APRIL 1960 MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES

The Advisory Committee on Civil Rules met in the Administrative Office Conference Room, 725 Madison Place, N.W., Washington, D.C. on Thursday, April 10 at 10:00 a.m. and was adjourned on Friday, April 11, at 5:45 p.m. The following members were present:

Dean Acheson, Chairman
William T. Coleman, Jr.
George Cochran Doub
Wilfred Feinberg
John P. Frank
Abraham E. Freedman
Arthur J. Freund
Charles W. Joiner
Benjamin Kaplan
David W. Louisell
W. Brown Morton, Jr.
Louis F. Oberdorfer
Roszel C. Thomsen
Charles E. Wyzanski
Albert M. Sacks, Reporter

Messrs. Jenner and Cooper were unable to attend the session. They were working on trials.

Others attending all or part of the sessions were Honorable Albert B. Maris, Chairman of the standing Committee; Professor James William Moore and Professor Charles Alan Wright, members of the standing Committee; Professor Maurice Rosenberg of Columbia University; and Mr. William E. Foley, Secretary of the Rules Committees.

Chairman Acheson opened the meeting and directed the attention of the members to the Agenda which had been prepared by the Reporter. The first rule to be considered was Rule 26(b)(2) on Discoverability of Liability Insurance. The reporter made one general comment on the responses received on this rule: "The ABA Committee's response is fairly typical in the sense that in terms of viewing our proposal in toto they approved by a vote of 14 to 1, and then went on to pick eight matters of importance on which they had specific comments, either by way of proposed amendment, usually substantial, or in one instance or two, opposition to what we had. The general tone to their response was to call attention to the specifics and not to rail against the whole."

Professor Sacks: The response on liability insurance makes it clear that the Bar is divided on the subject. Just in terms of a count, the individual responses were very heavily adverse. [Note: Of the adverse responses, a very large number came from Texas. The reporter's impression of this summation was that some large group had met and decided that they did not like the rule and the thing to do was to write against it.] The organizational response was largely favorable. Question: How should we appraise that state and Bar opinion? Running into a division of opinion, should we somehow pull back? No in between position can be found on liability insurance, it is

either made discoverable or not. The question is, do we do it, even though the Bar is divided? We should go ahead, particularly here. The reason is because there is the situation where the Court is hopelessly divided. They are divided as between different districts and even divided between judges in particular districts. This is a bad situation. Because it is a bad situation, if the committee does nothing, the situation is left in worse shape than if the situation is left in the somewhat divided law.

Mr. Doub: I concur in that statement, because I think the excellent note of the reporter giving the reasons for the change are just unanswerable. I do think one suggestion which was made should be incorporated. In most states, the application for liability insurance is a part of policy. That application gives a great deal of personal and financial information with respect to the insured. It was never our intention to make that kind of information discoverable. I think it would reassure the Bar and strenghthen our statement in the last sentence of the paragraph that information concerning the agreement is not by reason of disclosure admissible in evidence.

Mr. Frank: In writing I have suggested the same thing. I second Mr. Doub's suggestion.

Professor Sachs: The only question I would raise -- to be perfectly clear we did not intend to make discoverable the application for insurance -- is whether that can be taken care

of in the Note. What I did, on page 3 of my memorandum, was to suggest an additional paragraph in the Note which has a sentence in it which says: "The provision does not authorize discovery of facts (apart from the contents of the insurance agreement itself) concerning defendant's financial condition." We could strengthen that by saying "apart from the contents of the insurance agreement itself and not including the contents of any application for insurance." That is the issue. We can certainly make an express reference to it in the Note, making it clear it does not include the application for insurance.

Mr. Doub: Notes have a way of getting away from us after the passage of years, and where we have categorically stated in a rule that the insurance agreement is admissible and where the application of a part of that agreement -- I think we have to negative right in the rule itself the page 356 comments of the New York Bar -- they suggest that we merely add a sentence saying "the application for insurance shall not be treated as part of the insurance agreement for purposes of this rule."

Dean Joiner: Why don't we want discovery of the application?

Professor Sacks: It contains information about the person's financial condition that goes beyond the fact of insurance. I think we took the position, and I think rightly, we were distinguishing the existence and content of an insurance agreement, namely, the existence and content of liability insurance from facts relating to the financial condition of the defendant.

Dean Joiner: I think this is correct. I do have a question about the sincerety of a number of members of the Bar who commented on this point, and this comes in part from a meeting I had last week with a group of defense lawyers from all over the United States and they were concerned, as you would expect, about this particular provision, not unanimously, but the great majority were. I started interrogating them a bit and I found that in certain kinds of litigation, they themselves, had found ways in their own states, at the inception of litigation, to ascertain the financial background and ability to pay, etc., of other defendants whom they were suing which they thought was a good idea. They were unwilling to relate the two together in any way at this point, and I don't think that, just because we don't think that should be done, we should encumber our rules in any way by any complicated provision that would negative that.

Professor Wright: It will come as no surprise to the members for me to say that if we are going to do something, we should do it in the text rather than in the Note. I'm glad I finally have some support on this. The comment on our proposals from the Columbia Law Review last year says "The Advisory Committee's qualification in the Notes and the important textual language is a questionable technique". If you are going to have a black letter which says you contain the discovery of the contents of an insurance agreement, and you add, as I suppose you would, a policy providion that the application is in all respects a

part of the agreement, and then you say in the Note you can't get the application -- seems to flatly contradict what the black letter provides. I think if you don't want the discovery of the application, you ought to say sonin the Black letter.

Mr. Frank: I would move, if I amy, that we approve the rule with a request of the reporter that the application be included in the rule.

Professor Sachs: That's perfectly acceptable. I don't have any problem -- to me it was a question of where to put it -- but I don't have any difficulty with putting it in with the text.

Judge Thomsen: I think there is one point that might be made on this and I'm taking the other side -- but with an open mind -- probably most of the rules of which we are dealing are ones in which it is vitally importaad that practice be the same throughout the country. There are certain practicing judges in our court who feel unanimously it is more important to be the same -- as we say, on both sides -- that is in the state courts and in the federal courts. I think that this is perhaps the only major one a judge would have -- in which an argument can well be made that it is more important to have the federal rules the same as the state rules on this point than it is to have the same rule apply throughout the countyy. If the judges in Baltimore, etc., make this information available and the judges in Chicago, etc., don't -- it doesn't seem to me that there's any great loss,

especially if they are following the practice in their own state. I think that is an argument in favor of the suggestion made where we are divided. We should not force a rule on an unwilling half of state courts as well as the Bar.

Dean Joiner: The reason we would not want to have exploration into general financial background is one that it lacks relevance to the issues being tried, but it has the same relevance to the reason why we want discovery in the sense that it would promote the concept of settlement of this point. But the main reason that we do not want that to go along with insurance is that it gets into a whole host of collateral problems at this point -- too early in the case to worry about. If we simply say that whatever the state law is as to what is an insurance agreement is discoverable at this point and if it does include the application and if this happens to include some evidence of the other kind, then we're not getting into any collateral outside inquiry at all, and we're promoting getting some additional information that may promote some settlement. I would say that we not change the draft in any way and allow the discovery of the policy, and if the policy happens to include some additional information, that's fine.

Mr. Freedman: It would seem to me this additional information is highly relevant because the reason we want the insurance policy disclosed is because we assume that the defendant is either impecunious or is unable to pay any judgment which might be

rendered; and therefore, any financial responsibility of the defendant becomes highly relevant in this aspect and it would seem to me that the two are tied in to get to the defendant's insurance policy and to determine the amount is to assume that the defendant himself can't pay it. This is the only reason that one gets the insurance. And therefore, any light which is thrown on the defendant's financial condition is highly relevant but I think desirable particularly in connection with the purpose that we pass this rule in the first instance.

Mr. Frank: If we follow the view Mr. Freedman has expressed, we would have the clearest moral obligation to resubmit the proposal for national review because that would be so radical a departure from what we have done, that it would be the plainest kind of a breach of faith. I don't mean that it may not be done, but we would certainly have to invite comments and we would then have the most overwhelmingly adverse comments. What has happened has been that on matters of divulging the insurance limits. I will alude personally the fact that we've spoken of before. In myown state, I have won the case which bars the insurance and have written an article to that effect. I think my position was permissible under the existing rule, but I think the rule ought to be changed. The insurance should be made available. The Bar has come to that conclusion by a thin predominance. So in my state we have had votes going both ways, then the Bar finally ended up "yes". In our circuit,

the committee voted no, but the Bar overruled the committee and voted yes. They were tight votes based upon two premises. One is that the actual dollar amount of the insurance is a relevant factor for settlement because the parties are dealing between the insurance company and the plaintiff and they may as well have that purported. And second, on the clearest kind of a moral commitment, we did not intend to go any farther than that and open up the general finances of the defendant who in fact is not a meaningful part of the settlement negotiations anyway. If we were to go farther frankly, we couldn't get a quorum in a telephone booth to support it. But we certainly would have an obligation to go back. And I think we ought to keep our implied moral commitment which is we mean to make the insurance figure available and no more.

Judge Feinberg: We're dealing here with objections which may represent the minority view, but nevertheless, objections to the fact that we're making too much discoverable. We're proceeding to deal with it by suggesting that we make even more discoverable. I think we should have a uniform rule. I think that the reference to the application should be made clear that it is not discoverable. It should be in the rule and not the Note.

Mr. Doub: I move that we approve the rule with the modification that Mr. Frank suggested.

Chairman Acheson took a vote of 7 to 3.

Professor Sachs: Am I right that the three votes were essentially on the issue of the application for insurance and not on the rule itself;

Members: That's right.

Judge Maris: Perhaps, Mr. Chairman, you should take a separate vote on the rule as amended by Mr. Frank.

Chairman Acheson: We have now amended the proposal, of course, and we have the rule as amended. May we have a vote on the amendment. I said the rule as amended, which takes the application out.

Chairman Acheson took a vote which carried.

