EXCERPTS FROM THE TAPE OF THE MAY 1966
MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES

The Advisory Committee on Civil Rules met in the Conference Room of the Supreme Court Building on May 20-21, 1966 at 10:00 a.m. The following members were present:

Dean Acheson, Chairman
Grant B. Cooper
Sheldon D. Elliott
Wilfred Feinberg (attended May 21 only)
John P. Frank
Abraham E. Freeman
Arthur J. Freund
Albert E. Jenner, Jr.
Charles W. Joiner
David W. Louisell
W. Brown Morton, Jr.
Louis F. Oberdorfer
Roszel C. Thomsen
Charles E. Wyzanski, Jr.
Benjamin Kaplan, Reporter
Albert M. Sacks, Associate Reporter

William T. Coleman, Jr., and George C. Doub were unavoidably absent.

Others attending all or part of the sessions were Judge Albert B. Maris, Chairman of the standing Committee; Professors Maurice Rosenberg and William Glaser of the Columbia University; Professors Charles Alan Wright, and James W. Moore, members of the standing Committee; Lee W. Colby, member of the Advisory Committee on Admiralty Rules; and William E. Foley, Secretary of the Rules Committees.

The Chairman opened the meeting at 10:00 a.m. and welcomed the members. He stated that Rule 30 contained an item on the de benne esse proposition in maritime cases and suggested

this rule be tabled until further consultation with the Admiralty Committee. The meeting was then turned over to Professor Sacks, the Associate Reporter.

Professor Sacks announced the rules which have been slated for consideration today were rules on which points of tentative agreement were reached on prior meetings.

Rule 26

(b)(1): Professor Sacks explains the background, and states Mr. Morton has questioned the use of the word "relevant" on page 26-3, (b)(1), lines 29-31 to say "Parties may obtain discovery regarding any matter, not priviledged, which is not clearly irrelevant to the subject matter . . . ."

Mr. Morton: I see the difference, Al, and you don't -- whether it puts the relevance on the discoverer or burden of objecting on the answerer.

Professor Sacks: If we change the rule verbally in that way we will not have accomplished anything of substance but I suspect a rather considerable emotion value . . .

Mr. Morton: I suppose the reason suggested changes it would tend to eliminate resort to the court. I think there would be fewer emotions, fewer resorts to the court if my proposed language were used.

Discussion was held and one suggestion made was that this might invite more litigation. Mr. Morton said he had not felt that it would but he would like to have the opinions of the other members.

Mr. Frank: Asked Mr. Rosenberg if in correspondence he didn't agree that relevance was the greatest problem he had. He asked Professor Rosenberg to summarize what he hand handed the Committee at the beginning of the meeting.

Mr. Rosenberg: On the question of relevance what my statement says is it is true that it emerges as the issue that arises most frequently as the trouble and friction between the parties this is a serious matter of frequency. The memo tries to ask why it is that relevancy occupies that enviable position and it says that relevancy is virtually the only peg on which the lawyer who objects to what the other side is looking for or doing with respect to discovery -- it is the only peg in which he can hang his objection. The only other words are privilege and then abuse, in some form, as the occasion for proective order. The lawyer who doesn't want to make discovery instinctively says what you are asking for isn't relevant. Now when you actually analyse the circumstances in which that objection is made it clusters around some familiar issues: these are such things as might acquaint a personal injury case discovery in defense liability insurance custody in limits, and he asks about interrogatories about surveillance materials on impeaching evidence and maybe insist the plaintiff devulge information about his tax returns. Must the plaintiff disclose prior accident, illness, etc., and part of his anadomy involving the personal injury litigation. Must he divulge information of

These matters when thought out are said by the respondent party to be relevant. How do you deal with all these issues. The reporter says he will take one issue at least -- discovery of insurance policy and limits, and write a flat rule about that because there is agreement that whatever arguments you can make theoretically about the relevancy of insurance policy and personal insurance cases seems to be agreement that they should be discoverable. Rule 26 does say that insurance policy should be relevant by incident of clarity. What about those: income taxes, impeaching evidence and surveillance material. Where the draft says we can't improve on the case law but write a flat rule and so those issues raised under the banner of relevance and tabled what you then have to ask yourself is with respect to the other common issues that mascarade under relevance is there a rule you are prepared to write on which you think will improve on the way the courts are handling the issue. Generally speaking the draft before us says there isn't any rule that can be conceived right now that will take care of one or another of these distinguiable problems in better ways than the cases now do. L in correspondence over a period of time asked the reporter, can't you do better than relevance as the test. I think what we have before us is the answer to that question and I must say that as far as being of help myself on rules or definations before us I pass, I can't think of any others.

Dean Joiner: Perhaps we would do better if we turned our attention in addition to the general statement of 4-6 subsidiary problems in addition to insurance. Handling those specifically under certain circumstances by saying that something is or is not permitted.

Professor Rosenberg: Yes, that is the line of inquiry. Can you do better on income taxereturns, impeaching and surveillance evidence and some other specific incidents.

Professor Rosenberg: Another large issue is in the area of legal theories, contentions, etc. One other main objection which sometimes is handled as problem of remoteness or undue relevance is whether one side can ask for the other side's contentions, conclusions, opinions and characterizations. The cases are in chaos and it would be very helpful if we could give guidance to the courts. There are problems and I suggested in my memorandum, page 4, which says you should add to 26(b)(1) a sentence, page 26-4 of your draft, following line 41 as sentence to read: "It is not ground for objection that the matter sought calls for a legal theory, contention, conclusion or characterization." Now you might want to stiffen that up by saying that it is not in itself ground for objection that the matter calls for legal theory, contention or conclusion. But my memo goes on to say that phrased in that manner the courts would be left to discretion as to whether in a particular case they thought it would serve any useful purpose to allow the party to inquire into contentions, conclusions, etc.

Judge Thomsen: I think part of the problem we have is we are attempting to make the word relevant and irrelevance serve additional functions. I think the matter of insurance problems should be handled separately. If you look at it logically you can't discover an insurance policy. It is not admissible in evidence and it can't lead to admissibility of evidence. It is extremely relevant along the question of settlement. It seems to me that this is a separate problem. I would like the rule to deal with problems straight on and not force judges to twist a rule to try to accomplish the purpose they think desirable or undesirable. I think we want to take matters like insurance coverage and decide "yes" or "no". And that the business of legal theory, contention and characterizations -- they are wide words and I am not against having them in a discretionary way . . . .

Mr. Jenner stated that he thought the issue was whether to deal with relevancy.

Professor Sacks: Charlie Wright had presented this question as to what to do about contentions, legal theories and conclusions and put it in his letter and suggested to put it in the context of Rule 33, as it in fact has arisen primarily in Rule 33. I don't mean in fact it has to go into the rule it could go into Rule 26, but I did list it in the agenda for Rule 33. I think it useful to have had Maurie present the full picture of his memorandum and I wonder if we can't come back to the specific question of relevance with the understanding that we will deal with the matter of contention as a separate and distinct problem.

Mr. Jenner: The word relevancy in 26(b) has been a governor, a governor that trial lawyers, practitioners and the judge who sits on the bench had had some feeling for. Relevancy seems to me in the administration of the discovery rules goes to a number of things: consideration to really sometimes just saying is the party going too far, now into physical examination, inquiries as to income tax returns, past crimes and matters in practice, relevancy after all is a measure of due process. There are a number of cases if you will inquire into the matter that is clearly irrelevant, wholly apart from the issues, that is basis of due process. I think courts are working it out reasonably well and if you read the cases you think there is a lot of trouble and controgersy. But what you are doing is aggravating the situation by making the proposed negative change in 26(b). I don't think there is any real problem. The Committee must keep in mind to the district judge rests the administration of the rule and whenever you change in an area such as this the district judges all over the country are going to be met with a lot of problems and a lot more motions, at least until it is all worked out again.

Mr. Acheson: We are prepared to accept this view or does anyone else want to say anything?

Mr. Frank: We can I think separate this question from the one presented by Maurie Rosenberg's memorandum because the precise issue is -- shall we stand pat on the one word relevance or should be attempt to add to it in some way with a series of specifics?

Mr. Acheson: I think the issue is narrower than that -- it is whether we want to say relevant or use the double negative irrelevant.

Mr. Frank: That is all right.

Mr. Morton: I would like to say one other thing. I think it is preposterous, even though Al doesn't think it is so, that in some places including the District of Columbia, including respective government lawyers as now stated is an acknowledgment by the answerer that the request is directed to relevant subject matter. I know this is not intended but it is the result of the rule saying one thing and meaning another.

Mr. Acheson: Most of the Committee thinks there are helter delta reasons for not changing it. Am I right? Then lets leave relevance and go on to other issues.

Professor Wright: This does not, however, to the reporter's other proposal to Mr. Morton, that in the language making discovery is not a concession for relevance for purposes of trial. This I take it would help Brown out without getting into a double negative.

Professor Sacks: On my memorandum, page 1, I suggested a possibility of meeting this point that Brown made by adding to 26(b) the sentencing "The making of discovery, whether voluntary or under court order, is not a concession or determination of relevance for purposes of trial." That comment was exactly as described by Brown that I think it is silly. The point is not a major one. I continue to think it would be better not to add it. We could make it a point in the Note.

Mr. Frank: If we have used that point up is it in order to consider broadening of relevance in the terms raised by Mr. Rosenberg?

Professor Sacks: I had hoped we could take it in order as part of Rule 33.

Mr. Frank: This is a prpposed amendment to this very section we are talking about.

Professor Sacks: I understand that. We could take it now. I think it is sufficiently distinctive point so that there are assurances we will deal with it we could deal with it later.

Judge Thomsen: I would like to talk about "contentions." Suppose you have the plaintiff in a damage suit under cross-examination. You represent the defendant or vice versa and the examining lawyer says what is your contention with respect

to negligence or what is your contention with respect to contributory negligence? This certainly is not a proper question to ask the court. It most properly is an interrogatory where he and his lawyer can get together and state what his contention is with respect to the other fellow's negligence.

Mr. Frank: It is because I want to agree with what Judge Thomsen said that I wanted to take this matter up with Rule 26. And I think we would be prejudicing what would be the opposite point of view if we don't dispose of it at least a little here. The problem is you have given us a reogganization -- and I would like to say a perfectly grand reorganization -- the whole spot we get into serious trouble is right here on the point Judge Thomsen addressed himself. You have set forth the standards of relevancy in 26(b)(1) to apply to all discovery. It would thus apply to both depositions and interrogatories. Mr. Rosenberg has followed you and has therefore proposed this go to the standard of relevancy in 26(b)(1). I personally agree with Judge Thomsen that this would be wholly improper for depositions but desirable for interrogatories. And therefore I would like to see the organization pattern broken to that extent and put this in 33 so it is restrictive to interrogatories. But I don't want it if othes think it should be in 26(b)(1) that should be faced before we get off this rule.

Professor Sacks: My own view is it would be better in Rule 33. If there is strong feeling it should be in 26 I will be happy to do it. We are not bound.

Mr. Cooper: I move it be deferred until Rule 33.

Professor Sacks: Then I take it that 26(b)(1) is finished.

Mr. Acheson: I take it the sense of the Committee is subject to going back in the light of future discussion 26(a) and (b)(1) are tentatively approved.

26(b)(2)

Professor Sacks: On this point of insurance policies I have this listed as a point which tentative agreement was reached at the last meeting, and we did have a full discussion about the insurance policy. The substance was just about what is in the Note ..... I do have one editorial change on page 26-4, line 44, where it says "which the other party's insurer may be liable" which should be changed to say "which an insurer may be liable." This will take care of cases in which policy covers third persons under some circumstances. We would want to avoid having a large scale dispute as to whether there was policy coverage.

Judge Wyzanski: Are you quite clear this is insofar as our policy. Is this a rule of procedure?

Professor Sacks: I would think it is a rule of prêcedure in the sense that it involves the disclosure of information and that sense it is a part of discovery. Its purpose is ....

Mr. Acheson: What shall we do? Pass this on with a note to our superior committee that we have some doubts about the constitutionality of this rule.

Mr. Freedman: I think it would be unfortunate to attach a note to it because it would call specific attention to it to the point that I don't think it deserves. I think Professor Sacks has made the point very well and to put a note in it now would express doubts that creats doubts where I don't think there are any.

Mr. Acheson: I am inclined to agree with that. May we pass on?

Professor Moore: This is something the bar and judges should have attention called to it long before it gets to the standing Committee. Maybe you don't need a note, this is something the bar should have a very good chance to discuss in completeness long before it gets to the standing Committee.

Dean Joiner: What do you mean by "this"? The discovery of insurance policies? .... I don't think there is any doubt,

Mr. Jenner: It has been seriously argued.

Professor Sacks: Judge Wyzanski, are you suggesting we put something in the Note on this issue?

Judge Wyzanski: Let me make it clear. I think the Supreme Court of the United States at least by majority vote will sustain this as being procedural. The only problem I have is whether we ought to draw attention to the bar to the fact that we have considered it and we are, for the reasons you suggested

Al, persuaded it is within our provinces.

Mr. Jenner: I would share that view. Would it help any if instead of putting this in terms of discovery under Rule 26 that Rule 16, the pretrial rule, be amended to provide that the court may and, or, compel the production for use in administering the discovery in the pretrial rule. When you get down to it that is what the court is doing.

Mr. Cooper: Bert, wouldn't that delay it?

Professor Sacks: It seems to me that what change you have of settlement before pretrial, which is the problem most of the cases go along, but the other thing is what I think is more important is the question of appraising the matter of preparation a case should take. I just wonder if it will change the question of power.

Voice: I don't quite see why if you have the power in Rule 16 and don't have it in Rule 26?

Judge Feinberg: Yes, but doesn't it pinpoint where the power comes from? I don't think it would be changed in Rule 26 to Rule 16, but I think if it is going to be handled in the note, as Bert said, is hopeful if the court can compel people to get together to discuss settlement. It certainly should be able to compel them to disclose facts which bear on the subject. I think that is the real reason for focusing on pretrial procedure and discussing what is being done on it. I don't think it should be changed in the rule, but the note might make reference to that.

Mr. Acheson: Then I take it we are prepared to pass b(2) with the amendment that we made and the Note.

