EXCERPTS FROM THE TAPE OF THE SEPTEMBER 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 September 12-13, 1966 at 10:00 a.m. The following members were present:

Dean Acheson, Chairman
William T. Coleman, Jr.
Grant B. Cooper
George Cochran Doub
Wilfred Feinberg
John P. Frank
Abraham E. Freedman
Arthur J. Freund
Albert E. Jenner, Jr.
Charles W. Joiner
Benjamin Kaplan
David W. Louisell
W. Brown Morton, Jr.
Louis F. Oberdorfer
Roszel C. Thomsen
Charles E. Wyzanski (attended September 13 only)
Albert M. Sacks, Reporter

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 Columbia University; Professor Charles Alan Wright, member 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 expressed the suggestion of the Reporter that they begin with the first rule and continue right on through. Then after agreement on the rules, he could make the editorial changes as instructed, then circulate the final results for written approval, and then perhaps send this to Judge Maris' committee to circulate.

If another meeting is needed, it will, of course, be held. Meeting was then turned over to Professor Sacks.

Rule 26

26(a) - Had been approved, and since there were no comments on it in respect to the present draft, there was no discussion called for. It simply sets up the methods of discovery and does have a provision for the extent to which the methods can be used; that is, the frequency of use is not limited. Professor Sacks requested approval without further discussion. Dean Acheson asked if there were objection to 26(a).

The reporter was requested to re-examine the notes with regard to organization and condensation.

Professor Sacks replied that, as he had said in his correspondence, there were some comments on the notes, but that he did not have the time to answer all the comments, but that he would take into consideration all of the comments, oral and written, and the general admonition to condense and simplify.

Rule 26(a) was approved without further comment.

26(b)(1) - Professor Sacks explained the background, and stated that Mr. Morton raised a question in his letter as to the usage of the term "relevant" and suggested somewhat different language. Professor Sacks objected. At page 26-3, line 4, Mr. Brown suggested change from "relevant to the subject matter" to "relates to the subject matter." Professor Sacks felt that if the wording were changed, it would appear to be far more drastic, as viewed by others, than Mr. Morton really intended.

Mr. Morton: After posing his views on the usage of the words "relevant" and "relates," stated that he would just like to see changes made on page 26-3, lines 33 and 34 - the words "is relevant" to "relates." Discussion was held. Professor Sacks stated that the courts had made it quite clear that "relevant to the subject matter" is quite different from relevant in the sense as to what is relevant at trial. It is broader.

Judge Feinberg: Agreed with Professor Sacks that to change the wording would seem to have far reaching significance - much more than intended. There was no further discussion. Mr. Acheson asked if the rule was to stand as drafted and the Committee was in agreement.

Professor Sacks said that there was a comment from Mr. Colby, with regards to the last sentence in 26(b)(1), lines 41-45. He said he believed that Mr. Colby felt if the sentence were read literally, it would suggest perhaps that even privileged matter is discoverable, when, in fact, it is not. Professor Sacks felt that the wording had been used from the beginning; he had not been misread by anyone up to now; to change it would be to cause scrutinization of what the Committee is trying to do; should let it stand as not raising problems. There was discussion. Objection by Mr. Colby was overruled.

Rule 26(b)(1) was approved as drafted.

26(b)(2): Professor Sacks explained the background; present draft was approved as now written. With regards to Mr. Freund's point of a case in which an insurance company contests - Mr. Sacks said that, of course, there was no objection to a company contesting, but in the case of a contest, the insurance company was required to disclose the contents of the policy. Since there was no prejudice against the insurance company, Professor Sacks felt that the point had been taken care of.

Mr. Freund: If it is satisfactory to the Committee, I think that the disclosure, on the insurance question, might well also disclose the fact as to whether there is a contest or not.

Professor Sacks: That will emerge inevitably because of the way in which the company responds to the claim.

Mr. Freund: The company may not be a party to it.

Mr. Jenner: That's right.

Mr. Oberdorfer: (Re Hardy's letter)

Professor Sacks: [Restates Mr. Hardy's problem.] [States he deals with it in the note.]

Mr. Frank: I think the note is especially outstanding in that regard. My main thought about this is that I think we should focus on the fact that if we pass it this will hit the country as probably the most controversial of the proposals we will make. It will seem to the insurance industry like an absolute calamity and we will give the appearance of being the instruments of the devil. I mention this because it relates not to this proposal but to others to which we are coming and I think we ought to hold in mind as we consider and reach other points coming up and down the line that

we are going to be in a major national contest over this particular proposal.

Mr.Doub: We are not providing that an insurance policy will be admissible by this when America is fighting for discovery in pre-trial proceedings as to whether it exists.

[General discussion re defendant's counsel.]

Dean Joiner: I want to agree with John Frank as he is right as can be about the problems we are going to get into. This is a very good rule but we tried to do exactly what this rule does four years ago when we drafted our rules in Michigan. We had a provision which said they shall be discoverable and we backed down at the last minute, or sometime in the process, in order to get the rules adopted just because of the flag put up on this particular rule. I think that we have to be prepared to face squarely up to the fairness of the question that the judge indicates and argues from that standpoint.

Mr. Morton: The only thought I had, Mr. Chairman, is that the term "insurance policies," if we're going to go to this, seems to me to be of a word of art which excludes a number of other forms of assumption of liability again without any logic. It is customary in patent affairs for somebody or other to have an indemnity contract by which the manufacturer, as a matter of fact, the UCC, if I may call it to your attention, imposes an implied warranty on the manufacturer of the assumption of risks for all forms of infringement. I see no reason why that shouldn't be equally discoverable, while you're about it, even though it goes considerably to the weight of the financial responsibility of the defendant ....

Mr. Jenner: Mr. Chairman, it happens, Brown, that I made remarks almost to the same effect. But, ah, this is a recognition on our part of the departure from relevancy or relating to or anything else. This is completely ad hoc and it is directed toward the problem of relieving some of the congestion in the courts. At least in the area of personal injury where normally there is insurance in automobile accident cases, the judges report to us on the experience of the trial lawyers who are in this field, plaintiffs and defendants, is that "now let's have the insurance" and the amount of the limitations does help get cases off the calendar without prejudice to anybody including the insurance company. On principle it ought to be extended to indemnity agreements guarantees, other forms of secondary coverage of a particular liability. My feeling on it is, that we really will raise a storm where we are dealing with something that is not in the ordinary strain of the making up of an issue and the obtaining of information relating to the decision by the district court or jury of that particular issue, and at this point, we ought to limit it, as we do, to policies of insurance. I don't think, John and Charlie, that as much doubt as you anticipate will arise for these reasons. In those states which now permit, such as Illinois, by court decision, and there are a good many of those states now, it will not cause a single ripple. In states such as yours, and ours, when we were at that stage of the game when we had to get legislative approval, of course the insurance companies worked on legislators, and you fail to get, when you pursue that course or that means the support of the Bar, that you would normally otherwise expect because the insurance companies are hiring lawyers

all over the place to defend these cases. The insurance attorneys are going to be a bit surprised about this. Of course they will enlist efforts of protests on the part of the International Association of Insurance Counsel, and other lawyers whom they hire in every town and city and developed area in the country. I don't think it's going to be a storm that really will affect us. Mr. Hardy's letter, in my opinion, is in evidence of the fact that when you do go beyond the issues in the case, discovery of matters that relate only to the issues, that then you have lawyers such as Mr. Hardy and others, who say: "Well, all right, if you're going to that extent why not go to some other extent?" and it does get you into a "Pandora's Box" or a little quicksand. We recognized that at the outset. Now, I happened to have been one who was opposed to this on the ground not that we ought not to have that information but I didn't think it related the issues, but I've been converted, at least to the extent that I think maybe it does help to relieve the congestion.

Mr. Doub: Bert, I don't understand your objection to expanding this to cover indemnity agreements.

Mr. Jenner: My objection there is that if you draft language, that is, draft language so it will cover indemnities and guarantees and other phases of secondary liability or coverage, then you will introduce into these cases new issues: Is this an indemnity agreement? Does it cover the particular claim or liability? and you will have separate law suits dealing with that at the discovery stage raising little separate law suits at the discovery stage of the game as to whether this is or is not discoverable. Unrelated to the particular issue presented. Now if, in a case you give

notice to defendaand that sort of thing and then you file a third party claim then its discoverable. But to go beyond this specific problem, when we know that in 95% of the automobile accident cases there is insurance, and it's there, it's something that the district court judges use to get cases off the calendar. It seems to me it is ad hoc and is special and that's as far as we ought to go at the moment.

Mr. Acheson: David, did you have (interrupted).

Prof. Louisell: I just wanted to confirm the remark that we don't need to overly fear reaction of the Bar. California has gone in this direction; district court of appeals upheld discovery and in typical insurance cases, the Supreme Court didn't even think it was worth reviewing it. So that I think it's easy to exaggerate the public consternation over this recognition of the realities of modern life.

Mr. Acheson: Are we ready to vote on ...

Mr. Freund: I'm not sure that you met my point and Mr. Frank said he would like to express a view on that.

Mr. Morton: As a point of information. Who knows how the direct action statute in Louisiana has worked out other than to increase the congestion of the docket in New Orleans? Has it been a good thing or a bad thing in the handling of automobile litigation?

Prof. Rosenberg: I've talked to members of the Bar on both sides in New Orleans on that and in Louisiana as I understand it the amount of coverage and the carrier is on file with the secretary of state or the equivalent and all you have to do is write to him

in pursuing a defendant and you'll find out what the coverage is and who the carrier is.

Mr. Jenner: Isn't that true, also, Al, that in Texas you may make the insurance company party to the defendant?

Professor Wright: No.

Mr. Acheson: Do you wish to pass this particular provision and vote when Mr. Frank comes back or should we vote on it now?

Dean Joiner: Could I ask, if I understand Brown's suggestion, is your suggestion to make the contents of any contract by which a person may be liable to satisfy all or part or a judgment discoverable?

Mr. Morton: That is what I think the logic of the situation compels. In patent cases there are no insurance policies because, as Judge Thomsen knows, the rule, at least in Judge Watkin's view, is that if there is a contract of indemnity of any sort it constitutes active inducement infringement that makes the insuring party liable for the whole sum regardless of the contract limitations. So we love to find out if it's a large solvent person who has assumed a very limited liability, it means that the defendant is as well healed as the person who has assumed the risk regardless of its contract in which he assumed it.

Mr. Acheson: Brown, are you suggesting we broaden ....

Mr. Morton: I would like to see it broadened to term "insurance policy."

Mr. Acheson: Let's take a vote then on whether it should be broadened and then I think we really ought to vote on the other question. [5 were in favor of broadening the provision; 6 opposed.]

Professor Kaplan: I would vote against it.

Mr. Colby: I should like to say at this point since it's becoming somewhat of a matter of a close vote, I cannot see that it isn't a completely unjustifiable discrimination to separate insurance agreements from indemnity guarantee agreements.

Mr. Acheson: I think it is a discrimination but we've had a good deal of talk about the justification of it.

Mr. Colby: Well, the purpose I assumed throughout was to enable to plaintiff to find out what he can't find out by buying a credit report from Dun & Bradstreet. Now among the things he can't find out are all types of guaranteesindemnity agreements of which insurance is only one and in many fields, as Brown Morton has pointed out, it is customary to have a letter of indemnity or guarantee rather than an insurance agreement with an insurance company. The letter of guarantee or indemnity may be, again, backed up by an insurance company, and, of course, over the water by a bank, but that is the normal procedure. Now it seems to me that one of two things; either the provision we have here is to be regarded as an unjustifiable discrimination or it is to be regarded as a draft primarily to automobile accident litigation, and I don't feel either way that it's altogether sound when it comes to defending it, and we are, of course, going to have to defend it.

Professor Sacks: Could I add. It's my impression, in going through the cases, that you have case after case after case raising these insurance policy questions. I'd like to put to Charlie Wright the question: "Do we have anything like this problem in cases ..." It

seems to me the distinction is in terms of the Committee addressing itself to a very controversial and rather difficult problem because it is required to. The state of the cases is such that it is really our duty to try to deal with this problem. To take on then another problem which I think is likely to raise questions of practice and types of contracts and make all kinds of issues as to whether we know exactly what we're doing. To raise additional controversy in doing it when we can not point to cases in which people have sought to obtain this information and been turned down or where there is conflict in the cases it seems to me most unwise in this controversial area.

Mr. Acheson: We voted not to do that (broadening the section to include indemnity, guarantee, and secondary liability agreements.)

Mr. Frank: Mr. Chairman, It would be repetitious. We discussed it previously .... I think if it is a major problem that needs to be faced, it will be treated as major by the profession and we are cutting off every bit as much as we can chew and I would quit at this point. I like Mr. Freund's coining? however and I wonder if this could be considered before we close it. Mr. Reporter, you had used the word "may" in the rule -- "may be liable." Now the number of times in which that conditional "may" will be important is rare. In well over 99% of the cases, there isn't any damn doubt about the insurance. Somebody's got insurance policy; he's had an accident. In a small number of cases coverage is contested and those are likely to be very substantial cases when it happens.

Frequently are, because people get mad about it when there's a lot and are more concerned. I wonder if, in some fashion, Mr. Freund's position might be ... his mind might be put at ease if you were to broaden your note just a little to amplify what you mean by the word "may," and to show expressly that you are using a conditional term because you're aware that sometimes there may be contests and that the divulgence does not mean that any contest is waived or that there is anything done about that at all and that this is merely a conditional matter and it shows that there may be coverage.

Professor Sacks: I'd be glad to do that.

Rule 26(b)(2) was approved with the understanding that the note would be changed as regards to the verb "may."

26(b)(3) - Professor Sacks gave background and subject matter of rule.

Dean Joiner: ... To put this in context - at the last draft we had a slightly different draft than we have at the present time - with two alternatives: one alternative was a very broad alternative - making discoverable the statements taken of all witnesses, and the other alternative was making discoverable the statements taken of witnesses who were going to testify at the trial. The discussion at the last meeting was held on the broader of the two alternatives - making discoverable the statements of all witnesses and there was a vote by this Committee that we did not wish to go that far. The other matter was not pressed at that time. It looked like the decision was against making all this discoverable. On reconsideration however, in light of this draft, it seems to me fair and squarely

puts the question to this Committee as to whether or not it would not be wise to make discoverable the statements of witnesses that are going to be called at the trial. The reason for this is that under no stretch of the imagination can it be argued that this particular matter is not relevant. This is clearly relevant. If a man is going to be called at the trial then things he said to other people has relevance as to what happens at that trial and the only question is as to whether it sufficiently invades the preparation process ... that we ought not to do it. It seems to me that on principle this is the kind of thing that ought to be available to both parties, and on this limited draft, I would urge that we take a position that the statements of witnesses which are going to be called to the trial be made available to the opposite side so that they have full knowledge of everything these persons have said ... prior to the time they are called at trial.

Mr. Acheson: Would you tell us what line of 3 ....

Dean Joiner: I would add the language in my memorandum sent to you as follows: "The party may, without any showing, obtain from a designated party a copy of the statement previously given by a witness to the designated party or his representative. If the statement contains matters with respect to which the witness is probably to testify at trial and if the designated party plans to call the witness to testify at trial. This is taken verbatim from the alternative draft Al Sacks prepared for our May meeting. It is suggested as an alternative to this particular section.

Mr. Acheson: Does the Committee wish to discuss the matter?

Mr. Jenner: Mr. Chairman, As the practice now stands the automatic motion there is in every case - each side - the names of persons having relevant facts being supplied to the parties. The opposite party, when it receives that list of persons, who have knowledge of the facts, may take their depositions. One of the questions that is proper is whether or not he gave a statement to anybody in that connection. To do as Charlie Joiner suggests - that you must state to the other side which of your witnesses you are going to call at trial is at odds with the rules as they now stand in every state. When the witness is called if he is at trial it is a proper motion and an automatic order that if the witness responds that he has given a statement, you are entitled to that statement to look at ....for the purpose of impeachment. I don't see that adding anything to the rule other than to raise controversy at an earlier stage of the game when you don't know what witnesses you're going to call. The relief which he seeks is obtainable now at a later stage of the game, and it seems to me - at a more appropriate stage.

Dean Joiner: How do I get copies of the statement?

Mr. Jenner: As soon as the witness is on the stand you may ask him on cross-examination if he gave a statement. If he says "yes," then the statement must be produced.

Dean Joiner: He doesn't have a copy.

Mr. Jenner: Well, his counsel has it, or his insurance company ....

Mr. Freedman: Well, Bert, before you can get it, you've got to ask him whether he has refreshed his recollection with it. If he has, then the judges will generally let you see it. If he has not

not, then they won't give it to you. At least that has been my experience. [Slight discussion between several members.]

Mr. Cooper: Mr. Chairman, I'd like to ask Bert a question. Wouldn't this cause delay .... Seems to me you should know X number of days before the trial what witnesses you are going to call.

Mr. Frank: Mr. Chairman, I am totally opposed to the suggestion. Delighted we voted it down the last time and don't want to do it now.... I don't want to take away from one side the benefits of the work which it has done and turn them over to the other side to get a free ride in on a law suit .... I do not want to set up a system of rules of procedure which become tutoring installations for perjury or devices for finding just how you get around; for all these reasons I sure wouldn't change this draft. We do practice, as Mr. Freedman states, without jurisdiction.

Judge Feinberg: Mr. Chairman, I just want to make sure that we keep this in perspective of what we're talking about and what Charlie Joiner is talking about is getting statements as a matter of right without any showing of cause. There is still under the rules now, and as we propose to leave it, the opportunity to get a statement if you can show some special reason for it. Is my understanding of that correct?

[Side comments that his understanding is perfectly correct.]

Mr. Freedman: I think that we're overlooking and I think we overlooked it before when we adopted this rule that it goes much further than Hickman and Taylor goes today or did go. Hickman and Taylor sought to cloak certain statements with a limited privilege

but limited only to those statements which were taken by the lawyer's work product, the lawyer's theories, which probably would find themselves in the statement itself. Now this rule goes much further than anything that Hickman and Taylor stands for. It puts a tremendous cloak of protection on every kind of statement whether it's taken by the office boy in an insurance company, or by a clerk or an investigator or anybody else and in my judgment this defeats, probably more than anything, the early part of the purpose of the discovery rules to start with to take this important theory right out of the trial of the law suit and it will, in many, many instances permit perjuries to go undiscovered. It will undoubtedly just open many miscarriages of justice because the facts will not be disclosed .... I would go further than Charlie Joiner's going. I don't know why we should limit it to those statements only of the witnesses who are intended to be called for trial. Seems to me that that's a perfectly proper exercise for the trial itself. And in answer to that the whole subject matter, the whole set of rules is designed to smoke out all of the information which can be smoked out on both sides of the fence, so that both parties come into court on equal footing. Both sides will know all the facts, and if one party is permitted to withhold any of the information, any of the statements in which the information is contained, then purely there may be a miscarriage of justice on one side or the other. And in this respect, I would again invite attention to the fact that this is going to be a very substantial

hardship on defendants because plaintiffs particularly in personal injury cases are individuals and they may be called for oral examination and they may be made to tell every single thing that they know about the case. Not only the actual personal information but also any information that may have come to their attention or to their counsel. A corporation, on the other hand, doesn't have any personal information, it only acts through agents and it may discover all these things that are permissible here in this rule by investigators or by anybody else even other than a lawyer. Now the best that you can get out of Hickman v. Taylor is the work product of the lawyer himself - not of the investigator - not of anybody else. As a matter you have many instances where the FBI investigators who are generally lawyers conduct an investigation but they weren't working on the case. And then investigations weren't protected as such. I mgith say something else that I think would cause a little reflection. If you've got a statement in your file and you asked to produce the information apart from the production of the document itself, if a defendant is permitted to edit - if we are going to have complete disclosure, (pause) I'll pass for the time being.

Dean Joiner: The Reporter says in his memo of September 6 that his views are as previously stated. I can't find the previous statement he's made. Could he tell us briefly how he feels?

Professor Sacks: I'm opposed to the proposal that Charlie Joiner made. I think we went through the question of witness statements generally - that's where our focus was - but in deciding against witness statements discovery of witness statements generally is a

a matter of course, it seems to me we did put some emphasis on the policies in favor of having each party prepare independently and some emphasis on what you might call "privacy preparation." As to limiting it to trial witnesses there are a number of difficulties I see. I think the line between the trial witness and the witness who is not going to testify at trial is not a good one for the discovery rules. I think the Evidence Committee, in dealing with the problems of evidence and the management of the trial, should address itself to the question of whether the statement should be producible as a matter of court. I think probably it should make that clear, and if there's a problem of management to make sure that the statement is produced enough in advance of that testimony to give the lawyer some time, that can be provided for as part of the management of the trial. But to do it as part of the discovery seems to me to create a number of problems that are out of proportion to what we would be accomplishing. One is that it creates the difficulty of now having to provide a procedure for identifying the trial witness in advance, which is not impossible but it is a cumbersome and difficult thing. We do it as to experts but I think that experts are easily more identifiable. The problem of witnesses, generally, is a more difficult one. I think there's a difficulty in Charlie Joiner's language about his being required to produce the statement if it contains matters to which the witness is competent to testify. You've got a whole problem there as to just what will be encompassed and you will have, I think, a good deal of dispute in advance when at trial that dispute tends to disappear. It seems to me that Judge Feinberg's point that the

provision as we have it already provides for discovery in those instances where a case can be made. In terms of the note as I understand it it provides for court consideration of a variety of factors and a development of the law here which will I think to a large extent safeguard the interests and policies that Abe Freedman is concerned about, that other people have been concerned about. So, that in my own view taking account of how far we are going, the additional step is a narrow gain; it creates definite difficulties in the administration at the discovery stage, and I think we can accomplish just what Charlie Joiner is trying to accomplish far better through changes in the rules of evidence approach in the management of the trial.

Mr. Acheson: All those in favor of the amendment, please raise their hands. [3 raised their hands.] All those opposed. [Majority, and I think the amendment is lost.] All those in favor of the rule as it stands in this draft, ... It is adopted.

At this point, Mr. Frank suggested three cheers for the Reporter on this summing up of the problem which had been discussed for two years.

Mr. Jenner: Despite the approval, may I inquire of the Reporter as to the last sentence, lines 64-68. You have a definition of what a statement is" ... is a written statement signed or otherwise adopted or approved by the party or a recording or transcription which is a substantially verbatim recital of an oral statement which was made by the party and contemporaneously recorded." I think that is more narrow than the present law. Why does it have to be a statement signed or otherwise adopted or approved by the party.

If I take the witness' statement, it's not infrequent that I don't submit the statement to the witness for his approval. The second part, you say "recording or transcription." To me that means a mechanical recording. Now you don't mean that do you?

Professor Sacks: Well, it could be stenographic; it could be mechanical, it could be longhand. This, by the way, is taken from the Jencks Act and I tried to follow the language of the Jencks Act so far as it was applicable to our problem. It seems to me a virtue to utilize language in a statute that had struggled with the same problem of defining a statement.

Mr. Cooper: Does that mean if I interview a witness and I just make the notes of it - highlights of the thing - that that's embraced within this?

Prof. Sacks: If it was just little notes I would think not. It has to become a substantially verbatim recital of an oral statement, and bear in mind that the Hickman and Taylor itself there were, as I recall, some oral statements taken by the attorney as to which notes were presumably made and he subsequently just wrote up a memo for himself.

[Side comments about there being no notes at all.]

Prof. Sacks: Oh, he had no notes. It was just a matter of memory.

Dean Joiner: I didn't say you were wrong on this though, under this language. If he takes notes and if he writes down, for example, the phrase "going too fast" which is the phrase the party used that is a verbatim statement at that point - that portion of a longer statement. That would fall under this as being discoverable.