Professor Sachs: That brings us to Rule 26(b)(3) Trial Preparation: Materials, which has been one of our difficult ones all along, Let me say first, by way of review, that our approach to the issue on trial preparation: materials has been to operate on the theory that we should eliminate a requirement that good cause be shown in Rule 34 for documentary materials generally, but that we should find some standard by which we would indicate the requirement of a showing for the production of those materials involved in trial preparation. In our earlier me meetings, we went through various possibilities including various terms that had been used in the Hickman case itself: undue prejudice, injustice, what have you; but, what prevailed in

the committee was that we utilized the standard of good cause itself in Rule 26(b)(3), i.e., that in order to obtain the production of these materials the person seeking them should show that there was good cause for their production. The response from the Bar has been to a substantial extent critical of that, it's surely a division that is -- it has been by no means unanimously critical, but there's been a substantial objection to our standard of good cause. In a way, the objection derives to some extent from our Note on the subject. We point out in the Note that good cause has been the source of a considerable amount of difficulty in the past. It has been construed sometimes to mean essentially relevant and it has been construed at other times to mean more than that. I think we made it clear in the Note the basis on which we were proceeding. We discerned in the interpretation of good cause in prior cases a trend or a tendency on the part of courts essentially to utilize relevance plus a protective order approach of undue expense or annoyance or oppression when documentary materials were generally involved under Rule 34. We also discerned particularly in Gilford, the stronger task being applied in good cause when you are in trial preparation. Certainly, it was obvious from our Note, that was what we contemplated, But the response from the people who are critical

has been "Well, if good cause has produced this much difficulty, confusion, and contradiction, isn't there some danger that that will continue?" One could make the answer, "Well, we made it clear in our Note that that is not what we contemplated, and surely the courts will understand that." It would seem to me that here was one where a response on our part was justified in an effort to see whether we could do something better. My effort in that direction was to respond and you might look at the draft of what I'm suggesting [pages 6 and 7 of the memorandum] my effort was to say "Yes, good cause probably isn't the best terminology here, on the other hand, I don't think it is desirable to go back to the terminology that the committee discussed before and rejected, namely, 'undue hardship' or hardship or injustice, undue prejudice, necessity or justification'", all of which we've played with before. I looked for something else. I discerned in the comments first some desire on the part of the people writing to get a sense that a showing here was a showing of "exceptional circumstance". This language is used in 26(b)(4)(A). I also had the feeling that we would improve our draft if in the standard we set forth we gave both the bench and the Bar an idea of what the content of the showing was to be. So my proposal, which I think meets the comments and I think is an improvement over our prior draft, is to

require that the party show that he has substantial need of the materials to prepare his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means, or a showing of other exceptional circumstances indicating that denial of discovery would cause manifest injustice. I think related so closely to it that it should be mentioned is a set of comments along slightly different paths (we may be able to separate it in our discussion, but I'm not entirely sure we can). Some people in writing us have said "Well, the thing you have failed to take care of in your good cause formula is the lawyer and his mental impressions, his conclusions, his opinions, his legal theories, etc. We're not satisfied that good cause gives him sufficient protection to prevent rumaging around in this files getting him to produce documents that will show these things." The ABA Committee said, for example, they were somewhat bothered by good cause but they would buy it provided we made very clear our protection of the lawyer and his mental impressions, etc. Now they ask for absolute protection. A number of other comments have made a similar request. My reaction to that is similar to the one I've had all along. I think that a sentence that infers absolute protection creates very serious problems not because I'm in favor of forcing an attorney to produce a document in which he has been speculating about the case. I don't think under any formula, the court would do that anyhow. My concern with

"absolute protection" is with the cases in which the particular document in question is one that has information in it that is needed by the other side on which they can make a showing -- they need it -- they can't get its equivalent in any other way -- there's material there that is important -- but its possible for the lawyer to say that in some small way it is indicative of his legal theories or his mental impressions. It may be a statement obtained from a prospective witness, or a person who knows something who is not going to be a witness, but the very fact that the lawyer engaged in a mode of questioning, will be argued to show his legal theories on mental impressions. In that type of situation, an absolute ban works badly. The result is that the committee has thus far resisted an absolute ban. You will recall, by the way, that the 1946 proposal of an absolute ban was not adopted by the Supreme Court. The Hickman case itself, in terms of written documents at least, has no absolute ban. I think myself that in those states that have had it, they've run into problems of having to interpret it as not quite absolute in some way, and therefore, I rather oppose it. On the other hand, I did see the possibility of a sentence that would accomplish what is really sought here, namely, to make clear to the reader, that the standard or the requirement of showing something should not be taken to apply

equally to lawyers and non-lawyers -- there's a special problem when you are trying to get something from the lawyer concerning his work. Somehow we should convey the sense that a lawyer may be entitled even in the application of the general formula, but with somewhat more consideration of the special problem of his legal theories and mental impressions and their confidentiality. Therefore, I did draft a sentence that says: "In determining whether the required showing has been made, the court shall give due regard to the importance of protecting against disclosure an attorney's mental impressions, conclusions, opinions, or legal theories." I feel it quite important not to go further than that. Now to determine whether that sentence is needed, that to some extent depends on where we come out with the other formula. If we keep "good cause", I myself, would say the sentence is definitely needed. If we don't keep "good cause", but have a formula identical to or similar to the one I have proposed as to what the showing would be, then it seems to me that the need for the sentence about attorneys is much less clear -- I don't think I would object to it -- but the need for it is much less clear. The formula itself takes care of it to a large extent. It requires that one show it is needed and one can't get the substantial equivalent any other way. That obviously brings in the question as to why one would need or not be able

to get the substantial equivalent of the other side's lawyer's legal theories or mental impressions. Perhaps the most orderly way to discuss this would be to take the general formula first and so far as we can defer the discussion of the peculiar problem of the lawyer. Having done that, then turning to the problem of the lawyer.

Professor Louisell: First of all, I think you're absolutely right. We must do better than "good cause". We simply can't rest on that language. I was wondering whether you considered putting the qualification that is now bracketed into the general formula and making it a matter of the need countervailing against the writer's privacy or the lawyer's thinking. It's very difficult to do -- probably impossible -- but I suppose you have to concede that that would be the ideal, because those are the factors that the judge should be taking into account.

Professor Sacks: If that's your approach, let me suggest that the sentence I have written I think would make it a factor. It says "In determining whether the required showing has been made", so you're clearly relating the sentence to the showing, "the court shall give due regard to the importance of protecting against disclosure an attorney's mental impressions, conclusions, opinions, or legal theories." So you're pretty much saying to the judge "there's no absolute ban, but in deciding whether a showing has been made, special consideration has to be given to

whether you are permitting disclosure of mental impressions, legal theories, etc." Obviously that says to him "if that is the case, and to the extent it is the case, the showing itself would have to be enormously strenghthened", and, pretty obviously, if all you were talking about were documents that had mental impressions, predominantly or even substantially, the showing couldn't be made.

Mr. Morton: I don't think the problem is in the showing, I think the problem is in the compliance. This happens all the time in patent litigation for various reasons. We're always getting into "who's been advised to do what?" The way it has been met most satisfactorily, for example, I recall a specific case by Judge Gignoux in Maine to block out from the documents. You don't establish the entitlement to a document and therefore, get everything that is in the document -- you are entitled to some parts of the information in the document and the person tendering the discovery on his own -- the way we did it in Maine -- I simply blocked out the parts I thought would have been the feeling of an attorney's impressions and the like. The other side says "Has this got what you want?" After about two-thirds of it, he said "Yes". After the other third, he said "No, I still want to see the parts that are blocked out." So we handed it to Judge Gignoux and he looked at it and said "No, you don't need any of it, it was properly blocked out."

That was the end of that discussion. I think, therefore, the problem is when you say "the document is discoverable" you don't mean that -- you mean "some or all of the contents of the document".

Mr. Doub: On the standard of "good cause" on the reporter's alternate, I strongly favor his alternate. Criticisms of "good cause" have been proposed all through this material, and it's a totally inadequate standard. It gives no guidance, it isn't explicit and it's subject to a wide variety of interpretations. I think that when we are dealing with material prepared in anticipation of a litigation or a trial, there should be a much stronger showing to be made. As the New York City Bar proposed, it should involve exceptional circumstances. I think the reporter's standard is excellent. It's pretty close to the New York City Bar equivalent. On the second sentence, it has been pointed out to us that in view of Hickman, we could not -- should not -- just treat in one dash things prepared for trial unrelated to a lawyer's work. We haven't given enough recognition to the distinction of the attorneys' work and, therefore, I strongly favor the sentence of our favor, but perhaps we can drop "or legal theories" and limit it to "mental impressions, conclusions, etc."

Judge Feinberg: I have the feeling that we are limiting discovery and, therefore, the ultimate objective of the rules of discovery; namely, a just result in the case. It would seem to me that the "good cause" should be left as is and left to the discretion of the trial judge so that he can, in his own discretion, exercise it in accordance with the particular facts in the case. Now when we put in, for example, the statement which the reporter has in his proposed change, the statement that "he is unable without undue hardship to obtain the substantial equivalent of the materials by other means or upon a showing of other exceptional circumstances indicating that denial of discovery would cause manifest injustice." This means that you have to know what's in the papers which you are trying to discover; and generally speaking, or in almost every case, you don't know what is in those papers and, therefore, you can't say that a manifest injustice will result. This is a "fishing expedition". Before you go to court, you have to "go fishing", and find out what's in those papers. Now, anything which is a bar to that, it seems to me, is a bar to the general purpose of discovery. To further limit the term "good cause" and take it away from the discretion of the trial judge, in essence, is a conflict with the general purpose of the discovery rules themselves. It would seem to me, if anything, that the rule should be liberalized. I think the Hickman case must be read in

a manner to liberalize the rule. The court at that time was interpreting the rules as they then existed. They were not laying down a philosophy as to what the rule should be. I think the whole gist of the Hickman decision is broad and liberal discovery intending to promote a just result. I would therefore think any change in the rule would be improper. It would be in conflict with the general purpose of the rule itself.

