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P R O C E E D I N G S

ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE

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THURSDAY MORNING SESSION

March 10, 1955

The Advisory Committee on Rules for Civil Procedure for the United States District Courts reconvened at 9:40 a.m., William D. Mitchell, Chairman of the Committee, presiding.

CHAIRMAN MITCHELL: Charlie, shall we proceed?

JUDGE CLARK: As we adjourned we were discussing Rule 25(d) involving substitution in the case of public officers, and we adjourned in part so we could examine the Department of Justice discussion.

I did that last night. Possibly this is a note of witticism, because this is a serious and difficult matter, but all I can say, to be perfectly frank about it, is that I was quite disappointed. The Department of Justice, among others, have been pressing for a change here. This is a rule which has been objected to. Judge Holtzoff, having some of these cases, criticized them severely, as I think was justified. Then the Attorney General wrote the Chief Justice something over a year ago suggesting that there should be some change.

After what might be termed all this period of agitation so far as I can see, the suggestion of the Department of Justice is to modify somewhat the time limits in order to make them longer, in order to give more room, and then to take out what was about the only real advance we suggested, which was to legalize or to recognize a practice which is growing up,

and then to do nothing more here, going back to the idea of legislation.

As I said in correspondence with Mr. Brownell a year ago, I thought that legislation would be the more complete way of doing this, that there are some matters here involving curtailment of substantive rights by way of limitation that are probably matters for a legislative body. I was fearful of going further with that idea because it seemed to me that the Department of Justice, which welcomed the idea of statute, was then going to hedge it about with all sorts of small distinctions, notably, of a kind that would force the pleading in every action to bring out the distinction between an officer suing in a public capacity and suing in a private capacity. That seems to me to be rather unfortunate, in part, of course, because the distinction is by no means clear. If the Supreme Court or we or the Department, people who have studied the matter somewhat, cannot state a clear-cut distinction, as I think we cannot, it seems a little difficult to try to put the burden on the pleader.

Therefore, quite frankly, I come back to what we have discussed and recommended. I think, in the words of that great citizen of Philadelphia, God helps those who help themselves.

The best thing I have seen yet, I think, therefore, is that what we have, with some slight modification --

CHAIRMAN MITCHELL: You are referring to Rule 25 now?

JUDGE CLARK: Rule 25(d).

MR. PRYOR: Judge Clark, the Department cites the case of Blackmar v. Guerre, 342 U.S. 512, as holding that unless Congress has authorized the suit against a commission, board or agency eo nomine, a suit against such a body must be brought against the individuals as members of the body. I am not familiar with that case. Is that the way they hold?

PROFESSOR WRIGHT: I have the case here, Mr. Pryor. That is what the case holds. The case does not concern substitution at all. It is a case in which a person brought an action against the Civil Service Commission and named the defendant as the Civil Service Commission, and made service on the local manager, as I recall. The Supreme Court did not get to the merits because there is no right to sue the Civil Service Commission. You have to sue the individual. Nobody named the individual in the complaint, and the individuals were not served. Therefore, they held, we have no action before us.

MR. PRYOR: As I recall the comments that we received on this section, most of them were quite favorable to this particular amendment, and I think it is too bad if we have to back up on that.

JUDGE CLARK: I do not know how broadly the Blackmar case can be taken. There are quite a few instances now where actually the suit is made in the name of the office. The most

usual one is now the Commissioner of Internal Revenue. It has gotten so I would really be surprised to see the name used. In fact, I am not sure that I know which one it was whose name was last used. The last one whose name appeared regularly was Helvering, who retired and became a federal judge, and who since has died. Since that time I recall that there was at least one who has been convicted of some crime, and they passed along pretty rapidly.

You will find in the Supreme Court reports and all our reports either the word "Commissioner" or the letters "C.I.R." We have done that also in state courts.

I think I spoke once before here about this. We had a case brought involving the Industrial Commissioner of New York, involving one of the forms of taxation in New York worked out through that office. I thought I would perhaps see how counsel would respond, so I said, "There must be some person involved. Don't you have to sue the individual, and who is he?" The counsel against the state was arguing. He stopped and said, "I don't know." Then he asked the counsel for the state and, much to the amusement of everybody, the counsel for the state could not tell us what the name was. There was nothing on the record to show. So finally we gave up and went ahead. Everybody was satisfied and it worked out well.

As I say, this is a difficult question. It is not easy. For reasons that I stated yesterday, I think I agree with

Professor Kenneth Davis, who has written very searching criticisms, who has an article in the last number of the Cornell Law Quarterly, that the attempted distinction between suing a government official in his personal capacity and in his official capacity is not workable. All the cases of the kind that we have in mind are really double cases. But there are Supreme Court decisions, and we cannot change those.

It seems to me, therefore, that Professor Davis' recommendation, which was quite at the opposite pole from what the government is saying, would not achieve the result because that would assume for real workability that the Supreme Court was going to overrule its decisions in Ex parte Young and Ex parte LaPrade, and we have no idea that they will.

Therefore, I think I would go ahead as we have. Looking at the suggestion we have on page 18 of the green draft --

CHAIRMAN MITCHELL: May I interrupt to ask a question. Did we leave 25(a) as it is? We were discussing that, and there was a question whether a reasonable time limitation was a good and satisfactory way of handling it.

JUDGE CLARK: I should have mentioned that. After considerable discussion and I think some suggestion from various persons of a change in the reasonable time, eventually the proponent of the suggested amendment for change withdrew and himself moved that we adopt the rule as it is, and we voted the

amendment as it appears here. That is the way we voted.

CHAIRMAN MITCHELL: All right. So we are down to Rule 25(d).

JUDGE CLARK: Yes. It is 25(d) which I have been discussing.

Let me say, therefore, referring to 25(d), I do not see any real reason why the time provision should not be the same here as it is in (a). We were discussing that last night. Assuming that we are still satisfied with the reasonable time stated here, I should think that is appropriate.

That would mean approval of the striking out in lines 27 and 28, and approval of the added part in lines 41 to 43.

As to the provision in lines 44 to 50, I still think that is desirable, and while I have brought to your attention criticisms from Professor Davis and others that this does not go far enough, his idea in general would be a form of statement of this type but a little different, and would be a substitute for the whole rule, whereas the Department of Justice thinks it goes too far and should be stricken out, for my part I am inclined to think we are doing something here which is desirable and that it is desirable to let it stay.

I am, however, inclined to make one minor change which I think is in line with what would be held anyway to be the meaning. In the first line or two, I would substitute for lines 44 and 45 the following: "When an officer of the class

described herein sues or is sued as such officer, he may be . . ." You see, that is very little change. What I am trying to do is to make clear what I believe is the situation now, that it is a matter of pleading and not a matter of the courts having to decide this question on the facts. In other words, whenever the complaint alleges a suit against the officer by the name of the office, that is when this rule would apply. It is not up to the court to do more than look at the pleadings.

MR. PRYOR: You would strike the word "may" at the end of line 44 and the words "sue or be" at the beginning of line 45, and insert "sues or is".

JUDGE CLARK: I think I would go a little more than that, although it is the same general idea. Particularly for the words "may sue or be sued in his official capacity" I would say "sues or is sued as such officer". That would be my suggestion. We have done something and we have done the best we can in helping to clear up a thing which cannot be fully cleared except by legislation.

MR. DODGE: Will you state again, Judge Clark, how you would change line 44?

JUDGE CLARK: In place of the words "may sue or be sued in his official capacity" in lines 44 and 45, I would substitute "sues or is sued as such officer". My idea is not to change our intent, which I don't think we are doing, but I want to make it perfectly clear that it is what appears on the

face of the papers and that the court has no obligation to look into it further. Nobody can raise the question and say, "This is not his official capacity."

We just take the form for the suit as it comes to the court, which I think is what our words before meant, but I think these words make it a little clearer. I do this partly because Professor Davis made a very considerable attack on the blindness of this.