Professor Sacks: This now brings us to Rule 26(b)(3) on trial preparation and the related part of elimination of good cause in Rule 34. They have to be taken together as noted by John Frank in his memorandum.

Professor Sacks: Stated there is substitute language for the first eight or ten lines as stated in his memorandum. Explains the substitute which was in response to comment of Mr. Morton, and which was explained in his Memorandum, on Comments Received.

Professor Sacks stated his thoughts were that it is better to use undue hardship or injustice than to use good cause in this 26(b)(3). My reasons are as follows: Good cause is a term that has been associated with Rule 34; it has been used to apply to a wide variety of cases, the result its use in a wide variety of cases has been a good deal of confusion with courts wondering about what it means. Of course you have the problem of relating it to work product and have been further confused by what it means so that at the present time if one looks to good cause in a nice way it comes frayed down with a lot of confusion. There is virture it seems to me in breaking away from a phrase that has been so confused. Another point is that undue hardship of injustice is closer to the Hickman Detailer standard in verbal terms and the third is that it is a great deal closer to what the various state courts have

put in their rules when dealing with trial preparation. And finally, I would agree entirely with John Frank that in any inherent sense undue hardship or injustice does not tell us any more than good cause. Both are very general phrases. This is what makes important in my view the listing of factors on pages 26-5 and 26-6. At some point, of course, we have to deal with the suggestion made several times by Charlie Joiner and create an additional exception for witnesses statements. I don't know whether you want to bring that into the discussion or not.

Dean Joiner: No, we will bring it up later.

Mr. Freedman: I am concerned about this new element being injected into ....(Thinks this should only be with leave of court)...

Professor Sacks: Charlie Joiner has a suggestion which I thought we might delay, but I see we can't. His suggestion is set forth by me at page 26-14.

Dean Joiner: In its simplest form the suggestion is one that says basically that statements about facts of witnesses ought to be discoverable as matter of right and not as the draft shows statements from parties only and as such there ought to be a way of getting these from the witness.

Mr. Freedman: I think at the last meeting it was shown that Charlie's suggestion was favored.

Professor Sacks: I don't think we can say it was favored or disfavored. There was a strong feeling that we should not have a vote and it was brought back by me because it seemed important enough that it had to be presented. You are arguing for additional exception on 26-14 or such version thereof.

Mr. Freedman: Yes, I think it should be in Rule 26. ....

Professor Sacks: There was general agreement that the statement of a party should be discoverable as a matter of course.

Mr. Freedman: I think we went further than that.

Mr. Acheson: Never mind, let's talk about the merits. What are the objections to the draft?

Mr. Freedman: I would like to strike out the requirements for good cause in 26(c) and substitute if necessary a provision which would enable any party who feels there is any legal impression, conclusion or contentions contained in any such statement would be required to apply to the court for a protective order. Starting on line 54, the language "only upon a showing that denial of production will unfairly prejudice the party seeking the production, etc." We would insert therefor "subject however to the right ofvany party or discoveree the right to apply to the court for relief in the event he feels any statements or documents which are subject for discovery contain contentions, etc., of the attorney involved.

Mr. Acheson: Would you strike out all of page 26-5?

Mr. Freedman: No, you would have to leave it in or at least modify it in determining when the party goes to court for protective order. You would have to have some showing of good cause and it would have to be defined here.

Judge Wyzanski: Assuming your suggestion has some merits, tactically, I think, you are making a great mistake because even if you were to persuade this Committee you couldn't possibly persuade the bar as a whole to go that far because I think the ... Hickman-Taylor has been interpreted either correctly or incorrectly to be much

more protective than this rule. I think the majority of the bar would regard it as a considerable relaxation of the Hickman-Taylor rule and it is as far as I think you can possibly go that doesn't involve (blurred).

Judge Feinberg: I would like to add a word to what Judge Wyzanski said to which I agree. I think Mr. Freedman is merely suggesting a burden, not suggesting a change in text. In either event if someone is going to object to the production of a document because it reveals lawyers work product the court is still going to have to apply the test that is set forth in this rule. It is true that Charlie Joiner's suggestion goes much further than Mr. Freedman's but as I see it all you have done is, Abe, to say put the burden on the person who wants to give over the document to go to court and not suggesting a change in text.

Mr. Freedman: I think it is a little of both ....

Mr. Frank: May I ask this as a point of procedure? If the point of view which I would like to present about this were accepted by the Committee, then we would never reach Mr. Freedman's point because, under my own view, we wouldn't do this at all. And, therefore, the question arises do you want to present the fundamental question or do you want to go to the details of a particular amendments?

Mr. Acheson: Let us hear your proposal.

Mr. Frank: Mr. Chairman, may I say I think for this two-day session this is the largest single matter I suppose we have by far. We put it off last time because we had not had adequate time to think about it and now we have. Would like your indulgence. I have presented my thoughts in writing for those of you who have had the chance to

go over them. I think we start with the fundamental thought that we have now gotten to a new reach of our work and the matters of parties we can fight, bleed and die, what we do with out angels on the point of a pen is abstract. We are come -- it takes every law suit in the United States and we really need to be deeply concerned. We have begun our work in this field by asking Professor Rosenberg to do a great deal of work, large amounts of money have been spent and I understand an inquiry has been made, and if I may say so, what we are now doing is throwing away everything Professor Rosenberg has told us. I think this is wrong in part but not entirely. I am prepared in part to reject the Rosenberg materials but I do think we have to confront, at least, and articulate and make a responsible account to our sponsors as to why we are doing what we are doing if we do it. Specifically, Professor Rosenberg said the survey timing tends to deflate the importance of several discovery problems that are widely assumed to be not only vexatious but ~~xxxxxxxx~~ pprevalent: (1) good cause is a pre-requisite for inspection under Rule 34,(2) racing for priority, (3) voluminous applications for court orders for attempts to pry into new trial preparations. The Rosenberg Report, page 116, on the basis of the survey says those four problems were deflated in importance and that the major problem was the problem of relevance and that was the largest single problem which the bar and the courts have. What are we doing? In the draft before us, we are taking the four problems which the Rosenberg Report said were not very serious and we are solving those four. Each one of them we now proposed totally to revise good cause, change the rules as to

priority, change the procedures on applications for court orders, and change the practice to attempt to pry into lawyers trial preparation. All of those things which are covered were not very serious. Now we passed over relevance this morning as we were told the one serious problem by leaving exactly one word just where it was when we found it. Thirdly, this does raise the question of what is the relationship of social science research to the actual appliance of the law. We are more narrowly on the matter of good cause and how we should treat it. I wish to report as follows: I have made the best survey of the bar in my state, we have had present the leading plaintiff's lawyers, principle figures of the plaintiff's lawyers'organization. Leading defense lawyers and leading essentially neutral lawyers who are in litigation. None of them report any problems with good cause or any desire to change it at all. I have consulted Mr. Simpson of the Ninth Circuit Committee and others and they say "leave it alone." So why take a rule where there isn't any major problems and we are really assiduously weaving together the biggest damn mess we possibly can. I think that is wrong. To be specific, I do believe this. I believe first that the good cause test as set forth in Rule 34 and the Hickman-Taylor language have presented a problem of which do you use. I think the reporter has created a suggestion in the possibility of their being integrated. I propose specifically that we ought to do that. On the other hand as to good cause we have had a comprehensive opinion by Judge Maris in Allmont in which my section of the country has taken the survival. We have recently had the Guilford decision from the Fourth Circuit. I was talking to Judge Sobeloff the other day and he still thinks it is the Bible.

And he has some basis for doing so, because the U. S. Supreme Court expressly,within the last 2 years, took that very stuff out which we are now discarding. An indorsement by the express and comprehensive quotation. I am satisfied after thinking about it deeply that good cause presents obviously serious problems and as to how you interpret those couple of words, but I am also satisfied that it, like the conclusion we reached as to relevance a few moments ago -- namely, that our best efforts won't help it very much. We have reached one of those things which will not be improved by an attempt to elaborate. Therefore, my judgment to the proper solution is to put the good cause, Hickman-Taylor, language together in a proposition so that they will be together and we will understand it. Then expressly cite the Allmont case, the Guilford case and the Hickman-Taylor, and simply leave it to the judges to continue to work it out. Surely we shouldn't take something that affects all these law suits without having anybody in the whole country coming to us and saying now we need help on this situation. I have set out in my own memo my suggestion for whatever it is worth. (Refers to page 4) (this is a detour) but what Mr. Sacks has done by taking good cause out of rule 34 and putting it into 26 with trial preparation he eliminates it as a factor as he just very fairly said in all the other documents cases which don't involve trial preparation material. I am inclined to say that is sound, but when I say inclined, I am simply not sure. If I may direct your attention to the bottom of my memo on page 5 and top of 6 I said on relevant items outside the trial preparation as to which there may nonetheless not be good cause (triple negative)

see cases collected in Barron & Holtzoff/Wright and Moore. Those are all maters to which we are eliminating under this approach the possibility of good cause as a relevant test because Professor Sacks has removed this from 34 to the device he is using in 36. I am simply in doubt, I would hope that before we totally settle that point that we could have- not today, as I am taking about precise details,-but I would hope that we could have some express discussion with consideration of cases as to whether there is any injustice being done by making that type of change. But, coming back to the main line, I cannot see any good in striking the phrase good cause and substituting some other empty phrase and then attempting to define it. The suggestion that I make at the tope of page 7 that I believe the proper solution is to provide that such materials are as here involved, not otherwise privileged, should be required to be produced for any purpose under these rules "only upon a showing that there is good cause for their production; and where the materialshas been prepared by or at the direction of counsel for the benefit or use of the party in connection with the litigation, only upon an express showing of hardship or prejudice." That takes the good cause language from Rule 34 and the precise language of Hickman-Taylor and puts them together. The Note should expressly refer to the leading cases for the definition of good cause and attempt no more. However, I do agree that the other special provision ought to be as is. My solution, in short, is to adopt the approach of Professor Sacks in moving it to trial preparation materials pending discussion from persons more expert than I but then to make simply a simple rule of the sort suggested

and completely eliminate a lot of separate standards which I think is opening the damnest hornet's nest possible and starting us on another two years'of confusion.

Mr. Acheson: You would not have something similar to the bottom of page 26-5?

Mr. Frank: No, I would expressly avoid that by citing the cases and leaving that to be worked out by the decisions.

Mr. Oberdorfer: May I inquire for the basis of considering this some of the ideas expressed by the Reporter might not be reserved in an examination of (c) with respect to protective orders, while at the same time adopting something along the lines of Mr. Frank's that you reserve the case law and the literature ... (not very clear on tape).

Mr. Acheson: Could we discuss Mr. Frank's suggestion?

Judge Wyzanski: Could I suggest that as wholly tentative, we have a showing of hands who approve Mr. Frank's approach.

Professor Louisell: Do you contemplate taking any issue of getting rid of good cause requirement of Rule 34 as to the routine production product? You are in agreement with the Reporter?

Mr. Frank: Not only am I in agreement, but I want to report that the bar feels the Reporter has done a great job in (reversing) revising this whole procedure in lets try first before we go to court.

Mr. Freedman: I think Mr. Frank and I are talking about two different things .....

Mr. Acheson: Don't, let's confuse it. It is a simple proposition. We are talking about whether we like the proposal of Mr. Frank or the proposal of the Reporter.

Mr. Jenner: The Committee of Illinois, appointed by the Illinois Supreme Court to review our discovery procedures, has now reached the point of reporting to the bar and after journeying into the prior task suggested by the Reporter that Committee has returned almost substantially to what Mr. Frank has suggested as being the solid way of handling it and the way the bar is being administered in Illinois. ....

Professor Wright: I think John Frank is sound but put this in terms of good cause is far more saleable to the bar than a new definition even though the definition is an accurate statement of the factors which the case was developed. But to limit good cause to trial preparation materials is pure gain but it does not prejudice Abe Freedman's point because whatever else we may differ on, the meaning of Hickman and Taylor, certainly Hickman told us whenever you want documents you have to show good cause under Rule 34. We may disagree as to what good cause is but there is some showing required under Rule 34 that is beyond dispute. So I think if we adopted John's proposal that Abe could still argue to his judges that good cause means very little except where malimpressions of the attorney are involved.

Mr. Freedman: The only difference there is that the Supreme Court was interpreting Rule 34 -- not necessarily saying it was the better rule. .....

Mr. Acheson: John, are you ready to have an expression of view. Purely tentative of showing of hands on who would rather proceed according to Frank's proposal and then who would rather proceed according to the Reporter's proposal.

Showing of hands for Mr. Frank's proposal:
9 members for this

No vote was called on Professor Sacks' proposal.

Mr. Frank: Mr.Chairman, if we did that the effect would be to Section 3 as follows: Subject to the provision of Subdivision 4 of Rule 35, a party may require another party to produce any document or tangible thing obtained or prepared in anticipation of litigation or preparation for trial by the party from whom production is sought or by his attorney, surety, endiminator, or agent only then strike the entire remainer of the sectinn to read: only upon a showing that there is good cause for their production; and where the material has been prepared by or at the direction of the counsel for the benefit or use of the party in connection with the litigation, only upon an express showing of hardship or prejudice. The Note will then refer to the leading cases to which I have referred. This is my understanding, Al, of what we are trying to do here. Sometimes the insurance company gets to the adverse party and gets a statement before he has a lawyer. This suggestion is to say the person has an absolute right to that statement without any showing at all and may have it automatically.

Professor Sacks: As I follow you, you would strike the material at the word "upon" at line 54, strike everything through (interrupted by Chairman who said: there is good cause for their production) -- to "injustice" onlline 57 and substitute for that the language quoted, with Judge Wyzanski's correction that it should be his production rather than theirs.

Mr. Frank: Yes, but I would like to say for the record of never having made a particular drafting suggestion to this Committee, I would rather the Reporter do that. This is in general.

Professor Sacks: Then we would strike from 65 to the bottom.

Mr. Frank: Could I put a question to our visiting technicians? On the one lose end we have not disposed of? Would be anxious to know from Professor Sacks, Professor Moore, Professor Wright and Professor Rosenberg, in particular, what this does is delete the good cause requirement for everything except trial preparation material which Charlie regards as pure gain. It may well be but we haven't expressly considered that point. We haven't analyzed cases so that we can make up our minds whether it is pure gain or not. Could we have some information on that point as to how important is good cause in the penumbra area.