Mr. Frank: It is clear that this has been a successful submission in the sense we've gotten our thoughts over remarkably well to the Bar and we've had a generally sympathetic response. It is also true that in two respects in these rules we have simply failed altogether: (a) to express ourselves as we would like to, or (b) to be an effective communication. I would say apart from the bureau(?) of insurance or not, this rule and the one we will come to, the one on the non-testifying expert, will create more problems and more resistance than anything else we have done by far. I will say in a preliminary way, in part. I feel the earlier draft in some respects reflects some points of view I've had and I've changed my mind after going around the country and listening to people. First of all, I will comment on the matter of the attorney's work product and the general matter of attorney's impressions. It is perfectly

apparent that (a) we did not mean to trench on Hickman v. Taylor, and that (b) the Bar overwhelmingly thinks that we did. We have given an impression which I think is not our impression. The ABA feels that we have largely deserted Hickman, and proposed specific language to protect work product and I am, personally, for that. The Antitrust section wants us to adopt the Illinois provisions on privilege. The District of Columbia wants mush stronger language and the Department of Justice concurs. The Association and the Bar of the City of New York has offered its own specific recommendations. General Motors has a detailed proposal. There is a general fear that we are menacing the work product exception, the Florida Bar, the Kansas Bar, the New York County Association, the Ninth Circuit thinks we've junked it entirely, the National Association of Railroad Counsel and the Utah Committee thinks we have scrapped Hickman v. Taylor and so do a lot of the individual commentators. We did not mean to do that, and it seems to me that when we get that kind of a misunderstanding we really ought to meet and embrace it and truly, completely reverse ourselves. My own view is to make that absolute and Mr. Morton was right when he said that we have to work in something to show that the document doesn't become immune just because a lawyer has poured the holy water of an idea into it. I think this is a mechanical problem

that we can solve. I'd like to go all the way with the ABA position. Reaching the other part of the matter, I think we ought to convey our general thoughts to the reporter. We should end up with something that is both a rule and then have note illustrations which meet the underlying functional problems which are here. To solve the functional problems, which are more concrete than any general verbalization, it seems to me that as far as party statements are concerned when one takes a statement of an adverse party -- clearly, one should have a copy of it. We have provided that and I think it is sound. I would go further: when one takes a statement from anybody, part or not, if a copy is wanted by the party, he is entitled to have one. Next, we come to the matter of witness statements. These are not statements which are requested by the individual, but simply witness statements that the other side has. As to that, we have taken the "hard line" of the Fourth Circuit, the so-called Guilford line. I strongly supported that. In hearing discussion around the country, I think we went too far. The most recent comprehensive discussion of this is Judge Thornberry's opinion in Lanham. It does take a softer line than Guilford. It does make witness statements somewhat more readily available. I'm aware that using "hard line" is elusive. On the matter of the investigator's reports and impressions, as distinguished from the witness' statement, the Fifth Circuit takes a very hard line and says "the investigator's report

ought to be largely immune, and certainly, all of his impressions should be." That, to me, is reasonable. To sum up, I would (1) take something like the ABA position on Hickman v. Taylor, and I would take a totally new approach on what we've done on that score; (2) as to the rest of the matter, I would keep "good cause" or otherwise we would appear to be rejecting all of the "hard line" cases that we deal with, but I would follow the approach of defining "good cause" in some way which would refer to the cases. I would, then, in the Note, give concrete illustrations of what we mean. As illustrations, I would move away from Guilford and move toward the Lanham decision, but I would protect the investigator's reports and impressions.

Judge Feinberg: It would seem to me that the replies which were not received speak more eloquently than those which were received. By far the greatest number of Bar associations did not reply, which it seems to me means that they were in general agreement with the rules. Those which did reply, generally speaking, by bare majority did approve the rules as written. Some of them, and even the ABA report itself, make it very clear it is a report of the committee -- not to be deemed a report of the ABA. We've got to assume here that the objections which were lodged were objections of a relatively small minority.

Judge Wyzanski [To the reporter]: Will the effect of the language you have used create a very great possibility of an appeal and reversible error to be found on the part of the district judge?

Professor Sacks: I would not think so. We say that "on a showing that a party seeking discovery has substantial need of the materials in the preparation of his case". The concept of "need" is inevitably involved in however we approach the problem. We do look to the district judge to make an assessment of "need".

Mr. Freedman: How can a party show a "need" if he doesn't know it's in them?

Judge Thomsen: You've got the names of witnesses from the other side.

Professor Sacks: What I set forth here was essentially what the judge, today, has to address himself to under Hickman. It is a meaningful and understandable application of the "good cause" formula, although the "good cause" language has meant so many things.

Judge Wyzanski: I have read Judge Thornberry, and I think, in any event, it will be a matter of what the individual judge thinks. I am in favor of what the reporter has done.

Judge Feinberg: I, too, strongly favor the reporter's draft.

Mr. Frank: The suggestion that the Fourth Circuit wishes to tighten, I understand, meant to go to the Hickman v. Taylor part of "work product". I hold this recent Fifth Circuit opinion which says "There is a tendency on the part of many courts to require a strong showing of special circumstances

which justify production. This is exactly what we are doing here. It goes on to say "A less rigid approach seems desirable". They go on to develop the fact that this is "too tight".an approach to that matter. So, what we are doing now, is making a perfectly reasonable judgment of the courts, but one which rejects the approach just taken. Item number one is something which cannot be covered by a note. It will have to be taken into account in the rule, as the matter of, first, the party's own state. I take it we're agreed that if the party has given its own statement to the other side, he's entitled to it. Then I would move to test the sentiment of the group that the same thing ought to apply to any witness who has given a statement. It seems to me just terrible to say to someone "you gave us a statement some years ago, and now you're going to testify. We won't tell you what you told us then." It seems to me that anybody who gives a statement ought to be entitled to his statement. I would move to amend by broadening in that direction.

Dean Joiner: I support that.

Judge Feinberg: I'm just wondering how a witness, who is not a party, would get the statement without a petition to the court.

Mr. Frank: Well, I think that if we say in the rule that he is entitled, a petition would not be necessary.

Judge Feinberg: Could the party's attorney make a petition if a petition is necessary?

Mr. Frank: Only if requested to do so by the individual.

Dean Joiner: I want to call your attention that what Mr. Frank proposes is something we discussed, but he is supported by an agreement entered into between the ABA by five different insurance groups. These agreements state in essence that the insurance industry position is that statements be given to witnesses from whom taken. Not only is it an agreement between the insurance industry and the Bar, but it becomes a part of the basic law.

Mr. Oberdorfer: Is there any gap between the right of the witness of that statement and the right of one of the parties where the witness can have a statement but the party cannot?

Mr. Frank: Yes. Under the path we are taking in the draft rule, we are following Guilford and the consequence is that the party could almost never have that statement. He would be put to the burden of deposing the witness and taking it that way. In difference to the fact that the group wishes to hold that line, I'm suggesting we carve out an exception for common fairness, to at least let this human being get what he wants.

Judge Wyzanski: What about the lawyer's summary?

Mr. Frank: If it is reduced to writing, it seems to me that he is entitled to know what somebody says he says.

Professor Sacks: We do have in our present draft a definition of a statement previously given which we use for the party statement. It is broad enough even in present language to cover the witness statement.

Mr. Coleman: That doesn't take care of a summary, does it?

Professor Sacks: The lawyer's summary would not be produceable. I don't suppose you want to make a lawyer's summary produceable.

Dean Joiner: Well, if it is made in summary form, he and his side are inhibited to its use.

Judge Wyzanski: He is not inhibited in its use if he can say "Did you say this?"

Mr. Frank [To Professor Sacks]: What is the provision in the rule defining statement previously given?

Professor Sacks: It's on page 7 of the memorandum, which states, "for purposes of this paragraph, a statement previously given is (A) a written statement signed or otherwise adopted or approved by the person giving it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person giving it and contemporaneously recorded."

Mr. Frank: I adopt that statement.

Professor Kaplan: I wonder what the consensus of the members would be about the probable reception on this change in the Bar generally? Would it be regarded as the kind of thing that should have been submitted to them in this submission, or will they regard it as being a rather minor extrapolation of what we already have?

Professor Louisell: It is true that this is very inoperactive in the sense that for the first time, if we adopt this, we are giving a mere witness standing in litigation which isn't his own.

Chairman Acheson [To Mr. Frank]: Haven't you brought a rather new idea into the discussion. We were discussing Rule 26(b)(3) as amended. Then we go on to whether we should still broaden it by giving witnesses copies of what they have previously stated. Would it be better to finish the first part of the discussion then go to your viewpoint?

Mr. Frank: I believe that this is the heart of the 26(b)(3) matter. This is the amendment which my State Bar has proposed to this section. If I may summarize, the three proposals I submit might be voted upon and disposed of all squarely on this point and this section and nothing else: (1) should the right to get the statement be extended to the witness statement? That would materially soften the rigger of the draft we are proposing;

(2) I will propose that the various concrete illustrations be included in the Note as taken from the cases as illustrative of the rule; (3) I would propose that we adopt the ABA proposal on Hickman v. Taylor. These three proposals are the package which relate to this section and nothing else.

Dean Joiner: Professor Kaplan raised the question as to whether Mr. Frank's suggestion went beyond the original submission and whether we should submit a new submission. It seems to me we have covered ourselves reasonably well on this because there is a parenthetical statement in the Note. On the bottom of page 24 and the top of page 25, I call attention to a number of proposals which were considered by the Committee, one of which was the very end -- whether there should be an exception to the written statements of witnesses. It seems to me we have alerted the Bar to the fact that this is one of the matters which has been discussed and is subject for discussion before the Committee.

Professor Rosenberg: On that point, I would like to call attention to pages 26 and 27 of the reporter's Note. The Committee Note tries to account for the free discoverability of a party's own statement. In some small measure, I think that statement by the witness himself -- in large part, it does not read to the point being pressed, namely, the discovery by a witness of his own statement. The justification offered here does not seem to be appropriate to a witness' own discovery. All that means, I suppose, is we should write a new justification.

Chairman Acheson: [To Mr. Frank]: Would you approve first of all taking out and deciding the first matter you spoke of? That is disclosing to the witness his own statement.

Mr. Frank: Sure.

Chairman Acheson: We are ready to vote on it -- I take it Mr. Frank has moved that we enlarge this rule to permit a witness to get a copy of any statement which he has made.

Judge Wyzanski: We've had no discussion from the Bar on that at all.

Professor Sachs: There were two aspects of our submission to the Bar that can be adduced as relevant. We just have to decide w what we think is sufficient on notice. It is perfectly clear that we did not put to the Bar a proposal to make a witness statement available to the witness. We did, in the discussion of Rule 26(b)(3), put in a parenthetical paragraph in which we indicated a number of the alternatives considered by the Committee in arriving at its then current formulation. Those included far-ranging discovery eliminating any requirement, and then we said still another view is that a showing of "good cause" be required for all trial preparation materials but with an exception for written statements of witnesses. The other point made was to the effect that in supporting our arguments for a party statement being freely discoverable, we gave a variety of reasons which are in small part applicable to the witness statement.

Professor Rosenberg: In large part as on the top of page 27, courts which treat a party's statement as though it was that of any witness, overlook the fact that the party's statement is more admissible into evidence. The whole thrust of justification was in that direction.

Professor Sachs: In other words, what we have in terms of submission to the Bar is the sentence which simply calls attention to the alternative approach that would have made witness statements freely discoverable.

Mr. Frank: Might I suggest that this is an important rule which ought to be taken up at the end of our meeting. We may well end up with enough different matters that we will want to make a new submission no matter what we do with this rule.