MR. PRYOR: I move the approval with the changes suggested by the Reporter.

JUDGE CLARK: Does anyone want to discuss it?

PROFESSOR MOORE: I think it is about as good as a rule-making body can get it now as you have it.

CHAIRMAN MITCHELL: You mean as it stands, or as it is proposed to be changed?

PROFESSOR MOORE: As the Judge has changed it.

I should like to ask a couple of questions just for my own information. Take the Ex parte Young case. I institute a suit to enjoin the enforcement of a federal statute. Do you contemplate, Judge, that I could name the Department of Justice as the defendant?

JUDGE CLARK: I cannot answer that finally. I have to give what I suppose is only a curbstone opinion, but I will give that. If I were doing that, I think I would still be inclined to name the individual, because in that case I think

probably you would get back to the individual sooner or later. But I would say if you named the Department of Justice, I think under our rule any objection made would be to put in an individual and not to dismiss the action. Therefore, I think this would be helpful to that extent.

I should suppose that would be a case where somebody very quickly, possibly even the judge, would say, "Before I start entering an injunction, I want somebody to enter it against." Therefore, I should think that would be a case where very normally you would put in the name of the person.

DEAN MORGAN: Wouldn't you rather put in the name of the district attorney or the prosecuting officer? That is, wouldn't you rather put in the prosecuting officer, whatever the office is? If it is the United States District Attorney for such a district, it wouldn't make any difference whether one person got out of that job and somebody else got in. It would not be the whole Department of Justice that you were after.

JUDGE CLARK: Yes, I should think that is right. Of course, one thing this would do, I think, as you have indicated, is to help the plaintiff to pick a proper person. I think that is what the Department doesn't very much like here, because that means if they come in and object, they cannot demur or move to dismiss, and so on; they have in effect to say, "We want to put in XY instead."

It seems to me that is a good thing. If the Department is objecting on that ground, as I think it is, that also adds to the showing that it is a good thing. It does allow a plaintiff to be less precise, but the defendants here have all the information as well as perhaps the legal knowledge, for that matter.

PROFESSOR MOORE: One other question, then. Suppose a tax refund suit is brought against the District Director of Internal Revenue. Can that be done under this rule now as amended?

JUDGE CLARK: Am I not right that that could be done without this? I think so. You could sue the Collector -- excuse me, did you say the deceased Collector?

PROFESSOR MOORE: No.

DEAN MORGAN: The District Director.

JUDGE CLARK: You see, the statute allows suit against the Collector, and the regulations have been changed so that the Collector has now become the District Director.

MR. PRYOR: That is in the Internal Revenue Code, isn't it?

JUDGE CLARK: I wonder if that could not be done without the rule. Do you know that, Monte? I would have to look back at the provisions to be sure.

MR. LEMANN: I think the new Internal Revenue Code uses the expression "Commissioner or his representatives."

I think that is the form. I do not know whether you sue the District Director or whether you sue the Commissioner. I am inclined to think the statute says you sue the Commissioner. The Collector no longer exists.

JUDGE CLARK: We have something on that on page 57. That gives the Treasury Order. It does not give the statute for that in the Internal Revenue Code.

PROFESSOR MOORE: Unless the last Internal Revenue Code changed it, and it may have, if you wanted to sue for more than $10,000 in district court, you would have to bring the suit against the Director.

JUDGE CLARK: I am quite sure that is changed, and not by the Internal Revenue Code. That was changed very recently. Now you can sue, I am quite sure, in the district court for any amount in a tax matter, and I think you can get a trial by jury, too.

MR. LEMANN: You can sue the United States now. You do not have to go through that monkey business of suing the Collector. It used to be the law that you could only sue the Collector, unless he was dead, and then you could sue the United States.

My impression is that they have changed that now to state that you can always sue the United States.

JUDGE CLARK: You can sue I think for any amount in the district court in a tax case.

MR. LEMANN: That is right, and your suit would be against the United States. I think that is the present law.

JUDGE CLARK: We can look that up, but I am quite sure that was passed only within the year.

MR. LEMANN: You do not undertake here to say when you may sue someone as a public officer, do you? Suppose you undertake to sue a District Director and you have no right to sue the District Director, that would not be within this rule or this amendment.

JUDGE CLARK: No. That is what I was going to ask next. I am not quite sure.

MR. LEMANN: We cannot undertake to say how you plead. We will not undertake to say how you plead, but we can say that if you brought it to begin with against the public officer and that public officer changes his identity, you do not need any substitution. Isn't that right?

JUDGE CLARK: That is right.

PROFESSOR MOORE: I think we go a little further than that under Judge Clark's new change: "When an officer of the class described herein sues or is sued as such officer, he may be described as a party", and so on. I think that is a fine idea. As I understand it, you could name the Department of Justice as the defendant instead of Herbert Brownell, and unless Brownell came in and objected your suit could go on. If he did object, it would not abate, but he would be substituted. Isn't

that your idea, Judge?

JUDGE CLARK: Yes. Although I wonder if our rule goes so far as to say you could sue a department. We think of it always as an officer. If you changed your question and made it Attorney General, I would agree.

PROFESSOR MOORE: Well, Attorney General, then.

DEAN MORGAN: Yes.

JUDGE CLARK: Yes, I should think that would do, but I do not think that we do anything to say that the Attorney General can be sued someplace where he cannot be sued. For example, if the Attorney General were sued in New York, you would have still the question that that is an improper place. I do not see that we have done anything about that.

All we have done, as I see it, is to make a shorthand form of demand. That is why it is later provided that anybody, including the court, can put in the name that this phrase signifies.

MR. LEMANN: As I understand it, now, your lines 44 and following really go beyond the title of this rule. They do not deal with substitution of parties. They purport to state how you can bring the suit to begin with, is that correct?

JUDGE CLARK: Yes.

MR. LEMANN: Then that goes beyond the title, because the title is "Substitution of Parties." This new language at the end goes beyond substitution. Isn't that correct?

JUDGE CLARK: Yes, I think so. It makes a substitute for substitution.

MR. LEMANN: Would anybody realize he is going to find that in a rule on substitution? Is that clear?

MR. PRYOR: We might add something to the title of the rule, "Suit Against an Officer as Such."

MR. LEMANN: Yes. I wonder if we want to take a look at the statute which authorizes a suit against the Commissioner of Internal Revenue and see how they worded it because, as I understand it, we are really taking the principle of that statute and applying it generally to public offices. Isn't that what you have in mind, Judge?

JUDGE CLARK: That had some suggestion. That was down here as Section 1143 of the Internal Revenue Code. Do we have that here?

MR. LEMANN: Mr. Tolman has gone to get the Internal Revenue Code.

JUDGE CLARK: That is cited on pages 20 and 21. We use it as an example. I would not want to say that we were limited to that.

MR. LEMANN: No, but it might give us some idea of the phrasing and language.

JUDGE CLARK: We can look at that when it comes in. The statutory citation is there.

Leland, we have the citation, 1143 of the Internal

Revenue Code.

MR. LEMANN: That is 1939, so we will have to get the new one. But I think we have a cross-reference table in here.

PROFESSOR MOORE: 1143 is not very definite. It is not very clear. This reads:

"When the incumbent of the office of Commissioner changes, no substitution of the name of his successor shall be required in proceedings pending after May 10, 1934, before any appellate court reviewing the action of the Tax Court."

That also deals only with the question of substitution. There must be another statute which says you can start out with a suit against the Commissioner without mentioning his name. There must be another provision other than the one you cite here.

JUDGE CLARK: I don't know whether there is any more or not. I think this is the one that we are talking about because we say that it is unnecessary in proceedings before any appellate court reviewing the action of the Tax Court.

MR. LEMANN: That is confined to substitution. There may be another section applying to the original action.

JUDGE CLARK: Do you have the latest amendments there? Leland, do you remember last spring, about a year ago, there was a provision made changing the suit in the district court involving taxes, removing the limitations and providing

for trial by jury. Do you remember that?