Professor Sacks: It seems to me that where you have the typical area where just the ordinary document which makes no claim except that it is a document I can't find a contemporary court giving it any protection whatever or requiring any showing.

Mr. Jenner: What troubled me was what I thought was a matter of language and therefore I did not seek it before. If you will turn to page 7 of Mr. Frank's memo the language is "only upon a showing that there is good cause for their production; and where the material has been prepared by or at the direction of counsel for the benefit or use of the party in connection with the litigation," bothersome there is this area which arises in practically every personal injury case, certainly in everyone where there is insurance. That is that these memoranda and statements are generally taken not

almost exclusively long before there is any litigation in anticipation of litigation. They are taken when there are no counsel in ordinary opperation of the insurance company staff in anticipation there will be litigation and what concerns me is the language you employ is very narrow and does not cover that area.

Judge Thomsen: Not only in damage suits. I have a suit under the Securities Act with which a substantial claim is being made to one against the other. The defendant had wind of the claim about 3 months earlier and I just this week fixed (blurred) work on it at a date when the defendant had been given a pretty clear indication of the serious danger that a suit would be (blurred).

Mr. Jenner: Not only that Judge Thomsen, but in this day and age frequently as you are working on a matter that may result in agreements are advice on antitrust policies to a client whether they take a business risk or not you begin to prepare material .... I wonder if this is a little too narrow.

Professor Sacks: The initial language Bert is in anticipation of litigation of preparation for trial.

Mr. Jenner: That is a great improvement Al (interrupted)

Professor Sacks: I wonder here if it would work out in connection with litigation so that it simply relates back to the general scope provision that precedes it.

Mr. Frank: That is a good idea.

Mr. Jenner: You want it prepared by or at the direction of counsel. Much of this is assembled without any counsel at all ....(Discussion between Mr. Freedman and members of the Committee).

Mr. Acheson: We are talking about Mr. Jenner's provision in econ-

nection with the litigation.

Mr. Morton: I made a suggestion to Mr. Jenner which I understand meets with his approval. I don't understand us to have pre-termited -- the suggestion of the Reporter that we use the language in his Notes as the preamble rather than the preamble which John read. Then I understand that we would add John's suggestion but instead of using language appearing in John's suggestion that "have the direction of counsel" we use language to refer back to the language that appears in the Reporter's suggestion. I think that meets this point.

Mr. Jenner: I would add to your list, line 53, insert the word "insurer." That is something we can all understand.

Mr. Morton: On pag 2 of the Reporter's Memorandum on Comments Received, new lines 48-54b, I understand Bert's suggestion is that we add after the word "surety" the word "insurer," and that John Frank suggested - and in line 54a we cut off the word "denial" and substitute "there is good cause for its production" and go back then into the (interrupted).

Mr. Acheson: Brown, would you dictate that to a secretary so that we could have something before us.

Mr. Freedman: I would like to make a proposal to get it on record. On page 26-5 of Reporter's draft I would like to change sense that it will mean "except that a company of a statement concerning the action or its subject matter given by any person." In other words, instead of limiting the provision to a party who would give a statement before getting a lawyer this would make broad statements producable as a matter of right subject only to a protective order. I would put that in a form of a motion, Mr. Chairman.

Professor Sacks: I think you are moving Charlie Joiner's alternative, as I understand it.

Mr. Freedman: Yes, that is correct.

Mr. Jenner: Mr. Chairman, a point of order. I don't think Mr. Freedman's point is pertinent to Mr. Morton's motion. He is seeking to draft that which we are about to consider. May I say that the rules of Evidence Committee had disciplined this chairman so that we resort to stenographeress to prepare the material. If we get Mr. Morton's proposal before us in express language we will (interrupted).

Mr. Freedman: I was going to make this motion, Mr. Chairman, when Mr. Frank made his ....

Mr. Acheson: We will adjourn for ten minutes until we get the paper back from the stenographer.

The redraft was drawn as follows:

(3) Trial Preparation. Subject to the provisions of subdivision (4), a party may obtain discovery of the terms of a document and discovery of a tangible thing prepared in anticipation of litigation or preparation for trial by another party or by that other party's representative (including his attorney, consultant, surety, indemnitor, or agent), or so prepared by any person and obtained by another party or his representative, only upon a showing of good cause therefor and an express showing of hardship or prejudice.

Mr. Acheson: We have a paper before us but there is some question as to whether this/is really what we thought we were getting. John, do you (interrupted).

Mr. Frank: I have simply deferred on the theory that these fellows are simply better draftsmen than I, and I would like to follow the lead of others as to how we do it.

Dean Joiner: There is a major distinction between the draft you presented and this one in that there was a specific reference to preparation by counsel in hardship or prejudice cases.

Mr. Morton: Bert pointed out he did not want the limitation.

Dean Joiner: He did not want it to apply to a preparation of trial.

Mr. Jenner: Or directed by counsel.

Mr. Acheson: Will the Reporter tell us what he has.

Professor Sacks: It seems to me as it now stands we have two standards applying to precisely the same matter. That is all matter coming within the scope of (b)(3) trial preparation matter, broadly described is now subject to production or discovery only upon a showing of good cause therefor and an express showing of hardship or prejudice. Two standards which are surely overlapping standards which I firmly believe are confusing when put together because all the cases indicate when you give the courts both standards to apply they cannot draw distinction between them-this is what has caused most of the confusion to date. Seems to me this simply is not a good solution. I am talking about the new one.

Mr. Acheson: May we reject the new one altogether? This is nothing we have talked about before.

Mr. Frank: Mr. Chairman, the problem was I think the drafting. My suggestion as originally made kept the good cause as here provided as it says at the top of page 7 of my memorandum and where the material has been prepared by or at the direction of counsel, etc. pick up precisely the Hickman-Taylor language. Mr. Jenner had a feeling that those words were better deleted and that this would serve to precipitate it, you can conclude either that they are better out or better in.

Mr. Acheson: I thought Mr. Jenner was merely talking about preparation in anticipation of trial and he said a lot of this is done before there is any trial at all.

Mr. Jenner: Yes, there would be no counsel at that particular point.

Judge Thomsen: I think it is Professor Sacks' intention really to eliminate and in express showing of hardship or prejudice so that we have a single rule and that good cause becomes a test and hardship or prejudice becomes one of the opposite of good cause.

Professor Sacks: That is a perfectly understandable approach and i gather one of the thoughts of the majority vote was that they preferred language of good cause to the language that I had and it seemed to me that could be reflected by stopping with the words "good cause therefor."

Judge Thomsen: Seems we might accomplish what they have suggested if we restore the word "material" rather than trial preparation and trial (blurred). It seems this was lost in the shuffle. And carry out the suggestion of Mr. Jenner about the word "insurer." And have the whole thing end at the word "therefor" in next to the last line -- I believe it would express what most of us thought we were voting for. I am suggesting it be amended in three ways and

then it would express what I think most of us thought we were voting for.

Mr. Frank: The language which said "where the material had been prepared by or at the direction of counsel" expressing a showing of hardship or prejudice was meant to narrow out that category for the reason Judge Wyzanski properly opened the discussion with, there is a heavy sentiment in the country for Hidman-Taylor and there is some advantage to putting that language in. And making it that category because many lawyers are emotionally concerned by intrusions upon their own handling of their own business.

Judge Thomsen: Then you would add to it "and where it has been prepared by (interrupted)."

Mr. Frank: But this is the point that is troubling me. Brown and Bert had some good reason for leaving that phrase out and I think we ought to consider what it is. Otherwise it may be that we would be better off simply to put it in "where the material has been prepared by or at the direction of counsel in express showing of hardship or prejudice." That would preserve the talismanic significance of a landmark case. Al, [illegible] am I right that this would have that effect, am I not?

Professor Sacks: It would at least give us two different sets of material. I would add, John, here are some points I would like to make. I have a problem as there was a vote and one of the questions is to proposal out what the vote decided. On this business of the lawyer, I limit myself to that for the moment, I put aside do we want good cause in here, the answer is yes- that was the vote. I put to one side the question of factors as I

don't know where that stands but on the question of the lawyer, it seems to me you could do it the way you had it before with some change of language to get rid of the problems in connection with the litigation but you would have a separate test for the instances where the material was prepared by or at the direction of the lawyer. That I understand. I raise a question about it -- I would like to check with the others on it as I think the cases are not that clear that Hickman-Taylor is applied when it is prepared by or at the direction of. It seems there are plenty cases that insist it be prepared by the lawyer and at the direction of is not good enough. The other case, which I think are the best reasoned cases, are the ones that say in effect that even the lawyer being in it does not supply a suitable test because it is too mechanical. They say it really depends on what the lawyer did and ultimately come down to the question to the risk of or appraisal of the cases or what have you. I just suggest for consideration that we might bring in as the case for the second standard -- I don't have words to do it right this minute -- a test not in terms of whether it was prepared by or at direction of counsel but some language for protection against disclosure of mental impressions, legal theories, etc.

Mr. Frank: I am deeply persuaded that if we are going to have some of Hickman-Taylor I would like it to say when the material has been prepared at the direction of counsel upon a showing of hardship or prejudice in order to keep that language we cannot overlook the fact that we have just taken out the matter of insurance. At the bar, these things are boing to tend to balance or equate in

their minds and if on top of that we tinker with Hickman-Taylor anyway we are just buying trouble not worth buying, but I would like to turn back to Mr. Jenner and Mr. Morton, fellows, if you think the references to by or at the direction of counsel express showing will undesirably,as obviously you did just now in that hasty drafting,--is that your firm judgment or do you feel as we discussed it, it is better to keep the Hickman-Taylor tie.

Mr. Jenner: I think it is unwise to use the reference "by or at direction of counsel" as I think it is limited. I may be wrong. Could I express myself by siggesting language? Take your material at the top of page 7 and say "and where the material has been prepared or obtained for the benefit or use of the party in connection with or in anticipation of litigation only upon an express showing of hardship."

Dean Joiner: He is drawing a distinction between prepared by non-counsel and preparation at direction of counsel and the distinction is that in one case you don't have to show hardship and in the other case you do.

Mr. Frank: Not only do you keep the good cause rule for the investigator but you keep the hardship or prejudice for the attorney at his direction. The reason you do that is to bring together the Hickman-Taylor language on one hand and the Guilford and Alltmont language on the other.

Mr. Freedman: (Discusses this proposal and re-work product of lawyer).... It seems we are now going directly contrary to the basic purpose of the rules of discovery which were to take the element of surprise out of the trial of a law suit. What we are

doing now is to give protection to information, not only to statements, but to information. You read this last proposal and John Frank's proposal, as well as Professor Sacks,- discovery of tnagible things - may obtain discovery on the terms of the document. In other words, not only can you not get the document but you can't get what is stated in it. ....

Mr. Frank: May I ask Judge Thomsen a question? Mr. Morton, Bert, and I are agreed and would like to submit, Judge, to see if this would satisfy you. After the word "materials" at the top as you suggest, add the word "insurer" on line 54b; after the word "and" insert "where the material has been prepared by or at the direction of counsel, an express showing of hardship or prejudice."

Judge Thomsen: That is exactly what I suggested. You see there are four different suggestions before us. One is the one which would require the strongest showing that a party seeks, which is the way it is typed now, which would require in every instance a showing of good cause and a showing of hardship. There is the other extreme, which would eliminate the hardship and prejudice and just make it good cause in all cases. There are two possible middle grounds -- one is that exactly stated by Mr. Frank where the material has been prepared by or at the direction of counsel. The other possible middle ground is where material has been prepared by counsel rather than by or at the direction of counsel. I take it Mr. Freedman was suggesting the second middle alternative and you are suggesting the first middle alternative.

Mr. Frank: We don't mean to interfere with your proposal. Would this be satisfactory? If so, I would move if that is acceptable, that we accept the draft subject to other amendments but we put

it into shape for definitive treatment with the changes just mentioned. Do they need to be repeated, sir?

Mr. Acheson: They do for me.

Mr. Frank: Line 48, Judge Thomsen, I believe, has suggested, the wording "by trial preparation materials. Line 54 insert after the word "indeminitor" insert the word "insurer"; line 54b after the word "and" insert "where the material has been prepared by or at the direction of counsel,". This is then precisely very nearly verbatim what we voted on previously.

Dean Joiner: No, No, Mr. Chairman. This is wrong!

Mr. Frank: In any case, the proposal is before you and you can do what you want.

Dean Joiner: There is a whole clause in there that substantially changes it. A whole new concept has been introduced. The clause "or has been prepared by any person and obtained by any party or his representative." This is new.

Professor Sacks: That is in my memorandum. We have introduced a complexity here. I have no objection for present purposes to a draft in the form of the original draft so far as preparation is concerned. Nor did I have any notion to expand the rule so drastically. It was meant to cover materials prepared in anticipation of litigation or preparation of trial or so prepared refers to it. But for the moment just to keep the problem from getting more complex than it needs to we can treat the first draft of 26(b) as right where it says "obtained or prepared in anticipation of litigation or preparation for trial" and John, I think, has no objection to that. I might add his proposal is in relationship to that.

Mr. Frank: I might say our troubles arise because we have two pieces of the pure Sacks.

Mr. Acheson: ... the difference comes in about the phrase.

Judge Maris: I think you have put your finger on it and I would think much better to go back to Professor Sacks' original draft not only does that get confused by the second draft but also _____ that he requires any document to be obtained only on a showing of good cause as you read this "may obtain discovery of the facts of the document and discovery and discovery of tangible things prepared in anticipation of litigation." Document doesn't have to be that. I don't think you need that. Therefore the original language is much better.

Mr. Frank: Can't we have your draft prepared over the noon hour?

Judge Thomsen: Can't we have the vote before us to know which we want? Are we in favor of accepting requirements of hardship and prejudice apply only to trial preparation documents prepared by counsel or do we want it to apply also to trial preparation documents prepared at the direction of counsel.

Voices: Why ____ (sounds like E)?

Judge Maris: I just wonder if there is any reason for another standard to throw down on what good cause means?