Professor Sachs: It seems to me we ought to proceed on the assumption that there is a goal here. A goal to see whether we can come to a resolution without another submission. The question is really in two parts: (1) Do we favor Mr. Frank's proposal on the merits in light of the discussion. It seems to me there is general sentiment in favor, and (2) whether or not it's fair to make such change without another submission. My initial reaction is of doubt. I take it the question is whether or not that parenthetical sentence really eliminates the doubt. The problem is -- is there enough of a problem about a submission that we ought not make a change without one?

Judge Feinberg: I am for the proposed amendment on the merits. I think it would be terrible to make a change without making some effort to get comments from the Bar. I think if we, in our judgment, feel that it should be made, I think we are duty bound to go back to the Bar.

Mr. Frank: On the question of exposure, it seems to me we are worrying about reporting back to the Bar. On the standpoint on a rather minor point, the fact is that almost all the criticisms we've had go to this rule in one phase or another. We are meeting it bravely by a real basic rewrite. I would think that in common fairness, we ought to informally circulate that draft to our critics anyway --- no matter what we do on this point --- to see if there are any last thoughts on it.

Judge Feinberg: That is a fine idea. My only problem is we're making a major change. Couldn't it be submitted to the Bar on an expedited basis?

Judge Maris: That can be done on one or two simple issues.

Dean Joiner: I move that point.

Chairman Acheson: It has been moved.

Professor Wright: This committee should do what it things is right --- get it out to the people who are interested --- telling them to send their comments directly to the standing Committee which will vote on it in its meeting in July.

Chairman Acheson: Then, the sentiment is that we do send our judgment back to the Bar for comments to be submitted to the standing Committee. Now, are we in favor of the first proposal of Mr. Frank, i.e., that witnesses are entitled to a copy of their statement?

The Committee voted unanimously in favor of the motion.

Mr. Frank: I would ask that after lunch the reporter present language adopting the Lanham decision.

Chairman Acheson: You accept the language that the reporter has suggested up to the "work product" part, provided that after reading the Lanham case, he can show provisions in the Note which will adopt the Lanham positions?

Mr. Frank: Yes.

Chairman Acheson: We will now take up a discussion on the "work product" language which has been drafted on pages 6 and 7.

Mr. Frank: What I submit, Mr. Chairman, is there is a proposal from the ABA which is more or less typical of the nationwide point of view. The suggestion they make is based on California proposals. [The reporter read the underlined portion of page 23 of the comments in the deskbooks, which he stated was a proposal for absolute protection.] Judge Wyzanski asked if the underlined portion of page 23 would eliminate the bracketed language of the reporter on pages 6 and 7 of his memorandum.

Professor Sacks: I continue to worry about a lawyer who gets a proviso of this sort. Under the circumstances arguing that he formulated the mode of questioning of the witness and, therefore, any part of the document is going to disclose his mental impressions, and his legal theory. It seems to me to be a tenuous argument. When one gives absolute protection, it's the type of argument one allows. I don't think we should allow that kind of argument. Because of this, the bracketed sentence is a far preferable sentence. It's a fairly important distinction. I feel that the bracketed sentence is better toward absolute protection.

Professor Louisell: I agree.

Professor Wright: I agree that absolute protection does give rise to tenuous arguments. I would prefer giving the Bar the comfort of an absolute protection, counting on the good sense of the judges, not to let it be pushed to its most attenuated form, then to come out with a proposal as the reporter has. The reporter says that in passing on this showing, the court is to give due regard in protecting the mental impressions of the attorney. I'm with Mr. Frank in preferring the absolute protection.

Mr. Oberdorfer: One of the charges of the ABA is that we were insufficiently sensitive to the attorney-client privilege. I suggest, for consideration, an addition to the language in the brackets which would include in the factors to be given due regard the protection of the client giving privileged information to his attorney.

Dean Joiner: In the railroad group in Minneapolis, this was the major problem that I got out of that group. They construed this section as an opportunity on the part of the court to order disclosure to matters that might otherwise be privileged under the attorney-client privilege. I think the draft does not have that, because it builds on section (b)(1) prior to this time. On line 69 of page 12, I suggest adding "discoverable under (b)(1)."

Mr. Frank: The Antitrust section of the ABA on that point has taken the same view of the parent organization on the general matter of protection of work product. They ask that we adopt the rule of the Illinois Supreme Court: "All matters that are privileged against disclosure through any discovery procedure." [To Mr. Oberdorfer] Does your thought go as far as the Antitrust section's proposal in that regard?

Mr. Oberdorfer: I still think we would do well to identify in that clause.

Dean Joiner: We have already said in (b)(1) that one can discover matters not privileged.

Professor Sacks: As I understand Dean Joiner, he suggests that just to "hit this" so that the Bar sees it in (b)(3), that in line 69 on page 12 an insertion be made to say "a party may obtain discovery of documents and tangible things discoverable under (b)(1)." It would repeat that it has to be unprivileged matter right at that point. Then in the Note, if it is privileged, it is not discoverable and a reference could be made to the Illinois rule.

Judge Feinberg: Do I understand that the Illinois rule covers communications between parties and its agent?

Mr. Frank: Yes, between parties and its agent.

Judge Feinberg: Would it be better to use "great weight" instead of "due regard" when protecting the disclosure of an attorneys' mental impressions?

Mr. Frank: We have been told by virtually every professional association in America that we are doing this wrong and they want absolute protection. I want to vote on it. If we cannot carry a vote on it, I want to get as close to it as I can.

Mr. Freedman [To Mr. Frank]: Well, your motion is to substitute the ABA proposal as on page 23 for the material in the brackets?

Professor Rosenberg: My question is, do the words "conclusion" and "opinion", as they appear on page 7 in lines 16 and 17, set up an unnecessary and unwanted antithesis to the provision in Rule 33(b) that "discovery sought in opinions and conclusions shall not of itself be grounds for objecting"? In Rule 33(b) those words were put in because it was desired not to promote decision points -- i.e., to give lawyers unnecessary invitations to argue that some matters thought to be conclusions or opinions.

Professor Sacks: There is an important difference between discovery of document materials and the kind of discovery which is included in Rules 33 and 36. There have been comments that suggested that somehow, if we have Rule 26(b)(3) and retain the material in Rules 33 and 36, there is some inconsistency. I don't feel this is true. I think we should take the phraseology that has been used in the past to suggest what the lawyer's work product is.

Mr. Frank: The ABA proposal is tighter that Hickman v. Taylor and Judge Feinberg's proposal is Hickman v. Taylor.

Dean Joiner: Our discussion is on the assumption of a rather substantial difference between the citations. I'm not sure this is completely accurate. I think we can resolve this by relying on a "directed provision" which will give the appearance of a rather flat statement.

Chairman Acheson [To Dean Joiner]: The next thing we might consider is the suggestion which you made that the language of page 23, and include it without the words "under any circumstances" into the bracketed part of the reporter's draft. This seems to me to bring about the results you want without the "absolutism".

Judge Thomsen [To Chairman Acheson]: Isn't your suggestion the same as Dean Joiner's?

Chairman Acheson: Very close. I just suggest that the judge "not give it". Let's leave it that the reporter will bring in another alternative suggestion of which one will have something which is absolute.

Professor Sacks: There is one other aspect of Rule 26 that we should consider. It relates to "party statements" of a corporation or of an organization. We had previously agreed that our reference to a "party statement" included a corporate party statement, but we had quite a few comments pointing out that that created some problems because of "what was the corporate party statement?" That is, when do you have a statement from the corporation and when don't you? It's always given by some person. In response to those comments, I have put in new language on page 7 of my memorandum which is in lines 20 to 24. It says: "or by a person who when

the statement was given was an officer, director or managing agent of the party seeking the statement or was a person designated by the party to give the statement on its behalf." I don't think there is any problem with this. It is simply for clarification.

Judge Wyzanski: If a statement is admissible against a corporation because the person who made the statement is authorized, shouldn't, under those circumstances, that statement be discoverable in advance of trial? In other words, "designated" is wrong, it should be "authorized".

Professor Sacks: I agree.

Dean Joiner: The proposal from the Evidence Rules Committee on defining statements which are admissible regarding the "Hearsay" rule, is much broader.

Professor Sacks: We took the view that we wanted to make a "party statement" available without any showing. One of the major reasons we gave in our Note was that the statement was admissible into evidence against the party without moor. That we regarded as a rather special reason. When it came to the corporate party, the first question was definition: when could the corporate party obtain a statement given by some person having some relationship to the corporation? My approach was to attempt a definition in rather specific terms but one which

generally conformed to the idea that it having been given by that person it would be admissible against the party, therefore, the policy reasons apply to it.

Mr. Doub: Isn't this language somewhat limited?

Professor Sacks: We're talking here about the right of the corporation to get the statement. We're not talking about the right of the plaintiff to get the statement.

Mr. Coleman: I take it if the statement is given by an officer upon showing the person is an officer, one could get the statement whether admissible or not. I think we could really solve the problem by keeping what we have and adding after "its behalf" a clause to take care of the other type of person making a statement which because it would be admissible, he ought to have a right to get it.

Professor Sacks: We're limited to preparation for trial and I suppose our prior decision was that situations where material has been obtained from someone which might ultimately be usable by way of impeachment, we did formulate a requirement of a showing and it would be a rather clear cut shift and a change to say that we want to now make it available without any showing at all. What we had done before was to say if the statement had been obtained in some routine fashion not related to preparation for trial that's freely discoverable. But if it is in preparation for trial, then some showing has to be made.

Then we make an exception for the party and our reason for the exception is that it could be used as evidence against him without moor. When we get to the corporation, it would be sensible to make it clear that there ought to be available without a showing any statement that would be admissible into evidence as the admission of a party opponent.

Lunch Break 1:00

[Chairman Acheson was unable to preside over the beginning of the afternoon session due to a previous engagement. Judge Thomsen presided.]

Judge Thomsen: I take it at the present time what we have is a proposed modification of the material on pages 6 and 7. We have two extreme proposals. We have the ABA proposal and the other is the proposed suggestion as on page 7. There are two in between suggestions which have been made. The first is sort of a modified form of absolute protection [modified ABA], the other is as proposed by Judge Feinberg [great weight]. We have the ABA provision as on page 23 of the deskbook. The other is on page 7 of the reporter's memorandum.