MR. TOLMAN: I remember that, yes. That was about a year ago, wasn't it?

JUDGE CLARK: Yes.

MR. DODGE: What do you say, Judge Clark, concerning the point made by the Attorney General's office that we should not amend the rule as proposed because our rules have no application in the courts of appeal.

JUDGE CLARK: Of course, the point that they do not have application in the court of appeals is true and very important. What the next conclusion should be may be more debatable. I should think the conclusion well might be that we then should start adopting them where we can. The Supreme Court of the United States, in adopting rules, adopted our rule of substitution. I understood that they understood that they were going to follow along with whatever was done.

Perhaps Mr. Moore can tell us something about that, because I think he had something to do with that. I should think one way of bringing the courts of appeals up to date would be perhaps to make the amendment.

MR. DODGE: Where would there be any difficulty? What do they have in mind -- a case where death occurred after the trial in the district court or when the district court had made an order of substitution or had ruled that it was unnecessary?

JUDGE DRIVER: Isn't what they had in mind that if there was a death pending appeal, and the rule is different in the appellate court, it might be confusing to the attorneys? They would be relying upon the district court rule and might be confused if there was a different rule in the appellate court.

But each appellate court makes its own rules, and there are eleven of them. I do not see how we can control that situation. It certainly is impractical to try to have any sort of liaison with them or any cooperation in the formulation of rules in the first place. If anyone wanted to undertake to go out and get the eleven circuits to agree with us, I bid them Godspeed, but I wouldn't want to try it.

MR. DODGE: I do not think any serious difficulty would arise.

JUDGE DRIVER: I don't think so. I think we should do our work and not pay attention to what the appellate court might do. That is their job.

MR. TOLMAN: Judge Clark, in your revision of the rules of the Second Circuit, didn't you adopt the district court practice simply by reference to the civil rules?

JUDGE CLARK: To tell the truth, I have forgotten.

MR. TOLMAN: I thought you did.

JUDGE CLARK: Do you have a copy of our rules here? I just don't remember on that.

MR. TOLMAN: That is a solution. They can do that in the court of appeals.

JUDGE CLARK: I did want to add one other thing which is somewhat along the same line. I don't think really there is the same amount of question in the appellate courts as there is here. The case has been pretty much formed, and when it comes to our court and we get motions, practically always as a matter of course we have our clerk endorse them, really, for substitution. The only chance of question would be on long delay, and I do not think you get long delay of the kind that occurred in this Remington Rand case in the appellate court. When substitution is moved rather soon, it is usually granted.

I cannot remember a case of substitution where we have had these various subordinate questions come up. I think they are the kind of question which come up in district court. They do come to us on appeal from the district court, of course, but I do not think they are newly raised in the appellate court. I have never seen any real problem with us.

There is a problem in the district court, as these cases indicate, but with us it seems to work out fairly simply. The parties agree on substitution, the clerk endorses it as done, and we practically don't see it beyond the point that the clerk has noted it on the caption of the record and the briefs.

Or, to put it another way, I think the Department of Justice objection here is perhaps technically an accurate statement, but it seems to me not to be very realistic or important as the cases go on. If we have the district court practice fixed up and that works, I think we have done at least 90 per cent of the task.

MR. LEMANN: I am a little disturbed about the language at the end of the rule beginning in line 44, not only because it goes beyond substitution, but it seems to be the professional impression that you can generally sue an officer when apparently at least in some cases you cannot, such as the Civil Service case to which you referred, Mr. Pryor.

MR. PRYOR: The amendment would have no application there, would it, but it would in others.

MR. LEMANN: I am wondering whether the average lawyer might not think that this language authorizes him to sue officers as such. If we were making the law, I guess we would favor making it a general provision that if your claim was really against a representative of the government you could sue the office. Does this language imply that we are trying to say that here?

CHAIRMAN MITCHELL: How can you?

MR. LEMANN: I don't think we can, but somebody might get the impression that we were trying to say that. We say whenever you sue someone as a public officer. Does that

indicate generally we think you sue people as public officers; or does it mean we don't know when you can do it, but if you do it you do not need to name an individual?

JUDGE CLARK: Would you mind, Mr. Lemann, giving us an example? I am afraid I haven't very clearly in mind what you are referring to.

MR. LEMANN: Let us take the Civil Service Commission case. If it had not been for this decision to which the Department of Justice has referred and which Mr. Pryor picked up, I would have thought you could sue the Civil Service Commission, that you could bring a suit against the Civil Service Commission, which is what the fellow tried to do. The court said he couldn't do it and threw it out.

CHAIRMAN MITCHELL: If the United States has consented to be sued, it seems to me it is clear as a bell that people making rules for the district court cannot decide who can be sued.

MR. LEMANN: What I would like to know is what cases would fall within lines 44 and following. Give me the cases.

PROFESSOR WRIGHT: Snyder v. Buck.

MR. LEMANN: Who was the defendant?

PROFESSOR WRIGHT: The Paymaster General of the Navy in an action for mandamus.

DEAN MORGAN: Suppose it was the Attorney General

instead of the Department of Justice, and you hadn't named him and he came in on that basis. It would be easy enough just to add the name, wouldn't it? He cannot be without notice of it if he has been sued in his official capacity. It is just like the old common law plea in abatement for misnomer.

MR. LEMANN: The point I am making, Eddie, is that I might think, reading this rule, that this was an invitation to sue the Paymaster General or any public officer that I can sue as a public officer, without naming him.

DEAN MORGAN: By naming his office, yes. You have to serve on somebody. You have to serve on the incumbent in the office.

MR. PRYOR: Isn't it clear that it is beyond the competency of this Committee to say which officers can be sued as such, and which can not?

MR. LEMANN: I would think so.

MR. PRYOR: This rule, being a rule promulgated by the Supreme Court on the recommendation of this Committee, certainly would apply only where the proper authority had authorized suit against the officer as such.

JUDGE DRIVER: Would it make it any clearer if instead of "When an officer of the class described herein sues or is sued" you said "If an officer sues"?

CHAIRMAN MITCHELL: Pursuant to a statute.

JUDGE DRIVER: Yes.

MR. LEMANN: "When the statutes provide that an officer of the class described herein may sue or be sued in his official capacity and he does so sue or is so sued, then such officer may be described as a party by his official title."

JUDGE CLARK: I am afraid that would not hold water, because if the statute says so, it says so, and you don't need to say anything more.

Frankly, I think we ought to do more, and I don't believe the Blackmar case is against it. I think you are somewhat assuming for the moment that this does more than it does. This is the manner of stating your pleading, if you will. I mean by that that you use certain words, say the Attorney General or what-not, as signifying Mr. Herbert Brownell, and that is all you are doing. You do that for convenience. You do not extend jurisdiction or anything else.

In the Blackmar case, from the beginning everybody was raising the question of jurisdiction. The respondents appeared and filed a motion to dismiss because of improper venue and lack of jurisdiction. The point was reiterated throughout. The question was finally passed on in the court of appeals.

Nowhere in that case is there any discussion of whether it would have been impossible to substitute for these words "Civil Service Commission" the names "Messrs. A, B, and C," which is all we suggested. The bare question throughout was

whether the Commission was a semi-corporate body and could be sued as such.

It seems to me that does not affect our question. Our question is whether we can have this little shorthand way or convenient way of suing.

The great reason for doing it, I think, is because the courts are doing it right along. Suppose that we acceded to the Department of Justice suggestion and took this out, what should the district court do or what should we do when the parties are not raising the question? I wonder about that a little myself when these cases come in. Everybody seems to be quite satisfied, and it seemed frankly quite pernickety to raise some question when the matter was going along all right. It is a practice which has more or less grown up, but a very convenient and helpful thing.