Professor Kaplan: Moreover all you would have to do is interpose a lawyer, just have something at the direction of the lawyer, a totally new set of criteria would come into play. It seems to me that all is needed is to say good cause (interrupted)

Judge Maris: Good cause and then the Note could refer to cases.

Professor Kaplan: You might do more than that Judge -- spell out some of the factors.

Mr. Acheson: We will come to that in a little bit.

Professor Moore: I just want to add another phrase or two. I thought John Frank made a position of effectability when he said that unless that point could be argued the Rosenberg Report shows good cause is not causing trouble. Good cause necessarily means something in one situation and something else in another. It is true over in Rule 34 you could eliminate good cause on the theory here is something there is little fuss about and the Bar will not be upset with the new draft of 34 but as to this problem in trial preparation, if we are getting along well with the good cause requirement I think that is what you should put in and say nothing more/than and to have a good elaborating note on it.

Mr. Frank: Mr. Chairman, I have heard my Master's voice and I so move.

Dean Joiner: You are not foreclosing discussion of (interrupted)

Mr. Frank: No, we will fight, bleed and die, but we obviously con't want to see everything go back in the Note that we took out of the rule. That will be a separate issue.

Professor Sacks: As I understand the present direction, it is to go back to the first of my drafts and then to tack on John's requirement of a showing of good cause therefor.

Mr. Acheson: We will first vote on whether we shall stop there. All those who would like it drafted that way, please signify.

10 members voted for the motion.

Mr. Acheson: Now, I think Mr. Freedman wants to speak.

Mr. Freedman: I would like to amend that provision by changing the top of 26-5, lines 57-64, (exception to party statement) -- I would like to take out the word "previously" and substitute words "the party (beginning line 59)---."

Dean Joiner: Did you look at page 26-14?

Mr. Freedman: Checks 26-14 and says: I think that Charlie Joiner's wording on 26-14 is more desirable. Start with 'except a copy of the ... without such a showing." It is better to put the facts on the table than in your pocket.

Mr. Frank: Okay, let's vote.

Dean Joiner: Bert, have you ever practiced where they give you witnesses' statements?

Mr. Jenner: Yes, in Chicago.

Dean Joiner: Do they give you witnesses' statements there.

Mr. Jenner: Yes, if good cause is shown.

Dean Joiner: I mean without good cause.

Mr. Jenner: No.

Dean Joiner: I can give you a state where they give it to you without good cause and it works very well.

Professor Louisell: I think one of the two elementary propositions is too elementary to call attention to but if Charlie Joiner is right about his claim in respect of witnesses' statements necessarily be a position inconsistent with what we have just done. We have just required that good cause be shown for material pertaining to trial preparation. If we are going to permit a statement of a witness which is the very heart of trial preparation to be discoverable automatically then we have to rethink. You can't do two

inconsistently things (blurred).

Dean Joiner: I voted against this for reason of good cause. I construe the vote in favor of position of good cause is providing a better basis for the exception now proposed then we had prior to this time for with the posture with which the rule is now drafted and the requirement there be a showing of good cause, this clearly attacks all the kinds of things that need to be protected so far as the lawyer's involvement in the case is concerned and allows us at this point to take a free look and objective look at facts which then can be used by alwyers on both sides to try the law suit and the fact I am talking about at the statements of witnesses that have been found and taken either by the lawyer or other persons, and I would say that having now adopted the good cause provision we are in a much better position to move forward and make this exception which would then free for both sides the availability of the objection statements of witnesses so that we can come in prior to trial and have full knowledge of what is available at this time. It will enhance severance and will shorten trials.

Mr. Frank: I would agree with Professor Louisell that this would totally nullify the decision laboriously reached. It is in the teeth of Hickman-Taylor, in the teeth of Alltmont provision, in Guilford, that each fellow shall make and prepare his own case.

Professor Sacks: I think important thing to note is it is contrary to Hickman ....

Mr. Freedman: We are not going contrary to Hickman. The point is the Court was construing the rule ... This doesn't mean we are going against Hickman.

Mr. Acheson: I think you have made that point. Are we ready to express a view whether we want the amendment proposed by Mr. Freedman in Mr. Joiner's words?

Vote: 4 members voted for the motion
7 voted against it.

Motion lost.

Professor Sacks: One remaining question which we perhaps don't want to resolve definitively is the way on to treat discussions in the Notes that are going to resemble, look like, these factors that were deleted. It seems to me a full statement in the Note as to the way good cause has been construed will have a tendency to show what the factors have been. I regard that as an affirmative -- a good thing -- but it seems to me from the discussion this morning that there are views the other way.

Dean Joiner: I did not think we had passed that point as a point of no return as to whether this should be in the Note or in the rule. ... There is still an open question as to whether the final paragraph in the rule from 65 through 79 or some better statement of the text should be generally incorporated in the rule and I, in order to put the issue squarely, would move that the Reporter be instructed to prepare a series of statements along the lines he has here that point up standards he applies in connection with applying good cause. I believe this drafting technique involved here and in Rule 19 is one of the most significant advances we have made in the drafting of our new rules. It is a technique which calls attention upon problems and requires the judge to think about them and doesn't hide everything under the use of a single word.

Mr. Frank: I have a feeling that we are having the same battle for the third time. Let me say what we have suggested is that the elements of good cause .... The note should provide .... (read from his memo at the bottom of page 6 and top of 7). Let us do that and no more.

Dean Joiner: My motion is to put them in the rule.

Mr. Acheson: The question, as I take it, is whether you want to leave this entirely to case by case growth or want to have some kind of prediction as to the main factors that judges should look at and probably will look at. What do the judges think?

Judge Wyzanski: I think it is helpful in the Note but not in the text. Judge Thomsen agreed, but thought the list should be broader.

Judge Feinberg: Make it articulate what the judges do under the concept of good cause, but I think it is a good idea. I think the sense of the majority is that it should not be in the rule in view of what happened this morning. I would have been originally for putting it in the rule but since the majority feel the way they do on John Frank's good cause I think there is not much sense of wasting time as to whether this should be in the rule. However, I do think it should be in the Notes.

Dean Joiner: Mr. Chairman, I have been foreclosed then because this morning I (interrupted)

Mr. Acheson: No, you are not foreclosed, you are going to have a vote.

Dean Joiner: I want the good judge over here, he is foreclosing himself, from the whole thing. I want him to vote his conscience now.

Mr. Frank: If we wish to reconsider, we should not stand on form but do so, but the motion adopted was whether in principle we should

adopt definition of good cause and reject all of 26-5 and top of 26-6. We voted after comprehensive discussion so to do. We now have a proposal to put back the identical matter which we excluded this morning on the explicit motion and if anybody thinks we were wrong this morning, then for heaven's sake do as you think we should.

Mr. Acheson: Let's have a vote whether we do anything further with the rule and then we will go back to the Note. Shall we put anything about standards in the rule. All who think we should, raise their hands.

2 members voted for the motion.

Motion was lost.

Mr. Acheson: Now, let's go back to the Note. I take it in any event you would wish to have the Note discuss all the cases and discussing the cases would bring out the propositions decided by the cases and I take it you wouldn't object to the Reporter citing, at least illustrative, what the courts have decided they might go further along certain lines (this sentence was muffled and not clear.)

Professor Sacks: Right,and ordinarily I would assume I could do this but the vote itself raised a question about it.

Mr. Acheson: I gather you would not object to that, John?

Mr. Frank: I would prefer we not worry about it until we see a draft.

Professor Sacks: I just want to be sure I wasn't foreclosed as some discussion this morning indicated that I was.

(b)(4):

Professor Sacks explains this section, stating there was a full discussion of this at the last meeting.

Judge Thomsen: Our court adopted almost the exact rule with the addition of the following phrase but I am mot sure this should be put in the rule, but perhaps it belongs in the footnote or something like it:

> The phrase "expects to call" has been chosen rather than the phrase "may call" because the latter phrase is too broad but the phrase "expects to call" would be interpreted broadly to achieve the purpose of the rule which is to make available to each party a reasonable time for trial. The facts, opinions and reasons of the opinions of the experts who his opponent will call at the trial so that the party may adequately prepare for cross-examination of his opponent's experts. While it is contemplated the party will be entitled to obtain full disclosure of an expert's opinion and the facts and reasons upon which it is based. It is not contemplated that the party will be allowed by deposition or otherwise to conduct a preliminary cross-examination of his opponent's expert for the purpose of developing material for the use of

> impeachment nor to obtain the use of his opponent's expert on other facts than those on which he shaped his opinion. Orders for the protection as far as experts may be issued under appropriate rules including orders requiring that the discovering party pay the expert a reasonable fee for the time spent in responding to discovery under Rule 30-31. The court wishes to encourage the practice followed by many members of this bar of exchanging reports of doctors and other experts.

We worked this out before judges and by sending drafts around and they agreed this was the implementation of this with respect to cross-examination. That may be the best way to do it, but I suggest this as a basis.

Professor Sacks: It makes good sense and the question is whether this sentence in the rule or a sentence like it should be the basis on which the Note would be written.

Mr. Jenner: .... (re material in brackets in lines 103-105.

Mr. Frank: ... is this a built-in booby trap? Or you won't know until you get to the courtroom ....

Mr. Jenner: My feeling is that we have made material progress under (a). I see (b) as a means of insuring that you get that material. My feeling is if you go beyond that, that is to permit the witness to be cross-examined or you seek to induce a devolving finding of opinions, what this means to me -- that lines 103-105 that a good faith response by the witness to the party to inquire as to what this expert's opinion is must be presumed. If it is presumed it should be limited in 103-105 and what we are doing in 103-105 is really stating. Now if the Committee should be of the

view that inserting that viewpoint by way of lines 103-105 will interfere with that disclosure, then I certainly would yield.

Mr. Frank: This would restrict our practice ....

Mr. Jenner: The statement by Mr. Frank to the extent that cross-examination reveals that turret? maybe it is a difference in what we mean by cross-examination (goes on to explain difference in types).

Professor Louisell: I don't see how it is possible to be much more precise in limiting cross-examination than this is. There are the marginal cases where there will be an issue by bona fide examination to try to discover the grounds of the opinion. In a typical case I would say it would work about as well as you can do in correlating the rule.

Judge Maris: I would be curious to hear from Mr. Frank how this works out in his state where they have complete cross-examination.

Mr. Frank: Our senior federal judges took the view that you can cross-examine. We have all followed it ....

Mr. Jenner: This presents a question of policy in balance -- there is so much gain in sub (4) and there will be protest from a good sentence of the bar going as far as we did in sub (4). I fur a little bit the loss of the gain if we permit cross-examination. I know as well as everybody else here knows that there will be a measure of cross-examination. You can not examine theoretically on direct examination an adverse expert with what we call a mild cross-examination. I would like the bracketed words in, and I so move.

JENNER MOTION: To begin on 93 and run as it is through 105 eliminating the brackets after the period on lines 103 through 105.

Dean Joiner: Against the 93?

Mr. Jenner: Exactly.

Mr. Oberdorfer: Would the Reporter indicate his view as to whether without the bracketed material it would be possible to permit cross-examination of expdrts under the lagguage that remains if it were the subject of the Note for instance referring to Judge Thomsen's suggestion.

Professor Sacks: It would be very difficult. You would have nothing to hang it on.

Mr. Jenner: May I say in the Rules of Evidence Committee this issue has risen several times and notes are not part of the rule. That Committee has taken the view point that where we have something that is a matter of policy, reasonably important, the thing to do is to put it in the rule and not put it in the note.

Professor Wright: I am glad after all these years to hear someone come to that view.

Mr. Acheson: May we have an expression on Rule 4(b) on experts beginning on line 93 and going through 105?

Professor Rosenberg: (Rasied question about word "expert" in line 101 but the Committee decided to leave it as is.)

Mr. Acheson: Those in favor of the rule, please (interrupted)

Mr. Frank: Before we vote the rule we have two or three other minor points. Will we be prejudice in taking up other minor points about the rule at this time.

Mr. Acheson: No, take them up.

Professor Sacks: I don't see any problem with them, John, and I am in accord with you on the regularly employed expert and on the second of points, I am quite sure (interrupted)

Mr. Acheson: Why don't we state them?

Professor Sacks: They are on page 7 of John's memo and the point was that the Note should make clear this rule does not deal with the staff expert not especially retained for the litigiation, and (4)(a) does specify that ... and I think the Note can spell out (interrupted)

Mr Frank: What is worrying us a little, and I don't want to get into this, Al, particularly, unless you do but let us at least be aware we are authorizing testimony of experts here if they are retained especially for litigation and particularly if they are going to testify. We are doing nothing whatsoever who is simply on the staff but not retained especially for litigation.

Professor Sacks: May I suggest, Joh, that the Note would make it clear that he is not covered by (b)(4) but I take it if he prepared material in anticipation of litigation or preparation for trial the discoverability of thatmaterial would be subject to (b)(3) and I think that is what the Note would indicate.

Mr. Frank: Let me give you a different case. The other side wants to ... (example re collapse of a tower). Nothing relates to this.

Professor Sacks: Right.

(Discussion continues for a moment about getting witnesses)

Professor Sacks: Brown Morton made the same point.

Dean Joiner: I sent you a redraft of subsection (c).

Professor Sacks: I made a change in response to that on page 12 of my memo.

Mr. Acheson: Are those to be incorporated in what we are to vote on?

Professor Sacks: Yes, this is on (c) on page 12 of the memo. This is in response to Charlie Joiner and has the following effect: delete lines 106 to 107 and in lieu thereof it reads: in addition to orders issued under subdivision (c), the court may", and then on line 108 you delete a word "requiring" and substitute the word "require", so what you have is .... and similarly on line 111 a similar change.

Professor Wright: I am a little uneasy about the point John Frank just made. There are cases which a doctor is being sued for malpractice and which the court has held the doctor on deposition to say what he has done but may not be required to answer the question as this is not in accordance with general medical practice in the community on the ground that to do that would be asking for the opinion of an expert rather than the facts known by an adverse party. I felt those cases wrong and have said so but what troubles me is the adopting of a very long rule about experts may suggest this is the only way which you can get expert opinion even where the expert is a party and has knowledge of facts related to his expert (blurred) and you can't get it and on the new Jenner principle which I applaud to the Committee to legislate by rule rather than by Note I wonder if the Note is a robust enough way to deal with the problem?