Professor Sacks: My sense is that the ABA proposal was proposed to be modified by Chairman Acheson simply to take out the words "under any circumstances" and I rather assume that the modification was thought to be a good idea. So one possibility

is what I would regard as an absolute version and it would be a modified ABA proposal which would in effect simply put in at line 13 of the memorandum, after giving the general formula, the words "provided that a party may not obtain discovery of an attorney's mental impressions, conclusions, opinions, or legal theories". The second point I make, is that in terms of the bracketed sentence in my memorandum, it seems rather clear that the group would want to again go away from the extreme and that would mean striking out "due regard" and inserting "great weight". The one I came up with, with the help of Judge Feinberg and Mr. Morton, and which really flows out with what Dean Joiner suggested, is in ordering discovery, when the required showing is made, the court shall protect against disclosure of the attorney's mental impressions, conclusions, etc. [To Dean Joiner]: Is that right?

Dean Joiner: Yes.

Judge Thomsen: Does anyone want the ABA proposal?

Professor Sacks: That's the one that reads: "Provided that a party may not obtain discovery of an attorney's mental impressions, conclusions, opinions, or legal theories" as modified by Chairman Acheson.

Judge Thomsen: Does anyone want the ABA ppoposal as it stands on page 23 of the deskbook? [Two votes]

Does anyone want the proposal as it stands on page 7 of the reporter's memorandum? [1 vote]

What I am trying to do is find out what the majority of the members prefer. Either Chairman Acheson's form, Dean Joiner's form, or the reporter's form of the modified ABA proposal. Also, Judge Feinberg's "great weight" or something similar.

Professor Sacks: The modified ABA provides that "a party may not obtain discovery of an attorney's mental impressions, conclusions, opinions, or legal theories", and the modified reporter version is "in determining whether the required showing has been made the court shall give great weight to the importance of protecting against disclosure of an attorney's mental impressions, conclusions, opinions, or legal theories." [It was decided from a previous reading of this section by the reporter, there were two versions of the modified ABA proposal. The majority seemed to be in favor of the ppoposal as read by the reporter (Dean Joiner's proposal). Due to the many proposals, it was decided the section would be given to the standing Committee for resolution. In other words, hhving approved the Joiner proposal, it would be submitted to the standing Committee with an amendment to the draft.]

Professor Sacks: I've read through the Lanham case. I did it to see how the witness statements and the investigator's reports and files were treated. [To Mr. Frank]: I think the case really goes along with our formulation. The court

followed out from good cause and, therefore, said "more than relevance is required" and then said "on the other hand, we don't think the degree of protection in all instances has be be the same and we're particularly concerned with respect to the privacy of the attorney's files and mind." They distinguished the investigator's file on the ground that he was working with the attorney and, therefore, did go to the privacy of the attorney's operation. When they got to the witness statement, they looked at the issues of need for the statement and the possibility or opportunity that the party had to get the equivalent of the materials by his own means. They said flatly that ff he could get the equivalent, they wouldn't be ordered. But in this case, under all the circumstances, they addressed themselves to a variety of other considerations and said "There's not enough here to change our minds in terms of need and the opportunity to get a substantial equivalent." My proposition would be that the formula we have does fit the case. It ought to be possible in terms of a Note, to make clear that a witness statement does present a very different type of case from the investigator's file.

Mr. Frank: If we can have the assurance that the language of lines 8 through 13 would be left as is, but the illustrations will be amplified in light of our earlier discussion, I would

like to mention two things: our protection of an investigator's files, impressions, and work and I would also like to protect the party's statement to his own counsel. In other words, what we are saying is, when defendant takes plaintiff's statement, the plaintiff is entitled to a copy of his statement. When a defendant gives a statement to his counsel or investigator, I would like to give him some protection. The language of our rule is drawn from the Guilford case, and the Lanham case expressly says Guilford is an illustration of a case which is too strict. I simply request that you try by way of illustration to pick up these comments.

Judge Thomsen: Then the material from line 7 to 13 on page 6 is approved with a modification to the Note?

Judge Feinberg: I move the suggestion be adopted.

The motion carried.

Judge Thomsen: Now to the second problem of this section on page 7 beginning with line 18. The suggested addition begins on line 20 (the underlined material). One suggestion deals with the word "person" -- it should be modified in some way; another, is in line 23, the word "designated" should be "authorized" -- I take it that much was agreed upon by common consent. I so rule without taking a formal vote. There was a general suggestion that an alternative provision be prepared by the reporter.

Professor Sacks: I made one effort on one assumption. The assumption was that it was desired to have an additional clause preceding the period on line 24. That is that we wanted to add after the word "behalf": "or is admissible in evidence against the party seeking it as the admission of the party opponent." [To Dean Joiner]: Was that what you had in mind?

Dean Joiner: Yes. The theory in which we are proceeding in this particular section is a theory of admission.

Judge Thomsen: Another suggestion was "Any agent or employee of the party seeking / . ." Shall we take a preference vote? How many would prefer the draft to any of the suggestions made? [Two votes] How many would prefer "admissible in evidence against the party seeking it as the admission of the party opponent"? [Two votes] How many would prefer adding "any agent or employee of the party seeking the statement"? [Eight votes]

Professor Sacks: I understand the preferred change will be on line 20 in the memorandum to be: "or by a person who, when the statement was given, was an officer, director, agent, or employee of the party seeking the statement or was a person authorized by the party to give a statement in its behalf."

The motion carried.

Mr. Frank: My state Bar committee has voted that if there is to be a tough Guilford rule on statements, there should be a

modification to let a person obtain his own statement.

Professor Sacks: If we are going to submit to the Bar a revised version, with a request that they respond within a period of 60 days, it does seem to me that we have some obligation to how far we've gone and how closely it relates to the comments we've received. If, for example, we are resubmitting, that's responsive to the comments we've received. We've got a provision on the attorney's mental impressions, etc. We've got a motion that you turn over a witness statement to the witness, which is something we have the sense that it is likely to be acceptable. If, on the other hand, we go on the motion of freeing up the witness statement completely to the other side, I think we have a problem on our hands to ask for comments within 60 days.

Judge Feinberg: My recommendation is to leave the definition of a corporation's right to get a copy of the statement as it stands in the original draft.

Professor Sacks: The motion includes the striking of all the underlined material from line 20 through the period on line 24. As a minor drafting matter, I would like to keep in the language "For purposes of this paragraph, a statement previously given is".

[Judge Thomsen gave the alternatives to the committee for a vote: (1) making all statements of all witnesses available to

everybody for the asking; (2) the printed draft as revised by the reporter; or (3) adding "the person authorized to give a statement on behalf of the corporation". The members were in favor of the printed draft as revised by the reporter.]

Chairman Acheson returned to preside over the remainder of the session.

Professor Sacks: We are now going to Rule 26(b)(4)(B) Trial Witness Experts. These are the experts who will testify at trial. What we have in the printed pamphlet is a provision that a party's interrogatories secure the identification of these expert witnesses and a statement on the subject matter on which they will testify. Thereafter, any party may discover from the expert or the other party facts known or opinions held by the expert. This contemplates unlimited modes of discovery. After reading the comments we received on this rule, we must decide whether an exchange of writings or statements could be had without a court order, but with a provision that the court could order further discovery. [Judge Wyzanski questioned who paid for the services of an expert witness. The reporter answered there was a provision in Rule 26(b)(4)(C) that "a party seeking discovery pays the expert a reasonable fee for time spent in responding to discovery."]

Professor Sacks: On the other hand, this does not provide for any reimbursement of expenses to the party for the time and trouble in preparing a statement asked for. The new proposal is on page 9 from line 1 through 12 on the entire Rule 26(b)(4)(B). It proposes that a party be able to get the identification of each person whom the other party expects to call as an expert witness, the statement of the subject matter on which the expert is to testify, and to require the other party to state the substance of the opinions on which the expert is to testify, and the summary of the grounds of each opinion.

Mr. Frank: The proposal, as we have it before us, would be in the "teeth" of the Ninth Circuit and it would be a step backwards. I want to deal with (A) and (C) simultaneously. Part (A) is on the non-testifying expert. This is the other item in which we have been grossly misunderstood. It is this misunderstanding which is contributing to the problem we have on part (B), the testifying expert. What we intended under 4(A) was that the non-testifying expert should not be called. We were going to allow him to be called only where there were extraordinary circumstances. It is in this instance that our intention did not relate to the Bar. It was widely supposed that we were making the non-testifying expert available. We have to make clear that we did not mean that. Also, we have had opposition to 4(B) the testifying expert. On that score, the attitude is the expert is the same as anybody else if he is going to be a witness, etc. Briefly on part 4(C), it did not provide that a person be paid for the time he appeared. It provided he might be paid. We had a lot of opposition to that. In the revision, the reporter has adopted that objection. Other parts of the country are not in agreement, however. My suggestion for the solution of this problem is that we merge the motions, first that we nail down part 4(A) to say what we mean to say. Second, that on the testifying expert, there should be an exchange of statements; and third, I'd like to

see it "(B) that if after the exchange, anybody wanting to call an expert, can do so." But, I feel there should be payd for it. The only new thought I have on this is that I would make the charge against the attorney, if need be. One final matter is that we have heard this should not be done at all in the eminent domain cases. The California Law Revision offered concrete arguments that this is unnecessary, etc. Can we tighten down part (A) to say what we mean? Can't we then keep the witness testifying under part (B)? Finally, I think we should decide whether eminent domain should be treated the same or differently.

Mr. Doub: I think several of Mr. Frank's suggestions are excellent. I suggest, however, that part (B) become (A). In other words, reverse them, because the exchange of information occurs first.

Professor Sacks [To Mr. Frank]: With respect to 26(b)(4)(A), I don't have the sense of the comments you do. Some people are saying "This allows more discovery than it should." It says one is able to get something from an expert in the way of facts only upon showing by the party seeking discovery is unable without undue hardship to obtain facts and opinions on the subject by other means. In other words, the general tone is of exceptional circumstance. The comments on 26(b)(4)(A) which say it's too broad do not adjust themselves to the language we have used.

Judge Thomsen: Page 78 of the Proposed Rules of Evidence which deals with Privilege states: "A communication is 'confidential' if not intended to be disclosed to third parsons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." Rule 7-05 flatly opposes what we are doing. "The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination."

Dean Joiner: The Evidence Committee is rather conservative. Part (A is inconsistent with the Evidence Rules only in that the Evidence Rules deal with Privilege and this rule deals with matters which are not privileged.

Mr. Doub: I would like to suggest that we take the consensus of the committee with respect to two basic matters in paragraph (A): (1) whether discovery should be limited to experts expected to be called as expert witnesses at a trial; and (2) whether the standard in (A) should be liberalized or whether it should be tightened up. On the first point, I wouldn't vote on it. If we find how many favor making a restriction and how many feel the standard should be made more or less severe, we would cover some ground.