Insofar as I can see from the cases that come before us, probably in most of the cases nobody gives it a thought, as in the example I gave, the New York case, where counsel had gone so far with the case that neither side could place the individual. It seems to me this is a shorthand convenience, in other words, and doesn't touch the question of jurisdiction. If anybody has a question of jurisdiction he raises it just the same as before, but when you talk about the Attorney General you mean the Attorney General, to wit, Mr. Brownell.

There was some question raised as to what the circuit

courts of appeals might do, and so on. Mr. Tolman has gotten our rules. Since I drew these, I think they are good, but I have forgotten what they do.

This happens to be Rule 9, Death of a Party, Court of Appeals for the Second Circuit, Rules effective August 1, last year:

> "The substitution of a party during the pendency of an appeal shall be in accordance with Rule 25 of the Federal Rules of Civil Procedure, except that such substitution shall be made within 60 days after the event calling therefor; and if not then made, the court may take such action as it shall deem appropriate, including dismissal of the appeal. Death of a party does not affect the taking of an appeal; see rule 73(b) of the Federal Rules of Civil Procedure."

The Supreme Court rule, which is now 48, is considerably more extensive.

"Death, Substitution, and Revivor." There is a general provision for substitution.

> "Such substitution, or, in default thereof, such suggestion, must be made within six months after the death of the party, else the case shall abate."

Then there is a provision for substitution of a government office, and that is a six-months provision.

Would you like to discuss it more? There is a motion

before us to approve the rule with the modification I suggested. Do you wish to discuss it further?

If not, all those in favor will raise their hands. Six. Those opposed. One. There are several not voting. At any rate, there it is.

Now we pass to the discovery material. The first is Rule 30(a). Do you have anything recent on that, Professor Wright?

PROFESSOR WRIGHT: Nothing else has come in. The comments favor the amendments to 30(a) and 30(b). In fact, they express some enthusiasm.

JUDGE CLARK: Rule 30(a) is the regulation of the time of taking and the order of taking the depositions. That has been quite generally approved. Does anyone wish to discuss that?

I think, then, we shall assume that that is approved. The amendment to Rule 30(a) is approved.

Rule 30(b). There are first two somewhat minor matters -- the addition of the words "time or" in line 26, and the addition of the words "undue expense" in line 42. Is there any discussion of that?

PROFESSOR MOORE: Judge, I am in favor of the substance of these amendments in 30(a), (b), and (c), but the point that troubles me is that I think we are making too many amendments to the rules in the light of the rather hostility of

the Supreme Court to this Committee and rule-making. Justice Black has admonished me two or three times that there is too much tinkering with the judicial code, rules, and so on. I am inclined to think these things in Rule 30 are pretty much taken care of now by the cases. They work themselves out fairly well.

Apart from that, I am in favor of these amendments to Rule 30. I am fearful of too many amendments at this time.

JUDGE CLARK: It would seem to me, as I have suggested before, that we have an obligation, as the Supreme Court itself has, and we each must proceed according to our lights.

In the first place, I do not believe we can now, here, work out what is going to be the most satisfactory course for the Supreme Court. I do not believe we can adjust ourselves to what Mr. Justice Black or Mr. Justice Frankfurter may wish, and more particularly to what the majority may wish. I do think we need to perform our function as a rule-making committee.

Of course, it is a question of degree always. I do not mean to say that we should rush boldly into things which are unnecessary, but these matters which appear small, these very matters, I think perhaps are good illustrations. They have given a great deal of unnecessary trouble to the judge sitting in the motion part and to the parties. I do not see why it isn't quite proper for the Supreme Court, if it feels that way about it, not to approve of some of the separate

amendments. It is an unproven factor, I think, that the number of amendments itself is going to result in rejection of amendments that the Court itself feels are worth while.

I still am inclined to think that we each should make a reasoned judgment according to the light involved, that we cannot wisely or we cannot actually, as a matter of prophecy, govern our actions in detail by what we think the Supreme Court is going to do.

Take, for example, the addition in (c), as to which there has been discussion and some division among the people commenting.

"the court may order the cost of transcription paid by one or some of, or apportioned among, the parties."

I think that might well be limited as I have suggested. I suggested putting in there, "where transcription is requested by a party other than the one taking the deposition, the court may order the cost of transcription or a portion thereof paid by the party making the request."

Here is a matter where I should hope that the court would be inclined to think it had the power, but that has been doubted a good deal. It would seem to me clearly it is quite a considerable burden to say to a party who has taken a long deposition and does not use it that he must pay the cost and have it used by the other party. It seems to me this is the kind of regulation which makes things run easier and work,

and that it would be too bad to limit our functions or to make them one-sided or warped by guesses about what might happen to us.

I think it may well be that the Supreme Court may do various sorts of things. The Supreme Court may well say that it does not want any Committee, but I do not think that should change our ideas as individuals that the rule-making power is a desirable thing. After all, the Supreme Court and the members thereof have their ideas.

MR. DODGE: The practice now is for the party who takes the deposition to pay for it, and if the other party wants an extra copy, he pays for the copy; isn't that it?

JUDGE CLARK: No, I think not. It is supposed to be transcribed now, is it not?

PROFESSOR WRIGHT: Unless the parties agree otherwise.

DEAN MORGAN: Charles, the depositions are taxed as costs afterwards, if the depositions are used at any rate, isn't that right, Bill? The winning party charges the costs of taking them.

PROFESSOR MOORE: Where they are put in evidence.

DEAN MORGAN: They are part of the costs ordinarily. At least some of these comments indicated that.

This would change the rule which allowed the winning party to tax the cost of the whole business.

MR. TOLMAN: I think the practices differ in the

different districts. The districts have different attitudes toward the taxation of costs.

JUDGE DRIVER: It has been my observation that much of the criticism of the amendment has been due to some misunderstanding of the breadth of it. I think that would be cured by Judge Clark's proposed change in the wording specifically limiting it to a situation where one party takes a deposition and finds that he does not have any use for it and does not wish to transcribe it, and the other party does wish to have it transcribed. Then the other party may be required by the court to pay all or part of the cost of transcription.

MR. LEMANN: Doesn't the judge now have a right to pass on the costs? Does he necessarily have to tax them against the losing party? He can decide that. I know I had an appellate court case decided wrongly, I thought, on appeal where he held that I had incurred some unnecessary expenses and, although I won the case, he taxed those unnecessary expenses against me -- although I was the winning party. My impression was that the district courts have similar power. So it could be that without this provision a district judge could well say, "This part of the costs should never have been incurred, and I am not going to tax them."

JUDGE DRIVER: I think we should keep in mind, Monte, that this refers not to the final taxation of the costs; this refers to the cost that shall be borne by the parties regardless

of the outcome of the case.

MR. LEMANN: That is quite so. It really imposes a limitation on the power of the judge in a sense. It says to him, "This much you must charge against the party who required the taking of that deposition." To that extent it controls his discretion, and he may say it really wasn't necessary because he could control that anyhow when he came to tax the costs.

MR. PRYOR: It says he may do it, but he does not have to do it.

Judge Clark, what were the words you were going to insert there?

JUDGE CLARK: "where transcription is requested by a party other than the one taking the deposition, the court may order the cost of transcription or a portion thereof paid by the party making the request."

MR. DODGE: Why do you put that in? You have given a general power to the court here to deal with the matter. Why specify that particular case, which might be very unjust, I should think, to a poor plaintiff who was harried by long depositions taken by the defendant, who found it entirely adverse and did not want it written up.

I would not call attention specifically to that particular case which I think might work very unjustly.

JUDGE CLARK: The reason I did it was -- maybe I was

too much moved by the criticisms, and maybe those criticisms were too vocal from people who do not like this. The criticisms are referred to on pages 26 and 27 of the summary.

"The critics seem to think that this language will give the court broad power to require one side to bear the expense of discovery incurred by the other side. The Committee of course only intended to authorize requiring a party to pay for the transcript where he wants it and the party who took the deposition does not wish it. That the problem is linguistic rather than to the merits is indicated by the fact that no correspondent criticized giving the judge this power in the situation the Committee contemplated, as well as by the following comments of Professor Joiner:

"'It seems to me that the court's discretion may be exercised pursuant to that rule in a way that would not be fair. There seems to be no limitation upon the power of the court to order one or the other parties to pay for the cost of the transcript. I think it is too broad. I think that you are making a situation which will cause more trouble than we have today.'"