(Further discussion about experts)

Mr. Frank: Have the Committee come back to Charlie's point. Have you scorched the earth - have you inadvertently dealt with it by such a comprehensive rule?

Professor Sacks: I certainly think it is worth another look to see if it has preempted it. That is something the Note can be addressed to.

Dean Joiner: Perhaps you could show there is no preemption rule more clearly by instead of heading this experts to head it experts especially employed or retained (whatever you want to use) to show the narrowness of the application?

(Further discussion)

Professor Sacks: As far as the procedure is concerned, I suppose one party makes the request to the discoveree and he tenders a showing. The other party may accept that. If he objects, then, of course, you have to go to court but it doesn't say it has to be on order of court. It avoids a requirement of a court order. It simply states what the burden of the showing must be to win ....

Mr. Frank: My other point is we discussed last time whether we should have to divulge what experts you talked to but you don't want to use -- at least in our jurisdiction our plaintiff's lawyers and our defendant's lawyers are absolutely unanimous that they don't want to have to do that. And that should be outside the scope of legitimate interrogatories. Anybody we talked to is our business and nobody's else's business and somewhere we hope that however you do it you make it clear that this is not a divulgable fact.

**Professor Sacks agreed.**

26(c)

Professor Sacks: The only editorial change is on line 200 (shown on memorandum, page 3).

Judge Feinberg: Al, are you going to deal with the Note on impeaching evidence?

Professor Sacks: Sorry, yes. The note on impeaching evidence was intended to make it plain that the law concerning thatsubject as reflected by the cases or by people who believe there are very few cases on it we are making no change (Interrupted by someone who said he did not understand). All I am saying is that we have varying contentions about what the law is and there aren't very many cases.

Dean Joiner: What do youthink is the best policy?

Professor Sacks: I would suggest we lave this to the discretion of the court without trying to draft a rule. That is what we voted. The specific instance now is a very limited one. I think I made the point as to impeaching evidence but I citad two cases both coming out one way. I think, as I understand Charlie Wright, he was concerned about the thrust of the citation as he thought it tilted. I haven't redrafted it but I would propose if I can't find a case the other way, probably the language should be strengthened to make it clear the citation is not meant to suggest the law is one way only.

Professor Kaplan: What about dropping the citations?

Mr. Frank: I think 26-17 is a fair and just statement and I would like to leave it as it is.

Professor Sacks: If we took out the cases, Charlie, would that meet your point?

Professor Wright: Yes, I would be happy if you drop the cases.

Professor Sacks: The point would still be made. (discussion re cases being one sided and Judge Thomsen suggested to put in cases that go the other way) (Prof. Wright said he could give citations for the other cases.)

Professor Sacks: Charlie, why don't I check with you on that. I gather if we can find citations both ways you would prefer that,and if we can't find citations both ways the acceptable solution is to eliminate them.

26(d)

Professor Sacks: (Explains the rule)

Mr. Oberdorfer: I would like to inquire whether 26(d) and 26(e)(3) are perhaps one and the other surplusage.

Professor Sacks: ..1 (answers)

Mr. Oberdorfer: The suggestion that occurred to me was that this is both in (e)(2) and (3) (3) on a matter which would not normally be a problem unless someone raised an objection asking for application of a protective order.

Professor Sacks: ... re early cases.

Mr. Oberdorfer: My philosophy is that we usually leave things like this to the discretion of the court. We now have in (c) the place where people can look for reliefs so that (2) and (3) may be (blurred).

Professor Sacks: Is your suggestion that since (c) gives the court explicit power to put a limit on and to vary the sequence we can get rid of them and in the Note indicate unless a protective order is issued (interrupted)

Mr. Oberdorfer: Yes, I think that would be a great achievement.

Professor Sacks: I have no objection to that. There is a historical reason for its being there but it does seem peculiar today.

Mr. Frank: There is one other problem which is troublesome to me and that is the problem of timing in connection with discovery and that crops up in this series of rules in perhaps 5 different places in which this is the first. And you can't decide what you want to do here without having some thought about the entire group as they are interrelated. As the matter stands at the present time we now have first a system of priorities in depositions .... What this draft does is to abolish and extinguishes that balance. Here we have a proposal to change the priority system taking this alone and narrowing in on that although I will oppose each of the other four changes as we get to them. I report as follows: first, in the learned literature we have been told the priority system is the great abuse. We were told that in the 50's and at other times but in fact the Rosenberg Report expressly says, Maurie, that you have not one single objection as practical matter which was so negligable that it amounted to nothing as a source of complaint in the United States. If that isn't precisely right, it is close to it.

Professor Rosenberg: That overstates it but it is a minor frequency complaint.

Mr. Frank: In our area we interrogated and in our proceedings and at least not one single lawyer was able to report that they had ever had trouble with the existing priority system.

Clearly there has to be some order in these things; clearly there have to be modifications when there are abuses but onee again the same (stops to cite a case mentioned to him by Mr. Williams on abuse of priority system on TWA case). There has been enough flexibility in the case so it works. We are now precisely at the point of making a change for which there is no call whatsoever and one which again is a part of a general network or group which I think unfortunate. Restricting myself to this one, I believe the priority system on the merits to be moderately desirable. It gives some basis to get started with the basis at hand; it is in any case practically unobjectionable and I would think it would be changed absolutely for sake of change and I therefore would vote against section (d) before us.

Mr. Morton: I would like to ask, John, what is the priority system and where it exists and what the rule would be if you didn't have proposed (d). This is declaratory of the actual state of affairs inthe majority of districts in the United States today. It isn't changing anything.

Mr. Frank: (elaborates)

(General discussion)

Professor Louisell: We discussed this amply at the last session. The Reporter has this just right. Admittedly the priority rule isn't creating frequently a serious problem and where it is a rule problem is in a big antitrust case particularly the arbitrary rule of priority works as just protection and this is a good corrective to the extent that it is only declaratory of most of the practice, it is only declaratory to the extent it remedies the evid on the due case. I think it is a welcome cause.

Judge Wyzanski: (discusses the norm)

Professor Sacks: But you want a norm with having to go to the court. The norm as it now operates in terms of the decided cases is first the notice goes first and you have to go to court to get a change in that. The cases are uniform in that direction, as John Frank says any party checking the cases who was served a notice of the deposition unless he wants to invoke the discretion of the court, he is confronted with a norm that says the following notice first goes first. This establishes a norm in the terms of putting on an equal footing. It seems to me this is by far the better norm.

Professor Moore: I don't understand how this puts him on the equal footing as in Rule 26(a) as now drafted, the defendant gets the initial break in that the plaintiff, unless he gets leave of court, must await 20 days but as I read this, you just turned it around. The plaintiff will serve notice to take deposition right along with the summons.

Professor Sacks: But he can't take the deposition for 20 days and the defendant can notice deposition of same time ....

Mr. Jenner: You can make certain that at the end of the 20 days there will be motions before the court that there aren't now to unscramble these (blurred) as to who is going to take depositions first.

Mr. Colby: I think the Committee should not overlook the fact that this was the great sticking point of unification of Admiralty and Civil Rules. The Admiralty bar has been able to rely on fortunately the fact that whereas it may be true that in those districts where there are cases this principle of preemption or

priority applies in vast majority of districts. There is no such principle so far as the Admiralty Bar is concerned; it is absolutely essential to take your depositions in the order of availability of the witnesses technically the plaintiff files his liable and is expected to get hold of his opponent and take depositions at the following day because 36 hours later the ship will be gone. Now in our office we have marked up those districts, like the Northern District of Illinois, with a red star for danger, which you have to look at this concept of priority that somebody may steal a march on you. I think it is completely misleading that the cases that are reported on allowing the fellow who files first can carry out first. It seems to me natural result to come out where there is a litigated case but the fact remains that in the most of the districts there aren't any litigated cases and discovery does proceed simultaneously and I think that the rule is highly desirable because it will preclude the spread to most districts of this mechanical conception that he who serves notices to 15 persons first can thereupon keep his opponent from taking depositions even though the ship comes in 6 times.

Mr. Jenner: That is not the practice in Illinois.

Mr. Acheson: All those in favor of the rule raise their hands.

Majority vote for the rule.

Judge Maris: There is a little thing, "unless the court otherwise orders under this subdivision of subdivision (c)" that excepts this subdivision and permits as otherwise ordered.

Professor Sacks: Right.

Mr. Cooper: I have one other minor thing. On protection of orders (d) - page 26-12, beginning with the language of line 194(7) "that trade secrets or other commercial or research or development data maintained in confidence -- (right here I would suggest "or other matters of similar confidential nature) This would be limiting it only to trade secrets and the like.

Professor Sacks: This broadens it and as I recall this comes from the language of Brown Morton. Is this all right?

Mr. Morton: Not at all, the broader the better.

duly acted upon and
Motion was/approved by the Committee.

RULE 26(e)(1)

Professor Sacks: (Explains there is a rewrite on page 4 of his memo. Also explains there are two additional changes, one suggested by Professor Kaplan on line 219, where it says "answer with respect to", as Professor Kaplan thinks it should say "with respect to any question directly addressed to the identity and location.") (Discussion started before the second change was explained.)

Judge Wyzanski: I don't understand. Suppose a person isn't offered as a witness. "X" knows something and at the time you made the answer you didn't know "X" had the information. Later you learn he had it.

Judge Thomsen: That isn't the point. The point here is that if you have an accident and the question is who was there (discussion between Judge Wyzanski and Judge Thomsen). All right, the question is who were the witnesses to the accident? You later find out someone, who you don't know about, also saw the accident (Judge Thomsen explains a certain type case). If this rule is passed as it is now we will have many mome court orders. If you have pretrial in every case it is all right. . . (continues to explain a case).

Dean Joiner: If you drafted a rule broad enough to cover that situation it would be very difficult.

Professor Louisell: I think this is a good compromise. Last meeting we discussed this considerably and I thought this was a good compromise by making the duty continuing only in respect to the identity and location of witnesses.

Judge Feinberg: What about the problem that Judge Wyzanski raised, and what Judge Thomsen described, where you find out a year after lancing interrogatories that Paul Jones did see the accident and because his version is very harmful to you he would be the last person in the world you would attempt to produce at the trial. What sanction is there then?

Professor Sacks: (Answers by saying the one against "failure to carry out duty imposed by court.") (Discussion on this.)

RECESS

Professor Sacks: There was an addition suggested by Charles Joiner to add a reference to the identity and stated subject matter of persons who would be called as expert witnesses under 26(b)(4). I think this is in order.

Judge Thomsen: I move we approve Rule (e)(1) as modified by any suggestions directed to it.

Mr. Oberdorfer: Does this include my caveat about (e)(2) and (3)?

Professor Sacks: My effort will be to do one of two things with it: Tuck it away in a place where it will cause you much less pain, or, alternatively, eliminate it altogether.

Mr. Acheson: Do you approve in principle all of (e)(1) and in addition Mr. Oberdorfer's suggestion?

Professor Sacks: I would like approval in principle in the sense there is no affirmative objection to its inclusion and I will explore it along the lines Lou suggests.

Committee Approved

Mr. Jenner: How about 29? Does the Committee want a motion to approve?

Professor Sacks: Yes.

Mr. Cooper: So moved.

Mr. Acheson: All in favor of approval?

Received majority approval - no count taken.

RULE 30

Professor Sacks: Explains first item about time provisions.

Mr. Frank: We haven't touched on this -- we now get it from a different standpoint. I think this is truly a serious error and if taken in this fashion we will do an actual injustice. (Refers to 26(a) as existing rule and 20-day clause.) This proposal erases this edge which defendant is given. (Elaborates on need -- saying there is nothing to suggest this is working an injustice except in specialized admiralty problems.)

In order to avoid repetition, I would say this identical problem arises in (a) to depositions, (b) to interrogatories, and (c) as to admissions. We should leave this time relationship as it stands.

Mr. Freedman: Mr. Chairman, I would like to address myself to two facets of this proposal: (1) the admiralty aspect: one key point of the decision which the Admiralty Committee made in arriving at the conclusion for unification was this particular proposal - the provision that would give the admiralty people the right to go ahead with discovery immediately. There are special considerations which are involved in admiralty proceedings. (States he had talked with Judge Pope). I am authorized to state the Admiralty Committee is unanimous in saying if this rule goes through and the admiralty people do not get the right to go ahead with depositions and discovery immediately when the complaint is filed, he (Judge Pope)

is going to call an immediate meeting. This is how strongly they feel about it.

Mr. Acheson: May I interrupt you. Haven't we passed on this once before.

Mr. Freedman: Yes, but this is now in the existing rule (continues re the de benne esse statute).

Judge Maris: Mr. Chairman, may I interject here. There is a problem here that is involving the interest of the two Committees, with the idea that this was a temporary expedient and hope that the two Committees could work out something satisfactory to everybody. Under these circumstances, I said to Judge Pope on the phone this morning, that I was sure this Committee would not take any action on this this morning and would give both Committees time to work out something which is satisfactory but we not have it here and I would hope this particular problem could be postponed for further study and consultation with the Admiralty Committee.

Mr. Acheson: Isn't that what we decided this morning?

Judge Maris: Yes, I thought so.

Mr. Acheson: Are we into it?

Professor Sacks: We shouldn't be . . . (explains). Since this provision is not acceptable we cannot work out the de benne esse provision and for the moment no proposal is made to eliminate the de benne esse provision and for this morning we pass it.

Judge Maris: Except that this text eliminates it.

Mr. Acheson: Do you want to discuss this?

Professor Sacks: No, I would like to skip it and like it to be understood the elimination in the text should be taken out.

Dean Joiner: Why don't we eliminate discussion on this until we get another draft.

Judge Thomsen: The problem is I won't be back, I guess, after this meeting as my term expires. I would like to make this suggestion in line with Mr. Frank's. If this is an attempt to meet the Admiralty Bar, it can't, because the 20 days is hopeless for that. They have to have the de benne esse provision. But, if we are not doing this for the admiralty people, then I would agree with Mr. Frank not to change the present rule. . . .

(General Discussion)

Judge Maris: You certainly have to permit depositions to be taken immediately in every case or you have to make a special rule for those cases where it ought to be permitted.