Mr. Frank: I don't want to eliminate (A) altogether. I only want to include our earlier decision to get into the language the thought that there will be extraordinary and highly unusual circumstances. My proposal is that we word this that (4)(A) may not be discoverable, except, etc., and change "or" to "and". Then, in the Note, state this is only for "extreme" and "extraordinary" circumstances.

Dean Joiner: I don't understand why we are dealing with "facts". Any witness who can testify to "facts" is an ordinary witness. It's only when he gets to opinions, is he an expert.

Professor Louisell: Opinions are so often inter-related.

Mr. Frank: I move we solve part (B) by going along with the reporter except that the option of further discovery will not require a court order.

Professor Sacks: Most of the comments on "written discovery" are against the motion. The comments didn't even provide for "oral discovery". They wanted it limited to "exchange of written statements".

Mr. Doub: I move the approval of (B) as shown on page 9 of the reporter's memorandum.

Mr. Frank: I'd like to move an amendment. The language at the end is restricted to those given on direct examination at trial. I would like to change to read "will be admissible at

trial". We wish at all times to put a premium on having rules which the states can adopt. On the federal side, the cross is limited to what is said on direct examination. On the state side, it will not. This language given on direct examination at trial will have the effect of limiting the states if they followed our language. I'm suggesting this language be modified so that we don't needlessly offend state adoption on this point.

Chairman Acheson: Does the committee wish to proceed with further debate on amending (B) or does it wish not to discuss it anymore. All in favor or cloture of (B) [not to amend] -- The vote was 6 to 5. [The chairman stated the vote was too close, and called for more discussion.]

Mr. Frank: Before voting on the general question, I move to amend the last line requesting the reporter to give us some language so that in areas that do not restrict the cross to the scope of the direct, it will not limit the interrogation in discovery.

Professor Kaplan: Will the problem be solved if we use the same language in the last sentence as used previously?

Mr. Morton: It would have to be modified.

[It was decided the committee would adjourn with the members bringing in suggestions on this rule at the next session.]

The committee adjourned at 4:55 p.m.

The meeting was opened at 9:40 a.m., with Chairman Acheson presiding.

Professor Kaplan: On March 25th, the Supreme Court handed down a case under the title of Snyder v. Paris, the effect of which is to say that in class actions of a (b)(3) title, i.e., the type of class action most resembling the old section, aggregation of which would not be permitted. The effect of that is that the representative-plaintiff must himself have a claim in the requisite jurisdictional amount. I suppose this case means our class action rule, particularly (b)(3), is somewhat limited in its application. That is to say, in cases resting juriddictionally upon diversity, a requisite will be necessary for the plaintiff himself to hold the claim for an amount in excess of $10,000. In some cases, it will not be possible to find a plaintiff with such a claim. I don't know that it is disastrous, but it does limit the operation of the rule. The decision is an interpretation of the statute with respect to diversity of citzenship actions. It also deals with (b)(3) of our rule. I should think it would be difficult merely by a change in the definition of the (b)(3) class to overcome the effect of the Supreme Court decision. What the Court is saying is that in class actions of the (b)(3) type, the plans of each of the numbers is separate and distinct from any other. I feel it is a misinterpretation of the diversity or citizenship clauses. I don't know of an amendment to Rule 23 which would obviate the decision.

Professor Moore: There are a great many (b)(4) cases. The majority of these are mainly in diversity areas.

Professor Sacks: With respect to Rule 26(b)(4), (1) I do have a suggestion which was made by Mr. Doub yesterday, that it would be a desirable drafting change to change the order of (A) and (B). I don't propose to give you the exact language now, but it seems the change would be right. I would propose to shift the order unless there is some objection; (2) Mr. Frank urged that we attempt to strengthen (b)(4)(A) making it more plainly exceptional. I have a suggestion which was written out by Professor Wright which seems to me to be perfectly acceptable. The suggestion would be, also picking up Dean Joiner's suggestion, "a party may not discover facts known or opinions held by an expert retained or specially employed by another party in anticipation of litigation or preparation for trial except upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain the fact or opinions on the same subject by other means." [Underlined portion is new language.]

Mr. Freedman: I would take the "exceptional" out because it makes it virtually impossible.

Professor Sacks: If we do that, we've simply not accomplished the purpose. The reason we put that clause in was to convey the sense of exceptional, and the real question is whether the committee accepts Mr. Frank's proposal that we should attempp to tighten.

Mr. Frank: I so move.

[The motion carried.]

Professor Sives: With respect to (b)(4)(B), I call your attention to page 9 of my memorandum. I think the new approach was generally acceptable. With respect to changes in that draft, first note that on line 3 the word "written" is deleted; second, the sentence on lines 9 and 10 now permits further discovery by other means. The question was whether we couldn't respond to those people in parts of the country that have not gone that far by providing discovery on court order, and yet permit the local courts to have a different procedure by rule for themselves. The proposal to carry that out would change that sentence on lines 9 and 10 as follows: "the court upon motion may order discovery by other means and may provide by rule for such discovery upon notice or request and without order."

Mr. Frank: I think that from our standpoint, with due deference to what we are told by the first, second, and third circuits' practice, that's the best we are going to get, and I move that we do it.

Dean Joiner: I think it is a grave mistake to put an exception of this kind into local court rules.

Judge Thomsen: [To Dean Joiner]: What alternative do you suggest?

Dean Joiner: I prefer to have it either by court order or by open discovery.

Professor Lowdell: I think we all agree that it is unfortunate to ever have to have provisions in our rules for local variation. Isn't this the case of form against substance? The necessity for permitting us in the west to continue this practice, seems to me more significant than the general desirability against the local variation. The practice is so well-established of taking the deposition of an adverse expert, that it is diminished except by special showing in a particular case -- it would really come as a radical proposition in the Ninth Circuit.

Dean Joiner: I move an amendment -- that is, this sentence be changed to read "the parties may have other discovery by other means."

Professor Sacks: I don't think that is a solution.

Dean Joiner: It adopts the western approach.

Professor Sacks: Well, that's okay. If we want to, I did prepare a draft to adopt the western approach for the nation as a whole. That is our pamphlet approach.

Dean Joiner: I accept the sentence in the pamphlet.

Chairman Acheson: The choice is either leaving it as it is in the pamphlet or moving toward the new amendment.

Professor Sacks: . If, for example, the committee were satisfied that for the country as a whole, it wants to have the draft that I put on page 9 would it, nevertheless, insert a provision for a local rule for the circuits that want it? We could try to find that out, and then if we find it would not, at that point, we could say which of the general practices we prefer.

Chairman Acheson: Could we have the sentiment of whether a local rule should be permitted or not?

[The vote on having a local rule was 4 for and 7 against.] What should the general rule be?

Dean Joiner: As a policy matter, it seems to me to be appropriate to provide for a right on the part of the opposition to require a person to identify expert witnesses which are to be called, the right of the party of the opposition to require that person to make a formal statement, which he may or may not do at this point, to avoid duplication, and the right of that person to discover the person identified by any means appropriate under these rules. The discovery by deposition, written interrogatory, or by any other kind of discovery. One can then choose, if he wants to, to move directly to the discovery practice, or he can choose to look at the statement and then if it's not adequate, move to the other discovery problems.

Professor Sacks: May I say that in terms of drafting, it is essentially the pamphlet draft -- itds a question of whether you would like to call attention in some fashion to the possibility of the exchange of written statements. That, I think, would become an optional matter. Once you say discovery is routinely allowed or unlimited, the point to a written exchange disappears unless the parties decide they want to do it. The policy seems to me to be between the pamphlet approach of unlimited discovery, and the draft on page 9 which has an exchange of written statements and a provision for discovery by court order thereafter, and I think in light of the various responses and comments, the draft on page 9 is clearly the better one. The pamphlet draft allows discovery by any and every means whatever. The draft in the memorandum permits the exchange of written statements and then discovery thereafter by order of court.

Judge Feinberg:[To Professor Sacks]: Is there anything in your new draft on page 9 which prevents a judge in the western part of the country from ordering further discovery of an expert?

Professor Sacks: Not at all. It would seem to me that if one is in a part of the country where this practice is recognized as desirable and useful, I would think the judge would reflect that, and issue the orders more freely than judges in the parts of the country where it is new and lawyers are worried about it.

Mr. Doub: I think the practice of the Ninth Circuit has been over-emphasized. In nine other circuits, that's not the practice at all. I don't know why we should give such consideration to the Ninth Circuit. I'd like to move the reporter's redraft of (B) be adopted.

[There were 9 votes in favor of adopting the reporter's redraft and 5 against. The motion carried.]

Professor Louisell: Could we have a note that states there is no intention to meet the Ninth Circuit practice or to pass any judgment of derogation of it? In other words, the recognition of the problem that what goes on in the Ninth Circuit might be taken into account as the continuing norm there.

Mr. Coleman: On page 9 in line 10, after the word "order" could we insert "further"?

Professor Sacks: It does help.

Chairman Acheson: The word "further" will be added without a formal motion, since there are no objections.

Mr. Frank: I suggest we strike lines 10 through 12 beginning with "Discovery" through the end of the sentence. To the sentence beginning on line 9 with "Upon motion, the court . . ." I propose adding "subject to such restrictions as it may impose" to the end.

Dean Joiner: I support that proposal.

Mr. Frank: If we are ready to vote, I would like to state the motion. The matter be compromised by striking the last sentence and adding "subject to such restrictions as to scope as the court may impose."

Professor Sacks: The first proposal for a vote is that we insert "unless the court orders otherwise" in front of the last sentence.

[It was unanimously adopted.]

Professor Sacks: The substitute proposal is to strike out the last sentence and add "subject to such restrictions as to scope as the court may impose."

[It was carried by a vote of 7 for and 5 against.]

[A vote was taken on the proposal of entering in the Note a provision stating that a judge may order that discovery of the expert's opinion is restricted on direct examination.]

[The reporter brought his proposed changed to Rule 26(b)(4)(C) to the attention of the members, which were written out on pages 10 and 11 of his memorandum.]

Professor Sacks: The point now is that in (C) we have not provided for a payment of fees and expenses which were incurred by a party in obtaining facts and opinions from his own expert where a party seeking discovery of those obtained his discovery under (b)(4)(B). The reason we did not was he was not getting

anything new. Now we have broadened the possible scope, we haven't required it, that the court may order a scope that goes beyond and may permit a party to use the other side's expert to build up facts and opinions for its own case. That, I feel along with Judge Wyzanski, should be accompanied by a power in the court to award to one side a fair portion of the fees and expenses built up.