That is why I put in the limitation. Maybe it is not desirable. I did it to meet those criticisms.

MR. DODGE: Was it Joiner who thought this proposition as stated by us was too broad and might lead to injustice? He

doesn't seem to have suggested any alternative language.

JUDGE CLARK: That is right.

JUDGE DRIVER: I think your language, Judge Clark, really brings the amendment in line with what is stated in the note to be at least the principal purpose of the amendment. You seem to stress in the note the situation where one party takes a deposition and does not care to use it, and the other party wishes it transcribed. That, you say in the explanatory note, is the justification for this amendment. So I think the new wording of Judge Clark's really brings the amendment in line with what was indicated in the note as the principal purpose of the amendment.

JUDGE CLARK: Yes, that is right. That is what we thought was the intent of the original provision.

Do you wish to discuss the matter more? We have these three amendments to subparagraphs (a), (b), and (c). Let us take a vote on them separately.

DEAN PIRSIG: I am a little bothered by the implied limitation which would be involved in the proposed change.

JUDGE CLARK: In (c)?

DEAN PIRSIG: Yes, as you have it here in your latest suggestion.

JUDGE CLARK: Would you want to make a suggestion about it?

DEAN PIRSIG: I think I am inclined more to leave it

as it is in the original draft. As I understand the situation, the court now is intended by the rules to have that power. At least one court, according to the note, has so held. There are some other authorities which have suggested otherwise.

This is apparently for clarification of the general power the court had, although we discussed it earlier in terms of a particular situation where we thought discretion was involved.

That isn't your understanding?

JUDGE CLARK: Dean Pirsig is suggesting that we retain it in the form that was originally suggested.

MR. LEMANN: Or are you suggesting that we leave it alone, as it was in the original rule?

DEAN PIRSIG: I think there may be some need for clarification.

MR. LEMANN: You see, this presents the question of policy to which Professor Moore referred. We have one case which reached this result under the original rule. We have one case which differs. Isn't that right? That is at the bottom of page 26. We have only two cases.

My own view, suggested by Professor Moore, is that that is not enough trouble to justify tinkering with the rules.

JUDGE DRIVER: This amendment necessarily, as I see it in its context here, could apply only to transcription. Already in the rule is the provision that "The testimony shall be taken

stenographically and transcribed unless the parties agree otherwise". If they agree not to transcribe it, you have no problem. If the party who took the deposition wants it, you have no problem because obviously he should pay for it. So the only way it could arise is if the party who took it does not wish it transcribed and the other party does, and that is where we say "the court may order the cost of transcription paid by one or some of, or apportioned among, the parties." I do not see where you lose anything by spelling it out here, because it has to be that narrow.

MR. LEMANN: It is just a question of judgment how far you are going to gild the lily and how far you are not going to leave anything to the district judge to make a mistake about.

JUDGE DRIVER: The point is that we are not dealing with the whole problem of the cost of depositions. We are dealing only with the cost of transcription in the case where they do not agree that it shall not be transcribed.

JUDGE CLARK: Suppose we vote on 30(a) first.

MR. DODGE: Do you think these amendments are necessary?

JUDGE CLARK: Yes. Of course "necessary" is a relative term. The way I define "necessary," I would say yes. I suppose hardly any of them are necessary in the sense that the procedure will not work without them, but I say that they are necessary in the sense of being reasonably effective to carry out matters

that have caused quite a little trouble.

MR. DODGE: I have a good deal of sympathy with Mr. Moore's suggestion that they really are not essential.

JUDGE CLARK: I am afraid if we followed that argument to its logical conclusion, there is almost no amendment which would stand up if you apply that strictly. As we know, the rules are working, and working pretty well, but there have been sources of confusion, and it seems to me it is the proper function of an Advisory Committee to keep the matter running. If you do not do that, of course it means that the strictest and most arbitrary practice in the decisions is going to prevail for the very natural reason that those are the cases which are reported, and the only way that you can keep the practice flexible, attuned to the kind of needs the Committee visualizes, is to make the recommendations.

MR. DODGE: The court now clearly has the power which you specify in the last lines of paragraph (a).

JUDGE CLARK: I suggest if we have gotten to the point where we may vote, I shall first call for the vote on 30(a). All those in favor of the amendment raise their hands. Six. All those opposed. Three.

Now on 30(b). All those in favor will raise their hands.

MR. DODGE: This is (b), isn't it?

JUDGE CLARK: This is (b).

MR. DODGE: If the rule should be amended at all, I would vote for the amendment of (b) as you have it.

JUDGE CLARK: Eight. All those opposed. Two.

On (c), I take it Dean Pirsig is moving for the amendment in the form as written in the draft, without the change I have tentatively suggested. All those in favor of it in that fashion raise their hands.

MR. DODGE: What is the question?

JUDGE CLARK: On (c) as printed here.

JUDGE DRIVER: As it is, without Judge Clark's proposed substitution of language.

JUDGE CLARK: Yes.

DEAN MORGAN: Charles, on (c) that applies to getting the transcript, whether it is used at the trial or not. The usual costs for transcripts, and so forth, are in cases of depositions which are actually introduced at the trial.

JUDGE CLARK: Yes, that is true. I think that would be clear. I should think that could be stated.

DEAN MORGAN: This stuff may actually be the last payment. You are not going to distribute it afterwards.

MR. DODGE: Hasn't the court that power now? Hasn't that been in the existing rule as to costs? The court must regulate it.

JUDGE CLARK: I think perhaps this is more doubtful than some of the other things we have been talking about. You

see, there are cases over on the other page which say it is doubtful. As you read it, isn't that a more solid argument than some of the others we have, because the one who starts the deposition going must see that the copy is filed, unless they agree otherwise.

PROFESSOR WRIGHT: I should mention the arguments of the Department of Justice on 30(c). They say it should be made clear if this amendment is adopted that the government cannot be required to bear the cost of transcription, and they also say that there ought to be some provision in 30(c) allowing the use of mechanical recording devices for the taking of depositions.

MR. TOLMAN: They are used for taking depositions already, are they not?

PROFESSOR WRIGHT: I thought they were occasionally. The government says, "Although this language on its face would seem to permit the use of mechanical recording devices for deposition upon agreement of the parties, the courts to date have not clearly approved such a practice."

JUDGE CLARK: Before we take up either of those matters, let us consider the general proposition on the proposed amendment here. Are you ready? All those in favor will raise their hands --

JUDGE DRIVER: I am not clear what we are voting on.

JUDGE CLARK: We are voting on the language in lines

51 to 53 as printed.

JUDGE DRIVER: I see.

MR. DODGE: How about the United States? If the United States takes a deposition, it has to pay for it, doesn't it?

DEAN MORGAN: If it wants a transcript, it has to pay for it.

MR. DODGE: It says here the rules "should make it clear that such costs shall not be assessed against the United States".

DEAN MORGAN: They are talking about an assessment of costs.

JUDGE CLARK: I think we can take that up a little later. Now let us vote on that language in lines 51 to 53, unless you want to do something else. I don't want to hurry you particularly, but we have to decide these matters some way.

JUDGE DRIVER: It occurs to me you might get a fairer expression if we vote first whether we wish the substance of the amendment, and then vote as to particular language afterward.

JUDGE CLARK: All right. The question of the substance of the amendment, then.

DEAN PIRSIG: Professor Wright raises a question --

JUDGE DRIVER: I move as a substitute motion that we vote to see whether we shall have this amendment in substance,

the substance of 30(c), and then decide afterwards what language we want.

JUDGE CLARK: Yes. All those in favor of Judge Driver's motion raise their hands. Six. All those opposed. Four. That is carried.