Judge Thomsen: If twe're trying to protect the party I'm inclined to think that we might eliminate the words "signed or otherwise

adopted or approved by the party." If you're talking about a non-party witness I think these words ought to be in. They're in the Jencks Act and in matters of that sort. I think you only ought to have to disclose. But if the defendant talks to the plaintiff and gets a statement from him - which he puts down not verbatim, but sufficiently that somebody is going to be able to take the stand and say the plaintiff told the defendants, adjustor of the claim, or whatever it was, I think the plaintiff ought to know, and I think in the same way that the plaintiff or some friend of the plaintiff's attorney has spoken to the defendant's driver and he has made an admission to it, and the driver is the defendant, I think that these people ought to know what is going to be offered as his having said. Now if we were talking about witnesses' statements, I would want this in. But I think if we're talking about party's statements, it ought to be broad enough to cover anything that might be used as an admission against the party.

Prof. Sacks: We aren't talking about a party's statement here.

Judge Thomsen: Therefore, I concur in the suggestion that line 65 in its entirety should be eliminated.

Mr. Doub: My objection is that we are highlighting a statement of a party because it can be binding on him in the minds of the ? prior to the trial (?) and therefore, we should make it strictly clear in making this exception that we are talking about a statement that he has signed or has adopted or approved. We're not talking about a note of either a lawyer who talked to him or an investigator that talked to him, because he can repudiate that without a bit of trouble and deny that and say it wasn't put down accurately at all.

We're talking about a statement that really is going to be very prejudicial to that party when it goes in, and that's why he's entitled to see it. I don't think he's entitled to more than that and I don't think it's desirable to go beyond that.

Mr. Freedman: What about the case where a man comes in and he confronts a party with a statement he made, although he never signed it. He might not have signed it because he can't sign his name. In some instances the administrator had this thought.(?) But in most instances he would be because either he didn't submit it or the man didn't want to sign it. But he gets him on the stand and he starts to impeach him with the statements.

Prof. Louisell: We are never going to avoid altogether, any more than the Jencks Act cases have, the problem, in some cases, of proving whether or not there was, in fact, an adoption of a statement that wasn't signed. I mean - an oral statement - there may always be the issue as to whether it was or was not adopted. You just can't avoid that in the nature of things.

Mr. Freedman: Put the clench? man or the investigator on the stand and he so testifies that that's the truth. Then it becomes an issue. Why shouldn't the other party have the benefit of it before he goes into court.

Mr. Doub: Well, if it is read back to him and he doesn't object to it, the FBI reads it back to him, and the FBI agent testifies, and he answered that the didn't object to it; you had it right, that would be a discoverable statement.

Dean Joiner: George, supposing you just took the statement of the witness. We go out with the charging reporter to talk to the party in this instance, and the charging reporter takes it down verbatim

and then writes it up. It is not submitted for signature. Surely under our concepts of what we're doing, that should be discoverable.

Prof. Sacks: I think it is, but I think under George's theory it should not be.

Mr. Doub: No, I'm not objecting to this. I'm objecting to Judge Thomsen's suggestion that we strike out any limiting words at all.

Judge Feinberg: Mr. Chairman, may we first get a statement from the Reporter as to Charlie Joiner's hypothetical just now. Such a statement would be discoverable.

Prof. Sacks: Yes. Just trying to understand. I don't gather that there's any proposal here to eliminate the definition altogether. Just to rely on the general concept of a statement. The only question, then, relates to the words "signed or otherwise adopted or approved by the party." That is the proposal would be "is a written statement or a recording or transcription which is a substantially verbatim recital." I take it that what you could have is a situation in which there's a talk back and forth and you don't have a substantially verbatim recital. What happens is that after the discussion is had and maybe shortly thereafter, the person who did the interrogating prepares a written statement of what the witness said as he understands it. And at that point, there you now have a written statement. The proposal here, which I think is Jencks Act language, is that in order for that to be includible it would need to be something signed or otherwise adopted or approved. Now, if what you're saying is that you want to include the situation where you take a statement, then just relying on memory you later on write down what you believe the witness said, and you have it in

your file, it's your own memory, and you've never gotten the witness to look at it, sign it, adopt it, approve it, do anything with it, it's not apt to stand as a verbatim recital of what he said in the sense of contemporaneous reporting. It is not binding on the witness. That is just the type of situation in which the reasons we had for making this a matter of automatic production apply. But I am willing to be advised otherwise. Remember our big emphasis is that the statement is admissible. One of the reasons of making it a matter of course is that it's admissible.

Mr. Cooper: What I'm concerned about is this. A lawyer interviews a witness for a party and as the witness talks, he makes notes, not verbatim, but some general idea, Then afterwards, he writes down what he thinks was said. You've got a combination of the both. Is that discoverable? [Slight discussion on discoverability and admissibility.]

Prof. Sacks: Under the same token, then, the shorthand reporter's notes aren't admissible nor what he says. He's got to be able to understand to read it at that point.

Prof. Louisell: Didn't Grant introduce a new type of problem? He referred to taking a statement of a witness but not the statement of a party. If we are talking about a party and only a party then we have substantially the same text that the Jencks Act has had for about ten years, I think - that the Reporter is taking here.

Prof. Sacks: It doesn't answer everything. It surely doesn't automatically answer every question. That is, there are going to be statements about which there will be some contest. But that's I think inherent in the problem. I don't know that we can eliminate

it unless we simply want to say well any written statement of whatever sort no matter when prepared is to be produced.

Mr. Acheson: Clearly we do not want that.

Mr. Oberdorfer: Would you reach this problem more directly if you included the word "admissible" in your description of the kind of statement that would be discoverable?

Mr. Acheson: This again we discussed at great length before and we're just going over old ground.

Mr. Freedman: Aren't we trying to find the defense of the case? (blurred) of the other fellow and in order to do that don't we have to have all the information ... (blurred) in the form of one statement - a written statement - or a statement consisting of notes of the recorded conversation and these other things we were talking about. Now all these things can be used for impeachment purposes. Now if we're looking for information that will be used to assist in the defense or to support a claim don't we have to have all these statements?

Mr. Acheson: Well, now let's see where we are. Bert, we had approved this. I think you are the ... (didn't finish).

Mr. Jenner: I just made an inquiry and I opened up a hornet's nest. I wish I hadn't said it. I am only really concerned about the recording of transcription as indicating mechanical recording. You say you'll take care of that by note. It might be of some help, and I don't know. The Rules of Evidence Committee, in this field, is pursuing the traditional rules of admissibility with respect to impeachment not only as to admissibility but as to impeachment.

Mr. Freedman: I move that we adopt the rule as it states here.

[Slight stir - as rule had already been adopted.]

Mr. Doub: Mr. Chairman, could I question one word in line 60? We say "only upon showing a good cause therefor." Is the word "only" necessary? Why not state it in the affirmative and merely say "upon showing a good cause?"

Prof. Sacks: I only want to emphasize that this is a limitation on 26(b)(1) .... If you eliminated "only" maybe it would be understood the same way. It does seem to me this clarifies that it has a narrow effect, which is, I think, important.

Mr. Morton: Mr. Chairman, may I suggest that in line 61 the words "a copy of" are redundant. You don't mean that you'll have to make some new discs or something of the source.

Judge Thomsen: Well, no, I vote a distinct no, because people keep their original statements. You don't give up your original statement. You give him a copy of it.

Mr. Morton: What I'm talking about is an expensive magnetic tape.

Judge Thomsen: Well, if you're talking about a magnetic tape, alright, but ordinarily one would use a written statement, and you certainly don't want to give up your original statement. You're giving him a copy.

Mr. Acheson: No new questions. We must go on.

Prof. Rosenberg: In two years of new discovery rules in New York state, two of the commonest problems that have arisen are these two: when an insured gives a statement to his insurance company, may the plaintiff discover, and if so, under Hickman (blurred) qualified immunity conditions or not, and second question is: "When an employee gives a statement to his employer, may it be discovered ... (blurred). In reading that a few days ago that those are the

two commonest problems that have plagued the New York state courts, I wonder how this draft responds to those two questions which do also arise in federal practice.

Mr. Acheson: Is this any longer relevant? We've adopted this. Can we go on.

Judge Thomsen: I think we've taken care of it Mr. Rosenberg - given by the party seeking the statement not by his own (word blurred).

Rule 26(b)(4): Prof. Sacks gave background and said only comments were by Mr. Hardy who suggested that discovery against experts should be unlimited. Prof. Sacks stated that they had been through that and he simply would note "that one point that's raised by Mr. Hardy and by Brown Morton relates to the materials at lines 89-92. In each instance the question raised was whether we want this limitation as a matter of policy and whether the draft is sufficiently understandable. The problem arises from the desire, I think of a substantial number of the members of the Committee the last time to limit the discovery against expert trial witnesses to the testimony they would give on direct examination and not to permit the discovery to become a full cross examination. In response to that I prepared this sentence; it was submitted at the last meeting; it was approved at the last meeting. It's the best I can do to meet that point. The observation has been made by Brown and by Mr. Hardy that perhaps - well I think their point is they're not sure they understand it. I recall pretty specifically that I put that very question: "Is this an administerable standard that a court can apply?" I was, myself, somewhat concerned. The answer that we gave last time was "Well, it's not going to be easy in every case, but yes it is an

administerable thing." I simply note that.

Mr. Frank: Mr. Chairman, could I address a question to Mr. Jenner, in relation to this sentence? Bert, I think it would help me to decide this if you would tell us what the Evidence Committee is likely to do in relation to the other side of this point. In our own state practice once you put a witness on the cross can go anywhere; it is not limited to the scope of the direct. On the other hand, in the federal practice, that is not true. We are under the scope of the direct.

Mr. Jenner: May I anticipate to you that the Committee will decide that on the 29th or 30th of this month or the 1st of October.

Mr. Frank: Well here is my point. I think that the federal rule is terrible myself, and that you ought to, once the guy is there, you ought to be able to go full scope. I would so vote.

Mr. Jenner: You asked my anticipation. I think that the Committee will adopt the rule that the cross-examination is limited to the direct.

Mr. Frank: Well, then I would think that this sentence is cognate to that. If you are going to limit the cross, in your Committee, to the scope of the direct, then we really ought to limit this in the same way. If, on the other hand,you're going to reverse that rule, then we could reverse this. And to me, that controls how this sentence should be dealt with.

Prof. Sacks: Since we have a present rule to which this is cognate, Bert says it's likely to continue. I would suggest that we keep this. If the other Committee comes up with a proposal the other way, I would assume they would then, either on their own recommend, or

would recommend to this committee that this be changed accordingly. But for the present, it seems to me that this then, as far as that issue is concerned, is relevant to the rule of evidence. This is the appropriate way to do it.

[Mr. Cooper moved that the sentence be adopted for the present.]

Judge Feinberg: Mr. Chairman, I would like to suggest that Mr. Reporter should put in his note the reason for this. I think that one of the reasons the letter came in from Mr. Hardy, and even perhaps from Brown Morton, is that we're not sure exactly what we're trying to achieve. By this sentence. I think if the note clarifies what the purpose of it is, that some of the criticisms would ..(didn't finish).

Mr. Jenner: I have the question, also, Mr. Reporter, that in the second clause, "the grounds therefor" does that modify the whole sentence or that you may only inquire of the expert as to the grounds of the defendant and not inquire what his opinion was.

Prof. Sacks: Discovery of the opinions is restricted to those previously given or to be given on direct examinations. But certainly you can inquire about his opinions. And the grounds therefore - the grounds for the opinions? Would that be clearer to you? :For those opinions? It would just change the last word, which is "therefore" to "those opinions."

Mr. Jenner: Well what if you read - it read - discovery of the expert's opinions and the grounds therefor is restricted. Just move up your concluding clause to the forepart of the sentence, and then I think you will eliminate any ambiguity. Well, I don't know if you'll eliminate any ambiguity, but it will make it clearer.

Prof. Sacks: It's improved this draft. The problem we talked about before remains. [Was then reminded by several about proposed changes in line 79). On line 79 the proposal is to insert at the very beginning right after the parenthetical (b) "as an alternative or in addition to." This makes clear that (b) can operate independently of (a) and needn't have used subsection (a) in order to invoke (b), and the second change is at lines 85 & 86 strike the words "the party who served the interrogatories" and insert "thereafter, any party." And that would now make it clear as it was intended from the start that once the expert witnesses are identified any party may conduct this discovery. It's not limited to the particular one who had served the interrogatories. That may be fortuous.

Judge Thomsen: I move the approval as corrected in these three ways by adding as an alternative or at the beginning, by changing the words "the parties serving the interrogatories" to read "thereafter any party" and by promoting the words "the grounds therefor" from lines 91 and 92 to ... (just trailed off).

Prof. Sacks: Now, I take it, this is the point Ben Kaplan has made very clear to me that I should have inserted at the beginning. I assumed that editorial changes, clearly an editorial effort, that would seem to me an improvement could be introduced after the meeting.

Mr. Acheson: We said that at the outset.

Prof. Kaplan: Why is the identification of the expert limited to interrogatories and why do we preclude asking a man on his deposition who his experts would be.

Prof. Sacks: It just seemed the natural way to make clear how it would

be done. The point is, that the timing here is important, that is this needs to be done, as we say, a reasonable time prior to trial. It has to be done with a view of when the trial is going to be and when the people will know. Depositions could be going on at any time. It seems to be that we're better off making it clear that the interrogatory device is the right device, and the timing is to be thought about and very deliberate - it shouldn't be just the result of an accident.that a deposition is goigg to happen.

Judge Thomsen: I think it ought to be the lawyer in charge of the case and not the man who procuriously attends the deposition or the party who won't know what is going to happen.

[Slight comment from the side (couldn't make out the voice)].

Mr. Acheson: I take it that your motion for approval goes for a, b, and c, or how far does it go?

Judge Thomsen: The one we were just talking about. (sounds like (a) - but voice trailed off).

Prof. Sacks: No questions have been raised about (a) and (c) in the current rule.

Judge Thomsen: (coming back in) so let's call it (a) and (b).

Mr. Acheson: Why don't you do them all, Al. Then that will rest the discussion. Now - is there any further discussion on the approval of (4) Trial Preparation: Experts (a)(b) and (c) with the amendments already added: Let's get all matters disposed of before we vote.

Prof. Sacks: In terms of the correspondence, I think they are.

Mr. Acheson: They'll all vote for it. Now, is there any objection to approving (a), (b), and (c). There are no objections. Therefore,

(a), (b) and (c) are approved and we'll move on.

Rule 26(c) - Prof. Sacks: This takes us to 26(c) which is at pages 26-10 and 26-11. First, let me note some changes that are being proposed by a result of correspondence and that are noted in my comments on the correspondence. One comes at line 169. You'll notice at 168 it says "the court in which the action is pending may make any order." The proposal is that after the word "pending" and before the word "may" we make explicit the power of another court. It would read as follows: "The court in which the action is pending, or alternatively, on matters relating to the deposition, the court in the district where the deposition is being taken." That is set forth in my memo at page 3. That is in response to a point made by Brown Morton. I'm not sure that I dealt with all the problems Brown raised, but I did see, in his comment, one problem that seemed worth dealing with, and that is the following: If you can't have a deposition being taken rather far from the court where the action is pending through the device of Rule 45 - Subpoena, and we purport to confer upon the witness - the deponent - the power to seek a protective order. But that isn't much of a protection if his deposition is being taken in California and he would like a protective order, but the court where the action is pending is in New York or Massachusetts. This would make clear that he could apply for the order in the California court.

Judge Thomsen: Then the court in which the deposition is being taken, as compared to the court in which the action is pending, has sufficient information to make all (a few words blurred) this type of protective order. If you want to give the deposition the right to make all of these - now I'm not saying to make any one of these .. (blurred) you are

requiring the court in which the deposition is pending to get so deeply into the case (didn't finish).

Prof. Sacks: Not requiring, Judge Thomsen.

Judge Thomsen: You are permitting them.

Prof. Sacks: Authorizing them.

Judge Thomsen: But suppose he acts on very narrow information - on partial information.... The witness needs to be protected against having certain matters inquired into that he has a right to protection from, but I certainly wouldn't have cases pending in my court where I've had already dozens of hearings or fights about various pretrial affairs or want to have a judge who has heard the case for a half hour undertake to control all of these matters. It seems to me that we may be too far, and we ought to think about that. What do you think Judge?

Judge Feinberg: Well, I think that if ti is a matter that's pending in the Southern dsitrict and there's a difficult decision affecting it before you, why, Roz, I think you ought to decide it.

(General laughter.)

Judge Thomsen: No, the case is principally before the state and a deposition is being taken in New York. Now I can't be certain the judge in New York ought to have a right to protect the witness, but there are some things that he can't possibly know about unless he does an unreasonable amount of work, and I just want to be sure whether we mean that the judge in the district in which the deposition is taken may use all of these 8 things. You just raised a point. I have both sides.(?).

Judge Feinberg: May I give a serious answer to this question. I think that the way it will work out is just the way that you think it would. That is it raises matters which really should be decided by the home court. That the judge in the other district will allow the home court (blurred). If it raises matters of an emergency nature someone being harrassed, who is being deposed on a Sunday, or until midnight, obviously the judge isn't seeing this (blurred). I think it will work out perfectly all right, even with the language you waived.

Judge Thomsen: I wasn't saying he didn't. I just want to be sure we thought it through.

Mr. Doub: Mr. Chairman, I'd like to support Judge Thomsen more vigorously than he has supported himself. This (c) is designed to give the court in which the action is pending complete control over the litigation. So he's given numerous powers here in the interest of justice and the administration of the case to act. Now I'm opposed therefore to inserting in line 169 "or alternatively on matters relating to deposition the court where the deposition is taken" because that court shouldn't have all these powers that we're defining it here. I think that if we wish to give the court a power to control a deposition in the place where the deposition is taken, we can do it in a subhead of (c) in a separate sentence, because that's a much more limited power. It doesn't relate to all these powers at all. And if the choice must be made between whether the court, where the litigation is pending, who presumably has far more knowledge of the case. He's been throughtperhaps many aspects of it in pretrial proceedings. If the choice is between

him and the court where the depositions are taken, we certainly want to give these powers and make it perfectly clear that it's in the first situation because we must assume that the judge who's administering the case really is better qualified to act than one who knows nothing about it. He's busy; he's told there's a case down in the District or Columbia and he's told a little about it and he's asked to rule on whether deposition is to be taken in a particular place, or not, and (blurred) and whether it's inconvenient. Usually the issue presented to him is a narrow issue. So I think it would be unwise to put this clause in line 169 but it should be dealt with in a separate sentence - at the end - or a separate subparagraph.

Prof. Sacks: Might I just point out that the problems that Judge Thomsen and Mr. Doub addressed themselves to, do come up before the court where the deposition is being taken where that is not the court where the action is pending in two other places: one is in rule 37 where it just comes up the other way, that is, what happens there is the witness refuses to answer and an application is made for an order to answer. The problems, I believe, the problems of trying to understand the case are the same. There, the present law is that application may be made to the court where the deposition is being taken as a matter of case law, and we are making that very explicit in the re-drafting of Rule 37. Now coming up in another place - in Rule 30(d), and I am now talking about the present Rule 30(d), there is a provision whereby a deponent or party may in the middle of a deposition and while a deposition is being taken ask that it be suspended for time sufficient to enable him to apply for court - and he may apply for court and

among the things he may ask for, he may ask the court to limit the scope and manner of taking the deposition as provided in subdivision (d) of Rule 30, which is, of course, our protective order provision. So that we have it now. We did note, within the divisional rule of 37, that this is an authorization to that. Of course, there will be cases in which the court will itself recognize that it's inappropriate for that court to make the decision. It doesn't know enough. There is an alternative quorum and they can refer it over. Nothing that we say precludes that. It seems to me, in other words, that this fits in what we're doing in 30(d) and what we're doing in 37 and we're relying on the judge to recognize that in some instances it is appropriate for him to act and in other instances it isn't. Unless we want to say he can't have that power, which is really inconsistent with what we have in 30(d) and 37, it seems to me that we've just simply got to confer and leave it to the judge to make that determination. It certainly (interrupted) Judge Thomsen: May I suggest another possible approach to this to be thought out? And that is that it may make a difference whether it's the witness who is raising the question. It certainly has to be done in the court where the deposition is being taken. But if it is the party raising the question then the matter perhaps ought to be raised in the court where the action is pending because he is before the court and these questions, suggestions that instead of saying "alternatively in matters relating to disposition," whether that be put in there; leave it the way it is perhaps and add "at the request of the witness" that the judge in the court in which the deposition is pending, may make such an order, not only in order to protect the witness but require the parties to do it where they ought to do it and not let them, wherever it may, try to bypass the judge who is responsible for the case.

Mr. Doub: As proposed here, this would give two courts alternative powers with the dangerous possibility of conflict.

Mr. Joiner: I'm in trouble here, too. I m sorry. I don't understand quite why we have to put this in 26(c) when the whole thing is covered in 30(d).

Professor Sacks: 30(d) is machinery to be invoked when a deposition has been started. This is a machinery to be invoked in the middle of the taking. This is in advance or at the very beginning of the taking, 30(d) can be invoked.

Mr. Joiner: And it seems to be to me a completely erroneous policy to address this wild court, wild in the sense that it does not mean pending court, with power either substantially in advance or for a long time after the deposition has been finished. At that time, it ought to go back to the pending court, I would think. And I think you have all the powers essential,in the court in which the deposition is taken, under 30(d), which is a complete cross-reference.

Professor Sacks: Well, I think with 30(c) limited to the court where the action is pending, and 30(d) talking in terms of a procedure that applies in the middle of the taking, I think it would be read to mean that an attempt to get a protective order in advance of the deposition must be taken to the court where the action is pending. I'm afraid that would be the construction.

Judge Thomsen: That might be unfair to a witness; it could never be unfair to a party.

Mr. Morton: I've had some experience with this in the district of Massachusetts. We get all around, so we get into this inter-district squabble all the time. Judge Forbes was reminded to protect one of his Massachusetts' residents with an order and then I was met with the

proposition that Judge Forbes' decision was not appealable. Fortunately, Judge Aldrich didn't agree with him so that orders, made by judges in which the district depending, in this respect, are fineable and appealable. What the Court of Appeals did, was to say what he should have done was not to prohibit or rule in fact on this matter but to suspend it to give the judge in the District of Columbia time to pass on the relevance as to whether it was worth going to this bother in either the court, which was going to decide the case. But what happens if you don't have a protective order of this sort, it seems to me a difficult question, because the subpoena or other compulsion under which the discovery is being carried out is a compulsion under seal of the court where the deposition is being taken or a view being had, or whatever, and he certainly has to right to prevent his own process from being abused.

(General discussion held).

Mr. Acheson: George, are you going to allow your principles to go out?

Mr. Doub: No, I think that it is not sensible at all to put this in and I think that if we want to give any additional powers to the court wherein the deposition is taken, we should do it in Rule 30.

Mr. Joiner: I would like to have the insertion adopted by the Committee.

Mr. Frank: So moved, Mr. Chairman.

(Amendment proposed by Reporter [adoption of insertion on line 169] is approved by majority vote.)

Professor Sacks: Another change resulting from correspondence to my memo is at page 26-11, lines 183-184. This is the item number 7 - dealing with trade secrets. This is the one which I have tried to formulate twice now and each time without success so far as our expert on the subject, Brown Morton, is concerned. He proposes a change in

language which I have adopted in my memo and propose now. Item 7 would read as follows: "that a trade secret or other research or development or commercial information maintained in confidence need not be disclosed." If I remember, Brown, you were suggesting that this was language you were deriving from (did not finish sentence).

Mr. Morton: There is a bill pending before the Senate, S3681, the exact language of which was evolved by several committees who had a coordinating group. There's a committee,in New York,of persons interested in (word blurred) competition; they've been sponsoring the so-called Lindsey Bill for ten years. They finally got all the interested Bar Association groups together and changed it a little, and the language that was suggested is taken from a draft of the bill which was approved, not only by this New York group, but also by the ABA patent section and by the American Patent Law Association. All three sponsored the bill and recommended this adoption, so this language has been worked out at some length by a whole group of people.

