitled "Field Survey of Federal Pretrial Discovery" be released for distribution to the libraries and other interested parties. The motion was approved.

The Committee decided upon the dates of September 16, 17 and 18, 1965, for the next meeting of the Committee.

There being no further business, the meeting was adjourned at 4:45 p.m., Monday, May 17, 1965.