Now what shall we do about the form? Are there any suggestions as to the form? I take it that Dean Pirsig would take the form as is, and Judge Driver would like to have the substitution.

JUDGE DRIVER: You can vote for it on Dean Pirsig's motion. That is clear now.

JUDGE CLARK: Let us vote successively on these. I will give them to you.

DEAN PIRSIG: Professor Wright raised the question about the prospect of many applications being made to the court on the point by the party who has taken the deposition but doesn't want the transcription. That is one situation. There are many others where the question of costs would get beyond the particular point that we have in mind. Could you develop that a little more fully, Mr. Wright?

PROFESSOR WRIGHT: I just mentioned to Dean Pirsig the point that some of the people have raised in comment to the Committee, which I must say I think is wholly justified, that this amendment to 30(c) would go far beyond the situation the Committee had in mind, which would mean the court in any case

could order the cost of transcription to be borne by either of the parties. I do not think, as some of our commentators suggest, the courts would automatically then as a rule of thumb make the defendant always pay the cost of transcription, but at least it would give them that power if they wanted to.

JUDGE CLARK: Does that not in fact support Judge Driver's motion?

PROFESSOR WRIGHT: Yes.

JUDGE CLARK: It may be that convinces Dean Pirsig.

DEAN PIRSIG: What is his motion?

JUDGE CLARK: His motion was to accept the language which I had suggested in my comment. The language I suggested was this, in substitution for the italicized words in lines 51 to 53 on page 24, beginning with a semicolon:

> "; where transcription is requested by a party other than the one taking the deposition, the court may order the cost of transcription or a portion thereof paid by the party making the request."

DEAN PIRSIG: Would there be any case where the transcription is ordered by the party who took the deposition where some part of the cost should be borne by some other party?

JUDGE CLARK: I should not think so, without agreement. The party who takes the deposition must in the normal course, unless there is an agreement, have it transcribed and file a copy of the transcript with the clerk.

MR. DODGE: You are suggesting those words in substitution for what is written in here?

JUDGE CLARK: That is right.

MR. DODGE: I think if you are going to have the amendment at all, it should be in more general language such as you have in your original draft. You are specifying only one case in your substitute language.

DEAN MORGAN: The commentators were thinking of a case where a plaintiff took a deposition and then a witness went back on him. He says, "I don't want it." The defendant says, "I want a transcription of it." It seems to me that the defendant ought not to have to bear the expense of the transcription unless the judge thinks it is fair to have him bear it.

MR. LEMANN: Of course, you can try to conjure up all the hard cases that may arise. The case of Judge Chesnut, which was just shown to me, did not involve this particular point of one man wanting it transcribed and the other fellow did not want it. He went so far as to say he was not going to tax as costs depositions taken for discovery which were not used. That did not involve any controversy as to whether or not they should be transcribed. Therefore, that case would not be for this amendment.

DEAN MORGAN: He may want to use it later or he may make up his mind not to use it, either one.

MR. LEMANN: He didn't use it, but it was not a question of transcription.

DEAN MORGAN: It is just the original transcription which is involved here. Are we going to have this deposition transcribed? The fellow who gave the notice, and so forth, says, "I don't want it. There is nothing in that that I care about." Then the defendant says, "I want it. I want a transcription, and I want it now."

When he gets to the trial he can offer it if he wants to. If he offers it, then you have the same question as to the expense. Suppose he does pay for it. Then he offers it and then there is a question later of taxing the costs. Suppose he doesn't offer it. He just has it there as ammunition. Then this opinion I gave you seems to be applicable in a case of that kind.

DEAN PIRSIG: That would be covered by the narrower proposed rule which Judge Clark has suggested, I take it. The broader language would cover other instances which presumably we do not have in mind now. Isn't that the situation?

MR. PRYOR: It seems to me that the taxing of the costs in the case is not involved in this.

JUDGE CLARK: That is correct. That is not involved.

MR. PRYOR: It is just the question of the cost of transcription, and it is to provide that, where they do not agree, the fellow who wants it must pay for it. I think that

is all right.

DEAN PIRSIG: If that is all we have in mind, then I think we should adopt the narrower language.

MR. DODGE: Suppose he wants only part of it relating to a particular subject matter.

MR. PRYOR: He has to pay for it.

MR. DODGE: He would have to pay for that. Who pays for the rest of it?

CHAIRMAN MITCHELL: He is obliged to pay for it under the rules.

MR. DODGE: He would have the right, would he not, to ask for the transcription of only a part of the deposition relating to a particular subject matter?

CHAIRMAN MITCHELL: You are trying to distinguish between advancing the present costs to the shorthand reporter immediately --

MR. PRYOR: That would be a case where you ask the reporter to run off the testimony of a certain witness. You pay for that. You may want to use it in your argument to the jury.

PROFESSOR MOORE: I suggest that you use the word "expense" instead of the word "cost". I think that will avoid a little of the confusion.

MR. PRYOR: That might help.

PROFESSOR MOORE: All you are dealing with here is the

initial expense of getting it, and whether or not you can tax it later is another proposition.

JUDGE DRIVER: I think that is a good suggestion.

MR. PRYOR: Use the word "expense" in line 52 instead of "cost".

JUDGE DRIVER: "Cost" is misleading there.

JUDGE CLARK: Yes, I think that is a good idea.

DEAN MORGAN: That is very good.

JUDGE CLARK: Change the word "cost" to "expense". Now we can vote on what might be termed the narrower provision, which is the one of which I have given you the language and which Judge Driver has moved, or the broader one, which is the language appearing in the printed draft. I will call for a vote, if that is all right, on the narrower one, and then for hands on the broader one. If you are ready, now let us have the hands on the narrower one. Five. Did you vote for that?

DEAN MORGAN: I don't care which way you do it, as a matter of fact.

JUDGE CLARK: Now the broader one. Will you raise your hands on that? Mr. Dodge. I guess that is all. That was six to one. I put Mr. Morgan in with the prevailing vote.

PROFESSOR MOORE: Which one was adopted?

JUDGE CLARK: The narrower one.

PROFESSOR MOORE: But which one is the narrower one?

JUDGE CLARK: I will read it, quote:

"; where transcription is requested by a party other than the one taking the deposition, the court may order the expense of transcription or a portion thereof paid by the party making the request."

MR. DODGE: Leaving out the words "paid by one or some of, or apportioned among". Did you specify definitely the power of the court was limited to optionally requiring the party to pay all?

JUDGE DRIVER: Judge Clark said the court may order all or a portion thereof paid by the party making the request.

MR. PRYOR: He strikes out the words "one or some of, or apportioned among, the parties." and substitutes the other language.

I was just explaining to Mr. Dodge that you were striking out the words, "one or some of, or apportioned among, the parties" and substituting the other language.

JUDGE CLARK: Yes.

As to the Department's suggestion that we put in specifically that they do not need to pay, I should doubt if we wanted to do that and I should think, unless somebody wants to bleed for the Department, we will pass that.

As to the other provision as to using recording devices, I suppose and hope that those would be generally available throughout the courts. I do not know whether we need to have anything special or not. There is no reason why it

should come in here. It ought to be broader than this.

MR. TOLMAN: I think the act establishing the federal court reporting system does use the words "stenographically or by other mechanical means". I am sure it does, as a matter of fact.

JUDGE CLARK: I think certainly we should not add it here; that it should be general as to any proceedings in the court.

MR. TOLMAN: I was under the general impression that sound recording equipment was being used pretty generally for taking depositions.

MR. PRYOR: Isn't that included in the term "stenographic"?

MR. TOLMAN: I don't know.

JUDGE CLARK: Of course we have the authority of one of the two authorities right here. Dean Pirsig told the lawyers of the world what was happening here as to the use of sound equipment.

DEAN PIRSIG: That was mainly Professor Louisell.

JUDGE CLARK: You must not give your name to things unless you stand behind them, you know. You might find yourself where Judge Howland(?) speaks of himself; you might find yourself to be a constitutional reprobate.