Professor Sacks: Brown, I take it the intention is to make the words "maintained in confidence" apply to research and apply to development (did not finish).

Mr. Morton: Apply to information.

Professor Sacks: Apply to information. Well, now the word "research" itself is of such a nature, it seems to me, that, grammatically, in order that we don't get into any trouble on this, we would have to take the "or",after the word research, out.

(Slight discussion on "or").

Professor Sacks: Item 7 would now read: "that a trade secret or other research, development, or commercial information maintained in confidence need not be disclosed."

(A discussion followed on "commercial information.)

Mr. Frank: My intuitive response here is very favorable to this suggestion, but it is also intimidating to me a little for the reasons suggested by Mr. Oberdorfer. This could really mean very different things to different parts of the country and those not current with the rather specialized involvements in New York might well have a different problem. I wonder if we could put in a note about what Brown has said about the sources and the cites and the materials, and secondly, then I do feel that the device of highlighting two or three points in the last step, for special attention to the Bar, we really want help on this. This is the only one in the whole set in which I wish we could pinpoint and say tentatively this is the way it seems to us because of the materials (coughing in background drowned out words). We especially want information from the Trade Regulation Bar as to whether we are doing the right thing here.

Judge Thomsen: But these all protective rights one doesn't get from 169-172. This is saying that the court may make an order which justice requires to protect the party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one of the following. You see the "may" and "purpose" are both in line (blurred).

Mr. Frank: I'm inclined to be for this for all these reasons all the same. The question of whether the phrase, particularly "commercial information", takes me as a term of ours wholly by surprise and whether what we're going to be doing here is making it difficult to maintain anti-trust suits, for example, is something I'd like to hear

about not in the trademark-patent field but from other people in other branches of it, so if we could dramatize it a little bit I think it might be helpful. That's the whole of my suggestion.

Professor Kaplan: May I inquire if the word "commercial" has any special definition in S.3681, Brown? Is it special inquiring?

Mr. Morton: Not other than in context that S.3681 is a bill for the amendment of the Trademark Act of 1946 which in turn speaks of commerce throughout its provisions, and it just means business information.

Judge Thomsen: Isn't it broad enough to cover something like this? Maybe it won't. Here are two people having controversy between themselves and they want to know what relationship one of the two parties had with the person who had the bank account with a certain bank. Now, therefore, one of you subpoenas the bank to release the record of the account of this man. Now it may well be that one check or one item in that bank account may be properly discoverable. Certainly requiring the whole commercial transaction between the bank and its customer would be quite unreasonable even though one or two items might be. That is the second case that I have had before me. Now, it's trying to decide how much of the bank account in New York should be made available to the parties in this case. The answer, certainly that all of it shouldn't, and probably some of it should, because of the particular circumstances.

Mr. Oberdorfer: May I make a suggestion on this? This is a new idea. The word "commercial" is not a term of law. I suggest that rather than try to debate here without information or at this meeting that the use of the word "commercial" and what it means, and possibly finding

a better word, that the Reporter be commissioned to do that and advise us through the circulation method.

Mr. Doub: (Words drowned out by noise of workmen outside).

Mr. Frank: I distributed to you fellows because I'm pleased about it and wanted you to share the satisfaction. The amendments of my (two words blurred) rules of civil procedure. As the cover letter shows it has been a policy of our bar to keep our systems as uniform as possible, and we want to have them so that we will never have to practice under two systems at all. The consequence is, that with exceptions so minor that they are not worth mentioning, all of the work which has been done at this table has now become part of our state law, too. I think this is the largest batch of rules since the original and our state has now, since the original, and all consecutive times, been the first to make the adoption. I thought the rest of you might be curious to know that your handiwork is spreading at least to our minor state on a consistent basis. So there it is - simply something for your files.

Mr. Freedman: May I go back just a moment to 26(b)(3) and suggest something that I intended to suggest? Page 26-4, line 55, where it says "a party may obtain discovery of material (including documents and tangible things)." The interpretation that you might take from this is that the word "material" could include not only the documents but also the information contained in the documents. I don't think that that is the intention of this rule. If it is we ought to put it on the table.

Professor Sacks: Coud I just say that Abe Freedman and I talked about this and what's bothering him is that the term "including" there

suggests that there may be still other things within the meaning of "material." That is not my intention. This was a verbal device for simply using the term "material" to refer to documents and tangible things and that's it. And therefore, I would suggest, as an editorial change, that we change the word "including" to "meaning" to make it perfectly clear that we are not extending it beyond documents and tangible things.

(Discussion on changing of wording and Sacks says he'll work it out.)

Professor Sacks: With the discussion that we had on 26(c) of the two items, that's really all I have of any substance. Very minor editorial change in line 191 was simply change the reference to Rule 37(a) to Rule 37(a)(4). With that I think I can ask that the Committee express itself on (c).

Mr. Acheson: Will the Committee discuss (c)?

(No discussion - no objection - it is approved.)

(d) Sequence and Timing of Discovery

Professor Sacks: Minor matter of the language. Change at lines 194 and 195 "unless otherwise ordered by the court" instead of "unless the court orders otherwise". Beyond that minor point, the question has been raised whether the second sentence of (b) should be elaborated to make it clear that the court must function when it does regulate only by order in the particular case. . . . prefer to leave language as it is, but no objection to changes. Suggestion comes from Brown Morton and Colby, I believe.

Mr. Morton: I may only observe, the pressure for uniformity seems to come from those of us who suffer most from disuniformity. . . .

We would prefer to see, and I think Mr. Colby and I are in agreement, The Patent Bar and Admiralty Bar are particularly troubled by unnecessary variations of practice amounting in some instances negating the hope of the civil rules backers in a blanket way without limiting the powers of court in particular cases to regulate discovery if necessary.

Mr. Cooper: Are you moving to insert "in a specific case" in the rule?

Mr. Morton: Yes, I had a suggestion, for line 195, after "court", insert the words "on motion."

Judge Thomsen: Wouldn't you accomplish your purpose by leaving that up there as it is and saying on line 199"The court may at its discretion regulate the sequence and time of taking depositions or conducting discovery in a particular case in such manner . . ." The court may do this sua sponte.

Voice: I think this is a good suggestion.

Mr. Oberdorfer: I suppose you would change the word "regulate" to "order."

Mr. Colby: I suggested beginning the second sentence with the language "By order in any action the court may . . . ." This is very close to Mr. Morton's suggestion and could be worked in later on.

Judge Feinberg: I would suggest before we get involved in the language to decide whether we want to accomplish the change in principle.

Mr. Acheson: That is a good idea. You mean whether you want to have the possibility of a local rule.

Mr. Frank: May I in pursuance of Judge Feinberg's observation please make a brief statement on this section as a whole? I am going to vote against the section as a whole. I do not wish to take the time of this Committee with a matter previously discussed unless with the passage of time some member who voted the other way the last time sees it differently, in whichcase we could look at it again. I would like to note, as explicitly as I can, what we are doing by this section is attempting to jump a so-called priority rule and priority practice. We how have only one change of circumstance as far as I know between last time and this time, and that is that we now have in the Rosenberg Report the fuller and more complete text, and I don't now recall, Mr. Glaser and Mr. Rosenberg, that we had Chapter 10 of the Rosenberg Report before us at that time. That's new. Isn't that right, Maury? Mr. Glaser's special contribution, that is. On the off-chance that you have not all gotten to read Chapter 10 of the Columbia Report, I wish anew to point out to all of you that what we are now doing is categorically in retreat(?). We couldn't more out and out try on what we have done and we are doing with this section. Under the heading of page X12, "Deflating Exaggerated Issues", the author begins a 10-page discussion of the fact that the so-called priority problem proves on the basis of empirical study to be a totally, theoretical , absolutely non-existent problem - one which the profession has been diligently seeking to correct as though there was something there when in truth there isn't anything there. I can confirm, in a partial, but by no means in a narrow regional way, from my own questions of experienced trial attorneys all over the country that this is exactly correct, because in anticipation of our last meeting I talked to a lot of

lawyers from a lot of regions. I asked the question previously at this table as to whether anybody had ever had a problem with this particular matter at this table and I believe the answer was "no." So we now have cited in the literature in our own literature sponsored by us as a classic example of what rule makers ought not do - to wit: go off on wholly theoretical evils which have no basis in facts. We are now about to save the world from a non-existing dragon. I dissented last time; I dissent this time; I'm not for it, unless some member of the Committee, who voted the opposite way the last time, has changed his mind, with the passage of time, or unless some other member wishes further discussion. . . . On the main merits it seems to me that the heart and soul of this work is that we meet problems that the community feels and we ought not invent problems and then go solve them, and this is a totally invented problem.

Mr. Morton: I would be glad to accept an indemnity agreement we were discussing about from Arizona to pay the railroad fares, the air fares of clients going to Richmond, Virginia, for example, to solve priority problems. It may be non-existent in Arizona, but it's rampant up and down the Eastern Seaboard. It's working itself out very nicely in each case so that you might call the solution of the priority problem, a la Frank, an example of the quilting party.

Mr. Colby: To the Admiralty Bar, this is of preeminent importance. You have two vessels in a collision case. They're both in port; the people are around; both sides must go forward with their discovery simultaneously in many instances if we have in connection with this some of the other rules, they must do so within a few hours or certainly a day or two of the filing of the complaint. Now, the only sense in which it is not

found in the decided cases is that with rare exceptions there has never been any difficulty in the maritime districts over this - even in one maritime district where they have a rule as to priority because the lawyers don't do it to each other, because they realize that tit for tat is the rule in these events, but it is absolutely important when you have two vessels in port in personal injury cases where you have a vessel in port. Both sides should be able to proceed and get their discovery deposition, get their production of broken articles or anything of that sort, immediately, because if it isn't done then it may not be possible at all, if at all, only, as Mr. Morton has pointed out, at vast expense. It is certainly as liberal a theoretical point as any that is presented in the entire gamut of the discovery of the revision of the civil rules.

Professor Louisell: I agree with John to the extent that we should not bar local rules. I think that we are still in somewhat an experimental stage about this whole sequence of problems, and it would be better to leave the draft as it is, so that local rules may still be (word blurred) to a degree.

Mr. Freedman: Well, the object was to eliminate the disharmony as Brown pointed out before, and if we leave it to local rules, those districts which are practicing priority will continue and, as a matter of fact, increase the priority rules. It would seem to me that if there is anything to be said for the proposals . . . that the discretion of the court should govern in every case. If there is any injustice, or if there is any case where a different result was necessary, you can appeal to the discretion of the court in a particular case. It would seem to me that this ought to be done on a case by case basis based on the discretion of the court rather than on a series of local

rules which will create different rules around the country and complete disarmament.

Dean Joiner: I think this rule does permit, however, each court to have discretion even though there is a local rule on the point. This rule specifically says: "In a given case the judge in that district can hold differently than the local rule would prescribe." This is the rule giving the discretion.

Mr. Freedman: The field has been preempted by federal rule. You know the rule says no priority.

Professor Sacks: Some experimentation should be allowed. If you ask yourselves the question what's likely to happen under such it could get to the point that Abe Freedman earlier . . . I think the answer is "no." It can't get to the point of simply tossing this basic premise out the window. It will be. Rules such as they are will be of the sort that simply elaborate which (blurred) of the basic idea that both sides should be allowed to go forth but maybe establishing some particular way in which they can do it in a reasonable fashion. This is desirable as I see it. This is something which we ought to permit. I recommend that we stick by our rules.

Mr. Colby: Well, the scope of the matter seems extremely narrow, because it is a question of sequence and timing of discovery. Now, experience certainly teaches that there is only one acceptable sequence in timing of discovery and that is complete simultaneity. Now I just feel that it should be made absolutely clear that no gimmicks, no angles, are to be worked so as to destroy the right of simultaneous discovery, while the people are there so you can get them.

Judge Thomsen: Don't you think this rule takes care of it? What's the matter with the rule as written?

Mr. Colby: Well, I think it leaves it open to those courts and those persons who are dedicated to the idea that it is an orderly idea to do it first on one side and then on the other, to get back into that practice.

Judge Feinberg: Have you had any trouble on that in the past, Lee? I thought you said it worked out alright.

Mr. Colby: We have very little trouble because, regardless of what the courts do, the counsel kind of take care of themselves. I think that Abe will testify to that. As a rule you don't have trouble with opposing counsel no matter what the rule of court is. He'll let you do it.

Judge Feinberg: I think that the note to subdivision (d) at page 26-32 made it very clear just what we're talking about. It says "the principal effects of the new provision are: first, to eliminate any fixed priority in the sequence of discovery." That's what the last speaker was worried about.

Mr. Morton: I would like to move in the alternative that either we add to the text on 26-12 at line 195 after "court" the words "in a particular case," in lines 200-201 in lieu of the words "such manner as shall best" the words "any action to" or in the alternative that we delete from the note 26-35 and 26-36 the expression "is triggered by the action" where it says expressly "local rules of court if needed may, of course, be issued."

Judge Thomsen: I would like to support the Brown amendment because if you are not shattered by Mr. Frank's eloquence we have a sound

principle here. We are declining that principle - namely - that the fact that one party is conducting discovery - that that fact will not operate to delay anybody else's discovery. And that's a sound principle as the Committee has concluded before. That's a sound principle,in spite of all that John has said so vigorously, that I say it shouldn't be defeated by any local rule and we should make that perfectly clear, and if we don't believe in the principle then we ought to leave it as it has been. But the idea that a court can set up locally a rule directly conflicts with our principle just doesn't seem logical at all.

Judge Feinberg: I think everybody will agree to that, and perhaps the answer is the sentence that Brown Morton objects to ("Local rules of court if needed may enforce the issue.") should be clarified to make clear that they can be issued not to destroy the principle set up in the rules but only to implement it.

Professor Sacks: I would be glad to do that if that's what's causing the trouble.

(General discussion on sentence structure).

Judge Thomsen: Why don't we just eliminate the sentence altogether (26-35 - sentence in the notes) and say "Local rules of court, if needed, may of course be issued." Why not eliminate that? That's what sounds like an encouragement. We don't think local rules are needed. Why do we suggest it? If the court is going to make a local rule, it will go ahead and do it. I'm in favor of leaving the rule itself as it is. I think it accomplishes the purpose that everybody wants to accomplish. Why not just eliminate this one sentence?

Professor Sacks: I have no quarrel with that.

Mr. Acheson: Will you accept that, John?

Mr. Frank: I'm going to vote against it anyway, Mr. Chairman.

Mr. Acheson: How about you, Judge Feinberg?

Judge Feinberg: Yes. I think that the Reporter is correct though. That situations may arise where you want to have a local rule. For example, suppose you have the principle of simultaneous depositions but you want to set up a schedule that no deposition can last more than three days in a row even when it's being taken simultaneously, just because you feel in that district that that would create a hardship. You might accomplish that by local rule instead of having every judge deal with that problem at every motion. I see nothing wrong with that.

Mr. Freedman: Doesn't that come up in the rare case, Judge?

Judge Feinberg: No, not in the southern district. It crops up quite a bit. Fortunately we have been able to work it out, but I don't see why that you say quite plainly that local rules can be adopted to carry out the principle of the general rule, that that harms you. I think it helps you.

(General discussion on local rules).

Mr. Frank: I would like to emphasize the great importance of what Judge Feinberg has said. Under the rule, with no changes at all, the largest of our districts has issued a local rule which is to their satisfaction and they get along happily. Under the existing rule, with no change at all, my district gets along happily. Every other one that I've bumped into gets along happily. These things dramatize the course of

Mr. Glaser's conclusion, that we're just solving a non-existent problem.

Mr. Cooper: I would like to ask Judge Feinberg a question in line with that. Would this change in rule bother you?

Judge Feinberg: No. Now whether or not it would bother some of the lawyers in the district, I don't know. That's what we're going to have to find out. If it will. I don't think it will cause them too much.

Mr. Acheson: As I understand it, we have one proposal here which is to strike out the reference in the note to local rule.

Mr. Cooper: I second it.

Professor Sacks: Could we put the issue this way? The note reference to the power to issue the local rule could either be eliminated completely or it could be so written that it was clear that it couldn't be used simply to destroy the principle of simultaneity. That could be done in any case. There's no problem. As I understand the issue before the Committee, it is whether to go further and make changes in the text of the rule to make it crystal clear that the only deviation from 26(b) is to be by order in a particular case. I think if we could just get . .

Mr. Acheson: Alright, let's have a vote as to whether we want to change the rule itself so it is crystal clear it must be done in each case. All in favor, please raise their hands.

Mr. Doub: Is the alternative that we strike out the reference to "Local rules of court, if needed, may of course be issued."

Mr. Acheson: There are two things here, George. The proposal has now been made that we change the rule itself to say that it must be done by order in each case. After that vote has been taken, and if it is

lost, we will then put another question which is: "Shall the note be changed to indicate, either by striking it out all together or by saying local rules may be made but they may change the adoption of'simultanity'or whatever that damn word is.

Mr. Frank: On that narrow question I wish to vote in the negative for reasons unrelated to the rest of the discussion. I think that just increases paper work for everybody. It bars even a stipulation unless it's confirmed by an order. I means that not even a stipulation will be binding, I believe, unless you have the order. It requires you to make up an extra piece of paper; it requires somebody to sign it. This is the key to what we're trying to do which is to move stuff out of the courthouse back to the law offices. In the spirit of the thing I could vote "yes" on the amendment to the note, but I'm certainly (rest of the sentence drowned out by voices).

Mr. Acheson: (Repeats questions put). Let's have a vote on that amendment-making it clear in the rule itself that it must be done in every case by an order of court. Five in favor. Eight against. Next vote. Shall we change the note. First shall we eliminate the reference to local rules. Seven in favor. Five against. Reference to local rules is to be eliminated in the note. All in favor of 26(d) - Eleven - Passed.

Mr. Frank: I would like the records to show that there was an expressed notation of dissent on this one.

Mr. Acheson: Records will show Mr. Frank dissented.

Rule 26(e)

Professor Sacks: [Gives full background and presents arguments.] I do see the possibility of some give in 26(e) by this device of allowing variation by local rule.

Judge Thomsen: May I suggest another possible variation? That is by saying: "unless so ordered by the court or by agreement of the party." It seems to me that in the places where it is done and they like to do it, it would simply be a general understanding that the parties will write letters to each other and say that we understand you're exchanging interrogatories. It is understood that they will run this way. I think that argument against the local rule on this is that you have said it is customarily and happily done in most personal injury cases, everywhere, and I think that the personal injury bar would generally agree to do it by agreeing just on exchange of letters or that the court would require it in most such cases. The trouble with a local rule is that the problem will interfere with just people like Brown Morton, who have to practice in many different districts and would find different local rules in each district. They are the complicated cases - patent cases and trade secret cases - are the ones that it is a terrible burden to keep up with everything. I would have it defer to the practitioners particularly those who have practiced in different districts as to whether the local rule wouldn't be hard on them. I think it might and I believe that . . .[words blurred] you would accomplish a good deal of what we seek to accomplish.

Mr. Frank: Mr. Chairman, I thank Al for stating the problem. Could I amplify it just a little? This is one of those rare cases where the Commercial Bar and the Tort Bar simply have different interests and different problems, and we are covering both by this blanket. The auto accident lawyers want to have supplementation and in those cases there is really no good reason why there shouldn't be because the interrogatories are not comprehensive in the sense of creating a terribly great burden. Medicals could be kept up to date as you get further information and so on, and there is much chance in giving the plaintiff's lawyers the supplements that they want. On the other hand, in the big commercial cases this is an absolutely impossible task - to ask your office in an anti-trust case where it may have answered thousands of interrogatories - to keep those current when they lend to matters of only marginal relevance anyway. It's truly impossible . . .. On the commercial cases I am very much for this paragraph and voted for it. On the other hand I am aware that the Tort Bar sees it the opposite way, and I think the letter we got is symtomatic but in my own state we adopted a rule on this subject and the line of cleavage was exactly what the Tort Bar says is against the business lawyers. I would think that perhaps the Reporter could, without spending our time on it, could talk perhaps a little more fully and informally with some tort lawyers to see whether you couldn't add to your exceptions, say, medical facts relating to accidents or something of that sort to the things which must be kept current. You could thus satisfy the tort people and meet their legitimate problem.

Judge Thomsen: May I suggest there's another way. You can have a local practice in the Tort Bar of simply filing a second set of interrogatories before the trial and say: "Please bring up to date your answers to questions, so and so.", or, in places where you have pretrials, it can be done at pretrial, so that the Tort Bar is not helpless.

Mr. Frank: May I say a last word to Judge Thomsen on that point? One problem with that is the cause factor. What we are then doing is making the auto accident people do this in every case. . . . We ought not have a system where every last case requires an additional set of interrogatories. This just adds to the burden.

Judge Thomsen: Medical files almost have to be brought up to date because of the different specialists called in.

Judge Feinberg: From the discussion of Mr. Frank and Judge Thomsen, I feel that we have put the cart before the horse with this rule; that we ought to leave it with the burden as a supplement in the rule, with exceptions for large commercial cases, where we think it's burdensome.

Professor Sacks: I did come to the Committee with a proposal that there be a burden though I didn't press the point that this must be. They were the two alternatives. I have a mild preference for having the burden. The discussion, at that time, which was largely in terms of the large case, convinced me that this way of doingit was probably the better one, because we were not imposing too heavy a burden. Depending on which litigation you focus on you tend to come out with a different reference. It's narrow in the sense that the parties can protect themselves whatever the rule is.

Judge Feinberg: Mr. Freedman, what do you think about the rule as it is now phrased?

Mr. Freedman: Well, I'm troubled. I'm scared to death that if I am put under the burden of having to keep the information up to date, no matter how hard I may try, I may forget it, then my client gets sanction. I would be of the mind that counsel should file a paper in court and just ask the other counsel to bring it up to date.

Voice: Why shouldn't it be a burden on the fellow who wants it brought up to date?

Professor Louisell: That's exactly the basic point here. To put an automatic duty to supplement on the addressee is an artificiality. I favor the rule that there is no obligation to supplement except as ordered by the court or as agreed to by the parties.

Mr. Freedman: That would mean that you would have to wipe out the business of furnishing witnesses. I'm as concerned about that as I would be about the information.

Professor Louisell: My own preference would be to wipe that out, but I'm willing to compromise on that.

Mr. Morton: May I suggest that we could solve the problem by deleting 26(e) altogether, because it is taken care of by page 33-4, lines 53-59?

[General discussion on interrogatories].

Mr. Doub: I think we should state affirmatively that there is a duty - following lines 207-212 - with perhaps as John Frank suggested - the inclusion of another item on testimony. I don't think we should have the temerity to declare that there is never any duty. That would mean that a party who has responded to a request for discovery with an answer that was complete when made is

under a duty seasonably to supplement his answers.

Judge Thomsen: That's impossible in an anti-trust case.

Mr. Doub: I'm not stating that he is under a duty to bring his answers up to date. I'm only stating affirmatively that he is under a duty to seasonably supplement them with respect to any question directly addressed to the identity and location of persons having knowledge of discoverable matters.

Judge Thomsen: But then that leaves it open as to the others. And the problem is that the Bar wants to know where it stands, because they stand in a different situation in every district and there may be different situations between the judges in the same district . . .. My feeling is that we have to have a rule to take care of these situations where one man is trying to impose his will on the other side, and nobody knows what the rule is.

[Recessed for lunch. Meeting reconvened at 2:15 P.M.]

Mr. Cooper: I move that in principle we amend it as follows: "A party is under a duty seasonably to supplement his answer with respect to any question directly addressed to the identity and location of persons having knowledge of discoverable matter and the identity and stated subject matter which each person who will be called as an expert witness at the trial. Otherwise, a party who has responded to a request for discovery with an answer that was complete when made is under no duty to supplement his answers to include matters thereafter acquired nor may such duty be otherwise imposed except by further interrogatories, by order of court or agreement of the parties."

Dean Joiner: I second that motion.