Professor Wright: I would like to remind the Chairman that there has been a development since the Committee voted these proposals down and that is that the standing Committee, in the course of approving unification of proposals, specifically voted to recommend to the Civil Rules Committee and Admiralty Rules Committee that they undertake to find a means of regulating the time for taking depositions, that there is no differential treatment required for admiralty cases.

Mr. Acheson: I did not realize that that superior authority had spoken.

Mr. Acheson: The proposal is that we should pass this until we make it up with the Admiralty Committee.

Professor Sacks: I would like to raise a specific question on page 30-3, lines 29-36, re new provision.

Mr. Frank: Are you going to take up your parenthetical?

Professor Sacks: Yes, I will come back to that (interruption)

Mr. Frank: Just as long as you are going to do it.

Professor Sacks: I would like to put the question of the deposition of the corporation, re Morton's suggestion in getting information from the corporation and not knowing the exact people to get it from. . . . This goes beyond personal knowledge of person, he is selected to give opinion of the corporation. First, there is question of whether we should do it; the second question is whether it is in proper form; and third, related problems on whether it should be seen as extra procedure available to depose corporations in addition to present procedure or whether it should be seen as substitute procedure.

If we could take it first as to whether the form is acceptable, then I think we could turn separately to the points raised by Brown Morton.

Mr. Cooper: I move the form is acceptable.

Mr. Jenner: I like the idea, but I do have questions about the form. Take lines 35-36 where you say "the individual so designated . . . to the organization," as designated in lines 29-35. In other words, I am afraid you are circumstracting what you are getting at in lines 35-36. You are narrowing it.

VOICE: I thought it was reversing it too.

Mr. Jenner: Trouble is I don't think the last sentence does that. (Discussion about employees being sent who have been brainwashed and this sentence would create that possibility that the individual designated could become just a messenger boy instead of a witness.)

Mr. Jenner: That is what I am afraid of.

This is not an attempt to draft but, for example, "in which event the organization so named shall designate or produce one or more officers, directors, employees or agents more knowledgeable with respect to the matter specified in the notes to testify and produce documents, etc."

VOICE: With special knowledge.

Mr. Jenner: Yes.

Mr. Oberdorfer: The organization should have an obligation to designate the person most knowledgeable.

Mr. Jenner: Mr. Chairman, I think we are all agreed to the principle. We are in unanimity. There is only the doubt on the part of some of us that the draft accomplished the full scope of what we want it to.

Professor Sacks: All right.

Mr. Jenner: Also, the word "available" in line 36 also bothers me, as John has called my attention to.

Mr. Frank: I guess we will have a full-scale discussion sooner or later on how 36 will reach. When we get to Rule 36 (interrupted)

Professor Sacks: The present suggestion, as I follow it, is that we will eliminate that problem. It would ask them in good faith to designate the person most knowledgeable to appear and testify on its behalf.

Mr. Oberdorfer: But not limit it to his personal knowledge.

Professor Sacks: That is right. It may be a person that has some knowledge himself, but in examining him you find there is some other person in the organization that has more knowledge and we should make them produce him as well. Make them make a good faith effort in the first instance to produce one or more - not limited to one - witnesses who will be able to supply to the best extent the corporation, partnership, etc., can to supply information with respect to the subject matters designated in the note.

Professor Sacks: I have that, and I will attempt to do that. And the point is that the word "available" raises the same problem as it does in 36.

Professor Moore: Don't you go too far when you include employees? As I read it there needs to be no subpoena. But I don't know why the corporation should have the oneness of producing employees.

Mr. Freedman: Because they have control.

Professor Moore: No, the railroad doesn't have control over employees. The proper course is to subpoena them.

(Discussion held on this)

Professor Rosenberg: I raise a question in lines 34-35 where "officers, directors, employees or agents will appear and give testimony on behalf of the corporation." This is a big change in the deposition laws.

Now when an employee shows up he doesn't give testimony on behalf of the corporation.

Professor Sacks: I take it since the questions that can be asked of the person relate to information the corporation has, the questions can go to what other employees know and facts they have so I would assume you do get the answer to the question of the corporation in the same way you get the interrogatory.

(Further discussion)

Professor Wright: Would you have all the difficulty with this if employees were not involved? Particularly since the case law in the area has been on a much narrower question, i.e., whether or not we can designate the corporation and ask him to produce such responses in managing agents we have knowledge of the facts. The courts have said under existing rules: no, you cannot. But I think a rule change to permit that result would not involve any difficulties we have heard about here and it would in many cases serve a useful purpose. It will not serve all the purposes Brown had in mind, it would not let you get the cross _____ watchman, but in cases of corporate records and that sort it might be very helpful rather than having to find which are corporation officers, managing agents, etc., who know about this.

Professor Louisell: Your suggestion is just to strike out employees or management agents.

Professor Joiner: I move that, Mr. Chairman.

Mr. Acheson: All who approved, please indicate.

Mr. Acheson: The amendment is adopted. (no count taken) The amendment is to strike out employees or agents. (Professor Sacks states one or more officers, directors, employees or managing agents.)

Mr. Frank: What became of the "on his behalf."

Professor Sacks: That would be all right.

Mr. Frank: What does Maurie say about that?

Professor Rosenberg: That is fine.

Mr. Acheson: Do we go on?

Professor Sacks: No, there is another provision in 30(b). Substitute, in Memo on Comments Received, page 5, bracketed material on 30-3, but there is substitute provision for this.

Mr. Frank: I think that is great.

Professor Sacks: This now gives you a procedure for the closing party bringing deposition and 34 together.

Mr. Jenner: I move its approval.

Committee approved the action.

(c)

Professor Sacks: (Explains substitute on page 5 of memorandum and the background.)

Dean Joiner: Do we have a provision anywhere that permits use of tape recorder, motion-picture machine, etc., for taking it directly in the courtroom if within permission of judge, or is that in the discretion of judge?

Professor Sacks: We do not have a provision for that.

Mr. Jenner: I suggest that is for the Rules of Evidence Committee.

Dean Joiner: That may be

(Further discussion)

Judge Maris: That is a common thing and there is no doubt that it should be authorized.

Mr. Frank: I would hope we don't have to vote on this paragraph

at this time. This is an idea we have had only in the last 2 or 3 days. I would like to know how such things are to be handled -- as to how you are sure the thing is to be maintained; how you are going to be sure that people are not clipping out, revising, and tinkering with it; what are the standards of mechanical excellence to be applied. In short, I would like to have until next meeting to vote on this. I would like to pass on this for the time being.

Mr. Jenner: Mr. Chairman, the Rules of Evidence Committee is giving the problem of admission of new evidence, computerized story, recording of testimony, etc., special consideration. I would suggest this Committee not undertake as a Committee to consider the matter or draft a rule with respect to the use in evidence of these recordings.

Judge Maris: Not use, but there should be something to make sure they are preserved.

Mr. Acheson: John, you would rather not vote on it.

Mr. Frank: I would want more time. . . .

Mr. Acheson: Why don't we just pass this until another meeting.

Professor Sacks: One more matter in Rule 30 - page 30-8. I put it in originally in brackets with the thought in mind. . . . (explains Mr. Morton's and Professor Rosenberg's suggestions for this).

Meeting adjourned for day (approx. 5:00 p.m.)
Reconvened at 9:30 a.m., Saturday

Mr. Acheson: May I make a suggestion for the day's work, that is to try to finish up by late lunch and this morning instead of spending all our time on precise text, we get general ideas and

ask the Reporter to furnish us with a new text by the first of August and then have a meeting to clean up discovery in September.

Judge Maris: Mr. Chairman, one of the problems in the offing is when and how you will release this to the public. I think you will have to complete a text to exhibit to the public before anything can be advertised. I was talking to Bill Moore about this and it seems that here is an area the public should have ample time for consideration -- maybe two years -- before we really try to gather up, because lawyers all over the country have had a lot of experience in this field and they are going to have a lot to say about it.

RULE 31

Professor Sacks: Explains, stating subject to the problems of time of the first service, which was left open in discussion of Rule 30, and subject to the provision that the corporation is satisfactory in Rule 30, I think Rule 31 is acceptable, that is on the basis of comments I received.

Dean Joiner: I think this is ambiguous in accordance with provisions of Rule 30(a) and we should think of drafting a way to do it differently.

Professor Sacks: Possibly by repetition?

Dean Joiner: By repetition. Repeat the two (blurred) and get rid of them, any reference to time, etc., including in Rule 30(a), as your times are different now. (statement was somewhat blurred).

Professor Sacks: All right, I get your point.

RULE 32

Professor Sacks: (Explains background.) One question rasied was relating to the item on page 32-2, lines 3-4 in (a). I think this meets the point Charlie was raising.

Professor Wright: I assume that ultimately Rule 32 will go out on the ground that this is an evidence rule rather than the trial rule; plain that we have to preserve it until we have a set of evidence rules. I think the Reporter's language does clear up the point.

Mr. Morton: There is another point, Charlie, that is that truely procedural or state's direction, if you like, manner of introducing evidence contained in deposition into trial record and going back to your small state of Texas, the Southern District of Texas has a most unusual rule to require the parties to agree in a summary of a narrative form of the testimony contained in deposition and then you read the narrative. I don't think that is authorized really by the federal rules. I think it is procedural rather than evidentiary.

Professor Moore: I would like to raise the same point I raised yesterday, i.e., to strike out "employees."

Professor Sacks: Yes, we would make changes to conform to changes in Rule 30, with similar change in Rule 37.

Dean Joiner: Why do we have to be consistent at this point? Because this is a different problem.

Professor Sacks: The point is we have changed Rule 30 to eliminate reference to employee or agent. We changed it to managing agent and we have to do the same thing here.

Dean Joiner: I follow you.

Professor Sacks: Do I take it we can pass 32?

Agreed

RULE 33

Professor Sacks: (Explains the mechanical changes.) (Calls attention to proposed Rule 33(c), p. 33-4, Option to Produce Business Records.) (Also explains the changes for lines 53-56.) I haven't had any reactionssto this except general approval.

Mr. Frank: I feel the Reporter has given us in this revision of Rule 33 a first class rule and I will take up what we do with the remaining problem as raised by Professor Rosenberg, relevance problem but it seems to me just fine. This is particularly true about device of reversing order of objections even though the Rosenberg Report did not show any problem in that area, but it seems to me a vast improvement anyway. You did not show any extreme objection which is solved by this device in Rule 33(a) about reversing the order of objections but it still is a very good think to do.

Professor Rosenberg: I think, John, that the fact that interrogatories are used by only one of three litigants where depositions are used by only one of two, yet interrogatories form 65% of all complainss about interrogatories and a lost of it is inferentially attributable to the fact that it is easier to complain than answer, because of the time sequence.

Mr. Frank: I think the Reporter should be inclined to be smug about the whole darn thing.

Mr. Acheson: I do too, and I think we have approval.

Professor Sacks: All right, and now the main problem under 33 relates to the problem of treatment of what we might call interrogatory. . . . (states how far he thinks rule should go).

Dean Joiner: I think I would approach this in a little different way, perhaps my thinking is incorrect. The difficulty here is not so much in answering the interrogatories as it is in amount of time taken up in making the objections in these, and the difficulty of getting _____ on objections in advance of trial. Therefore, I would not say anything about these in connection with interrogating or use of asking of questions but put some kind of limitation upon their use at trial. I would put "except on the scope of use of trial under section (b) of Rule 33 subject to except that interrogatories within the legal period affects the conclusion of characterizations may be excluded at trial." This then would avoid the ruling at the time the questions are asked and would permit this to be taken up at trial. This is clearly not a question you want to have at trial and does permit what Maurie Rosenberg has suggested -- the use for discovery purposes and avoids, I think, to some extent the advance ruling on these particular matters.

Judge Wyzanski: I am not concerned with advances entirely, I suppose the value of asking with respect to intention of lawyer is acted like a pretrial from which you eliminate from the cases thereafter a particular matter and if you eliminate the final finding in point of view of shortening the trial.

Dean Joiner: I think it might produce this but it should not be used at this point in the trial itself.

Judge Wyzanski: If it can't be used then isn't it an effective estoppel?

Dean Joiner: Then I would say this is not the way to go at it -- by interrogatories. Pretrial conference is better.

Mr. Jenner: I think by far the pretrial conference is the best place for this kind of thing. . . (elaborates on difference of pretrial conferences).

Professor Rosenberg: May I say there are two conceivable purposes in a rule such as this. Judge Wyzanski and Mr. Jenner have been referring to one of them. That is, to try to do what the pleadings do now, to tie down legal theories on which the litigants are proceeding. I do not have that purpose in mind. And this is the way it goes: We know that interrogatories. . . (explains).

Mr. Frank: I am anxious to see what Bill and Charlie think about this from the caselaw standpoint and I state my question this way: This is a terribly serious deep-seated problem. If what we are going to do is to allow the interrogatories to become as _____ James is worried, where we allow them to become common law pleadings and then stop the person, then we will have done the evilest day's work of our whole lives. . . . Is there anything Bill and Charlie care to tell us as to whether there is a workable way dealing with this problem to do good and not evil.

Professor Moore: I would associate myself with what I understand the position of the Reporter and Professor Rosenberg is. A party ought not to be able to object solely on that ground. The difference between the opinion and fact isn't very clear to some of us. As you know from having talked to John, and if he has some other sound reason, fine. Just because he is calling for opinion or some legal conclusion, it doesn't seem to me to be one which in itself ought to be sustained.

Mr. Frank: In places where this is being permitted, are people being booby trapped into premature particularism?

Professor Moore: I hope not.

Professor Sacks: There are two possibilities. (explains)

Dean Joiner: This is good, but it only covers part of the problem. As I read Maurie's draft. . . . This is broader than theories. . . . You have to protect the man that makes the characterizations at the time of trial who may not really want to be bound by (interrupted).

Professor Sacks: As the judges tell us, my impression would be that answers to interrogatories to state contentions would not be read at trial. Am I wrong?

Dean Joiner: If you tie your idea in with John Frank's about free men, then you may have something that is workable.