[The reporter read (C) as he proposed it: "Unless manifest injustice would result, the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery. With respect to discovery permitted under subdivision (b)(4)(A) of this rule, the court shall require and with respect to discovery permitted under (b)(4)(B) of this rule, the court may require a party to pay another party a fair portion of the fees and expenses reasonably incurred by the latter."

Professor Sacks: This would clearly flag that (b)(4)(A) is a "shall" and (b)(4)(B) is a "may". It is true that we haven't focused on expenses in other parts of the rules and here [(b)(4)(C)] we did. The reason we did is because when you look at the cases on expert testimony and ask yourself "What has held the courts back in those parts of the country where they have held back?" One of the major considerations has been the feeling that it was unfair to permit one side to get the benefits when the other side incurred the expenses of an expert witness.

Mr. Frank: I propose that the sentence which we have already adopted which says that one must get an order from the court or it will be subject to restrictions as to scope be further amended so as to provide "shall be subject to restrictions as to scope and as to expenses." The object being to be sure that one goes before the court only once, so as not to waste judicial time.

Professor Sacks: My suggestion is to put that into (C), but to draft it in such a way that it's tied to the court order.

[This was acceptable to Mr. Frank.]

Chairman Acheson: I would like to feel really assured that what we are doing is not in conflict with the good sense of the members of this committee.

Judge Feinberg: The matter is a rather simple one. I'm not addressing myself to the merits of whether we should have unlimited discovery of a trial expert. I will admit that is a close question. I'm addressing myself to a different proposition; that is, we went to the bar with discovery of trial experts limited in the way presented in the draft. We are now dropping that. I would assume that if we were to drop that, there would be a response seeking us to take that course of action. I think what we are doing, is going further than we did before and we don't have the request of the Bar to do so.

Mr. Frank: I thought that what we were providing was unlimited examination of experts and I was taken by surprise to discover these limitations were there. I found great enthusiasm around the country for a broad discovery of this sort. We expressly agreed that the language of the sentence that we have stricken should be moved to the Note as an illustration of the kind of scope of restriction which a judge may wish to have. It seems to me that we have avoided the hazard of expressly authorizing a local rule and at the same time allowed variant local practice.

Professor Sacks: The criticism we received on this rule was not to get rid of the sentence. It took the form of raising some questions about the standard. Most of it focused on the language previously given to be taken out, but there were comments on this.

Mr. Frank: The motion is that the section on page 9 lines 9 to 12 shall be changed as follows: the last sentence will be stricken. The sentence beginning on line 9 will read: "Upon motion, the court may order discovery by other means and may make subject to such restrictions as to scope and provisions as to expenses as it may deem appropriate."

[Along with his motion, Mr. Frank stated Judge Thomsen's suggestion of placing the last sentence into the Note be accepted.]

[The vote was 7 for and 6 against.]

Professor Sachs: The next rule is 26(d) and, as I indicated in the agenda, I don't think you can consider the issues of priority of 26(d) without having recourse to the question of timing as in Rules 30, 33, 34, and 36. I think in talking about 26(d), we might conceivably limit ourselves to that and go on to the others later. I think Rules 33, 34, and 36 could be treated as a unit. In other words, whatever we do to Rule 33, will be done to Rules 34 and 36. Rules26(d) itself deals with the priority problem by eliminating what is the most serious part of the problem, namely, the long-range priority that one side gets over another, particularly in depositions, where under present rule there must be a notice of deposition first. To summarize, our major changes were to make clear that one'side's discovery activities did not preclude the other side from going on depositions to focus on the time the deposition is taken and as to that to give the defendant a 20-day leeway from the time the service and complaint is served. The plaintiff gets no leeway there, and with interrogatories, to give either side 30 days. My suggestion is that we leave 26(d) as it is. In other words, that we adhere to the principle that one side's discovery does not preclude the other side from going forward. With respect to Rule 33, I have made a proposal that we set the time as 30 days to answer interrogatories, but in any event, not less than 45 days for the defendant from the time he is served with the summons and complaint.

Mr. Doub: I move that we adhere to our draft on 26(d).

Mr. Frank [To Professor Sacks]: We do have two problems: (1) is the priority problem under Rule 26 and (2) is the general order of procedure problem as it relates under 30, 33, etc. Under the existing rules, the priority problem has solved itself peacefully. It is a matter of basic philosophy with me that one doesn't change rules unless there is an appreciable problem to be solved. [To Chairman Acheson] The existing proposal has in fact been worked out in most areas. As a matter of timing, the defendant gets a notice first. Within reason, the defendant goes on and takes depositions if he so chooses. Then the plaintiff picks up, but there can always be local adjustments where there has to be and what normally happens is that counsel works it out. [Professor Sacks read Rule 33 on Timing.] [Mr. Doub agreed with the changes of Rule 33, in that it would cut down on the number of motions filed in court and requiring a judicial termination extending times.]

Judge Thorsen: I would like to move with respect to Rule 33 that we adopt the 45 days for defendant to answer but cut out the portion of the plaintiff.

[The motion carried by a vote of 9 for and 4 against.] [The reporter stated unless instructed otherwise, he would make the same changes in Rules 34 and 36 as in Rule 33.]

Mr. Frank: I move that we keep the existing restriction as to plaintiff's demand for documents and for admissions, so they cannot be served. I particularly point out that it seems extraordinarily horrendous to give all the material.

Mr. Morton [To Mr. Frank]: Why does it make any difference whether he has more time or less time?

Mr. Frank: It seems to me that in these big cases one takes a flimsy complaint, one can then send in the six-months leave time an absolute bail of material.

Dean Joiner: I just can't see why that is better than the present rule.

Judge Thomsen: Then we want to make it 45 days?

Professor Sacks: Yes, that's being done.

Mr. Frank: I will restate my motion: that we adopt the 45 days and not permit service of requests for admissions with the complaint except upon special order of the court.

Judge Thomsen: That's two motions.

Mr. Frank: All right, I move service of requests for admissions cannot be with the complaint.

[The motion lost.]

Mr. Frank: Now, I move the time be 45 days.

Professor Sacks: I would simply say that unless there is objection from the committee, I will have the same draft for Rules 34 and 36 as I have for Rule 33.

[This was agreeable with the members.]

Professor Sacks: We are dealing with the problems of timing as they relate to Rule 30 on depositions. We have handled the problems as they relate to Rules 33, 34, and 36. Now as they relate to Rule 30, let me call your attention to what the pamphlet submission did. What we provided was that the plaintiff is required to seek leave of court if he seeks to take a deposition prior to the expiration of 20 days after service of the summons and complaint upon the defendant. That provision standing alone would have given the defendant a 20-day edge which would then have to be qualified by whatever time it takes the defendant to get an attorney. We did provide for some exceptions. One exception is our admiralty exception, which simply refers to subdivision (b)(2), and the admiralty exception caused no difficulty either in the committee or the Bar. The other exception is [exception (1) in 30(a)] that the plaintiff need not seek leave of court, if the defendant has served notice of taking deposition or otherwise sought discovery. In other words, the 20-day edge does disappear if the defendant moves for discovery.

Mr. Doub: Didn't the New York Bar recommend 40 days and the ABA 45 days?

Professor Sacks: The ABA recommended 45 days for Rules 33, 34, and 36 -- not Rule 30.

Mr. Frank: I move that we settle as a matter of policy that the edge which we have put into Rule 33, 34 and 36, should also be in Rule 30.

Mr. Coleman: Turning to page 39, line 12, of the pamphlet, I suggest adding after "sought discovery," the following: "and 30 days having lapsed from the commencement of the action". In other words, we don't undo the priority that has been given to the defendant.

[The chairman requested a vote on Mr. Frank's motion. The motion lost by a vote of 5 for and 6 against.]

Mr. Doub: I move that the 20 days be increased to 30 days in Rule 30. [The reporter supported Mr. Doub's motion. Mr. Doub's motion was carried by a vote of 8 for and 1 against. Mr. Coleman restated his motion of adding the phrase in line 12 on page 39 of the pamphlet. His motion carried by a vote of 7 for and 6 against.]

Professor Sacks: Regarding Rule 33, we included a provision which we knew was controversial. It relates to what we call opinion, contention, and legal conclusion. When we formulated it, we confronted what we took to be a considerable division in the cases. In an effort to resolve the division in those cases, in our pamphlet at page 61 the proposal we made was "an interrogatory otherwise proper is not objectionable merely because an answer to the interrogatory involves an opinion, contention, or legal

conclusion." We had a lot of reaction to this. I think it's fair to say that the reactions do make a distinction between the three items we included in our draft. What I propose is on page 25 of my memorandum. [Judge Wyzanski suggested changing the reporter's draft from "not objectionable because" to "not objectionable merely because". The draft was adopted as modified by Judge Wyzanski.]

Professor Sacks: The next item is Rule 34. With respect to Rule 34, I call your attention to the fact that there is a division of opinion on our elimination of good cause. The arguments made about it have been considered before. Our point has been consistently that whatever protection is appropriate is afforded by Rule 46(c). My recommendation is that we stay with our draft which eliminates good cause.

Professor Louisell: I move approval of the reporter's recommendation.

[The motion carried.]

Professor Sacks: The problem on non-party is not a problem of principle but whether we have the right draft: (a) the question of scope and (b) the question of whether we have solved the problem of non-party. With respect to the question of whether we should have such a provision, this is a very difficult thing to work in -- to work out the detail -- and I have not found

any indication that anyone was hurt by the absence of such a possibility. Nevertheless, what we did, we did not include a provision but we did call attention to the problem and invited the Bar to comment on whether they had run into problems by the inability of having a procedure of getting an order to a non-party. With the comments I received, I made an effort to draft a provision. I had the question "What should be the scope of an order to a non-party to permit discovery?" It could be limited to land cases, if being a prime problem. Our problem is that we have to assume that we have courts of limited territorial jusisdiction. My effort here has been to protect the third person by the provisions we make for the service of the notice of motion for an order. To guard against the many cases where the person is outside the state where the action is pending, I have a provision "the order may also be issued by the court in whose district is located the document, thing, or land, that is the subject of the order if notice of motion for an order is served by delivering a copy thereof to the person in possession, custody, or control."

Mr. Oberdorfer: What is the procedure for the enforcement of the subpoena in civil cases?

Professor Sacks: Contempt. If no motion is made to quash, Rule 45 provides "the court may treat a failure to obey a subpoena as a contempt."

Mr. Frank: I simply do not want to vote on a rule without a Note which contemplates and compares.

Professor Sacks: The main difficulty is that the federal problem is distinct from the others.

Mr. Oberdorfer: I move that we adopt the suggestion of putting a note with this Rule.

[The motion carried.]