Mr. Doub: Well, could we have what that rule does that this rule doesn't?

Mr. Cooper: Well, first it states the affirmative duty first instead of stating a negative first, and secondly, "nor may such duty be otherwise imposed" means that a fellow can not in his original interrogatories place a continuing duty except by further interrogatories, by order of the court, or by agreement of the parties."

Professor Sacks: It seems to me that the objective is the same as what we now have. The principal drafting change is a reversal of the order. "Agreement of the parties" does raise a point. We do have in 29 a provision that the parties may by agreement modify any procedure. It's unwise, I think, to make a specific reference to agreement of the parties in any one place.

Mr. Freedman: I would make at least one objection. After this morning's discussion, I thought that we had some agreement to cut out the necessity for supplementations in its entirety.

Judge Thomsen: There are two steps to this thing and we ought to decide first the basic question: Whether the basic rule ought to be supplementation automatically or whether we should require the parties to submit a second interrogatory without the court order. Then we could decide whether there should be some objection to it. Third question is whether or not we want to go into these questions' style or do we want to leave it to the Reporter to work out. May I suggest we approach it that way?

Mr. Acheson: I was not under the impression that this section at the bottom of the page was bothering anybody this morning. I think Mr. Freedman thought that it was -- where it says that "he is under a

duty seasonably to supplement his questions with respect to any question directly addressed to the identity and location of persons having knowledge of discoverable matters and the identity and stated subject matter of each person who will be called upon as an expert witness at trial."

Mr. Oberdorfer: I think there's one other issue and that is what the attitude is about local rules.

[Acheson calls for vote on Thomsen's proposal (from lines 203 to 207 leaving open what comes along afterward].

Dean Joiner: If I would be willing to accept the draft as it stands at the present time with the exceptions but would be unwilling to accept the first sentence without the exceptions, how should I vote?

Mr. Acheson: Well, I think you could vote for it. I gather that what Judge Thomsen wants to know is do we strew it out by announcing a general rule that there is no duty except blah, blah, blah, or whether we are going to start out by saying there is a duty to do this except blah, blah, blah.

[Vote was taken on starting out with the no duty provision. Approved by majority vote.]

Professor Sacks: Exceptions are witnesses and expert witnesses.

Mr. Acheson: Do you want to vote on those two exceptions?

[General discussion as to witnesses and unrelated issues].

Mr. Frank: On this witness point, here is what is worrying me. This is going to crop up anyway at the pretrial conference. The person will have to name his witnesses. At that point, if we have made an intermediate requirement that he name them earlier in this fashion, we are going to get people barring the pretrial from naming them then and the sanction is out of proportion to the offense. Isn't

it better simply to let the judge at pretrial use his discretion and allow some additional discovery if it is needed?

Judge Thomsen: Pretrials differ throughout the country. I think we ought not to make a rule that puts everybody in a strait jacket because in some districts before you come to pretrial you are supposed to have exhausted discovery. It's hard to pass a rule that will really be fair according to the practice in each district. . . . The supplemental interrogatory is helpful . . . By agreement of the parties is alright; order of the court can be done at anytime, and will normally be done at pretrial.

Mr. Oberdorfer: Judge Thomsen, would your difference with John be reconciled to some degree if we put a time point in here for this supplemented answer of identifying the witness, such as at or before the pretrial conference, if any.

Judge Thomsen: Well, that's what bothers me. I think the timing is a trap in some cases.

Professor Sacks: I'd like to try and persuade Judge Thomsen to vote for the exception. The point is whichever rule we adopt, there are difficulties with it. The particular difficulty that you have with no duty - the one that we've adopted - is a situation in which the one party who has made the answer knows of important facts which render his answer quite incomplete and he simply keeps quiet about them. My point about the witness is this: that is the situation in which you can come closest to the situation that amounts to what looks like a fraud. It's the one that's most easily abused. . . .

Mr. Jenner: Let me limit my remarks to . . . witnesses and that only.

Rather than by a listing by the person of names of persons having knowledge of discoverable facts, there be a supplemental interrogatory filed by the party who seeks that information. The reasons for that are (a) under the doctrine that there is a continuing duty, it results in delay in the trial of cases and (words blurred) The witness is put on the stand; objection is raised that the name of this person was not listed in response to the interrogatory and there is a continuing duty to list the names of persons having discoverable facts. Then the judge determines how much of a delay . . . to permit the person who sought the discovery but didn't obtain opportunity to question the witness in advance . . . or whether he is going to say to the opposite party: "Well, I exercise my discretion that you can't use the witness at all"., or however it might be. If, on the other hand, you permit the party who is seeking . . . to file an interrogatory just to that effect - at any time before trial, then you will place the burden where it ought to be and you do not deprive that party of the opportunity of obtaining that information. As a matter of fact he finds it a better point to file that interrogatory just before trial. If he is more diligent then he files his interrogatory very early in the course of his preparation for trial. Third, it is a fact that busy trial lawyers are in court all the time and trying a lot of cases, especially where they have assistance from men in their offices, that you do overlook perfectly legitimately updating your interrogatories as to the listing of witnesses. I think we should recognize that circumstance. Now the Illinois Committee in its present presentation . . . has submitted to the Supreme Court that there be no continuing duty to list the names of witnesses but that any party may file any time

before trial supplementary interrogatory and receive the names of those witnesses. That I respectfully submit is the best compromise . . . better practice rather than going whole hog this way or the other way.

Voice: Mr. Chairman, I move that we do that.

Judge Feinberg: I just had two thoughts: one is too much time is being spent on this question as compared to the time that should be spent on other questions. . . . Secondly, my own preference is that fact witnesses . . . who know about the case is such an important subject matter that I would be for making an exception to the general rule and require updating of that information.

[There is a discussion of pretrial methods employed in different districts.]

Mr. Acheson: Gentlemen, we now will vote on whether we stop at line 207 or have the exception of witnesses. All in favor of saving the exception for witnesses - Favor: 7 - Against: 6. Against this text and don't want any exception - Favor: 6.

[Discussion as to phrasing of motion].

Mr. Doub: Isn't the issue whether we shall require a continuing duty to supply the names of witnesses?

[General noisy discussion in background].

Professor Wright: It seems to me relevant to note that the Committee is not now taking a final vote on what it will recommend to the Judicial Conference. It is instead voting only on what it will distribute to the country. I think that whatever the merits of the argument that there is an advantage on publishing a text with the exceptions such as Al has them or in the form Grant Cooper would

have them, because no one in the country will have thought of this particular compromise. There are many districts in which there is a continuing duty with regard to everything, and there are places where there is no continuing duty with regard to anything at all. But by putting out this text the country will be alerted to the possibility that you will have a general rule of no continuing duty but that on these particular exigent matters there will be a continuing duty. They can then tell you: "We don't like this - we don't want any continuing duty at all" - or they can say: "Broaden it." But they will have had their attention called to a third possibility.

[Coleman enters at 3:00 P.M and is given a summary of the day's proceedings.]

Mr. Oberdorfer: Let's test Bert's feelings on this with this kind of question. Suppose this were drawn so that the part that we have all agreed to - no duty - including the right to inquire by supplemental interrogatories can die at the pretrial conference, but that we legislate in effect that the right to get the names of witnesses by supplemental interrogatory survives the pretrial conference, the local rule to the contrary not withstanding.

Mr. Jenner: The rules as originally submitted - the Committee did submit to the Bar as the submission stage of the game alternatives - sometimes alternative subsections and sometimes alternative rules - and asked for the comment of the Bar as to their respective choice. And it may well be that right here where we're so close that we have the Reporter draft the rule in the alternative in so far as listing witnesses is concerned. . . . I dare say that the Trial Bar will prefer a supplemental interrogatory rather than assuming the burden of

a continuing duty to supplement.

Dean Joiner: It seems to me that the proposal that you are making requires twice as much work on the part of the lawyers. . . . Your scheme requires the one lawyer who wants to know to dictate something to his secretary, carry it down to the courthouse and to serve it on the other side - then the other side to respond to every single question that he has answered in regard to witnesses.

Mr. Jenner: I did not say anything other than listing the names of persons who had knowledge of discoverable facts.

Dean Joiner: Well, I don't care how you say it. It requires the interrogatory on the part of the person who wants the knowledge.

. . .

Mr. Jenner: The facts of life are the problems of the trial lawyer who is in court all day.

Mr. Freedman: I'd like to support that. One of the things that really haunts the trial lawyer is the fact that he may be penalized for something he has left out. . . . If they have to adhere to this rule, it's going to involve checking whole series of interrogatories.

Judge Thomsen: I'm with Charlie on principles; but as in practice I'm with Bert. . . . How many things can one man keep in his head at one time.

Mr. Acheson: Either we leave this and have it put into alternative drafts or chew on it and come back at a later time.

Mr. Doub: I think it would be helpful if we knew the sense of the Committee in how it was divided on the second question

Judge Thomsen: Let Bert write up what he has in mind and circulate it to us, because I think it ties in. I think George is right - that

this is the question of expert witnesses. Surviving pretrial is very important if you are going to call in a new expert.

Dean Joiner: This last one is a previous rule. 26(b)(4) says you've got to have them.

Mr. Acheson: Will you please now vote on an exception in favor of the continuing duty for expert witnesses. [Favored by majority].

Mr. Jenner: May I suggest that you pose the motion that there be no duty to continue to list witnesses but the witnesses must be listed on the filing of a supplementary interrogatory before trial . . .

Mr. Freedman: I don't recall any vote on the question of whether the discovery process survives the pretrial conference.

Mr. Acheson: You're quite right, Al. We were just talking about continuing duties.

Mr. Jenner: The question as I understand it is whether there be a continuing duty to list the names of persons having knowledge of discovery facts and whether it be that the party seeking that information file a supplementary interrogatory and be permitted to do so at any time before trial.

Mr. Frank: I am wholly opposed to you on that one because I'm strong for the practice of Judge Will; that barring exception circumstances you shouldn't be able to name witnesses after pretrial. . . . You're putting in that question of the period between pretrial and trial. That I don't want to get into.

Mr. Jenner: You need a list of witnesses at trial or at any time ordered by the court, but if you just go through the normal procedures, the obligation to secure a supplementation is on the

party seeking the list of witnesses. That's the point I'm puzzled about.

Mr. Frank: It may be that your idea would sell better if it wasn't just discoverable matter but something like material facts.

Mr. Jenner: I'm afraid that would get us into a little quicksand . . .

Mr. Frank: The interrogatory to discover the identity of a witness after the curtain goes down.

Mr. Jenner: It must be a person having knowledge of discoverable facts. If you say witness then you don't get to the point you're seeking.

Judge Feinberg: All this talk about burden and busy trial lawyers is not helpful because no matter which way this rule comes out there's a burden on someone . . .

Mr. Acheson: I suggest that we leave this matter and have alternatives drafted by the Reporter and if anybody, between now and the end of this series of meetings, can think of a bright way to solve the solution, let him bring it forward or forever afterward hold his peace.

Rule 29

Professor Sacks: I would like to note an editorial change . . . at line 4 there would be a period put after the word "depositions." Then a new separate sentence would appear - "The parties by written stipulation may also modify the procedures provided by these rules for other methods of discovery."

Mr. Jenner: I think that would be most unfortunate. I would like to hear from Judge Feinberg and Judge Thomsen on this. To permit the parties to enter into stipulations from modifying discovery procedures would hamstring the district judge in the administration of his power.

Now perhaps you don't intend to go that far. . . but the language you suggested would permit the parties by stipulations binding on the district judge to modify discovery procedures.

Judge Thomsen: You can't do that. The judge has to administer his calendar. It isn't up to the lawyers.

Professor Sacks: Incidentally this is not a change from what we adopted the last time insubstance or principle; it's just simply a verbal change. What we adopted the last time has the same meaning or effect.

[General discussion].

Judge Thomsen: I think it's desirable to have the parties agree routinely to extend times for answering without having to get a court order . . . It certainly is desirable that the parties should have a right to make modifications subject to overriding orders of the court.

Professor Sacks: Would it meet the point if we wrote "consistent with orders issued by the court, the parties . . .?"

Judge Feinberg: My own feeling is that if there is any district where you don't need an order of the court for a stipulation, then you may have to put something there. In the Southern District of New York you have to have an order of the court.

[General discussion on wording. Approved as amended - by majority vote].

Rule 30(a)

Professor Sacks: One aspect of the problem - line 7 of rule 30(a) . . . proposed to delete "upon all defendants" . . . would read "upon a defendant."

Mr. Jenner: Is it not an answer to say that you can't use it against a defendant who is not present? When you take the deposition of a party or a witness much is revealed, and it is not an answer to say it isn't binding so far as his admission is concerned against one who has not yet been served with summons. Because he is then afterward served with summons , and the witness has already been committed. Admissibility is not the answer. The commission of the witness, for example, is one. This has more far-reaching effect than it appears on the surface.

Mr. Frank: May I respond to Mr. Jenner? Bart, the reason that I'm for this and that it was suggested by someone in my district is that what you say is perfectly true, but it's got to be balanced against the other hazards. That is, in large cases, with lots of former defe[illegible]nts some of whom you may not be able to reach, you can be in a state of paralysis for an awful long time. . . . On balance it seemed fairer to modify it . . . so that things don't have to stay in a state of suspense merely because of a busy year.

[General discussion followed].

Judge Thomsen: The word "a" is tricky. Suppose you serve one man on the 1st of August and you served the other man on the 18th of August. Is he bound by it? . . .

Professor Sacks: The key language is "providing that he had reasonable notice of the deposition . . . ."

[Further discussion].

Mr. Jenner: All this sentence is is whether you must have leave of court to take the deposition. The present rule is quite properly limited to the plaintiff. The defendant may take the deposition one minute after the action has commenced. What this was designed to do . . . is to prevent the plaintiff from filing his complaint and merely starting his discovery before there has been a reasonable opportunity for parties to retain counsel and to appear. The present rule is well drafted. . . .

Professor Sacks: . . . What we have done here is to change the rule . . . We've changed the reference to commencement of the action . . . to "service of the summons and complaint upon." . . . Second thing we've done is to put it in terms not of the service of notice but of the taking of the deposition. . . . Those are the changes we've made and I think they're right. I think the meaning is clear.

[Noisy discussion follows.]

Mr. Acheson: We have a suggestion here that on line 7 we strike out the word "all" and put in "any." Is there any discussion on that?

Mr. Frank: I'd like to ask a point of information. . . . Mr. Jenner referred to the fact that under the existing rule you can not move on the defendant for 20 days without notice. I want to go with you on this admiralty stuff, but, as you know, I intend to vote "no" on any modification of that general provision in Rule 26 except as it meeds the special admiralty needs. Now what I'm muddled about is are we doing that now or do you have that at some other place.

Professor Sacks: The change from "upon all defendants" to "upon any defendant" does not raise the issue that you raise. . . . When we pass from that it seems to me the next question is one that you do raise, which is, that we have made a change from Rule 26(a) . . .. This makes a change in that it requires that he obtain leave if he proposes to take a deposition within the first 20 days. We've abandoned the use of notice as the measure and we've shifted to the actual taking of the deposition. This was the decision made by the Committee and the reasons for it were that here in Rule 30, as to depositions, and Rules 33, 34, and 36, the approach that is used is consistent. What it says is that a defendant should be protected - given enough time to obtain counsel, but the protection he needs is protection of having counsel ready to act when that action is needed. It should not be protection against the plaintiff's serving of notes. There is involved in this . . . time elements.

Mr. Frank: If we rejected that second point, we wouldn't have to decide this point, would we?

Professor Sacks: If we abandoned this whole approach I think the drafting problems simply become different. . . .

Mr. Frank: May we state them in the reverse order, then, and may I make a motion directly to that point? . . . Under the existing rules, you can not start discovery against the defendant by serving anything on him except a complaint for the first 20 days, unless you have leave of court.

Professor Sacks: Twenty days for notice of deposition; 10 days for interrogatories; 10 days for (words drowned out).

Mr. Frank: Let me ignore the admiralty for the moment. The existing state of the law is that when you send a communication to the defendant saying: "Look, brother, we got a lawsuit against you," all you give him is that communication. You can not simultaneously therewith give him a notice of deposition. You can not simultaneously serve interrogatories. Under the procedure which we are now adopting . . . we are abandoning those defendant benefits and instead providing that the interrogatories can be served with the complaint and that the notice of deposition can be sent out with the complaint. . . . We are further providing, we are extending the time to answer but we are nonetheless permitting that these things be served from the beginning.

Professor Louisell: But it isn't right to deduce from that any diminution in protection for the defendant.

Mr. Frank: Well, I don't see it that way. I think that what we are doing is sticking by a system which I am for of essentially notice pleading? We're sending out a communique to the defendant: "Look, I'm injured and I want some of your money.", and that's all. I beleive that we do at the present time allow the defendant an edge - a chance to get started first on his various types of discovery. I think that that is a wholesome, necessary, and desirable balance to the notice pleading.

Mr. Acheson: Haven't we had all of this before?

Mr. Frank: Well, if we have I will come off of it swiftly then. I raised it in relation to that insurance point. What we are doing by putting these things together is: number one, we take away the defense bar as a real protection - not having to reveal the insurance details - and we simultaneously toss this weight in at the same time. These are bound to be put together and responded to as a package. I believe it to be wrong . . .. What I want . . . is that I would maintain the existing structure under Rule 26, 33, etc. which permits the defendant to have the opportunity to initiate discovery first. If we kept those elements of the present rules we wouldn't be worried about this change. This problem wouldn't arise.

Mr. Coleman: What would you do about 116 . . . priority . . .

Mr. Frank: I voted against the change on the priority matter this morning and it is related. . . . I move that the time advantages given to the defendant to initiate discovery not be altered by the total set of these rules including this one in this paragraph.

Mr. Acheson: Favor of John's motion - 3. Opposed by majority. [9]

Professor Sacks: Any other on Rule 30(a) that doesn't relate to the admiralty problem?

Judge Feinberg: Judge Thomsen posed a hypothetical where one defendant was served one day and another defendant was served 18 days later and a deposition was noticed for the 21st day. You referred to Rule 32 . . . Are we going to discuss that later?

Professor Sacks: Well, we could take it up now.

Judge Feinberg: Well, what happens in that case? Is 2 days, 3 days, due notice?

Professor Sacks: The rules simply do not state. At one time there was a suggestion made by me that we might put into the rules a "rule of thumb" you might say that in the absence of any court order to the contrary 5 days notice be regarded as a standard reasonable notice. . . . At that time the feeling was that present flexibility was fine, and "reasonable" and "due" were not causing trouble. . . .

Judge Feinberg: Well, was there any problem?

Professor Sacks: No.

Judge Thomsen: May I suggest that this amendment "within 20 days" . . . I just don't understand it.

Professor Sacks: I've agreed to clarify that language to make it clear that this is to be the service on the person.

Judge Thomsen: Even that may be wrong. . . . If you are trying to take the deposition before all the defendants are served and have all the consequent problems, then why not get leave of court? . . .

Professor Sacks: Brown, didn't you have some comment on the effect this would have on a complex case?

Mr. Morton: The dutibility is that if you do it other than on the first defendant you don't ever know when exactly you can start because you don't know who all the defendants are going to be. The rule is liberal in that it provides for adding defendants as you go along. Rule 19, for example . . . Having a deposition good against some but not against others and that's going to be a rule, what difference does it make?

[General discussion]. [Also discussion re: California rules].

Professor Sacks: There's one final point, Judge Thomsen. The present rule which talks about commencement of the action has built into it potentially the same problems that are involved in this revision, and yet they don't seem to have come to the surface in reported cases.

Mr. Jenner: It works well, as a matter of fact, because you have an arbitrary 20 days which you can figure out from the day of the accident. . . .

Mr. Acheson: What would you do with it, Bert? How would you change it?

Mr. Jenner: I'd go back to the present practice which says 20 days from the day the accident occurred.

[Discussion on the fact that a vote was just taken on that].

Mr. Jenner: I didn't so understand. John's motion was far more sweeping than that.

Professor Sacks: Yes, it was. The commencement of the action point is a narrower one but I would remind the Committee that I had commencement of the action in my draft. One of my reasons for using commencement of the action was that it does get you into some of these difficulties, but it was strongly felt that service of the summons and complaint is the better act for starting the enormous majority of the cases and it was worth getting into some difficulty in the marginal cases to have it. That was the decision.

Judge Thomsen: Well, then motion to approve would be to approve it subject to your rewriting to meet Judge Maris' proposal. [substitution of "any" for "all" and more clarification].

Mr. Acheson: May we have a vote on the approval of Rule 30(a) leaving open clarification on which the Committee will also approve some change of the word "all" to some other form of words? Approved by majority vote.

Rule 30(b)

Professor Sacks: 30(b) has a variety of subdivisions that we have to consider separately First:

30(b)(1)

Changes required to eliminate [illegible] on page 30-3, eliminate all of (c) [illegible] the (a); at line 21, I would put back 'and [illegible] line 24. I would put a period after "belongs and [illegible] the rest of the underlined material. . . . would now read "The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and if the name is not known a general description sufficient to identify him or the particular class or group to which he belongs." As to the final sentence of 30(b)(1), we need to make changes there. "If the subpoena duces tecum is" insert "to be" "served pursuant to Rule 45 on the person to be examined, a"; strike out"copy thereof" and insert "designation of the materials to be produced thereunder"shall be ; insert "included in or" attached to the notice" It would read "If a subpoena duces tecum is to be served pursuant to Rule 45 on the person to be examined, a designation of the materials to be produced thereunder shall be included in or attached to the notice." . . .

Mr. Acheson: Will you discuss Rule 30(b)(1) as changed?

Mr. Jenner: I don't understand the Reporter's. Do you wish to exclude ? If I want to attach a copy of the subpoena duces tecum instead of going to the trouble . . .

Professor Sacks: No, that would cover the designation, wouldn't it? I used the terminology that allowed you to use the copy or allowed you to do it more flexibly.

Mr. Jenner:"A copy thereof or a designation of the materials to be produced shall be . . . .." Is that the way you have it?

Professor Sacks: No. I'm sorry, Bert. I thought the term "designation" was broad enough to permit you to use a copy to do that.

Mr. Acheson: Any further discussion of the amendments? The question is approving the rule as amended. Is there objection to the approval? There being none, it is adopted.

Rule 30(b)(2)

Professor Sacks: [Gives background, then continues] The standing Committee would like to see that special treatment of maritime matters eliminated, and if at all possible, a common provision adopted that would be applicable to all civil actions. This is the effort that is attempted here. My aim was to take certain portions of the de bene esse deposition and to see whether simply limiting ourselves to those would satisfy the Admiralty Committee. . . . What I selected was that "The notice shall state that the person about to be examined is about to go out of the United States." . . . I suggested as an additional possibility "or is bound on a voyage to sea." The responses from the Maritime Committee members showed that there was a desire on their part to have more than this.

Mr. Colby: . . . The problem, of course, as you can see, is that the de bene esse statute provides for a number of situations in which it is necessary to take the deposition of a witness immediately without awaiting the expiration of any particular time. The de bene esse statute accordingly says "in terms of reasonable notice." It deals with the individual who is aged and infirm. That, I think we have all agreed, can be dropped out on the grounds that almost every time an individual is aged and infirmed you have to make special arrangements and like as not the intervention of the court is necessary. So that, if it's conceivable that it has to be done immediately, still an application to the court will be necessary. That leaves us the other cases that are presented by the de bene esse statute, which are that the witness is bound on a voyage to sea, or is about to go out of the United States and/or that he is to go out of the district and to a distance of more than 100 miles. Now almost everyone in the Committee who have tried their hand on this had hoped to eliminate some of these various cases. Judge Dimock, I think, having gotten sick and tired of receiving copies of various drafts, wrote a letter in which he pointed out that in effect it's frivolous? to hope to do this, because the man who goes from Detroit across the river to Windsor has gone out of the United States but he hasn't gone more than 100 miles; he has gone out of the district; the man who goes to Alaska or Hawaii has not gone out of the United States, etc. So he has concocted a formula which appears in the papers somewhere, and I believe I have a variance of it. I said "is bound on a voyage to sea or to a place out of the district and more than 100 miles from the place of trial." But you see I left

out "out of the United States." So I immediately heard from Judge Dimock that I am still at fault and that it has to say "is bound on a voyage to sea or about to go out of the United States or to a place out of the district and more than 100 miles from the place of trial." This takes us right back to the de bene esse statute except for the elimination of the aged and infirm business. I believe that the Admiralty Section will feel it's necessary to have all of that in there. . . .