(Discussion)

Mr. Frank: Charlie, can we ask you too. (for his opinion)

Professor Wright: I was afraid you would. I do not have mature objection. I am badly torn on this problem. I think it would be

a work of real importance if we can eliminate the needless scrapping to which Maurie Rosenberg referred. The case law is an invitation to lawyers to object in every case. On the grounds of his asking for a conclusion. I think the attempt by some courts to draw distinctions between matters of fact and conclusion of law is obviously illusory goal to pursue. And if we could do something about that it would be good. I think to the extent, by interrogatories, you can provide easy substitute for pretrial and narrow issues, this is fine. At the same time, if I may read to you two sentences from my unworthy work (reads from his book) and I urge the importance of some methods that we can be sure we have not gone back to common law pleadings (s ates procedure)

Mr. Frank: We are not going to do that!!!

Professor Wright: (continues on with a sample case he had sometime ago.)

(Discussion)

Professor Sacks: The question before us at the moment is whether or not a draft should be attempted which moves in the following direction: (1) makes it impossible for a discoveree served with interrogatories to object on sole ground that they call for contentions, conclusions and opinions - exact formulation of that not attempted now. There would be problems of fact versus law and, as Charlie Wright points, it would not be easy to separate these out. For the moment, the direction would be to eliminate that as a ground of objection where that is the only ground; (2) a provision would be included that permits the judge to defer answers to pretrial; and (3) a provision would be included which makes

answer which as this legal component freely amendable, subject to provisions of Rule 16. Now, when we say freely amendable, I don't mean to say unlimited. The standard should be in a form the judge can say in this type of case, a complex case where issues have to be worked out as you go, the judge has to be in a position to say you are bound.

Judge Wyzanski: I have no objection to having a provision that interrogatory is not necessarily objectionable because it calls for a conclusion of law. I do object to interrogatory which calls for a party to disclose his contention of law. Contention is the word it uses.

Professor Wright: I detect a consensus that if we can by rule submit a solution to this problem it will be useful, but we are not sure if we can. (re how easy it is for those who do not have to do the drafting to say give us another draft to look at). If the Reporter thinks this can be done, and is worth the time, I think it would be fine.

Professor Sacks: I think this is proceeding down the direction I outlined. I understand the objection of Judge Wyzanski about contentions. It creates a problem, but I think a draft along the lines I indicated is worthy of the effort.

Professor Rosenberg: I am not sure it would serve much more purpose but I would like to emphasize that all I think can be accomplished by this draft is to deal with the problem mentioned by Judge Wyzanski; namely, removal of the mere question of the formulation of the interrogatory in example as a basis for objection, and the only point I would like to make by way of illustration, taking

Judge Thomsen said, is this: any question that is put in an interrogatory can seem to call for contention instead of for facts, or vice versa, depends on how the question is framed. Part of the problem we are facing is the inartfulness of the draftsman of interrogatories. For example, take question of contentions -- at what rate of speed do you contend he was traveling" That can easily be changed by the questioner. . . . It seems to me a rule that would be possible would take into account both difficulties and damp down the extent of the objections. This would not revive the bill of particulars because. . . . I would suggest the Reporter consider merely wiring into Rule 15, at this point, and say the answers to questions in interrogatories would be freely amendable as provided in Rule 15.

Professor Kaplan: You could wire it into Rules 15 or 16. Possibly both.

Mr. Acheson: I think we have had enough on this.

Mr. Freedman: I think we should proceed with a little caution here about freedom of amending answer because as cases develop one side or the other has a right to rely on answers and proceed and base their case on it, because as you come to the end of the case if the other fellow withdraws his answer and finds himself without any defense to rebut he is boxed in.

Mr. Jenner: I would like to join Mr. Freedman on this point. This does present a very great _____ agent. If you reach trial stage . . . . and you are so free to amend that it is substantially no discretion on the part of the trial judge you are subject to a serious trap.

Professor Rosenberg: I didn't mean that. . . .

Professor Louisell: But it is to be liberally exercised, and I think you have to be careful that we don't meet this liberal amending capacity of the judge is applicable to sheer answers to purely fact interrogatories as to contention interrogatories.

Professor Louisell: (continued) It is interesting to note that when you face up to this problem in Rule 36 where would be the logical place for this, we don't say anything about contention of fact.

Professor Sacks: No, that is not the proposal. . . .

Professor Louisell: . . . . but if we could make this distinction between fact and contentions and limit our liberal amending capacity to those things that go only to legal contentions, I think that is the most helpful suggestion that could come out of the effort today either here or in the state.

Professor Kaplan: Would you limit the scope of this to contentions?

Professor Louisell: I would limit the liberal amending power that has been referred to here to contentions. Legal contentions or theories and not carry forward the notion for any encouragement to ask for (factual amendments?).

(Discussion Continues)

Mr. Frank: Could we have a list of 10 or 20 cases which seem to you to involve actual experience with injustice or waste which would be cured by whatever draft you are talking about. It is too voluminous to research.

Professor Sacks: How many can be submitted this way, I am not sure, but I get your point.

Mr. Cooper: Would it be helpful to consider the proposition of limiting interrogatories calling for legal contentions to after the other mode of discovery has been concluded? That is, after the facts.

Mr. Freedman: I think that may help. . . .

Professor Sacks: The principle is sound but the difficulties are the very ones we started with.

Mr. Ahbeson: May we move on to Rule 34?

Mr. Frank: Mr. Chairman, I have two other proposals which I would merely ask the Reporter to take under advisement and take them up if he has time over the summer: (1) The Rosenberg Report tells us that the largest problem in discovery is an appeal of interrogatories. Almost all is in the area of relevance. We did in our discussion yesterday in 15 or 20 minutes among ourselves conclude this is something we can't do anything about. But nonetheless it does seem to me we should take a more clinical look at it. The point raised in the Report is simply too serious and I would wish, as a minimum, that we could lay down a document and show that we have really exhaustively tried to consider whether we could do more than that, and number one is: can we at least have further consideration of whether anything more can be done in that direction?

Professor Sacks: Do you have any suggestions?

Mr. Frank: I am lost, I don't know how we get at it. That is why I ask you if you could brood over it a little.

Professor Sacks: I can do that. I have been through the various possibilities and you look at what has been done and I think most

of the solutions we would reject. There is the procrustean approach which you say no more than "X" number, you say -- we will just force you to pick the most important ones and that would cut down a good deal and there are people arguing for this. Professor Fields introduced it into the basic rules on the basis of his Massachusetts experience and he thinks for main practice it is a good thing. He does not suggest it for federal rules. Most of the solutions will turn out to be of the type we will reject. The problems are inherent. What you are asking for is a statement that covers this in a comprehensive way so you can feel it has been put down in this way. I think a statement could be prepared. Unless and until more specific notions or suggestions come to me, I don't think it will be more than that and you may not be very satisfied with it.

Mr. Frank: I want to revert to Judge Maris' point. This will go to the country and be there perhaps two years. What we are going to get back is a flood of suggestions directed right at this point. Ill-considered probably, and amateurish, from a lot of state bars. I would think we ought to have the jump on that and ought to disclose alternatives rejected that should be in it when it goes out to the country so it will be apparent we have considered, for example, a device of limiting number, we have considered a suggestion for the question of approving or rejecting form interrogatories. But the matter here is to at least focus in for that bar discussion if we documented our trial. My other matter is very different. Does anyone have anything else on this?

Mr. Jenner: I would hesitate to go to the bar and say we have considered something and the bar not comment on it because we have already rejected it.

Mr. Frank: I don't want to ask them -- I just want to say we have rejected limiting the number because. I am sure there is a great impulse in the country to limit number. Seems to me we have some duty to explain our rejection.

Mr. Jenner: What troubles me, I would agree at the moment as far as limiting the number, we see no practical way. From a political standpoint it is unwise to say to the bar we have rejected something. Let the bar write in and say how it should be done. Sometimes ridiculous suggestions will stimulate good ideas.

Judge Wyzanski: Would you say it would be a mistake to say we have considered the problem of a national standard and we find it impractical to impose a national standard?

Mr. Jenner: I see no objection to saying we have considered it and we have not been able to figure out anything.

Mr. Freedman: I don't think we should accept defeat at this time. After more thought, the Reporter may come up with a draft along the lines. . . .

Mr. Frank: My other point -- what we have done now under this constructive rearrangement is to put all the protective stuff in one place to cover all forms of discovery and thus we have made depositions and interrogatories largely functional. This is true in every respect except one and that is on the Rosenberg alternative. We are considering making a specialized distinction as to interrogatories.

I raise the question whether there should be others. I outlined this at the bottom of pages 8-9 of my memorandum (re interrogatories).

My sole request is has the Reporter fully considered, and if not, would he, as to whether there should be some express distinctions as to the functions and scope of depositions and interrogatories or is it best to leave that alone. Am I at least coherent, Al, as to the problem.

Professor Sacks: As to the first part of your question I got the impression when you talked of special treatment you are referring to the thing we have already talked about which is legal (interrupted).

Mr. Frank: There are all sorts of factual accounting -- other matters which may be quite appropriate to ask about in one place and abusively in the other. I take it could well be an abuse to call an officer of the corporation that we make answerable under the Morton proposal and ask him a lot of accounting details. You have to do that by interrogatories. Maybe there is some distinction here that should be thought about.

Professor Sacks: Maybe there is more to it than I now see, John, but I think that is true for all the rules. . . .

Professor Moore: May I raise a point in 33(a)? Interrogatories may be served after service of the summons of complaint and without leave of court.

Professor Sacks: That is a provision we have made subject to reexamination.

Professor Moore: In light of the Admiralty Rules?

Professor Sacks: In light of that particular problem and general discussion of similar problem in Rule 30. Any difficulty you have I would be glad to hear it but it is not now a firm proposal subject to reexamination.

Professor Moore: I withdraw it.

RULE 34

Professor Sacks: The major changes are the change to eliminate the requirements of an order. . . . Therefore, I don't know of any problem presented by Rule 34 insofar as parties are concerned. And if there is any view otherwise I would like to hear about it. There is a provision in Rule 34(c) which is a brand new provision -- nothing like it in the existing rule -- for orders to non-parties from any examination and copying of documents and things subject to a subpoena duses tecum under Rule 45(d)(1). . . .

Dean Joiner: The subpoena is the device to make available certain objective evidence for use in the court. There are perhaps other types of evidence that could be made available and if we have to devise a new device we should devise a new device. I just simply (cough blurred out few words) device in order of court at this point. It requires entry upon land of a non-party for purposes of taking photographic or surveying and it could be accomplished without any serious depredation of the person who is not a party. We ought to specifically say the court has the power to require that it be upon the land for the purpose of photographing or surveying or whatever the case may be. I would make the provision as broad as to non-parties as it is to parties and provide a protective device is the order at this point and is

the means by which the rule is accomplished instead of through the order and more limiting subpoena.

Mr. Cooper: Wouldn't the non-party have the right to come in and offer objections?

Dean Joiner: The point is we are involved now in trying to solve problems through a prodigious procedure and I think there is a need to provide a way to get at certain bits of evidence.

Professor Moore: What would he have to show to get a protective order? Would it suffice if he said he just didn't want people tramping on his land for geophysical survey or whatever?

Judge Thomsen: I don't see what this duces tecum has to land. You can't bring your land with you -- it has to be documents.

Dean Joiner: I am suggesting we go beyond this, Judge.

Judge Thomsen: And after a hearing, it certainly must be after a hearing, as which the person on whom it is served is represented.

Dean Joiner: This same language came from a rule I drafted for Michigan and I have now convinced myself that it is not a necessary limitation, that we can go further to provide evidence.

Judge Thomsen: I think we want to be clear that the third-party is going to have a chance to object and I think the order will give this after the deposition, rather than before, because they will want him to produce all sorts of books and you won't be able to tell ahead of time what they really want and what the problem is, and during the deposition they will call on this and it will be marked for identification and his lawyer will object to its being copied because it is a trade secret or whatever and at that point it should come back to the judge. We ought to have a ____

in the judge that after you have heard the witness and his lawyer that this can be done. Practically, it is going to come afterwards rather than before. Nine times out of ten it will be handled by rebut counsel without any court order at all. I would hate to have prior court hearings every time they want to take a deposition in subpoena duces tecum.

Dear Joiner: This has nothing to do with _____ duces tecum.

Judge Thomsen: Are we still talking about (c)?

Dean Joiner: I am suggesting a change in that.

Judge Wyzanski: But you are going into questions of substantive law and not procedure. I have never agreed that anyone can come on my land for the purpose of photographing or otherwise. Since when am I compelled that someone go on my land? This rule is plainly a substantive rule.

Dean Joiner: What subpoena itself?

Judge Wyzanski: That is established and it requires the bringing of property, That is a substantive rule established long before these rules of Civil Procedure. . . . (re bringing books but says that land is something quite different).

Professor Sacks: My inclination would be to limit discovery to non-party to subpoena duces tecum. That would be my inclination. But it is a very tentative view based on the sense that number one, there will be a considerable outcry in opposition to discovery against non-parties that goes beyond the subpoena duces tecum, and (2) I am not clear just how strong the case for it is, just what the cases for it are, etc. But that is the issue, Judge Thomsen, the present draft of 34(c) is limited to subpoena duces tecum and so

limited my suggestion is this other procedure under Rule 30 could well displace it. Charlie Joiner's point is, I think, not in disagreement with that but he is saying couldn't we have an order under Rule 34, use 34(c), and really cover matters of discovery that go beyond the subpoena duces tecum and particularly as to land and he may think of other instances where he wanted to do the same. That is the question. The one Judge Wyzanski called substantive issue.

Mr. Acheson: May we interrupt the discussion for a moment as we have the Chief with us and this is perhaps the last time for a few meetings that we will have Ben Kaplan with us and we wanted the Chief to be with us when we told Ben the rather embarrassing facts of how much we think of him.

The Chief Justice joined the meeting and then Mr. Acheson paid tribute to Professor Kaplan who is resigning from the Committee Professor Kaplan spoke briefly and asked that he be retained on the mailing list to receive future materials of the Committee. The Chief Justice also spoke in tribute to Professor Kaplan.

Professor Elliott: This will be my last meeting with the Committee. . .

Mr. Acheson: I was hoping, Sheldon, that the Chief Justice would talk you out of this, but he has failed. I had a letter from Sheldon telling me he was going to submit his resignation (bids Professor Elliott farewell and expresses his appreciation).