DEAN PIRSIG: In our own court the reporters use them quite extensively.

JUDGE CLARK: Down in Puerto Rico they have that provision, and the district judges committee is supposed to be making a recommendation. As soon as Mr. Chandler can get some money, he is carrying it further.

Unless there is something more on that, I don't raise any question.

I should mention one matter further, although my own view is not to do anything. Here we get back to the famous outcome of the Hickman case and as to whether we should try to redefine that in language. That has come up from time to time. Of course, as we know, several state provisions which follow the federal rules do it in various ways. New Jersey does it, for example, and Utah does it.

MR. PRYOR: Are you taking up Rule 33 now?

JUDGE CLARK: No, I have not gone to 33. I am raising the suggestion as to whether we should redefine the subject matter of the Hickman rule.

You remember we did make the suggestion, and the Supreme Court refused then, presumably because it was going to review the Hickman case, and from time to time there have been suggestions of another form there.

For my part, I am very happy and quite satisfied with the vote at our last meeting, which was to not do it, and I recommend that now. However, I thought I ought to mention it, at least, if somebody wants to have a reconsideration or rehearing

or further discussion of that matter. That could come up in various parts of these rules, but the place we hit it before was 30(b), when we made the recommendation to the Court at the time of the Hickman case. In many ways that is perhaps the natural place to have it.

So if anybody wants to speak on it, go ahead. My recommendation is that we let our vote of a year ago stand.

All right, if nobody makes any motion, then let us go to Rule 33. There is a lot of fun about that. I do think it is fair to say there is quite a bit of misunderstanding about both 33 and 34. Of course, there are some matters of substance there. I do not say there are not.

It seems to me a good share of the protagonists either way did not bother too much to read the particular suggestions or to line them up with the whole discovery principle. I think a good deal of the reaction was pro and con on the whole business. So I don't think the whole effect either way can be decided very much by numbers.

I shall ask Mr. Wright about the recent material, and then I think when we come to this we probably must divide it and take each proposition practically separately.

MR. PRYOR: Are we to consider Rule 16(4) in connection with this?

JUDGE CLARK: Yes, in connection with one provision of it.

How about the recent material?

PROFESSOR WRIGHT: I think in my summary I may have been too hasty on page 28 in citing letters from people representing plaintiffs. The recent count has been quite the other way. We have been getting heavy mail from people who are customarily representing defendants.

The breakdown I made in the original summary I have also made of the subsequent letters as between those which merely speak on the broad principle of whether discovery should be liberalized or not liberalized, and those which comment on very specific things which the amendments to 16(4) would do.

You notice on page 28 I said that as of the time I then wrote, there had been 154 letters which, without getting into details, said it was a grand thing if we liberalized discovery, and there were 46 letters which said we should not do so.

Since that time there have been five more letters in favor of liberalizing and 44 against liberalizing, so we still have a majority on the plaintiff's side.

Getting beyond that, the first of the specific questions dealt with in the summary was the question of the names of witnesses, a problem raised in both 16(4) and 33. There continues to be, as there was at the time I originally wrote to you, a very heavy barrage of criticism. Of the 33 new letters

that have come in, 29 have been critical of this provision.

I might just mention two of the more favorable letters, one of them from the Chicago Bar Association committee and the other from an insurance company, which was very interesting because it appeared to me to take a position against interest.

MR. PRYOR: You are talking about 16(4)?

PROFESSOR WRIGHT: I am talking about witnesses generally.

The insurance company said it would not object to having a provision that you have to give the names of witnesses -- this is a two-edged sword -- provided they could use witnesses whom they bona fidely discovered later, that there be some provision for making use of them.

There has been a good deal of suggestion that getting the names of witnesses may be a proper part of pre-trial under 16(4) where it would be discretionary with the judge, but not a proper part of the interrogatory process where it would be a matter of right and would come at a much earlier stage in the action.

We have had correspondence between Professors Field and Keeton of Harvard in reply to Judge Clark to that effect, and Judge Nordbye's speech which we got copies of yesterday, and also the American Patent Law Association has taken that position.

There have been certain other suggestions for

modification. One person said it would be O.K. so far as listing the principal witnesses, but you should not have to list the witnesses you are going to call in rebuttal.

One other development on that point is that there was some citation in the critical letters of a recent New Jersey decision. New Jersey, of course, allows this procedure. The case of Abbatmarco v. Colton, 106 Atlantic 2d. 12, which some of our commentators said is an example of the possible abuse of this kind of provision. I got the case out yesterday and have it here if any of you are interested in looking at it.

My own judgment would be that it is perhaps not an indication of abuse. It is a case in which, under the New Jersey rule, at the beginning of the action the defendant asked the plaintiff for the names of witnesses he planned to call at the trial. The plaintiff answered and did not mention the name of a certain witness. It rather appears that at that time he did not know the name. At no later time did he give the name of the witness until the day before the trial, when he filed what he termed a supplemental answer to the interrogatory, giving the name.

However, as soon as he found out the name he did tell the defendant's attorney, called him up and gave him the name and address orally. He took the deposition of the witness, and the defendant's attorney was present at the taking of the deposition and cross-examined.

At the trial the defendant's attorney first moved to prevent the plaintiff from reading the deposition of this witness, and then moved for a mistrial on the grounds that the plaintiff had not listed as a witness this person that he was going to call.

The court held that this was not grounds for mistrial and that the deposition was properly used. He said, "We do not condone violations of the rule, and your plaintiff should have sent a written statement giving the name of this witness as soon as he knew it," but since he let the defendant know orally that he was going to call this person, there was no prejudice.

Some people think this case is an example of how the witness provision could be abused.

MR. PRYOR: I am very much opposed to including in Rule 33 the provision that the interrogatory may ask for the names of witnesses. I think the Iowa Supreme Court, which has adopted most of these rules, was very wise in expressly providing in the rule on interrogatories that the other party could not be required to give the names of witnesses.

I think it is all wrong. Without counting noses, particularly those of the NACCA, I think it is wrong in principle.

Frankly, most of my experience has been in defending negligence cases. It may be that that experience influences

my conclusion somewhat, but I just cannot see anything to be gained by it. I think it more likely to induce fraud and promote a result which would be injustice rather than the other way.

I don't think the inclusion of it in 16(4) is quite so objectionable because some of the comments suggest the court still has some discretion there. I would not be afraid of the court's judgment in that matter, although I think it is entirely out of place in pre-trial procedure. The purpose of the pre-trial procedure, as indicated by the other subparagraphs of the rule on pre-trial procedure, is to expedite the trial, to save time in the trial of the case. Giving a list of the witnesses primarily does not accomplish that purpose at all.

As I say, I am not so much opposed to having it there, although I don't think it is properly there.

JUDGE DRIVER: I am opposed to putting that provision in Rule 33. I think we should bear in mind that under these rules, interrogatories may be propounded as early as ten days after the commencement of the action. I do not see how any lawyer could tell or even guess what witnesses he is going to call, particularly the defendant, ten days after the action has started.

I can see, too, that there would be great difficulty in the administration of this provision from the court's standpoint. What would the sanctions be? Just how liberal

are you to be in allowing witnesses to be called who were not listed by the parties?

I think it would create considerable difficulty as a matter of administration. I think I somewhat object to it in Rule 16 where it is discretionary, although my present view is that if that was brought to me in a pre-trial conference and I decided to act upon it, I would simply provide that the parties exchange lists of witnesses at the commencement of the trial or a few days before the trial. I do not think I would ask them to submit lists of witnesses a long time in advance. I do not think it is proper.

MR. DODGE: Even a few days before the trial you cannot tell what witnesses you are going to put on. In the very last case I tried the other day, where I was representing a defendant in a contract case, I had witnesses in the court room that I didn't know whether I would have to call or not.

JUDGE DRIVER: That is right.