Mean Joiner: I can't see that there's any reason to treat the sailors in a different way on going outside of the district than anybody else. It's the same problem in one place as the other.

. . .

Mr. Acheson: This doesn't apply differently. This applies to anyone

Dean Joiner: Well, that's what I'm saying. Why not then just have it as drafted here "about to go out of the United States?" This will cover all these situations that ought to be covered and then [did.not finish].

Judge Thomsen: No. It won't. Because, you know Charlie, if you go from Baltimore to Texas you haven't gone out of the United States.

[Muddled discussion].

Judge Thomsen: Well, you can go even closer - from Baltimore to Philadelphia - or Baltimore to Norfolk - I don't know how the 100 miles comes in, but you haven't gone out of the United States.

Voice: And in that kind of case I don't think they should be treated differently than the ordinary (words blurred).

Judge Thomsen: I think there's a good deal of difference - as a practical matter in the way admiralty cases are handled.

When you have anything in admiralty, it's a practical thing. Two things - a notice gets to the insurance company or the defendant's lawyer very much faster than it does in an automobile accident; and secondly, the cases involved are investigated usually by the lawyer's office who is going to handle the case for the defendant. The upshot of it is that both the clutcher's and the defendant's lawyer are working on the thing together. They get about as nearly an even start whether it's a collision or whatever it is as in any type of case, and they both want to take the deposition. Now you get an automobile accident . . . the lawyer who is going to try the case doesn't get into it soon; it's rare that the plaintiff's lawyer would get into it at once. But if he doesn't get into it, it's hardly ever that the defendant's lawyer gets into it promptly. The seaman is much more difficult to catch . . . he may well be a foreigner - shifting from ship to ship, from employer to employer - . . . this is different.

Mr. Acheson: If this is different, can't we be simple about it and just make an exception for admiralty jurisdiction or maritime jurisdiction?

Judge Maris: Well, the difficulty with that is we can't because a lot of the admiralty cases are brought in civil action form and not under the maritime . . . Why can't we make a provision that's going to be applicable in any kind of case where it ought to be applicable. What about the airlines? . . .

Professor Sacks: Could I put this in terms [doesn't finish].

Judge Maris: Or perhaps an international railroad.

Dean Joiner: I really can't see any difference, for example, if a ship loads in Philadelphia and a railroad starts in Philadelphia and the ship is going to end up in California and the railroad is going to end up in California, it's just as much applicable one time as the other.

[General discussion].

Mr. Frank: Could I make a motion on the subject, please? I think we have to consider Judge Maris' point that (a) we considered this very comprehensively two years ago when we came to our conclusion. The Central Committee then, the standing Committee then, asked us to take steps in the direction in which Mr. Sacks now takes them. We are here primarily to mop up and not cut new grounds. If we were now to go materially beyond that and get into problems of wholly different methods of transportation, then I would think that we really ought to have a serious chance to think it over. I just don't want to get stampeded into that. I would like to move in the spirit of faithful compliance with the suggestion as I understand it of the standing Committee that we advise the Admiralty Committee that this represents our present thinking but that we would accept any combination of the de bene esse elements than those mentioned by Mr. Colby which they think desirable and simply quit trying to tell them how to run their business, and ask them to hand us back, if they don't have a reporter, simply something over Judge Pope's signature which is their revision of this paragraph, and unless the Reporter thinks it's perfectly appalling, let's quit talking about it. Accept it, and let them run their business, and bow gracefully. Let me be quite precise, Mr. Chairman. As I understand it from

Mr. Colby, something in the nature of what they've got now in the current draft, lines 29-41, that is more or less okay, except they might put in some slightly different elements. I say let's send them this, put in any elements that meet their needs in good faith when adopted, and take it off our agenda. Put it in and send it to the country and no more.

Mr. Acheson: Doesn't this also affect your business?

Mr. Frank: Where it does, I would yield on that point with the thought that they simply won't take advantage of us and they're not going to put stuff in there that they don't need for their purposes. I made this suggestion because I had been the one who had been resisting it previously, but I discussed it with Judge Pope this summer, and I think we ought to simply yield gracefully to their point of view.

Mr. Freedman: In view of that, I don't think we need go back. It's already been pretty well crystallized between Mr. Colby and Judge Dimock, and I think that we've got the exact phraseology here which we can put on the table. I think Mr. Colby has already given it to you. . . .

If we take the Reporter's draft exactly as he has it and add to it just one additional phrase "and more than 100 miles from the place of holding the trial."

[Few comments from different members].

Judge Feinberg: Just a point of information. Do I understand that that then applies to any civil action.

Mr. Acheson: Yes. Any civil action at all. It isn't just telling admiralty how to run their business; it's telling us how to run ours.

Judge Thomsen: That means that anybody who has any action that's filed in New York could take the deposition of a man at once simply because he's going over to Baltimore.

[Comments from Sacks and Acheson over Thomsen's voice. Couldn't make out.]

Judge Thomsen: You can grab the defendant and take his deposition before he has a chance to get a lawyer simply because he's going to Baltimore.

Mr. Acheson: It would seem to me much more sensible to make them bring it in an admiralty suit in order to get these things. If they want these provisions, then . . .

Mr. Freedman: Judge, in this day and age I think this will be tremendously advantageous to all other litigations apart from admiralty. Things aren't as they used to be . . . People may leave the country . . . and you lose a witness. I think this could be of tremendous value to the civil rules apart from the admiralty practice.

Mr. Jenner: Let's be practical about it. How can it be said that "I'm about to go down to Louisville, Kentucky," which is more than a 100 miles from Chicago. Who gives the party the right to take depositions? That's preposterous.

Voice: "Shall therefore be unavailable." That's all you really mean.

Judge Thomsen: But that's where he lives, and this is a witness. You're taking the deposition of a witness before the defendant has ever gotten his case to a lawyer. We're talking about a damage suit, or an anti-trust suit, or a contract suit.

Judge Maris: What's wrong with this language that is here now - "is bound on a voyage or is about to go out of the United States."

Judge Thomsen: That's fine.

Judge Maris: Is it necessary to have the 100 miles?

[General discussion].

Mr. Freedman: They could go from New York to Baltimore, stay there a day or two or possibly for only a few hours and then ship out.

[Further discussion on this].

Professor Sacks: Two observations: One on the proposal that it should apply if he is going out of the district and more than 100 miles away, which various admiralty people have proposed. That certainly allows the deposition to be taken immediately in some cases where under our civil practice we would say: "No, it makes more sense to depose him in Baltimore where he lives - unquestionably." It does respond to a case where in fact he has an attorney and he is going a far distance - a good deal more than 100 miles, and Mr. Colby's proposition there was that it would be a great savings of expense if you could depose him now rather than later. But it does represent a deviation from the civil practice - the way the civil rules have gone. But there is an additional point. If we reject the "out of the district and more than 100 miles" on your reasoning, Judge Thomsen, we do have to pay attention to an additional point raised by some of the admiralty people. It referred to the last item in the book - page 4 - Judge Dimock - it is responsive to the statement by the admiralty people that when you have a ship collision, you have a lot of seamen involved in the collision. They may be transported by the owner of the vessel to another location

with the intention then to disperse them. The main problem is you don't know where they're going. . . . Judge Dimock says this is really what we need to solve the admiralty problem - is to fit into the civil practice. . . . He suggests "is bound on a voyage to sea or is about to go out of the United States, or while his present whereabouts is known to the plaintiff, the plaintiff has been unable to ascertain, after diligent inquiry, where he will be after the expiration of the 20-day period."

[General discussion].

Mr. Frank: I move that we adopt Judge Dimock's language.

Voice: I second the motion.

Mr. Freedman: Before we vote on that, I would just like to say that the Admiralty Committee may consider that this is of such importance that they may want to take a vote on it themselves and hold another meeting and see if [doesn't finish - is interrupted by several side remarks].

Mr. Acheson: We have a motion to adopt Judge Dimock's language. Suppose we vote on that now. Tentatively - subject to another look in the morning - all in favor of Judge Dimock's language please raise your hands. Tentatively, that's carried. Tomorrow we have a chance to talk about it again.

Voice: I move we adjourn until 10:00 o'clock tomorrow morning.

[Meeting adjourns at 4:15 P.M.].

[Meeting reconvenes at 10:06 A.M., Tuesday.]

Mr. Acheson: [first words blurred] having a vote on this admiralty matter with the understanding that we think it over over night and' if somebody had a brilliant idea we would consider that. The Reporter has an idea, which we won't classify as brilliant, but it is new at any rate. So I suggest that we hear from him, then take a vote on this, and go on. I don't think we ought to discuss it any further.

Mr. Frank: Mr. Chairman, would you mind? Mr. Jenner isn't in the room . . . He is so acutely interested in this point. Would you mind going to something else and coming back to this one as soon as he walks in?

Mr. Doub: Mr. Chairman, may I suggest to Professor Sacks that he consider the revision of (b)(2) from the form point of view? It seems to me the structure of it is wrong. Should it not state, too, leave of court is not required if the plaintiff serves notice? It really ought to be changed, but I will leave that to the Reporter. The point is that we have said in (a) that leave of court must be obtained if the plaintiff is to take a deposition within 20 days. Paragraph 2. The structure of it just doesn't seem right to me. I'm not suggesting alternatives but I think you might take a hard look at it.

Professor Sacks: It may well be that the "if" clause at the beginning of (2) is bothering you. It bothered me when I first read it, and I do propose to go over that in an effort to make that a more direct statement - a more declaratory statement. I think that may meet your point. Another editorial change I think that's useful is the end of (b)(2) wherein on page 30-4, at lines 40 and 41, it seems to me better to put a period after the word "true" and start a new sentence which would read: "The sanctions provided by Rule 11 are applicable to the certification." And I do propose to make an editorial change

to meet the point which Mr. Doub raises. I think that 30(b)(3), 30(b)(4), and 30(b)(5) . . . could be disposed of quickly, and maybe we could go to them before coming back to the admiralty problem.

Mr. Acheson: Yes.

Professor Sacks: On 30(b)(3) at line 44, I would add at the end of the sentence the words "for taking the deposition," so that it refers more clearly.

Mr. Acheson: Any objection to that?

[There was none.]

Professor Sacks: Another editorial change in 30(b)(4) at lines 46 & 47. On 46 simply strike the words "any means" and at line 47 in lieu of the word "taking" insert the word "means," so that it now reads: "If the party taking a deposition wishes to have the testimony recorded by other than stenographic means . . .." We discussed at the last meeting the procedures we might provide whereby the testimony could be recorded by some other means - other than stenographic, and I think we decided pretty definitely that it was advisable to try to get at this in a way that would protect any party against some other method if there were dangers of inaccuracy or untrustworthiness. The current approach seems then to accomplish two things: one, to make other means available; and the other, to give that protection by requiring a rather definite and specific notice of how the party proposes to record, preserve, and file the deposition, and then it emphasizes the power of the court to protect against inaccuracy or untrustworthiness. I would just note the method is to require this notice and then you will note that in Rule 30(c), at page 30-6 at the very bottom of the page, we simply say "The testimony shall be taken

stenographically or recorded by any other means designated in accordance with subdivision (b)(4). . . . Finally, 30(b)(5) is something we discussed, I think quite fully, at the last meeting. This is the draft essentially at the last meeting and there has been no comment on it. That one simply makes it clear that Rule 34 (Production) may be used in connection with the taking of the deposition to facilitate in cases,where that is appropriate, the examination of the copies, which may be convenient in connection with the taking of the deposition. Unless there is some point that people would raise, I think those are the only items I recall.

Mr. Coleman: Suppose it's the witness who wants to lengthen the time when a deposition is to be taken, but not a party. What are the rules in permitting [last words drowned out by background noises].

Professor Sacks: I think that's a good point, Bill. There is, of course, a provision back in 26(c) that the witness could use, and that may be why this provision in the existing rule referred only to "party." But I can see no objection to adding "or the deponent." That is, 26(c) permits a party to apply for a protective order and protective order would include [pause] a witness could apply under 26(c). On the other hand, Bill, I can see no objection to broadening this to permit the motion here.

Judge Feinberg: Why not just delete the words "of any party?"

Dean Joiner: Yes. Why do we have to. I have the same question that I would raise in connection with line 49. It seems that we are unduly restricting the discretion and operation of the court by making this limited only on motion. I think sometimes the court may want to act sua sponte in certain instances to protect a record or something of that kind, and really what we're trying to do is embrace the power at

this point and the normalties invoked by motion or by local rule.

Professor Sacks: I would have no quarrel with that. Your suggestion as to lines 48-49 would be to take out "upon motion made" under Rule 26(c).

Dean Joiner: And take out "on motion of any party" up above here. [Line 42]. Just say: "The court may for cause shown enlarge or shorten the time for taking the deposition."

Professor Sacks: I think that's fine.

[Slight discussion between Mr. Frank and Professor Sacks].

Mr. Morton: There is a point in respect to 30(b)(3). We raise the question of which court again. Are we satisfied that when we make it specific here, "the court may for cause shown", we mean both the court in which the action is pending and the court from which the subpoena issued? Or is it the court from which the subpoena issued is the place for the witness to apply if it's different from the court in which the action is pending.

Professor Sacks: Now that we have it spelled out in 26(c), Brown, I would say that you wouldn't have any difficulty just using the terminology of the court here. Now that we have spelled out that both are involved.

Mr. Morton: If you're satisfied that it means that both courts are appropriate, let's leave it.

Mr. Acheson: Is there further discussion on (3),(4), or (5)?

Judge Feinberg: Just a question, Mr. Chairman. Does stenographic means include stenotype?

Professor Sacks: I would think so.

Mr. Morton: There's one further point, Mr. Chairman. Last session we put into 30(b)(1) the requirement for the name and address of the officer on account of 30(b)(4), because it was felt that a person could not intelligently make use of the information about the other method of recording, preserving, and filing that was proposed unless he knew who was the fellow going to do the recording, preserving, and filing. [Elaborates by giving example]. We have that . . . but if the notice really specified recorded electronically on magnetic tape and you don't know who, you really can't know whether you should object on the ground that the proposed recorder is incompetent or not.

Judge Thomsen: Wouldn't it be even more important if somebody was listening to what the witness has said when talking into the machine. You'd want to be sure you had a competent man to do that.

Mr. Cooper: Well, Brown, isn't there enough protection in subdivision (4) here? In other words, call up the lawyer and find out what it's going to be. If you don't you can ask the court. Wouldn't that suffice?

Professor Sacks: My guess is that we're probably alright with what we have, but I see no objection to an attempt to add the thought of "and the persons by whom it is to be carried out". . . . I think the question of exact language could be worked out.

Mr. Acheson: Is there any further discussion? Is there any objection to (3), (4), and (5) of this amendment?

Judge Feinberg: I move that it be approved.

Mr. Acheson: All in favor say "Aye." Those opposed "No." ["Ayes" have it.] Those three are approved.

Rule 30(b)(6)

Professor Sacks: 30(b)(6) does raise questions. . . . In essence it was

that the party should name as the deponent the corporation . . . and designate the subject matter on which examination is requested. And then the proposal last time was that "The organization so named should designate one or more officers, directors, managing agents, employees, who are agents." That's the way the language was the last time. We had a discussion of that. We ran into a couple of difficulties. One difficulty we ran into was that the employee might object to being so named. . . . We agreed that if an employee was to be designated . . . it would have to be a consenting employee. But then, a more general objection was made. It was suggested that the corporation should not be put in the position of having to designate an ordinary employee or agent. And the proposal was made that this device should be limited to the corporations designating one or more officers, directors, and managing agents to appear and give testimony on its behalf. That's as far as it went . . . . As I went back over the provision, it seemed to me to be . . . unjustifiably narrow . . . Brown Morton has come to the same conclusion. Of course both of us are interested in the device. . . . My thought about it was that so long as the corporation has an option to select an officer, director, or managing agent, therefore, it is not compelled to select . . . I could see no harm in putting in the provision the notion that it could choose so to designate. So I put in bracketed material . . . "and the organization may, in lieu thereof or in addition thereto, designate one or more employees or agents after obtaining their consent to testifying on its behalf." I make it clear that this is an option. There has be consent both ways. Brown Morton . . . has avoided the rather refined language that I used in saying "shall" in the one

group and "may" as to the other group, and simply says: "The organization so named shall designate an officer, director, managing agent, or a person duly authorized and consenting to testify on its behalf." . . . That's his proposal. There are two differences . . . he abandons the option language that I used, though it seems to me, even in his draft, it's for the organization to make the selection and therefore it really has an option, and in that sense I think I prefer his draft. On the other hand, he states in his memo . . . that he would not have them designate more than one person whereas my draft says one or more. . . . It seems to me that the facility is a useful one. There may be occasions designating the following matters on which examination is requested, and there will be instances in which it will make sense for the corporation to designate Mr. A for one set of matters and Mr. B for another. I think that the proposal that's really being put to the Committee . . . would be to utilize Brown Morton's framework . . . but to add the "one or more" language of mine. "The organization so named shall designate one or more officers, directors, managing agents, or persons duly authorized and consenting to testify on its behalf." What we're really asking you to do is to reconsider whether it was wise to say the organization should not be in the position of designating an employee to speak on its behalf.

Mr. Acheson: Will you reconsider, gentlemen?

Mr. Freedman: Does this foreclose the discovering party from designating anyone [words blurred] in addition to the individual whom the corporation might designate?

Professor Sacks: It does not.

Mr. Frank: How do you make that clear, please, Al?

Professor Sacks: Well, I stated flatly in the note the various provisions of the rules including the rules for deposition taking and the rules for sanctions in 37 continue to operate so that as I read it, at least, all of the existing machinery that permits the naming of such a person would seem, to me, to continue that, and the note would so state. But I'd be perfectly willing to draft an additional sentence . . . to button that up.

Mr. Frank: I, for one, would feel happier because this is the kind of thing that the lawyer picks up . . . and it just should state clearly that it is an alternative device if the person does not care to name a particular [trailed off].

Dean Joiner: Am I to understand that this applies to non-party corporations?

Judge Thomsen: . . . wouldn't it apply to hospitals and insurance companies who want to get records of a previous incident . . .?

Professor Sacks: The problems are the same in the sense that you don't know to whom to go and if you have any difficulties this is a device that I think would be very useful to both sides.

Mr. Morton: The other purpose, Charlie, is to prevent the corporation from giving you the run around of getting witness after witness after witness out of a list of officers, each of whom professes personal ignorance. This enables the party seeking the deposition to require the designant to name somebody who will give some answers.

Dean Joiner: I understand that part in particular, but I'm a little confused as to why we have to get involved in consent, because it's inconveivable to me that you're ever going to get anybody on the stand without his consent. If he doesn't want to consent, then you

subpeona him and he has to come.

Mr. Morton: The consent was to prevent . . . the corporation designating an employee, who had a private interest, as its spokesman for the purpose of getting over that private individual. In other words the employee might not have the interest of the corporation at heart and he might let being designated be prejudice, so it was thought that unless the witness was either an officer, director, or managing agent (in which case he can be called anyhow) he shouldn't be able to be put on the stand by the corporation for the purpose of embarrassing him (the witness).

Mr. Frank: May I ask Mr. Morton a question about the witness? Brown, would you be, uh, I share Joiner's feeling. It seems to me we're pushing ourselves into the domestic management of corporations when we ask some proof that a person consents. That's their business. Couldn't we strike that? The case you mentioned is remote and rare.

Mr. Morton: Not according to the sense of the Committee last time which is the reason why the Committee went the way it did. I was impressed that there was merit in that. We're not saying that the discovering party can compel the organization to name any given individual. It can pick anybody in the world under this provided only that if the person selected is not an officer, director, or managing agent, that the person selected must consent.

Professor Sacks: The key case would be the one in which there is a personal injury situation and the employee has a clear and independent interest, because he was involved in the transaction and may be involved in a lawsuit in self-interest, and that's the case that was put and I think it did lead us to conclude that his consent should be

a condition.

Judge Feinberg: I'm still a little confused by what happens. Supposing I don't get the employee's consent, but he is the person who knows more than anyone else about what happened. As a practical matter won't the corporation say: "Well, now the fellow who knows most about this is Mr. Jones. We don't have his consent, so you'll just have to go out and take his deposition anyway." So what have we achieved there?

Mr. Freedman: Wouldn't that come under the question of asking whether the discovering party would have a right to designate?

Professor Sacks: Yes, he would.

[Slight discussion between Sacks, Louisell, and Feinberg].

Judge Thomsen: It might protect the individual, too, because if he is there for the corporation, he doesn't have a right of a witness. Whereas if he is designated as a witness he would have the right to have his lawyers speak for him and perhaps to protect him against some improper question. I think it might protect either the corporation or the witness. I don't think it's going to happen very often, but it might.

Mr. Freedman: But if the corporation designates him, and he is unwilling, and then the discovering party designates him, wouldn't he bind the corporation?

Professor Sacks: Not if he is just an ordinary employee. Because this procedure will not have succeeded since he is not consenting. He could not have been deposed under this procedure; therefore, his deposition would be taken in ordinary course as it is now.

Mr. Freedman: . . . the corporation is saying that here is an individual who is most knowledgeable on the subject . . . and designated him. Regardless of whether or not he consents that corporation has said: "This is the fellow who knows more about it from our standpoint." If he had consented, then they would have been bound by it. Now if the discovery party comes along and get his testimony through any other means, what difference does it make?

Mr. Cooper: Wouldn't the device be better so that they have to designate the individual, but if he doesn't consent it wouldn't be binding on the corporation. Rather than have to re-subpoena him and all that sort of business. Might that not be a better way of handling it?

Professor Sacks: Well, if he doesn't consent it seems to you you might have to subpoena him.

[Acheson calls an end to this discussion and suggests that they just take and modify it. Joiner moves that Morton's draft be modified. Cooper seconds.]

Mr. Acheson: Let's get on here. Any other vote on this?

Mr. Frank: Mr. Chairman, there are other places in the draft which would either require a negative vote at this time or [interrupted]. Well, Mr. Joiner's now modifying the motion. I'd like to vote for that. Would you give it over again?

Dean Joiner: I move that we approve the modified Morton draft on this issue of consent - 1st sentence.

Mr. Frank: Would you tell us how it would read, Mr. Joiner?

Dean Joiner: "The organization so named shall designate one or more officers, directors, managing agents, or persons duly authorized and consenting to testify on its behalf."

Mr. Frank: I'd like to vote for that, Mr. Chairman.

Mr. Acheson: I'm sorry, I don't understand what's going on.

Professor Sacks: There is an additional issue in the subdivision that we have not yet discussed involving essentially the last sentence of the subdivision. We are now voting on all but, I think.

Mr. Acheson: We now want to discuss the last sentence? You want to amend the last sentence?

Mr. Frank: No. I just want to approve the earlier part.

Professor Sacks: He wants to approve all but the last and then we'll go on.

Mr. Acheson: Let's talk about the first amendment and do we approve it. Do we approve that?

Voice: I second that.

Mr. Acheson: Good, that is approved. Now, let's talk about the last sentence.