Discussion Re Next Meeting: The dates of September 12th and 13th, and possibly, the 14th were set for the next meeting.

Professor Sacks: Are we ready to turn to Rule 35?

Mr. Morton: There is one matter, Mr. Chairman, in Rule 34(a),

a matter which is noncontroversial, probably ought to be updated, in this definition of what you can ask to do, taking into account the advent of computer accounting. You should be able, unless someone wants to say that running off computer information is copying, I think we ought to come up with it. . . . I don't have the language but you can compel a person who has the records, who has it in computer form, to run it off for you. I would suggest language later.

Professor Sacks: Brown says he will supply the language, otherwise we will have to hire a computer.

RULE 35

Professor Sacks: Explains the rule, in general, is acceptable. Raised one point by Charlie Wright involving preemptive effect of Rule 35. . . .

Professor Wright: When I raised the point in my letter of May 2, 1966 to the Reporter, I indicated no view on what the solution to the problem should be but, only that I wanted to be sure that the Committee made an advertent solution, rather than thinking specifically to this problem we changed the law and therefore produced a result we had not considered. I therefore put the problem in concrete terms because I thought it would facilitate some understanding (explains case he represented).

Professor Sacks: I think what I am suggesting is that this is the right conclusion to reach; what other conclusions are possible: (1) to say that 35 is preemptive, that is, when the plaintiff doesn't ask for statement of the defendant's doctor's examination report, no production is possible. That seems to me not consistent with

discovery rules in general, (2) would be to have a provision which would go beyond anything we have now for ordinary exchange of all unprivileged doctors' reporters, which I am not suggesting - I asked Charlie if this is something he had in mind and I think his answer was no. In other words, the suggestion we are making is a middle ground suggestion -- it doesn't preclude discovery under other rules but discovery under rules must conform to those rules, so that it is limited in many instances, particularly by trial preparation limitations in 26(b)(3) and (4). The other extreme would be to have general and automatic exchange of doctors' reports whenever nonprivileged.

Professor Louisell: I think the former is the preferable solution and could be achieved by the Note.

Professor Sacks: That is essentially what I suggested -- the middle ground and do it by Note.

Mr. Freedman: Would you just summarize what you will put in the Note?

Professor Sacks: The court would state that the cases of Buffington v. Wood, Viginski v. Rusk, and other cases like that describing the position they take. Namely, that reports of examining in compliance with those discovery rules and that these are better reason cases, and nothing in Rule 35 is intended to change the doctrine of those cases.

RULE 36

Professor Sacks: Some issues were discussed fully at the last meeting and some not so fully. I have three items to put to you -- all issues of substance and some importance. (1) on page 36-2, line 6, the draft deletes the words "of fact." That is to say existing Rule 36 prefers to requests for admission to the matters of fact and the proposal is to delete "of fact." This was proposed last time. The reasons are that Rule 36 is intended to serve function of limiting issues for trial, of aiding, in other words, in getting the proper scope of trial and in order for it to accomplish that it is necessary that one be able to request admissions that have legal components in them. There is a similar mixture in the kinds of requests that would be made. (2) It is very difficult to separate out facts of law from opinion, which includes elements of law, so we would be eliminating rather difficult distinction in the cases Pryor reached. (3) Would be that while this could be done at pretrial (cough blurred out few words) is really better place for it. There are two problems about that (a) not every case has pretrial and (b) that some of these admissions, at least, particularly in cases that go for several years, the problem which party confronts is whether he has to prepare the proof on the particular issue. Pretrial may be scheduled rather close to trial but his request for admission may well be made to serve purposes of eliminating need for having to present proof on particular issue. . . .

In our discussion last time these points were recognized and questions were raised -- in particular, whether it won't often be necessary or desirable to have a judge present to resolve

issue of this sort; as to that my response is to add a new provision, this is a change from point of draft, that the judge may (page 36-4 & 5, line 55 continuing on) in lieu of these orders, determine that final disposition of the request should be made at pretrial conference. That was the effort to deal with that.

The second problem raised referred to. . . (then refers to Professor Joiner's suggestion.)

General Discussion)

Mr. Freedman: I would like to add that the commodity and disposition of the objection to the pretrial conference could be too late and very prejudicial as in many instances the pretrial is held on the eve of the trial itself and therefore the party who might have to prove it might be unable to prove it at that time. It might be very expensive and he may think he cannot go to expense and doesn't know what will happen, and therefore I think there should be an added provision if it is going to be disposed of at a pretrial. There should be enough time between that date and time of trial to enable party to get witnesses together or for superior approval.

(Discussion continues)

Mr. Freedman: We can ask for admissions which are not contained in every particular document but what bothers me is you take the rule itself starting on line 1, 36-a, and when you get to line 5 where it says "request or of the truth of any relevant and unprivileged matters," I think we all take that to mean unprivileged matters any place else, not just in documents, but I think this language has already caused some confusion and it ought to be straightened out. Starting with the word "or" should be something to indicate

that this does not refer to the statements on material within the documents that is referred to in the preceding sentence.

Professor Sacks: It may be that we should turn them around to say "requests or of the truth of any relevant and unprivileged matters set forth in the request or for the admission of the genuineness of any relevant documents." Fine

I come back to this question of deleting "of fact."

Dean Joiner: I move its approval.

Majority voted approval

Judge Wyzanski: Of course, the comments will make it perfectly plain what we have done because this is going to excite a great deal of opposition when the bar hears about it.

Professor Sacks: The second point I would like to get to is the one raised by John.

Mr. Frank: I didn't realzie Bert would be gone and I am anxious to have his point of view. What is troubling me is the passage which says the person must admit not only what he knows but also to the things "reasonably available to him." (page 36-4, lines 40-43). I run into two caveats in my mind. On the other hand, I am supposed to have been about the most ardent fellow on the Committee for expansion of Rule 36 and I am delighted with the expansion. But on the other hand, I run into major prejudice as I don't want one side to have to prepare the other side's case for him and that is what we hit when we get into an ambiguity like "reasonably available." . . . . If it does not trouble anyone else then I will simply be voted down, but if it does trouble others then my request, because I have such respect for Bert's seasoned

judgment, if others are troubled I would rather we attempt to decide it.

Professor Sacks: Just by way of background this is an issue on which the courts are divided, there are cases both ways. . . .

(General Discussion)

Judge Thomsen: What bothers John, and bothers me is that "reasonably available" may go beyond certain matters we have been talking about and none of us know how far beyond.

Mr. Freedman: . . . . I think there is much to be said for this rule and so far as "reasonably available" I think this is a good provision as you don't have anything to go by if you don't have some standard. The term "reasonably available" means that it is available within reason to the man who gets the admission filed. In the absence of some other standard, it seems to me this is a perfectly logical way to do it. It will save a lot of court time and it will prevent many issues from arising to trial which have no business arising.

Professor Sacks: I have tought of another word, "readily available" -- I am not sure it is a better term. I thought reasonably available was a pretty good balance. . . .

Judge Thomsen: But reasonably available is a very broad term.

(Discussion)

Professor Wright: I supported this proposal for 12 years and twice said in different books this is all available law, and yet the discussion makes me uneasy. I would feel happier about it if the Reporter could present to us what the facts are in the cases in which there is a fight about this. There are a manageable number

of reported cases which have gone one way or the other and lets see what sort of things fellows are saying. I don't know whether it is something we simply have to pull down from the shelf or if it is a case of having to go out and prove the other man's (blurred) point.

Mr. Frank: If we could do that I would be happy and I also lean very strongly to Judge Wyzanski's suggestion that it was the word "availability" that worries our people. Everything is available to them.

Professor Louisell: You might consider "readily furnishable."

Professor Sacks: I could look for a substitute for available.

Dean Joiner: I would like you to refer to the specific one John Frank put to you (cough) use this as protective devices we throw in the other rule.

Mr. Frank: Yes, but others that relate to Rule 33. Can you frustrate Rule 33 by using Rule 36.

Professor Sacks: The third point, is matters in dispute. In present case law there have been a fairly large number of cases in which a party on whom request to serve objected to the request on the ground that the matter is in dispute. That is his objection. And courts have gone in various directions on this. In prior draft. . . . (explains). The rule as presently written states objections can be made or requested on the ground that some or all of the requested admissions are privileged or irrelevant, or that the request is otherwise improper in whole or in part. That material is lined out in this rule, page 36-3, line 27-30. It deals with. . . . (explains new change).

Judge Thomsen: I would like to see the word "sworn" come out as I think that causes a good deal of uncertainty.

Mr. Oberdorfer: A fundamental problem with the idea of this rule in terms of its relationship to pleaders. The civil rules have taken us away from old concept that are strictly -- have allowed parties, particularly defendants, considerable latitude leaving themselves flexibility as far as their commitment in a position is concerned, and I am troubled by the extent to which this rule can be turned around into a strict common law pleading type of litigation.

Professor Sacks: Your concern comes with provisions on withdrawal or amendment.

Mr. Oberdorfer: They come to a head there, but they are related now to what extent is a party pinned down to a commitment on issue about which the burden of proof is on the plaintiff or properly belongs there.

Professor Sacks: There are two separate things. . . .

Mr. Oberdorfer: The other element of question is whether or not we are slipping into a situation where a request for admission of something that requires judgments about the law.

Professor Sacks: You are suggesting again this is the type of thing we shouldn't be having people swear to and shouldn't be treated for purposes of trial lawyers where lawyer appraise it.

Mr. Oberdorfer: And should we not accord the parties the same privilege with respect to admissions that parties now in Rule 15.

Professor Sacks: For amendment?

Mr. Oberdoffer: I am asking a much broader question. What is the relation, have you thought through the relationship between pleadings and admissions in a lot of areas where we have not ourselves conceived.

Professor Sacks: (States what we have in rules now).

Mr. Oberdorfer: Let me ask one further question. Does the word "matter" as used cause any trouble? What would happen if we substituted "fact of the matter."?

Professor Sacks: We would have all the problems of distinguishing facts, fact of opinion, conclusions and whatnot - just the thing that has been bedeviling us in both rules, and we would eliminate any chance for getting some resolution of the issues as we go. . . .

(Discussion)

Professor Wright: Al, why in a system that has been so ordained since 1938 should the answer be sworn. If the answer given is false, whether under oath or not, we are going to have difficulty. That person has to make the proof. We then have a very effective section under 37(c) that is is inconceivable to me that false swearing of statute that would send a fellow to jail, so the only reason I can think of for reciting a false answer is because people are less likely to make false statements under oath but this, I admit, is something we don't really believe today.

Professor Rosenberg: I think there is another reason for the swearing. . . but the reason for swearing here I suppose is connected with fact that what emerges is judicial admission which is binding on the party to the point he won't be allowed to introduce statements in contradiction. That is a powerful dose to say he is going to be foreclosed from proof and contradiction. . . .

Professor Sacks: I would go along with Charlie Wright's notion and Judge Thomsen's notion that we could get rid of it. Would you do the same with interrogatories?

Professor Wright: No, because there you have no other real sanction if they give false sentences.

Professor Sacks: In order to get it admitted you (blurred).

Professor Wright: No, it would certainly still be admissible even an unsworn answer to interrogatories would be in admission of the party opponent. It would be no evidence problem. . . .

Professor Louisell: It boils down to this, there is not more reason for insisting upon verification of answers to admission than there is insisting upon verification of the complainer and answerer. Now the state still differs substantially on this and this would be perhaps desirable but nevertheless in the state procedure a substantial change.

Professor Sacks: What I gather that the notion of treating disputed evidence the way I have seems as such, as treatment, acceptable. The elimination of the specification of grounds of judgment seems acceptable. The suggestions are along the lines of trying to design the admission so it is clear for the purposes of the action, and I gather there is support for getting rid of the oath because it is now an admission for purposes of the action or denial for purposes of the action and also because we brought in legal _____ into the answer which is another argument for getting rid of the swearing.

Mr. Cooper: Was the consensus to be signed by the individual

and the defendant.

Professor Sacks: That's right. That was the suggestion. Signed by both.

Mr. Oberdorfer: I have a question in respect to (b) in limiting amendment to manifest injustice and that you might want to borrow language of Rule 15 when justice so requires.

Professor Sacks: Since we are going to try to find something for Rule 33 for similar problem, question is to see if we can find something for this too.

RULE 37

Professor Sacks: I have nothing on this of major substance. We did have one with respect to (d) where we had included references to officer, director, employee but we have changed that now. That is we changed Rule 30. On 37(d) (p. 37-9), as draft went to you it was changed in two ways in scope. It added the term director to what now includes officer or managing agent of a party. Charlie Wright raised question about that. (2) It includes employees or agents included under Rule 30(b) but we have changed that now. That comes out. We have officer, director, managing agent in Rule 30 now, so we don't have the conflict any more. But director is probably the one remaining problem. Charlie has question about inclusion of direction. -- (goes on to explain.) So I would include it but it is not a major point.

Professor Wright: I quite agree that it is not a major point. In fact, the thrust of my comment was that it is a change in the law and should be explained in the Note. If you do that, I will be happy.

Professor Sacks: Fine

Mr. Morton: I have a problem in 37(d)(1) in that it relates to venue statute, in fact, that venue in many civil actions over corporations of any size by the fifty states and D.C. and there is no geographical limitation expressed in here on scope of what amounts to subpoenaless subpoena. A notice having the full effect of a subpoena. It does not seem to be proper, and never has, is one of the places where discovery is abused and the expense side of discovery is important. The norm as set up here is not as limited as the norm of subpoena range and it is suggested that in many courts, particularly the Southern District of New York, take a sort of parochial attitude that anybody that wants to sue in Southern District will be glad to come to New York. I suggest we consider possibility of some reasonable limitation on scope of subpoena effect given to notice under this rule as the norm.

Judge Thomsen: I got lost on lines 37-38 (interrupted).

Professor Sacks: Yes Judge Thomsen, what I have done is changed that to make it a separate subdivision (3) so it becomes clear, and the other thing I have done there is it now reads for purposes of this subdivision I think B. Morton suggested it should read for purposes of this rule because an evasive or incomplete answer might be relevant to 37(b) as well as 37(a).

Professor Sacks: Mr. Chairman, we are at a point where we could stop and I think everybody would welcome it.

Meeting adjourned at 1:00 p.m.