[There was a suggestion to place "upon notice" in line 25 of the reporter's proposed changes in subsection (d), following "a party serving the subpoena may move". It was unanimously adopted.]

Professor Sacks: Regarding Rule 36, Requests for Admission, on pages 29 and 30 of my memorandum, I set out to make a minor change in the timing provision which change is in accordance with what we adopted earlier on Rule 33, and then having that, the language began to get so awkward and so difficult that I came back to something which had been lurking in the committee for some time, but never made it into the draft. In this case, however, it seemed to fit. It is different from the other rules in one mechanical feature; that is, it does not necessarily require a response. [He then turned to page 30, lines 31 through "defendant" on line 33, and stated that portion was to be stricken.]

Dean Joiner: I suggest as a matter of principle that we do not adopt this.

[It was withdrawn by the reporter.]

Professor Sacks: [On Scope: Reference to "Matters" Rather Than "Matters of Fact."] Now we shift from matters of fact. We have the Rule 36 analog to our Rule 33 problem. As to that, we have the present Rule 36, which says that one can request an admission with respect to any matter of fact. In our pamphlet draft we cut out "of fact", we simply said that one could ask for a request for admission with respect to any matter. It was made very clear in the Note that in doing so, we were permitting requests that might touch on opinions and some questions of law. The response with respect to Rule 36 simply hasn't been asvvoluminous or as pointed as the response to Rule 33.

Dean Joiner: I think there is very real reason to go back to the earlier language of the rule and include the words "matters of fact".

Professor Sacks: The main purpose to Rule 36 is to make clear to a party what he has to prepare by way of trial. Now, it is true that in some matters all he is concerned with is facts. If he can get an admission of fact, he knows that does not have to be proven. But in other situations he needs to formulate his request for admissions for just that purpose. It seems to me if the rule is limited to "matters of fact", two things are true: (1) there are lots of cases in which courts have denied requests for admissions because they say

it's an opinion that is being sought and I don't think we want that; but (2) there are a considerable number of cases that have denied the request for admission because the court has said in some way law was involved in the request.

Mr. Frank: I regard Rule 36 and these proposals as the most substantial, worthwhile, significant thing we are offering. At the same time, I have become worried about the pure-law point for fear of the familiar problem of the re-creation of code pleadings. The Note shows that there are really problems on so-called mixed up questions of law and fact. Cannot we say something to the effect that if the matter is predominantly factual, it is to be subject to an admission and leave it to the judge in any given instance to decide where the weight is?

Professor Sacks: The proposal I have made is that instead of simply saying "any matter", we say "any matters that relate to statements, or opinions of fact, or of the application of law thereto."

[The proposal by the reporter was adopted.]

Professor Sacks: [On Rule 37. Failure to Make Discovery: Sanctions.] Here we are dealing with "Sanctions" and you will recall that we made a change with respect to the imposition of fees or expenses by the parties who were involved in Rule 37 proceedings. The existing rule provides that the court shall impose fees and expenses if the court shall find that the particular party or attorney acted without substantial justification.

Judge Feinberg: Perhaps we can make it less mandatory by changing the word "shall" to "may".

Professor Sacks: That would "water down" the existing law. We have two alternatives: the existing law and the pamphlet version. I could not find an in between.

Mr. Frank: I move that we adhere to the pamphlet version dropping the attorney.

[The vote was 6 for and 5 against.]

Mr. Frank: I move we adopt the pamphlet version as on page 37.

[The vote was 7 for and 3 against.]

Professor Sacks: Rule 37(c) deals with the award of costs to a party because the other side has failed to make an admission. Our changes in 37(c) were all quite technical and simply to conform it to what we had done in Rule 36. [He then stated his writing of the rule on page 33 of his memorandum was meant to be in the alternative. Therefore, it was changed by placing "or" between subsections (3) and (4) on line 169. His suggested writing (the new material being alternative (3)) was adopted by the members.]

Mr. Frank brought up the Honeywell proposals, which he thought to be the most provocative comment of them all. He moved that upon the mailing of the new proposals to the members for consideration, the reporter also send some concrete proposals

which would take into account the Honeywell suggestions. Because of the shortness of time left for the session, Chairman Acheson suggested finishing up the remaining rules and then spending the remaining time on controversial rules. Rule 26(a) Discovery Methods, which appeared on pages 10 and 11 of the pamphlet, was changed by adding "under Rule 26(c)" in line 32 after "court orders otherwise". The reporter had suggested the change because of the comments received by the Justice Department and the D. C. Circuit.

Rule 26(b) Scope of Discovery. The reporter stated the comments on this rule from the D. C. Circuit stated it was understood the Committee had not intended to confer a power to broaden discovery. The D. C. Circuit suggested, and the reporter agreed, "Unless otherwise limited by order of the court" should be in line 35. This suggestion was accepted by the members.

Regarding lines 68 through 69 of the pamphlet draft, Mr. Frank stated Judge Doyle had brought to his attention the fact that the rule states "prepared" when the Note covers "obtained" materials. He moved these two words be related. Mr. Freedman objected to Mr. Frank's motion. The reporter stated, however, he would change the wording to be consistent. The reporter brought up a minor point in subdivision (c) Protective Orders. In line 204 "being" should be "to be". His reason was it is prospective.

On subdivision (e) Supplementation of Responses, the reporter stated there were a variety of responses from the Bar. The one point he thought should be made was that there should be included in the Note a reference to the sanction of the exclusion of trial. He then suggested adding "new" at the end of line 260 to emphasize that one could only through new requests be "brought up to date". There were no objections to his suggestion. Lines 255 through 257 were suggested to be rewritten as follows: "A party who has actual knowledge that his response is incorrect, is under a duty seasonably to correct the response." The reason being the comments received stated "A party who knows . . . that his response is incorrect" reflects a wrong-doing, or knowledge that the party knew his response was incorrect upon giving it. Mr. Doub stated he felt it could be better understood by just striking "knows or" from line 255. The reporter conceded his suggestion. Mr. Frank moved Mr. Doub's suggestion be accepted. The motion carried.

Regarding Rule 30(b)(1), the reporter stated some of the comments received had suggested adding "as described in the subpoena duces tecum" in line 36 following "thereunder". Mr. Morton stated the duces tecum of the subpoena contained the designation.

He suggested "the designation of the materials to be produced, as set forth in the subpoena shall be". The reporter agreed with Mr. Morton's suggestion. It was accepted.

Regarding Rule 30(b)(4), Mr. Doub was opposed. His reason being if someone designates any other method of recordation besides the stenographic method, it means the other party has to bring in a stenographer -- which would be a duplication. Mr. Frank agreed with Mr. Doub. The method of recordation should be by stipulation. The reporter suggested language pursuant to their suggestions: "A party taking a deposition may have the testimony recorded by other than stenoggaphic means, provided the court so orders." Mr. Frank moved the language be adopted. His motion carried.

Rule 30(b)(5) was adopted with the addition of "The procedure of Rule 34 shall apply to the request." at the end of line 73, as proposed by the reporter.

Regarding Rule 30(b)(6), the reporter stated a number of the comments which were received mentioned the use of the term "public or private corporation", or "partnership or association". In other words, governmental organizations were not mentioned. He suggested "or governmental organization, including any unit or agency thereof" be added to line 76. Professor Louisell suggested using "governmental agency" only. The reporter stated he would look into it further to determine whether "governmental agency" encompassed all the terms which were suggested by the comments. This was acceptable with the members.

It was then suggested by Mr. Morton that "matters" in line 83 be changed to "knowledge or information". This would eliminate "hearsay". The reporter then suggested changing lines 78 through 79 as: "The organization so named shall designate persons having knowledge or information concerning the matters and who are officers, directors, or managing agents, etc." There were objections from the members. The reporter then suggested the only amendment to the pamphlet draft of this rule would be to insert the word "reasonably" before "available" in line 83. Mr. Frank suggested lines 82 and 83 be revised so the corporation could designate which individuals would be responsible to testify on which subject matter. The reporter suggested adding "in a sealed envelope" in front of "on the party asking" in line 138. His reason being that if counsel could not be present at a deposition or did not want to spend the money, he could serve questions in a sealed envelope to the person officiating the deposition. There was no objection from the members.

Regarding 30(f)(1), there were no objections to the reporter's suggestion of adding "upon the request of a party" into line 209 prior to "be marked". His reason being that some areas do not require that documents be marked.

Regarding Rule 32 Use of Depositions in Court Proceedings, the reporter called attention to subdivision (4) lines 44 and 45. He stated the Evidence Rules Committee preferred it to read: "require him to introduce any other part which ought in fairness to be considered with the parts introduced." This was agreeable with the members.

Regarding Rule 33(c), the reporter called attention to the condition which had been inserted into lines 77 through 79. There were very few objections from the Bar on this condition. Mr. Frank asked the reporter if he would be in favor of putting into the note an express illustration that where the response can be given by computerized information, it will be usually assumed that the answering party, rather than the asking party, can determine easier that appropriate orders as to costs may be included in the proceedings. The reporter replied he would consider it, however, he did not really see the purpose of it.

Regarding Rule 35, Physical and Mental Examination of Persons, the reporter called the attention of the members to line 55, He suggested adding "or the taking of a deposition of a physician" after "examining physician". There were no objections to the addition.

Regarding Rule 37(a), Mr. Frank raised the points of the Justice Department and the D. C. Circuit about notice when there is a deposition. He felt the notice should be restricted

to the parties present. The reporter referred the committee to page 85, line 34. He stated that the D. C. Circuit and the Justice Department comments would include the addition of a parenthetical phrase after "affected thereby," as follows: "except that notice to the persons and parties present at the taking of the deposition by oral examination is sufficient when application to the court is desired in the course of the taking of the deposition." Mr. Frank moved the adoption of the addition. The motion carried.

The reporter then referred to line 57 of Rule 37(a)(2). He suggested the addition of a new sentence at the end of the subsection as set forth on page 32 of this memorandum. "If the court denies the motion in whole or in part, it may make such protective order as it would have made on a motion made pursuant to Rule 26(c)." Mr. Frank moved approval. There were no objections. In line 51 of 37(a)(2), the reporter suggested changing "apply" to "move". He reasoned in various places the committee referred to motion. There were no objections.

Regarding Rule 37(f) Expenses Against United States, the reporter stated in the present draft the Committee had decided not to have a complete ban on charges against the United States. Therefore, "To the extent permitted by statute" was added. The D. C. Circuit and the Justice Department suggested the subsection be changed to read "Except to the extent permitted by statute". There were no objections to this change.

The meeting adjourned at 5:45 p.m.