Professor Sacks: The remaining question with respect to this device involves an issue that comes up here and in Rules 33 and 36. Let me start with Rule 33 . . . at page 33-2, lines 5-6. What 33 . . . says is "Any party may serve . . . by an officer or agent, who shall furnish such information as is available to the party." . . . In other words, the officer or agent answering on behalf of the corporation is to furnish such information as is available to the party. We have had no proposals for changing that. The cases don't indicate that . . . "available" has caused any special difficulty here. I never proposed to change it. On the other hand, when we dealt with Rule 36 . . . one of the issues that we ran into was the question of the burden of the party on whom the request for admission had been

served. . . . In the prior draft as I have it, all new language is proposed as an addition to 36 suggested that the answering party could not properly assign as a reason for failure to admit lack of information or knowledge unless he stated that he had made reasonable inquiry and secured such information and knowledge as was reasonably available to him. So the word "available" was used in the prior draft then. I also used the term "available" in 30(b)(6) in my prior draft. The word "available" was used in all the drafts. The question was raised at the last meeting as to whether this was proper. I think the principal difficulties that were suggested related to Rule 36. It was particularly noted the word "available" seemed to put the answering party in the position of having to prove the other fellow's case. It seemed too broad, and it was suggested that I re-examine and try to find a different formula. In Rule 36 I've come up with a different formula. I now have . . . in lieu of the reference to "available information" to "unless he states that he had made reasonable inquiry and secured such information and knowledge as are readily obtainable by him." . . . in Rule 30(b)(6) I have also used "readily obtainable." . . . used "readily obtainable" in 36 . . . in 30(b)(6) but it left 33 alone. Brown Morton called attention to this . . .. I think my present disposition would be to retain the language of "readily obtainable" in Rule 36, but I can't see how we can justify the distinction in language between . . .30(b)(6) and (33). [Expands on meaning].

Mr. Freedman: Would you mind explaining the language distinction again between "available" and "readily obtainable"?

Professor Sacks: It's not easy. [Goes in to more details]. In light of the fact that you say there isn't much difference between them, it seems to me that the balance lies in favor of preserving the word in 33 and using it here.

Mr. Acheson: Why don't we preserve it in 36, too?

Professor Sacks: Well, this is a point which John Frank, I am sure, would have views the other way, and in 36, I think they're persuasive.

Mr. Frank: . . . could perhaps I move since we did discuss this previously that we follow the Reporter's recommendation, at least as to 30 and 33, and worry about 36 when we get to it, in the light of this explanation, but that we use the formula in present Rule 33 for these two rules as he has just so closely [trailed off].

Voice: Seconded.

Mr. Acheson: Are we ready to vote?

Judge Thomsen: May I raise one question about it? There is one difference between 30 and 33. The 30 is dealing with independent corporations that are not parties to the case, and I think that this has to be looked at. The word "available" has not always been quite as easy as you say, because the question has come up in a number of times before me. I've just gotten rid of a case [gives case].

Professor Sacks: The problem is there, Judge Thomsen. "Available", however, is subject to protective order provisions that take account of burden, of remoteness, of the expense which the party would have to prepare this material for its own claim or defense anyhow, and all I can say is the rules don't try to spell out how the judges can decide each of these cases - for very good reasons - because they are individual cases; each has to be decided. All I say is that

"available" has been an adequate verbal formula. It has not in itself caused the difficulty, and "obtainable" is no improvement on it for this purpose.

Judge Thomsen: I don't think the plain word "obtainable" is. I was thinking of when you're talking about a corporation that is a witness - available to them which may be interviewing . . . thousands of employees, checking up in a dozen offices throughout the country. Perhaps there ought to be some "readily available" or something put down.

Mr. Morton: Practically, Judge Thomsen, if you are determined to push around witness corporation, you can do it by the same faithful device of subpoenaing people, and it's really more trouble to the witness corporation than having this device by which they can appoint a spokesman who can cooperate in good faith without it.

Judge Thomsen: Why object to limiting what you do to an independent non-party to what is readily available to him? Why make him produce everything that is available?

Mr. Frank: Mr. Chairman, Judge Thomsen anticipates the last motion I wish to make relating to this. May I get it before you, so that it's all there at once, Judge Thomsen? The immediate question is do we follow the "available" formula in Rule 33? . . . There is one last question, Mr. Sacks? You have said that a person, here in the deposition rule, shall furnish information. Well, you don't do that at a deposition. In that respect, I think you have inadvertently changed the whole concept of a deposition. You may furnish information on interrogatories, but all you do at a deposition is answer questions .

And you may furnish documents under Rule 34, under the amendment we just approved, or you may produce what has been subpoenaed, but you do not, in fact, furnish information at all, except by the device of examination. And if we could make it clear that we are keeping Rule 26(b) intact in this respect: "The deponent may be examined regarding . . . as to any information available (or readily available)," we will then not have changed the nature of the deposition structure radically, whereas, if you simply bodily import the interrogatory language you do get all of the evils that Judge Thomsen has in mind, because you're making him then furnish information which is documentary information or accounting information or all sorts of things which nobody can furnish orally anyway.

[Brief discussion between Acheson, Sacks, Frank, and Thomsen].

Mr. Frank: The proposal is that we ask the Reporter to revise this to take the availability standard of Rule 33 but to concentrate it on the examination concept of Rule 26.

Mr. Morton: The difficulty with that is that it destroys the purpose of the subsection . . . is to permit a corporation to be examined through a designated spokesman, who, if the one answer he can't give is "I, the individual, do not know.", because we're not interested in whether he . . . knows or not. It is not supposed to be a device for throttling "Perry Masons", but, at the same time, it is supposed to be a device which will enable him to give the same answer to an inquiring attorney that he would give if his boss asked him.

Mr. Frank: This does not conflict. Mr. Morton's suggestions is a great one. This is the biggest improvement we've got here, and we want to do that.

Mr. Morton: I would expect very often in the course of this sort of deposition for the witness to say: "I don't know, but Mr. Smith is the man who is supposed to know that. Let's wait a minute. I'll call him up and ask him."

Professor Sacks: I think John is trying to exclude the types of interrogatories that really go beyond the material that you normally find in a deposition. [Elaborates by example]. In other words, he wants to make sure that this is limited to the type of matter that is examinable under a deposition. He is not trying . . . to limit it to the personal knowledge of this deponent.

Professor Rosenberg: Would this language do it? "Shall testify as to matters known or readily available to the organization."

Mr. Acheson: That's good enough. . . . Is there objection to that?

Judge Feinberg: Mr. Chairman, I just have a question. Do we need that sentence at all?

Professor Sacks: I think we do. Otherwise. The point is that you would set up a procedure and it might suggest to the person reading it that this is its thrust, but it's a sufficient change from the usual deposition situation in which it is limited to the personal knowledge of the individual. I think you have to spell it out.

Judge Maris: You're really setting up the subject of hearsay rule, aren't you? Having one man testify to anything he can find out from somebody else in the corporation?

Professor Sacks: That's right.

[Short general discussion].

Mr. Acheson: May we now vote on the amended rule? All in favor "aye." [Majority vote - aye]. Amended as adopted.

Mr. Coleman: I take it, John and Abe, that both of you, by your inquiries, are saying that you don't want the corollary of this rule: namely, that we designate the presidents, that the party or the president's counsel can say: "Well, I know nothing about this, but so and so does know about it, so why don't you examine him?"

Mr. Freedman: In other words, if you want the president, you have a right to get the president.

[Slight discussion].

Professor Sacks: Of course, the corporation continues to have what it has now - the power to say: "Well, if you want to subpoena the people in these offices, that's a precedent." You have the power to object, but it's a precedent . . . the present procedure continues.

[Jenner returns to conference room.]

Mr. Acheson: Bert, we have passed over this admiralty question in your absence. The Reporter now has a proposal he would like to make.

Professor Sacks: Just to bring us back to where we were on the admiralty matter. At the tail end of our meeting last night we voted approval, certainly in principle, and for the moment, the language that was suggested by Judge Dimock as a way of solving this admiralty problem. . . . I wonder whether we should tie to his proposal an additional requirement. In other words "go out of the United States' would remain; "bound on a voyage to sea" would remain . . . but tie to this an additional proposal of Judge Dimock that it apply to persons "who are about to go out of the district." I don't think I would use the "100 miles." [Explains why]. But it seems to me one objective requirement that could be imposed, simply to tighten it, would be "go out of the district." Then add the language of Judge Dimock.

Mr. Jenner: Has Mr. Sacks completed?

Professor Sacks: Ben suggests that I read the way it would go - "because he is bound on a voyage to sea or he is about to go out of the United States or is about to leave the district and while his present whereabouts are known to the plaintiff, the plaintiff has been unable to ascertain after diligent inquiry where he will be after the expiration of the twenty-day period."

Mr. Freedman: This defeats Judge Dimock's proposal, because he says he doesn't know. He's got a witness here; he doesn't know if he's about to go out of the district, except that he doesn't know where he's going to be after the twenty-day period. This might be on the second day. And when you say "about to go out of the district" might imply the next day or the next few days.

Professor Sacks: Well, in context it would mean go out of the district during the twenty-day period.

Mr. Freedman: Well, it might even be the twentieth day. It may not be "about to go out of the district."

Professor Sacks: It does seem to me unless you're prepared to say the man is about to leave, then you have him there. That was my suggestion. The same point applies to "about to go out of the United States."

Mr. Freedman: I know, but Judge Dimock makes the additional point here that he just doesn't know . . . whether he will be in the district or available after the twenty-day period.

[Discussion between Feinberg, Freedman, Joiner, and Sacks].

Mr. Cooper: Well, could you put an "or" in there? Would you put it in the disjunctive? Would that cover it?

Professor Sacks: No, it's either a double test or we leave it as it is.

Mr. Freedman: If you took Judge Dimock's proposal and qualified it, you would destroy his whole thought. I would like to put before the Committee again the Admiralty Committee's proposal that you have then "going out of the district and more than 100 miles out of the district."

Mr. Jenner: Mr. Chairman, may I suggest that we stick with the issue that is before the Committee at the moment? . . . I think we should comment on this proposal and not on a new one that Mr. Freedman is now suggesting.

Mr. Acheson: Well, we want to talk about this one, if we may. Do you wish to comment?

Mr. Jenner: Al, my feeling about this proposal to insert "going out of the district" renders this worse than "going out of the district more than 100 miles", which is what the 100 miles provision amounts to. . . . On Judge Dimock's last clause in the proposal, that may be of some help to admiralty lawyers . . . I'm a little bit concerned about its extension to civil cases, and I look at it from, first, a practical standpoint. This is a proposed affidavit which will enable the party to proceed with the taking of the deposition without leave of court. It is wholly impractical to say that you are calling up the witness whose deposition you want to take in twenty days and ask him where he's going to be in twenty days. Because, in many instances, as soon as you call him he's not going to be available to take any deposition whatsoever. So, any lawyer who is concerned

in the premises (a civil lawyer) will serve the deposition and then he'll talk to the witness about where he's going to be in twenty days, and arrange for a new date. What I am afraid of here is the affidavit [words drowned out by cough] in certain good faith, which he thinks may be helpful, in fact will become a purely pro forma statement of counsel.

Professor Sacks: Well, I was worried about that also, Bert, which is why I suggested that we add as an additional condition something . . . On the other hand, I think it our obligation to attempt, as far as we can, to meet the Admiralty Committee's meanings, and at the same time, attempt as far as we can to conform to the wishes of the standing Committee that we come to some agreement about this . . . . Chances are that whatever we adopt will be satisfactory in this situation.

Mr. Jenner: Because of the practical problems presented here in agreeing with the Admiralty Committee on something within reason, despit my concern, I would prefer to accept this as a means of coordinating with the Admiralty Committee, because by and large, there's no real problem here.

Mr. Doub: I would like to support Mr. Jenner's point . . . I think that as to any witness counsel could make an affidavit that he is unable to know, after diligent inquiry, where the witness will be twenty days hence. . . . I think Mr. Jenner is absolutely right. This subjective test is such that any lawyer could make that affidavit - that he is unable to state that the witness is going to be in the jurisdiction. . . . would accept such a subjective test as that, because the Admiralty Committee insists on it. I think we should tell the Admiralty Committee we won't go for that.

Mr. Acheson: Isn't the problem here . . . because it's a ship we're talking about? . . . If you have "is going to sea or going out of the United States" you're dealing with the problem of a ship. . . .

Mr. Freedman: You're dealing with the problem of a witness - not a ship. The witness is on the ship.

Mr. Acheson: No, no. The problem arises because it's a ship.

Mr. Freedman: A ship is involved but you've got a witness who is in Washington today and may be in New York . . . because he's going to go to New York to ship out. I would like to suggest in response to Mr. Jenner and Mr. Doub that it is not at all difficult to find out where the witness is going to be - generally speaking. Before you say anything about a witness, either you make an effort to contact him yourself or you send an investigator around and he finds out where the witness is going to be . . . Therefore, this is reasonable knowledge. It is not at all unreasonable to assume from the investigation that the man is going to be leaving within the next few days or within the twenty-day period . . . Therefore, counsel can very, very promptly take an affidavit that he's not going to be in the jurisdiction. . . .

Mr. Doub: You're not talking to my point at all.

Mr. Freedman: Well, then, maybe I didn't understand it.

Mr. Acheson: Let's really pass this problem on to the standing Committee. We have wrestled with it . . . Why shouldn't the standing Committee do a little work?

Judge Thomsen: You just said that we passed Judge Dimock's proposal, but the Reporter has come back and I think everybody is worried about the subjectivity of this, and I think Mr. Freedman's illustration proves that you can take the deposition of any witness, because I can

send an investigator to see anybody [interrupted].

Mr. Acheson: I'm sure this is right and I'm sure the standing Committee will correct this.

Judge Thomsen: Shouldn't we at least go as far as Mr. Sacks has suggested? Let's go through the subjective test that he is about to leave the district. . . .

[Slight discussion].

Mr. Cooper: May I make a suggestion? I'm not calling for a vote nor a discussion, but that the Admiralty Committee and the Reporter take under consideration. Why have any rules at all about "bound on a voyage to sea?" In other words, if some lawyer thinks that the witness is going to be absent, serve him with a subpoena with a proviso in there that if the witness or his counsel files an affidavit that he is going to be available, then the regular rules apply. Seems like a very simple device.

Professor Sacks: All I can say is that I suggested this to the Admiralty Committee and discussed it with a few and it was not an acceptable approach. I would like simply this, Mr. Chairman, if we could. Is the present disposition of this Committee to reverse itself on what we did the other night? It is my understanding that we have approved Judge Dimock's proposal. I think the Admiralty Committee is entitled to know whether or not that remains the case. . . . We have discussed this and we see that there is a subjectivity element in it. Mr. Jenner put the point very well. I think, Bert, your point is you recognize the subjectivity, but in the rule of give and take, you're prepared to see this used if it will lead to agreement between the two Committees.

Mr. Jenner: Correct.

Voice: . . . Has the Admiralty Committee approved the Dimock suggestion?

Mr. Colby: No. I think Mr. Freedman and I both oppose it. I have no reason to believe that any substantial part of the Admiralty Committee will approve Judge Dimock's suggestion.

Voice: Well, why are we wasting our time?

Mr. Freedman: We don't know. We would have to put it up to the Committee itself, but so far only Judge Dimock has made the suggestion and no one else has had time to consider it. . . .

Mr. Cooper: I move we refer it back to the Admiralty Committee.

[Background - voices muttering dissention].

Judge Maris: It seems to me, gentlemen, that you have to take steps . . In that way, ultimately, I would hope that we get a rule that would not only be right for the Admiralty but would be right for civil cases that are of the same type as those of the admiralty. . . . Whatever you do is going to be put out to the public subject to discussion, come back and be revised, and I agree with the chairman. I don't think we need to waste a lot of time on detail here as long as we put something out that can be chewed on in the ensuing months and can be worked over . . .

Mr. Doub: . . . I move that lines 32 and 33 read, subject to the approval of the Admiralty Committee, "The notice shall (a) state the person to be examined is bound on a voyage to sea or is about to go out of the United States.", and that's what they really want.

[General discussion on Admiralty's wanting more than that].

Mr. Colby: May I recall to the Committee what the situation is here? The defendant is able to take depositions at once. The problem is

what can you do for the plaintiff to permit him to take depositions when he needs to as soon as possible? Giving reasonable notice to the defendant who may . . . nominate counsel. Now there are two types of situations that are presented: the first one is where the witnesses are going to be dispersed or disappear; the second type of situation is where the witness is going to go to Alaska, Hawaii, to the other coast, or to some distance far away from the point of hearing or trial so that there is a factor of expense. Now in the present day, in the condition of transportation, the distance is no longer a hundred miles. We talk about a hundred miles purely because this is found in Rule 4(f) and Rule 45(e) in respect of service of process and subpoenas. It's most unrealistic. I, of course, advocated that both of those be changed to 500 miles. I think they should be 500 miles here. The idea is: Can the counsel who has the case go and take the deposition, or have his junior, who's preparing the case with him, go and take the deposition? Or do you have to, at the expense of $1,000, which may be prohibited to a personal injury plaintiff, nominate associate counsel in Alaska, or Hawaii, or in Los Angeles when your case is in Baltimore?

Mr. Acheson: Would it be satisfactory to your Committee if you said: "If the case is of admiralty or maritime action, they may take depositions as at present."

Mr. Colby: Yes, but that's not acceptable to the standing Committee, sir.

Judge Maris: I don't think it would be acceptable to you, either, because under our present formulation, a great many matters involving admiralty claims, including seamen's cases, are brought into civil action the same as any other maritime matter.

Mr. Acheson: Is that kind of a tort? . . . It will have to be satisfactory to the standing Committee, won't it?

Judge Maris: I don't think we're prepared to give up the idea that a formulation can be adopted here that will be across the board, useful in cases to which it applies whether they arise out of the sea, the air, or some other element. I think we ought to work for it.

Dean Joiner: I'd like to give the Charlie Wright speech of yesterday without repeating the speech. That is, we have approved a proposal which is tentative in form only. It would be wise to get the opinion of the Bar, and the Bench, and the Admiralty Committee. I recommend that we pass it on to the standing Committee and say, "Let's publish it and get it out and get comments on it.", and then we can talk about it when we get the comments.

Judge Thomsen: May I suggest just one amendment to that? . . . that we add Judge Dimock's with the addition that Mr. Sacks has made, after *discussion with other people*, to get something objective into it. That is "if the witness is about to leave the district and the plaintiff has been unable to ascertain, after diligent inquiry, where he will be."

Professor Kaplan: I feel that that is a distinct improvement. It adds an objective touch . . .

Mr. Acheson: We have approved Judge Dimock. Will you now vote on amending what we did yesterday and put it in the form that the Reporter has suggested? Let's have a vote.

Judge Feinberg: Before we vote on that, I'm still unclear as to what it is that Mr. Freedman and Mr. Colby would like us to put into this rule. Before I vote on this other one, I would at least like to know . . .

Judge Maris: I think the problem is that neither of them is in a position to speak for the Admiralty Committee which hasn't formulated its views.

Mr. Freedman: They are pretty well agreed, based on the letters which have been received and the conversations which we've had, that in addition to "going to sea" and "going out of the United States," that we were to add "going out of the district and more than 100 miles." This would take care of the de bene esse situation.

Judge Maris: This formulation may well cover that, or perhaps at least modify it, and after a discussion over the months, I think. . . . I think it's a very good proposal myself.

Mr. Freedman: Except this last modification of it, Judge.

Mr. Acheson: Gentlemen, may we have the question, please? . . . All those in favor of amending what we did yesterday to bring it into accordance with the Reporter's suggestion, please raise their hands.

[Amended by majority vote (8)].

Rule 30(c)

Sacks gives background and says that "allocation of expense" item had raised one question in Charlie Joiner's mind.

Dean Joiner: What I would really like to do is to read the paragraph that I wrote to you just to recall to mind what the issue is. Then, we can see whether anybody agrees with it. If nobody agrees with it, I do not wish to pursue it. [Reads paragraph. Summary sentence of paragraph is "It seems to me that if the party who takes the deposition finds little in it of value to him and does not wish to go to the expense of having it transcribed, the other party should not have the power to put this expense upon him, and if the other

party wants a copy of the deposition, he should bear the expense himself."]

Mr. Acheson: He can do that by bringing it before the court.

Dean Joiner: Under (c) here he would have to go to the court and get an allocation at this point and it seems to me that this should be the automatic rule rather than the discretionary rule. I don't have any language proposed.

Professor Sacks: We can work the language out. I don't think the language is the problem. I think the only question is the principle.

Mr. Morton: I'm thoroughly in accord with what Charlie Joiner said. That's what I suggested to you last time and I would like to see it come back.

Professor Sacks: I just have one question to raise about it, which I think came out of a discussion I had with Ben Kaplan. I think both of us see the proposal right in principle. The man who insists on transcribing should pay. Will it have a practical effect in any significant number of cases of enabling a wealthy party to oppress in the sense that the wealthy party can take lots of depositions, notice them, take them, record them, have sufficient staff so that they can make all the informal recordings they wish, and then say: "We don't want to have it transcribed. If you want to have it transcribed, Mr. X, it's your expense." The other fellow, who did not take the deposition, feels that it would like to have it transcribed in order to have the material, but he can't afford it.

Dean Joiner: Well, the answer, to me, is very simple on this. If he really wants that, he takes a tape recorder with him, when he takes the deposition.

Mr. Acheson: We have a second to the amendment and that calls for a vote.

Professor Wright: Mr. Chairman, at the risk of repeating John Frank's speech . . . I have inquired of Mr. Rosenberg whether or not the problem to which we are addressing ourselves at lines 99-104 weathered by means of the Sacks' text or the Joiner proposal is an imaginary dragon and he says it is. To the best of my knowledge there are only three reported cases in all history in which the problem has come up. Since there has been no difficulty since then [1955] I truly wonder whether this is something that we need to make a rule change about.

Mr. Acheson: Which side is the speech on? Is that in favor of the amendment or against it?

Professor Wright: That was against doing anything to 30(c) at this point.

Professor Sacks: That is adding the material from 99-104?

Voice: You're suggesting that it be not added?

Mr. Acheson: Well, can we vote in order: first, deleting all of that and doing nothing; secondly, on amending it as Charlie says; and, thirdly, on leaving it alone. Is that satisfactory to the Committee? Are we prepared to vote or do you want to discuss this some more?

Mr. Morton: I would like to observe that the reasons, it seems to me, for adding something about expenses because of the renewed emphasis on monetary sanctions for abusive discovery that are not in the present rules in the same stringent form. It seems to me that we are going to have more applications to the court for economic sanctions for abusive discovery. Therefore, it now becomes incumbent upon us to establish norms for the procedure which were not necessary before economic sanctions [trailed off].

Judge Feinberg: I take it from what Charlie Wright said that there is nothing in the rules now covering the subject.

Professor Kaplan: Well, what would be the disposition.

Judge Feinberg: I've had the experience a few times . . . you handle it according to the discretion you exercise under the facts of the case. I think what Charlie Wright suggested . . . is a pretty good idea.

Mr. Jenner: I would second Professor Wright's suggestion.

Mr. Acheson: First vote will be on striking out the language from line 99 to the end of the paragraph.

[Slight discussion among Freedman, Morton, and Sacks].

Mr. Acheson: All in favor of striking 99 to the end of the paragraph, please raise their hands. In favor - 11. Approved.

[Recess-11:30 to 11:50].

Rule 30(d)

Professor Sacks: Rule 30(d) does not raise any questions, except for a point that Charlie Joiner raised . . . which I have taken care of.

Mr. Acheson: Any discussion on section (d). Approved without objection.

Rule 30(e)

Mr. Acheson: W thout objection, (e) is approved.

Rule 30(f)

Professor Sacks: Now, with respect to Rule 30(f) . . . 30(f)(3), lines 186 and 187, requires the party taking deposition shall give proper notice of its filing. . . . Mr. Hardy . . . made a suggestion that makes perfect sense . . . to have 30(f)(3) read as follows: "The officer shall promptly notify all parties of the filing of the deposition." That would be in lieu of what is there.

Mr. Freund: . . . It seems to me that ought to be the duty of the clerk of the court.

[Slight discussion between Freund and Sacks].

Judge Maris: It might not be in the same place that the clerk is. The deposition could be some place else.

Judge Feinberg: It is a matter of practice. I would just like to raise a question. . . . Aren't we in a bit of a never, never world here when we talk about the officer filing? The officer is usually a notary. The person who is really responsible in connection with a deposition is the lawyer, and to talk about someone else having the responsibility of doing it, just troubles me. I'm not sure of what the practice. I think the practice is that the lawyers take charge. . . .

Professor Sacks: The Rule 30(f)(1) imposes the duty on the officer. . . . In other words the officer has the job of the physical acts of filing.

Judge Feinberg: The question I'm raising really . . . is does anyone pay attention to that?

Mr. Freedman: It's generally the reporter who does the swearing, too . . .

Judge Feinberg: . . . I agree . . . that we shouldn't monkey with it too much.

[Discussion between Freedman, Sacks, Feinberg, & Cooper].

Judge Feinberg: . . . I move that the draft remain as it is, particularly lines 186 & 187 on page 30-11.

Mr. Acheson: You have heard the motion.

Mr. Frank: I'm sorry, but I must ask Mr. Sacks: "What is the existing rule on this point?"

Professor Sacks: 30(f)(3) states that the "party taking the deposition shall give prompt notice of its filing to all other parties." . . .

Mr. Frank: May I ask Mr. Feinberg if we could express this? . . . make some express notion that we recognize the extreme variance that exists?

Dean Joiner: Well, John, we don't leave it to local practice the way the text is, except by the fact that we don't enforce [interrupted].

Mr. Frank: On the contrary. The Reporter becomes my agent for this purpose. . . .

Mr. Freedman: I'll second Judge Feinberg's motion. I think that would resolve it. . . .

Professor Louisell: The real question is whether you couldn't drop the requirement of notice of filing altogether. It is generally ignored and serves no useful function. . . .

Mr. Acheson: We have before us Judge Feinberg's motion, which has been seconded, which is to leave it alone. Let's vote on it right now. All in favor of that motion raise their hands. Approved by majority. Adopted.

Professor Sacks: I call attention to the second full paragraph of 30(f)(1), page 30-10, lines 170 on. [Gives background].

Judge Thomsen: May I raise one question? Suppose the party has produced the document pursuant to the subpoena but has raised some question . . . and has allowed it to be marked . . .

Professor Sacks: . . . All of this, of course, is subject to the rules on scope of discovery.

[Discussion follows - Thomsen, Freedman, & Sacks].

Mr. Frank: . . . It sure does have one factor that I wish you'd think about. It's in the direction of what Judge Thomsen is talking about. . . . We have harnessed Rule 34 to the deposition now. Under Rule 34 we asked to inspect perdicious quantities of materials. . . . By tying 34 to the deposition procedure, the deposition will become a marking session, and we have all attended such. And then, we have done two things: number one, we have transferred to the responding party the cost of making all of those copies, because he would either have to give up the files or he has to furnish copies. . . . On top of that we're requiring that all of these . . . be filed at the courthouse.

Professor Sacks: This is the point that you put to me last time. You stated your procedure as you followed it, and I attempted to state a rule that would conform to what looked like a desirable procedure as you described it . . . That's (B) . . .

Mr. Frank: . . . When you hitch 34 to it, how are we going to keep from having caseloads marked for identification? . . .

Professor Sacks: . . . This is an additional facility.

Mr. Frank:. . . I back off.

Mr. Acheson: Any further discussion on this?

Dean Joiner: I move that it be approved.

Mr. Acheson: Is there objection to approving 30(f)? It is approved.

Judge Thomsen: . . . you c tainly don't want these things sent to the clerk's office. It's probably the most inconvenient place for them - not only to keep them but for anybody to examine them. You want them in the lawyer's office . . .

Professor Sacks: So far as I know this is the ordinary practice of the parties under a procedure of this sort. Now you could have a situation . . . in that case as I understand it there is a practice of attaching them to the deposition because there are some local rules to their filing.

Judge Thomsen: . . . I want to be sure that what we've been approving has a cross-reference in the rule, not just in the note, because people don't always read the note.

Professor Sacks: I did accept the suggestion that was made that there be a cross-reference.

Mr. Acheson: Shall we go on?

Rule 30(g)

No change.

Rule 31

Professor Sacks: [Explains changes - then continues]. On page 31-3 (full paragraph at top of page) the provision there sets up the time periods for the service of the various questions. As you see . . . 10 days for cross questions, 5 days for redirect questions, and 3 days for recross questions. Mr. Colby suggests that we lengthen those periods . . . as follows: instead of 10 days it would be 20 days (line 19); instead of 5 days (line 24) it would be 10 days; and, instead of 3 days (at line 26) it would be 10 days. That is the suggestion.. . . If we extend the period for cross questions from 10 to 20 days, we no longer need the added material at lines 19 and 21; that is, we can strike out from "or within 20 days after" at line 19; strike out all of line 20; and strike out the first three words of line 21. . . . Finally, one last change . . . we would strike out at

line 19 the word "thereafter" and in lieu thereof, insert "within 20 days after the notice and written questions are served," and now it would read: "A party so served". It now reads: "Within 20 days after the notice and written questions are served, a party so served may serve cross questions upon the party proposing to take the deposition."

[Discussion as to service of cross questions upon all parties.]

Mr. Acheson: Do we wish to discuss them anymore.

Mr. Cooper: I move their approval.

Mr. Acheson: . . . Is there objection to approval. No objection. Amendments to Rule 31(a) are approved.

Rule 31(b)

Professor Sacks: Simply eliminates the word "interrogatories" at each point and substitutes "questions." There's nothing else.

Mr. Acheson: Any objections? None. Approved.

Rule 31(c)

Remains as is.

Rule 31(d)

Was eliminated before.

Rule 32

Professor Sacks: All the underlined language in 32(a)(b)(c) is an exact rendition of what is now in Rule 26 (d)(e) and (f), with one change that came out of the prior meeting. . . . Beyond that, it is all transposition and seems to have created no problem in and of itself. As to (d) we keep it as it is . . . page 32-6 at line 91, the word "interrogatories" changes to "questions" to conform to Rule 31; at lines 94 and 95 - same change for same reason.

Judge Thomsen: I have one question I would like to raise on Rule 32- on page 32-4 at lines 38-39. "Substitution of parties does not affect the right to use depositions previously taken." That might or might not (words blurred). Probably this is the rule for the majority cases. ... (Sorry, but words drowned out by background noises).

Mr. Freedman: Can you give us an illustration, Judge?

Judge Thomsen: Well, certainly, you "substitute the wrong party" -- (blurred and not very clear)

[Discussion among several members, but none is very clear.]

Mr. Frank: Could the Reporter briefly restate. We simply don't hear this parallel.

Prof. Sacks: I'm sorry. The suggestion relates to page 32-4, lines 38-39, referring to substitution of parties. Judge Thomsen was concerned that "substitution of parties" might be understood in the popular way to include more than is encompassed by Rule 25. The suggestion to take care of it would be to say "Substitution of parties in accordance with Rule 25."

Voice: Like an administrator or ....

Prof. Sacks: Yes, exactly .... There's certainly no harm or there may well be clarification in adding "pursuant to or in accordance with Rule 25."

Dean Hoiner: Mr. Chairman, and Al Sacks, I raise a question in connection to the next rule, since you responded that it was covered in this particular language of Rule 32. It had to do with the admissibility of interrogatories. You responded that the words "so far as admissible" under the rules of evidence, seems to limit the use of the interrogator; that one person could not use a cross-fact interrogatory or adjoining party's interrogatory in this respect. I read the cases that

you cited . . . and it seems to me that the very language we added the last time, we applied as though the witness were present and testifying, negates the effect of those cases because it's quite clear that if the witness - a second plaintiff - were present to testify, he could testify to the particular facts to which he responded in the interrogatory, although he should not be permitted to now just willy-nilly have that interrogatory read and his answer read as evidence on his behalf or on the behalf of another plaintiff. I really think we ought to reconsider the question as to whether this language is essential here in this particular rule and perhaps eliminate the (word blurred) as though the witness were present to testify.

Prof. Sacks: Charlie, I think that in order to do it we really have to discuss the Rule 33 point. Could we just note that that language does in your mind create that problem and take it up when we come to 33?

Mr. Acheson: Is there further discussion on it?

Dean Joiner: Are we satisfied, Mr. Chairman, that the word "due" is the appropriate word in line 7, or should we use the word "reasonable" ... used in Rule 30(b)(1) to which it refers? Should we not use the same language?

Prof. Sacks: I think that would be an improvement. The proposal is to change at line 7 on page 32-2 "due" to "reasonable" notice thereof .... The basis for that is that Rule 30 requires "reasonable" notice, so that the verbal formula should be the same.

Dean Joiner: ... you have to make a change at 14 and 15 in light of what we did earlier this morning with regard to Rule 30(b)(6). That it's no longer "employees or agents" ...

Prof. Sacks: Right. The bracketed material in 32(a)(2) is put in simply in accordance with my drafted material. It has to be understood that as we change 30(b)(6), we make the formula change that is made here.

Mr. Acheson: Do you wish to discuss 32 further? Is there objection to approving Rule 32 as amended subject to some reservations?

Chief Justice enters at 12:25 p.m.

[Chief Justice made few brief remarks.]

Mr. Acheson: We were just putting the question of approving Rule 32. Is there any objection? It is approved, subject to reservations.

Rule 33

Prof. Sacks: Explains. Mr. Colby's suggestion is read and discussed.

Mr. Freedman: The point that Mr. Colby is making, Judge, is that the marshal may not want to undertake to serve the interrogatories in addition to the complaint. (Further discussion follows.)

Mr. Acheson: Why don't we just leave it and we'll deal with it in the note.

Mr. Frank: . . . I move that we strike the provision permitting service of interrogatory to the complaint .... I think it is way wrong and grossly unreasonable to hand to somebody the typical complaint and simultaneously hand him all the form questions that come with the stock set of interrogatories ....

Mr. Acheson: Anyone like to discuss it.

(Discussion on interrogatories).

Mr. Acheson: All those in favor of adopting the rule as the Reporter has reported it, please raise their hands. I think the rule is adopted.

Mr. Jenner: I thought we might put Mr. Frank's motion as he suggested it. As you have put it, I'm sure you don't wish to foreclose.

Mr. Acheson: No, I didn't mean to foreclose anything.

Mr. Jenner: May I make a suggestion as to the language as it now is. ... if you don't serve with the complaint a summons then the rules say you may serve anytime after the service of summons and complaint, which takes us back to the problem we had yesterday. Is that service upon one defendant or multiple defendants or on all? May I suggest that we return to the sensible commencement of the action - that it may be served with the summons and complaint, or at any other time after the commencement of the action ....

Prof. Sacks: ... my original proposal was to use commencement of the action in all the various places .... I was overruled on that by the Committee and therefore, I don't know how to respond .... The various objections that were made were in terms of what might happen and the point is that the commencement is accomplished by the filing of the complaint with the court. Therefore, you can imagine the possibilties that a man will file his complaint today, but he won't bring about service for some period of time .... That's the situation as it has emerged thus far within the Committee ....

Mr. Jenner: Well, would you respond to that problem that was discussed yesterday in multiple defendants cases. Does this mean service of summons and complaint on all defendants before (interrupted).

Prof. Sacks: No, we've abandoned that.

(Further discussion on the service of interrogatories.)

Judge Thomsen: I've been bothered by the change, because "all defendants" is difficult; "a defendant" is ambiguous to my stupid mind. I think we had better spell it out and say what we mean which I believe is "after

service of summons and complaint on the defendant to whom the interrogatories is addressed" or "after service of summons and complaint on the man you're doing something else for." ....

Prof. Wright: On Judge Thomsen's point, I think the language might be a little more precise." The interrogatories may be served upon a party with or after the service of summons and complaint upon him."

Mr. Acheson: I take it that it's agreeable that we adopt Mr. Wright's suggestion. Is there further discussion on Rule 33(a)?

Prof. Sacks: Explains letters written to Frank - concerning 33(a). Reads from page 10 of his memorandum "The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory."

Mr. Frank: He has proposed at page 10 correlating cross-references to two rules and he has them all written out just where they would go.

Prof. Sacks: They appear at lines 32, 32(a) and 32(b) in my draft of Rule 33. The very same thing is done in substance by incorporating very similar language in Rule 34, lines 51, 51(a), and 51(b).

Mr. Acheson: I take it the Committee has approved of both rules. It does. Now, we are still on 33(a).

[Joiner reserves question until 33(b).]

Rule 33(b).

Prof. Sacks: Now with respect to 33(b), the important addition is at page 33-4 and the very top of 33-5. This is new. This was added as a result of our discussion at the last meeting .... (Gives explanation).

Mr. Joiner: Mr. Chairman, I am a little confused on all this language on 48 through 60 or there abouts. Do Sections I and II apply simply to the interrogatory that is an opinion contingent on legal theory or does it apply generally to all interrogatories?

Prof. Sacks: I meant for them to apply just to the interrogatory that calls for the opinion contingent on legal theory.

Dean Joiner: I think it is not clear. I think there is an ambiguity at this point, then.

Judge Thomsen: I move the approval of the proposition down through line 52, comma, eliminating the (1); changing the words "the interrogatory" to "such an interrogatory"; eliminating (2) but including in the note just a statement that an answer to such an interrogatory is not the equivalent of an admission.

(General Discussion)

Mr. Frank: . . . it seems to me that Judge Thomsen's motion does the best that we can do as a Rules Committee to solve a difficult problem, granting that it may not be solved very well.

(Further discussion).

Mr. Acheson: Would you wish to recess for lunch or would you like to vote on Judge Thomsen's motion?

Judge Thomsen: The motion is to approve the proposal beginning at line 48 running to the beginning of the bracket on line 52 substituting "such an" for the words "the interrogatory" and putting in the note a statement that such an answer is not the equivalent of an admission under Rule ....

Mr. Freedman: I think we ought to go further and say that it may be offered in evidence so that it doesn't have the same judicial binding effect ....

Mr. Acheson: Judge Thomsen, do you want to include "or after designated discovery has been completed,"?

Judge Thomsen: That may be helpful ....

Mr. Acheson: Now, you have all heard Judge Thomsen's motion.

Mr. Freedman: Shouldn't this be more than merely permitted to be offered in evidence? Neither party should be permitted, it would seem to me, to come along and contradict without any showing. He should be able later on to come along and offer additional evidence, but should it be related to some sort of an additional burden on him, if he wants to contradict what he said in advance at the interrogatory?

(Slight discussion)

Mr. Acheson: Alright, let's have a vote on this.

Mr. Jenner: If we are voting on this, we still have open the issue, I hope, as to whether we will provide something in the rule gives the district court the opportunity to permit an amendment or change in response to the interrogatory.

(Discussion on wording proposed by Judge Thomsen).

Mr. Acheson: Are we ready for the question? All in favor of Judge Thomsen's motion, please put up their hands. No count. Judge Thomsen's motion is carried (by majority). Now we will recess for lunch.

[Meeting reconvened at 2:20 p.m.]

Rule 33(b)

Prof. Sacks: Gave background and said that Charlie Wright had come upon us with a resolution which surely meets our problems and I think works a definite improvement in the Rule as well.

Prof. Wright: Yes, that is at lines 35-37, page 33-3 about the use of interrogatories. The old rule has said that you can use them to the same extent as provided in Rule 26(d) for the use of a deposition to the party. Al proposes to change the reference. The fact is that the old rule simply was wrong when it said that and no court has ever taken it

seriously. You cannot use an interrogatory to the same extent that you use a deposition for very good reasons. (Explains). My suggestion is that we substitute here the very equal language that the answers may be used to the extent permitted by the rules of evidence ....

Mr. Freedman: How about this situation, Charlie, where the deponent or party being interrogated gives an answer and then dies, and he may be the claimant himself .... How would it work out here?

Prof. Wright: I would think that in most places the law of evidence would not permit you to use that ....

(Further discussion between Freedman, Wright, Louisell & Sacks)

Mr. Acheson: Are we getting together on this proposal?

Judge Thomsen: I move it be approved.

(More discussion between Freedman, Louisell, and Sacks.)

Mr. Acheson: Very well, are we ready for the question? All those in favor of the amendment suggested by Mr. Wright raise their hands. I think that's adopted. [majority vote.]

Mr. Cooper: I have a suggestion to make. Rather than include this at the place provided for, that is subdivision 2, that in 26 we put in some language to this general effect. "Nothing contained in thes rules shall preclude the court from granting relief from an effect that would result in manifest hardship or injustice" - something like that - I mean to all of these rules.

Prof. Sacks: I don't follow the theory, Grant. The only point is, generally, except when we run into a very special situation, we have not tried to address ourselves in a general way to what the court does at trial. The judges at trial do, in fact, operate under some general power. I don't think there has been serious difficulty with it. I'm not sure we could get language in a rule that would be satisfactory

as a going practice.

Mr. Cooper: I am not going to debate it. It was just a thought.

Mr. Acheson: Now, are we in a position at this point to approve all of Rule 33? . . .

Professor Sacks: I just call attention to 33(c). The option to produce business records which we went over the last meeting. The draft has not changed. It is exactly what we approved the last time.

Mr. Acheson: Are there any further questions or any comment on Rule 33(c)?

Mr. Jenner: Mr. Chairman, has the Committee decided that we are not to have a relief provision in this rule?

Voice: Yes.

Mr. Cooper: Nobody brought it up.

Mr. Jenner: Well, it went over my head. I was waiting for you to finish.

Mr. Cooper: Nobody carried the ball for me, and I'm not going to fuss about it.

Mr. Acheson: Well, now is the time to raise something. We are still on Rule 33.

Mr. Frank: That there ought to be in this Rule a provision formally recognizing and affording the district judge an opportunity to grant an amendment of a response to this area to an interrogatory or a withdrawal of the response to the interrogatory.

Voice: Well, this language would sure capture that.

Mr. Doub: . . . Professor Sacks made a very good point at lunch that convinced me that I was wrong when I had the same impression that you have.

Mr. Jenner: What point is that?

Mr. Doub: Al, . . . the reasons why you didn't like this . . . it intended to suggest that you were bound by it, and if you didn't follow this procedure you were going to be estopped and yet there's nothing in our generalization in Rules 48 to 52 to say that it is going to be [words blurred].

Professor Sacks: If we don't have the provision (the bracketed material) in, several things can be said: number one, an effort to get an amendment or withdrawal is still in order even though there isn't a specific provision about it, but more important, it is understood, and the court decisions certainly support this, such as they are, that a party is not bound by his answer to an interrogatory. That is an important feature; it's what makes it possible to have the provision about opinions, contentions, etc. . . . One of the effects of the bracketed material is that it can call attention to this opportunity to withdraw or amend and establish a very formal set-up court. It has the effect; it suggests that there is a greater binding effect than if you don't have, and indeed, if a party mistakenly doesn't invoke it, then at trial he is in a much worse position. The present cases, I think, protect him quite adequately without it. . . .

Judge Maris: As I recall Judge Thomsen's motion, at least as he stated at first, he had coupled with it a suggestion that the Reporter would include in the note a reference to this right of amendment. . . .

Mr. Acheson: May I ask again if there is any further discussion at all on Rule 33?

Mr. Frank: . . . suggest a modification in the language at lines 48, 49, and 50, particularly at 48 & 49 to read as follows: "An interrogatory otherwise proper is not objectionable merely because it involves an opinion, contention, or legal conclusion." . . .

[General discussion on suggested wording].

Mr. Acheson: . . . All in favor of Mr. Frank's proposal, raise their hands. [Majority]. That is adopted.

Dean Joiner: I'm troubled, Mr. Chairman, about the non-binding effect of these interrogatories. Al asserts that they are not binding, that we can introduce as other evidence, and yet I read the note and there is divided authority on this to some extent. . . .

Professor Sacks: There are not many cases . . . such as there are, I think, establish that it is not binding. I think that's pretty clear.

Judge Wyzanski: . . . "otherwise proper" disturbs me a great deal in this last draft. It suggests to me that it would not ordinarily be proper to ask for an opinion, contention, or legal conclusion.

Professor Sacks: That's the one part of the draft that troubled Ben and myself, when it was stated. We didn't think that it was worth making a great to do about it. I think we'd feel better without it.

Mr. Frank: Mr. Chairman, I will vote for "otherwise proper" in deference to Judge Wyzanski, because I think otherwise we put too much weight on the word "merely" that the Bar will not understand it as we do. But it's clearly not worth talking about. Can't we just vote one way or the other?

Mr. Acheson: Gentlemen, do we wish to reconsider? Alright, then, let's leave it the way it is.

Rule 34

[Professor Sacks gives background].

Mr. Acheson: Will you discuss this further? Is there objection to approving Rule 34 as it stands?

Dean Joiner: Yes. If I haven't any support around here for the idea that we ought to permit the discovery as against non-parties and things. If I don't have any . . .

Mr. Morton: I think you must in some way, but I think possibly it's done by broadening out the language which we have here which is pre-World War II . . . in Rule 34 and "in reach of the subpoena duces tecum" as it's *in* conventional language may or may not reach to "play back of the electronic or accumulative data," for example, and "other sorts of things," and I do think that this language and either the language of the subpoena form or special provision for that sort of discovery has to be had in order that you can compel a third party, whose records consist of electrical impulses to run off the tape or do something else so that you can get at it. You don't photograph it. That's for sure.

Voice: What about "reproduce"?

Mr. Morton: . . . I had dug out the proposed copyright law revision to see what they did about it, and it's rather wordy for our purposes. "Copies of material objects other than phonograph records in which the work is fixed by any method now known or later developed." . . . They had trouble with the same thing.

[Discussion - general].

Professor Louisell: Mr. Chairman, shouldn't we keep these two problems distinct? Whether we want to make your enlargement, Brown, in respect to parties is one problem; whether we want to take Charlie's and extend this procurability to non-parties is another thing.

Mr. Morton: Well, they're related though, David, because the inadequacy of the subpoena is a means of getting at the non-party's modern bookkeeping.

[Another discussion ensues].

Mr. Frank: . . . My problem and the reason that I'm going to vote to support the Reporter's draft is that the idea, while genuinely interesting, is not half the Reporter's work. I don't know whether this is an imaginary dragon or serious business. I'm just unwilling to embark on something which involves non-parties at what is really a spit and polish meeting, as this is, without having had a serious monograph to consider and think about. So, unless somebody can report that this is somehow a great big major problem right now, I would rather be able to be told what to read first and not be restricted to just a few words.

Mr. Jenner: Well, I can answer that by saying that in almost 37 years now I've never had any problem under the old rules or these.

Mr. Frank: Yes, it doesn't seem to be very serious issues . . .

Mr. Acheson: Is there a motion that we approve Rule 34.

Voice: So moved.

Mr. Acheson: All in favor of approving Rule 34, please raise their hands. [Majority]. It is approved.

Rule 35

[Sacks gives background and calls attention to page 35-4, last sentence.]

Mr. Acheson: Do you wish to discuss Rule 35? Is there a motion to approve Rule 35?

Mr. Jenner: So moved.

Mr. Acheson: Is there objection? [None]. It is approved.

Rule 36

Professor Sacks: . . . First, with respect to language at page 36-2, line 13, suggestion made by Brown Morton is that we strike the words "relevant and unprivileged" and insert in place thereof "discoverable," thereby emphasizing that it's the general discovery Rule 26 that governs the scope and that the others are simply referring.

Mr. Jenner: I would move that change, Mr. Chairman.

Mr. Acheson: Do you wish to discuss the change? All in favor of the change please raise their hands. [Unanimous]. It is approved.

Professor Sacks: Another change in language is at page 36-4, lines 52 and 53. It now reads: "A party upon whom a request is served who regards matters as in dispute for purposes of the action shall answer rather than object to the request." This resolves rather a large number of cases that are in conflict on the point. The change is a point of clarification. Ben Kaplan suggested it. [Explains reasons for changes]. The proposal is: "A party upon whom a request is served who regards matters as presenting a genuine issue for purposes of trial . . ."

Mr. Coleman: What are "for purposes of trial?"

[Slight discussion on this].

Mr. Jenner: I have trouble, Mr. Chairman, on the irony of the Reporter - "who regards matters" - what do you mean by "regards matters?"

Professor Sacks: We've used the term "matter" here as referring to the subject matter as to which an admission is requested.

Judge Thomsen: I think you ought to say that, if that's what you mean.

[General discussion on "matter" and wording].

Professor Sacks: "A party upon whom a request is served who considers that a matter as to which an admission has been requested presents a genuine issue for purposes of trial shall answer rather than object to the request."

[Further discussion on wording].

Mr. Jenner: Would you favor me by reading it once more?

Professor Sacks: The suggestion is as follows: "If a party upon whom a request is served considers that a matter as to which an admission has been requested presents a genuine issue for purposes of trial, ..."

[Discussion on changes in latest wording].

Mr. Jenner: I suggest taking out lines 54 and 55, because we have a general rule that covers all that subject.

Mr. Doub: I move the adoption of the change.

Mr. Acheson: Do you wish to discuss it further? Is there objection? . . .

Mr. Jenner: Why do you need the first sentence in lines 56 & 57? Anybody may move the court for a hearing . . .

Professor Sacks: The reason for that, Bert, is that the present law puts it the other way. The present rules . . . explicitly put the burden on the man who made the objection. We are now changing that,

and I think we need to spell it out so that it's clear to lawyers who have been operating under a rule exactly the other way. If we don't there will be a lot of confusion. . . .

Mr. Rosenberg: May I suggest changing two words? Not "moved for" a hearing but "bring on" a hearing. . . .

[Discussion follows].

Professor Sacks: A couple of others. I'd like to call attention to lines 47 to 51. [Explains background]. You need to shorten this. Take out "upon whom a request is served" to make it read: " If a party considers that a matter as to which an omission has been requested presents a genuine issue for trial, he shall answer . . .."

Mr. Doub: I move for the adoption of the . . .

Mr. Jenner: Mr. Chairman, at lines 49-51 "unless he states that he has made reasonable inquiry and secured such information and knowledge as are readily obtainable by him." Isn't the thrust here that he has made reasonable inquiry and he has been unable to obtain the information called for by the interrogatory. This seems, to me, to be backwards.

Professor Sacks: What he says is that he has secured such information and knowledge as are readily at hand, and he still lacks the information or knowledge needed to admit or deny.

Mr. Jenner: Well, I don't think you say that, Al, in this sentence. . . .

Mr. Freedman: Well, I think what you meant was that having secured at least some notes the party is admitting for it or denying for it or pleading that he doesn't have any knowledge . . .

Judge Maris: But if he does that, Abe, he has to say that he still has no knowledge despite reasonable inquiry.

Mr. Freedman: That part which he is unable to admit.

[Further discussion on obtainable information].

Professor Sacks: Does that meet your point, Bert? Suppose we take out "made reasonable inquiry and"?

[Discussion between Jenner and Sacks - for clarification of Sacks' meaning].

Judge Feinberg: Would this do it, Mr. Chairman, or Bert, would this do it? If the thought was put in that "reasonable inquiry" means obtaining information and knowledge as are readily obtainable?

Mr. Oberdorfer: I have a suggestion. "unless he states that he has made reasonable inquiry and that the information and knowledge readily obtainable by him are not sufficient to enable him to admit or deny."

Mr. Jenner: I think these people are going to slide off on that "readily obtainable."

[Discussion on "obtainable" or "obtained"].

Professor Sacks: That doesn't meet the problem of the cases, Bert. The point is we're attempting to make clear to the party that he has a burden, a duty, to secure such information and knowledge as are "readily obtainable" by him. Now for him to explain his answer by saying the information he has obtained does not enable him to admit or deny, that's obtained after reasonable inquiry, whereas this draft attempted to establish a test of "readily obtainable." That's the difference.

Mr. Freedman: Why not put after the words "reasonable inquiry" the words "as to all information readily obtainable" and then go on as Louie has given it to us?

Mr. Acheson: Could we stop trying to draft in the Committee, We know what we want to do. Why doesn't somebody go out of the room and draft for awhile?

Mr. Freedman:"unless he states that he has made reasonable inquiry of all information and knowledge readily obtainable and has secured such information and knowledge [interrupted].

Judge Thomsen: Let's just agree on principle and let the Reporter . . .

Mr. Acheson: We are agreed on that. Alright, what else have you got?

Professor Sacks: The remaining question on Rule 36 for discussion is on page 36-3, lines 27-30. . . .

Judge Thomsen: I move that we adopt this using the word "either" in line 27; skipping until after the word "ALTERNATIVE." It would read: "either a written answer or objection addressed to the matter, signed by the party and by his attorney."

Voice: I second that.

[General discussion].

Mr. Acheson: Would somebody read the whole paragraph? . . .

Professor Sacks: At line 27, we would strike out from the bracket all the remainder of the line; we would strike out in line 28 the words "the matter" and the bracket and the word "ALTERNATIVE." So that it would now read: "Each matter of which an admission is requested shall be separately set forth and is admitted unless, within a period designated in the request, not less than 30 days after service thereof or within such shorter or longer time as the court may allow on motion, the party to whom the request is directed serves upon the party requesting the admission either a written answer or objection addressed to the matter signed by the party or by his attorney."

Mr. Acheson: Can't we have a couple of sentences here? This thing runs on and on . . .

[Further discussion].

Professor Sacks: We are considering a motion of Judge Thomsen to adopt what is, in effect, the alternative version here, and the draft would be as follows: "Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within a period designated in the request, not less than 30 days after service thereof or within such shorter or longer time as the court may allow on motion, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney."

Voice: I move we adopt it.

Mr. Acheson: Do you wish to discuss this further?

Mr. Frank: I have a question of the Reporter and, at least I think, of Mr. Wright, perhaps as well. Mr. Reporter, I'm very anxious that we not cut ourselves off in any way from the use of the admissions device at the pretrial conference, then and there. It's the best device we've got. That means that the judge has to be able to say, right there in the conference, "I direct you to ask him whether he will admit this and if he refuses to do so and you prove it, I'm going to charge to cross." Now the question is: "Have we, by our "days after" in any way precluded this?

Professor Sacks: I don't see that at all. . . . When you come into a pretrial conference, if "all" comes within the ambit of the pretrial conference and the various states in which the discovery requests and answers may be, are certainly looked at by the judge, but he is in a position to issue appropriate orders [interrupted].

Judge Wyzanski: If it happens at a pretrial conference and there is a failure to admit, are there any sanctions in Rule 37 to apply?

Professor Sacks: The judge can attempt, by the force of his personality, but if he fails and he gets none, the sanction is cost in 37(c). But it would have to take the form of a request by the party. What I think the judge does in that situation is by the way in which he handles it, a request comes forth very quickly.

Judge Maris: Don't you need to take out the words "on motion" if you're going to have this for pretrial conference? Line 25.

[Further discussion].

Mr. Acheson: We've had the question asked for on Judge Thomsen's motion. All in favor of the amendments proposed by Judge Thomsen? [Unanimous raising of hands]. That is adopted.

Mr. Frank: Mr. Chairman, may I ask the Reporter a question? Would you be agreeable, Mr. Reporter, just to make a note. In your own notes here you have discussed the matter of legal opinions, theories, etc. Would you make yourself a note to reconsider your own text there in the light of our discussion on the same point in Rule 33, please?

Professor Sacks: Um huh.

Dean Joiner: . . . Are we up to (b)?

Professor Sacks: Um huh.

Dean Joiner: My notes aren't clear as to what happened last time as to why we changed from the Rule 16 terminology to the Rule 15 terminology in connection with the withdrawals of admissions. Was this action taken by the Committee?

Professor Sacks: I don't think there was a clear vote on this. I think what happened was that we discussed it, and my recollection is that Lou Oberdorfer raised the question of the proper standard and there was support for the proposition that we should shift over to the Rule 15 language, which is a more liberal language. It was all related to our discussion, also, of the Rule 33 problem at the time. We were trying to puzzle out what was an appropriate standard. We didn't take a definite vote on it. It seemed to me, on reconsideration, that where you have a judicially binding admission, as you do here, subject to the provisions of Rule 16, which operate separately and differently with a text of manifest injunctives, we are better off here where you could get admissions at a much earlier stage, you're better off here with a more liberal provision for amendment or withdrawal. . . .

Mr. Acheson: Is there any further discussion of Rule 36? Is there any objection to the adoption of Rule 36? It is adopted and we go to Rule 37.

Mr. Jenner: Mr. Chairman, I'm sorry. I received a long distance call. [Apologizing for being out of room for short period]. I did want to raise . . . on lines 72-76 - that that should read: "Subject to the provisions of Rule 16, the court maypermit withdrawal or amendment as will subserve justice in general" rather than to say "when the presentation of the merits of the action will be subserved. . . ."

Professor Sacks: Bert, this language was taken from Rule 15 on the basis of a suggestion and some discussion at the last meeting. It was not voted on, however. . . . Now, if you use the language "manifest injustice" you're making withdrawal or amendment much, much, harder.

. . . It's been generally treated that the language of "manifest injustice" in Rule 16 makes it much more difficult for a party to secure an amendment of a pretrial order than the language in Rule 15 does when you're talking about amendment of pleadings. I think that is uniformly so held. . . .

Mr. Jenner: Why should the district judge be limited to his exercising discretion only to the extent that the presentation of the merits will be subserved? It isn't merely the presentation of the merits; it's the disposition of the case.

[Discussion between Sacks and Jenner].

Mr. Jenner: Judge Wyzanski, do you see the difficulty I . . .

Judge Wyzanski: Well, I understand what you're saying, but I rather agree with the Reporter in connection with this. I think if you don't word it this way, then there will be a great reluctance on the part of the district judge to allow withdrawal.

Mr. Jenner: Well, with that statement I would bow. I don't want any reluctance.

Mr. Acheson: Is there any further discussion on Rule 36?

[Discussion expressing desire to include somewhere the words giving reference to rule being subject to operation of Rule 16 procedures. Reporter agrees to put in wording].

Mr. Acheson: Very well, now we have finished with Rule 36. Charlie, would you like to take up your matter now?

Professor Wright: You will find it at page 14 of Al's memo. In the case of Gamble v. Pope & Talbot, Inc., the Eastern District of Pennsylvania has ruled that you have to file pretrial memoranda by a certain date. The defendant finally served his ten months after the time when he should have served. The court could, then, have simply thrown the defendant out. . . . It said that this has resulted in

the waste of time . . . and the attorney for the defendant therefore should pay $100 to the United States. The Court of Appeals for the Third Circuit said that you were absolutely without power to do that. . . . This seems very bad, and Al has here given us some language which would permit the courts to have this greater flexibility with regard to sanction. I suggest that it is important that something be done today, for this reason: That this is probably the last time for several years that this Committee is going to be publishing anything for the country to look at. If we sent something out today, we may very well modify it before we submit it to the standing Committee and the Judicial Conference, but at least we've established a predicate for action. It seems to me quite important that we not bog down in detail at the moment but simply indorse the general idea, if it seems as sensible to you as it does to me, that we want something of this kind. I think there are special reasons why it is important that we give the country and the profession something in this particular area: first, the court itself, in the Gamble case, where it reached this very unappealing result, said explicitly that this was a substantial question which calls for mature consideration by the body charged with making rule recommendations to the Supreme Court's Advisory Committee. So the Third Circuit, itself, has asked us to look into the matter. Second, Justice Black, in his dissent from the adoption of the 1966 Amendments, speaks very eloquently of what a terrible thing it is when litigants have to be penalized for what are nothing but the delinquencies of their attorneys. This, I think, provides a middle ground there. Finally, last week, the standing Committee approved a recommendation of the Appellate Rules Committee

which gives to the courts of appeals the power to take any appropriate disciplinary action against any attorney for conduct unbecoming a member of the Bar or for failure to comply with these rules or any rule of the court, and it says explicitly that this is done in order to enlarge the range of sanctions which rebel? I think it would be very odd if we gave Appellate courts this power and did not, in some form or other, give Trial courts the power. And so, I would hope that the Committee would be willing to publish Al's proposal, recognizing that this is not a matter which we have talked about often, and therefore it is much more of a tentative determination on the part of the Committee than would ordinarily be the case.

[Discussion among members].

Professor Wright: . . . So long as the Third Circuit's opinion stands, the court has no choice. Either it must penalize the party or it can do nothing. All this rule does is say to the court: "If you want to, you have power to use this intermediate sanction." . . .

[Further discussion].

Mr. Acheson: Charlie, will you give us something specific to vote on?

Professor Wright: There is a specific draft which Al has at the bottom of page 14.

Mr. Morton: Charlie, there is one point that Judge Wyzanski made that is simply not clear to me, and that is why is it necessary that the money be paid to the United States? Why can't it just go to the other fellow?

[General discussion on this phase of issue].

Judge Thomsen: I move that we approve this in principle and ask Professor Wright and Professor Sacks to re-draw this language in shape . . .

Voice: Second the motion.

Mr. Acheson: May we have a vote on it? All in favor of [trailed off].

Mr. Frank: I would like to note expressly, if I may, that I am voting in the negative on this proposal because I believe that I would not wish to send to the country at all any proposal which says the courts can impose fines in this fashion. I would vote for the proposal if it provided that the attorney can be charged damages to pay the other side. [interrupted by slight discussion among members]. Well, the answer is - you don't want to discuss it, but I don't want this to go forward without indicating that I'm simply not going to vote for that.

Professor Sacks: I think it's just as well to leave it to Charlie Wright and myself at this point. It may just well be that there will be enough comments from Committee members objecting that we'll have to drop it out, but a couple of things to be noted: 1) On having money paid to the other attorney by way of compensation to the other attorney, that there is now power to do, and the courts exercise it. [Explains]. Question therefore is: "Can the court have this type of sanction operate effectively?" . . . Does it have to be viewed as a fine? . . . I don't maintain this is the easiest thing in the world to justify. It's not. It's difficult.

Judge Thomsen: Why don't you read the cases . . .

Mr. Acheson: May we regard this as not a firm commitment by the Committee but ask our Reporters to do something to singularize this with the result and try to get something which we all agree on?

Mr. Cooper: Mr. Chairman - page 36-5, Rule 36(b), line 71. "Subject to the provisions of Rule 16, the court may permit . . ." Using the same language or part of the language of Rule 15, but Rule 15 says: "They shall do so freely when thepresentation . . ." Shouldn't we then say: "The court shall freely permit withdrawal or amendment.", because if you leave the word "freely" out, there is going to be a different interpretation. They'll say it was left out purposely. . . .

Mr. Jenner: I move that we insert the word "freely" after the word "may" in line 71.

[Discussion follows].

Mr. Cooper: I second Bert's motion.

Mr. Acheson: Do we need to vote on that? . . . All in favor of putting "freely" language in? [Count is taken.] Approved by majority. [8]. Now, shall we go on to Rule 37?

Mr. Jenner: Mr. Chairman, may I present, before you take up Rule 37, something wrong. . . . We have a practice . . . and it exists in some other districts. In order to relieve the district judges of the burden of passing on these motions, especially with respect to responsive interrogatories, objections, and when the deposition shall be taken and when it is not, admissions of facts and what not [two words blurred]. Counsel must serve a pendent to his motion that before presenting this motion to the court there was consultation with opposing counsel in an effort to work out the dispute with respect to the item of discovery as to which the motion is being presented to the district judge. In the absence of that statement the court will not entertain the motion. The counsel must then return and negotiate and work it out. . . . What I suggest is that I may send that to the Reporter so that in sending out the material when you

make these revisions, that that, as a proposal, be submitted for comment by the Committee. May that be done?

Judge Feinberg: Mr. Chairman, we have the same rule in the Southern District . . . It works very well.

Professor Sacks: I just note that I had that on one of the early drafts - I think two meetings ago - and it was stricken out by the Committee.

Mr. Frank: Bert, I've been aware that this has been very successful in those areas, yet it's a kind of a localism which we have been reluctant to press on the whole United States. . . . I wonder if it couldn't be, then, an alternative proposal noting that this is being used with great success in certain areas and expressly directing and hoping to get Bar comment on that.

Mr. Jenner: I have no objection to that method of handling it.

Mr. Cooper: Aren't the judges the ones - we'd be more interested in their views.

Judge Thomsen: We have the rule in the state of Maryland. I believe it might be opposed by lawyers in a place like North Carolina, where you don't have one central city in the district . . .

[Discussion among several members].

Professor Sacks: Not alternative - inviting comment on the sense that the question the Committee has is whether it should be a uniform rule. I think the sentiment is favorable, but concerned over whether this should be a uniform national rule, and inviting comment from various sections of the country in order to determine that.

Mr. Acheson: Alright, let's do it that way.

Mr. Freedman: May I make one more comment and ask the Reporter whether in connection with the subject matter that was introduced by Charles Wright there be an explanatory note to the effect that the fact that now a fine may be levied against counsel is not to be understood that the emphasis in such cases is to be directed against the attorney. It would seem to me that we should start out with the assumption that the sanctions have to be imposed against the client, and only in a rare situation where the attorney is really in defiance of the court should he be assessed. . . .

Mr. Acheson: May we leave that to the Reporter? . . .

Rule 37

Professor Sacks: . . . I would note that I am proposing the following changes in language at 37-4 and 37-5. On 37-4 at line 53, the language "failed to afford discovery" is being changed to "opposed the motion." On 37-5, at line 57, the words "failure to afford discovery" are being changed to "opposition to the motion". . . . Beyond that . . . I wouldn't say anything more about Rule 37.

Mr. Frank: Mr. Chairman, I move we approve Rule 37 . . .

Judge Thomsen: . . . Are you satisfied with 172-177? You don't think that is too rigid? I'm not saying it is, but I was worried about it.

[Slight discussion].

Mr. Freund: Don't you want to take out lines 182-184?

Professor Sacks: The point Mr. Freund is raising about expenses against the United States - I'll just briefly note that at one time I suggested that we change this to allow expenses against the United States. At that time the difficulty was that we had no statutory base. . . .

There has been a change in the statute. The change in the statute, however, does not cover attorney's fees, and what I have to do, Mr. Freund, is take a look at that and if I can possibly report a change that looks non-controversial, I shall. I think there is still a problem there.

Voice: Subject to that, I move approval.

Mr. Frank: Mr. Chairman, could I ask Judge Thomsen a question? Judge, would it be better on the point you raise, if in line 175 we put the period after 26(c), without, in other words tying it so tightly to the time period in which, etc.? The reason for that would be that the time is simply not going to be observed, anyway, as a practical matter in many, many cases. People will be allowed to an airing about it, and if that's the local practice perhaps we ought not snap it back quite this tightly. Would you feel more comfortable if we put the period after 26(c) . . .?

Judge Thomsen: What I wrote to Al was that I didn't oppose this, but I wanted to know whether the people who were in actual practice with it all the time [interrupted].

Mr. Frank: How do you feel, Al? Would that be alright with you?

Professor Sacks: That's alright. I think that the problem of times does raise questions in districts that are easy-going of which I think Judge Wyzanski is aware.

Rule 5

Professor Sacks: . . . This is dealt with in the memorandum at page 14, but I do have a re-draft for you, which I'll read. [Gives background]. I think I'll just read it [re-draft worked out by him and Ben Kaplan night before]: "In an action begun by seizure of property, whether

through arrest, attachment, garnishment, or similar process, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance, shall be made upon the person having custody or possession of the property at the time of the seizure."

Mr. Jenner: I move it, Mr. Chairman.

Mr. Acheson: Is there objection? [There is none.] Now that brings you . . . If there is no objection to any of these rules that the Reporter has called, we will regard them as adopted. . . . Now as I understand what is going to happen next is that the Reporter has been asked to make a new re-draft of all these rules, circulate them to us, and there will be plenty of time given to study these. Then the Committee may make up its mind whether it wishes to make suggestions by mail, or whether it wants to have another meeting. If you want to have another meeting, we'll have another meeting. If you don't, then we'll send the suggestions to the Reporter and he will take them and send the things on to the standing Committee. This is our proposal. Is that the way we want to leave this? Then, John has a matter which he thought he would like to bring up.

Mr. Frank: Mr. Chairman, in deference to his [Mr. Kaplan's] wishes, I don't want to bring it up.

Mr. Doub: May I ascertain how the Committee would feel about a different alternative to the one it approved, namely, the Dimock . . . which we haven't considered. Remember, we had a very close vote on that, and several of the members of the Committee, although they voted for it to get rid of it, they're not too well satisfied with Judge Dimock's suggestion. It hasn't been accepted by the Admiralty

Committee at all, and the members here are opposed to it, and I would hate to have the Admiralty Committee feel that we have taken action here that compels them to accept something when the only reason we did it was to meet the requirements of the Admiralty Committee. We were able to agree that deposition should be taken within 20 days without leave of court if the deponent is going to make a voyage at sea or was going out of the country. Judge Dimock then suggested "or counsel certified that after diligent inquiry he's unable to ascertain where the deponent will be 20 days later.", which I think will mean that any lawyer can make that representation and certification in good faith with respect to any witness. I, for one, was one who was advocating any objective test. I wouldn't care what it was - such as "he's outside the district permanently" or "for more than 100 miles." Now, the objection to "being outside the district" or "outside the district for 100 miles" was that he might just be making a trip there. I would like to see if any members of the Committee who voted for this - disastrous, in my opinion - a Dimock subjective test, would accept as an alternative "going out of the district for 100 miles permanently." In other words, he isn't going out temporarily; he's going out on a permanent basis. Whether they would accept that as an alternative. Now, if none of those who voted for the Dimock proposal, would accept that, I have nothing more to say.

Mr. Acheson: What we actually did was to say "that he was going out of the district and you would not know where . . . ."

Mr. Doub: No. We didn't. We said all a lawyer had to do was to certify that upon inquiry he didn't know where the defendant [interrupted].

[Slight discussion among members].

Mr. Freedman: You were right, George, except for the fact that it was amended to include "he's going out of the district."

Mr. Doub: Oh, did we put that in? . . . Well, that's alright.

Mr. Cooper: I move that we agree on everything.

Judge Feinberg: Mr. Chairman, are we supposed to do anything with this letter from the president of the Federal Bar Association on Rule 71(a) that we all got?

Professor Sacks: That is one of the items that would be on a complete agenda if we had a complete agenda. The reason we don't have a complete agenda is because this is going to take some consultation between myself and various people, particularly Ben Kaplan, and the problem will be to try to work out what is the future agenda.

Mr. Frank: When do you wish to see us again, Mr. Chairman?

Mr. Acheson: Well, I suppose what we've got to do now is to get your revision. If your revision is satisfactory and we all accept it, there isn't any problem. If we have some suggestions, and those are sent around by mail, and we all accept them, there is no problem. If, on the other hand, you decide we need another meeting on specific points, we'll have another meeting. If we don't find that, then I don't think we could set time now for the next meeting. . . .

Mr. Frank: . . . if we could take a tentative meeting date so that, regarding it as tentative, but at least we'll get notice to change it if you want it changed. I'd rather get something on our calendars. . . .

Professor Louisell: Preliminary to that, Mr. Chairman, would it be possible for the Reporter to give a rough estimate of the target date

on the re-draft?

Professor Sacks: I hope that would go out reasonably soon . . . something in the neighborhood of 30 to 60 days.

Dean Joiner: I should hope, Al, that this report that comes back to you could have with it an opportunity just to write you back and say "I approve this going out to the country.", so that when you get 9 of those back, unless something serious shows up from somebody else, . . . it could go out right away.

Mr. Acheson: Very well, then. With that in mind, you'd like to put down a date for a meeting if we need a meeting. . . .

[Discussion on date].

Mr. Acheson: That is Thursday and Friday, the second and third of March. Let's put that down tentatively, then. . . .

[Meeting adjourns at 4:07 P.M.]