MR. DODGE: It turned out I didn't have to call them because the plaintiff did not make it necessary by his testimony.

MR. PRYOR: When we had this up before, I said I had experience in several cases where I didn't know the witness until the trial was almost over.

MR. DODGE: Exactly.

MR. PRYOR: I don't think it is fair at all.

MR. DODGE: Furthermore, it is the process of the attorney's preparation rather than of the client's knowledge. The client may produce something to be considered by the attorney, but it is the attorney's job in preparation for the case to determine what witnesses he will call.

You are coming dangerously close to Hickman v. Taylor in requiring a list of witnesses by interrogatories, who, incidentally, it is impossible to name in advance.

There is tremendous opposition from the bar to this matter of the right of an interrogatory, which may be filed very early, tremendous opposition on the part of the bar, not confined to people who mainly are defending accident and liability cases, but the bar in general.

I was called up just before I left Boston by a prominent member of our bar who certainly doesn't try cases for defendants, a former president of the Boston Bar Association, who said he had been sick but had been meaning to write a letter to the Committee about these changes suggested in Rules 33 and 34. He said, "I am violently opposed to those. They are wholly impractical and not proper."

There is a letter in the file here from the present president of the Boston Bar Association and two of his associates who have a miscellaneous trial practice, who are practically never in this phase of negligence cases and personal injury cases, who are strongly opposed to it.

DEAN MORGAN: What is the advantage of getting the names of witnesses rather than the identity and location of persons having knowledge of relevant facts by way of discovery and pre-trial? Can you require the disclosure of witnesses you expect to call without disclosing your strategy?

MR. PRYOR: No.

MR. DODGE: It is the lawyer's determination as to what witnesses he will call.

MR. PRYOR: He may change his mind.

DEAN MORGAN: Under Rule 33 you can ask the question. In the Hickman case the lawyer was the one who answered the question, practically. My notion is such as has been expressed here with reference to that,that frequently there is a witness that you don't want to call and you may have to call, but the other party may have to call him. If I am for the defendant, I will want to wait to see what happens. If the scope of your cross-examination, for example, is unlimited, as it is in Massachusetts, this witness may know something about fact A which is favorable to me, and he is weak on the rest of the stuff. If I have to call him, on cross-examination he may bring in all the rest of this material which is not relevant to the particular matter on direct-examination. So as a matter of strategy, Hickman v. Taylor says I don't have to disclose my strategy or to disclose the witnesses I am going to call or intend to call at this particular time.

If I don't put this man's name in, I know it. I have tried cases where I had a group of witnesses in the back of the court room, and when the plaintiff rested I sent them away. If I had had them down as witnesses and then I sent them away, he might have said, "Well, the reason I didn't call them is because he said he was going to call them."

MR. DODGE: Don't you agree it is part of the mental process of the lawyer?

DEAN MORGAN: It is part of your plan for the trial. It is part of your strategy in a great many cases, and I think it is particularly true in personal injury cases.

JUDGE CLARK: If I may, let me make these suggestions.

First, as to Rule 33, in view of all which has happened, I am not going to object greatly to leaving this out of Rule 33. I still think there is more to be said for full and frank disclosure on both sides, but after all, we have to live and let live, so to speak. If, as I take it, there is a good deal of sentiment here in line with some sentiment expressed outside to leave it out of 33, I will go along.

Of course you want to recognize that this will be regarded as a retreat by a very substantial part of the bar. Either way we do here, we are making a real decision which is not going to be liked by many people. You cannot decide it on what is going to be satisfactory, because that just cannot be done here. Here is an impasse. We don't want to fool ourselves

that we will not get criticism either way. But I am willing to go along on 33 if that is the sentiment.

I do think it would be a very great mistake to leave it out of the pre-trial procedure because it seems to me, as we were discovering, a great many trial judges do this at pre-trial. I do not mean as a matter of course, but when they feel it is important they do exercise the power. It can easily be of very great importance.

In fact, the government has suggested instances of the kind I think we can well imagine in an antitrust case, for example, in a case involving grain violations all over the country, where it was a question of how broadly the issue must be set involving different trade practices in different parts of the country. Knowing the witnesses who were to be relied on, if you had witnesses involving farm machinery in South Dakota, you naturally would try to frame the issue in terms of other witnesses from South Dakota, but you would not necessarily then go into a battle over Georgia.

There are matters of that kind which I think can be very valuable and very important.

I do think there may be some question of time, just as Judge Driver suggested and as the Department itself stresses on that point.

I should think it might be well to put in something like this in 16(4). "The disclosure" -- and I will substitute

some phraseology of this kind "before the trial" or "before the opening of the trial", or something of that matter.

The Department has a very much more elaborate provision. This is their provision:

> "(4) The desirability of setting a date normally not to exceed 20 days prior to the trial of an action, for the disclosure of the identity of witnesses expected to be called at the trial, provided such disclosure is in the public interest, and the limitation of the number of expert witnesses."

It would seem to me it could be done more simply and quickly by some such provision as I have in mind. We can consider these matters in detail later. I really think it would be unfortunate to tie the hands of the judge at the pre-trial.

JUDGE DRIVER: Of course Rule 16 is wholly discretionary. As Bob just mentioned here, I think one advantage of the voluntary interchange of a list of witnesses would be to indicate to the court and to counsel the probable length of trial, and it would enable the court in making up its calendar to estimate more closely than if he had no idea how many witnesses would be called.

CHAIRMAN MITCHELL: If you would leave it out of Rule 33, I think a note ought to be put under the head of that rule referring to the fact that we considered the proposition

and giving our reasons for not adopting it. They have been outlined here very clearly in some respects. There is a very strong argument for the impracticability of demanding a list of witnesses at any particular stage of the case. It involves questions of administration, when you knew he was a witness and that sort of thing. It gets you in very deep water, I think, to require a statement.

MR. DODGE: The whole thing so far as it is necessary to go, it seems to me, is covered fully by our present Rule 26, which gives the location and enables you to find out "the identity and location of persons having knowledge of relevant facts."

Transplanting that into an interrogatory to be filed as a matter of right and enforceable as a matter of right by the court, is wholly impracticable, and it is out of the question to answer such an interrogatory. It seems to me that the call for it is really contrary to the decision in the Hickman case.

JUDGE CLARK: One of the leading treatises takes the position that it is desirable in federal practice. Of course, the way this first started was that there were conflicting decisions. I think most -- that may be dangerous to say. I think perhaps numerically there are more decisions refusing the names of the witnesses than otherwise, but there were decisions both ways. Some judges permitted it and some did

not.

Then we have, of course, the example of New Jersey where it is definitely done. Then there is the additional matter of pre-trial which, so far as I know, had not gotten definitely into the decisions, which would be less likely to get into the decisions. It appears to be the practice. At least it has been pointed out that some of the judges do it pre-trial.

MR. PRYOR: I move that the provision, the amendment to Rule 33 with respect to providing a list of witnesses, be eliminated.

MR. DODGE: I second the motion.

JUDGE CLARK: It has been moved and seconded that the provision in Rule 33 as to listing witnesses be eliminated. Do you wish to discuss that further? If not, all those in favor will raise their hands. Nine. All those opposed. None.

Judge Driver, do you wish to make some motion about 16(4)?

JUDGE DRIVER: I move to retain that with the suggested change in language which you made a while ago, Judge Clark, that disclosure prior to trial of the identity of witnesses be included there as a possible subject of consideration.

DEAN MORGAN: Judge, may I ask how at the pre-trial, prior to trial, you would handle a situation where I said, "There are some people I don't know I am going to call." That is what I want to know.

JUDGE DRIVER: I think I would require reasonably good faith or appearance of good faith. I don't think you could enforce it and make an ironclad rule that you must now disclose every witness you are going to call. I think if I were satisfied -- and you can tell pretty well -- that the attorney was making in good faith the best disclosure he could at the time it was made, I would be liberal in the matter of permitting him to call at the trial others he had not named.

DEAN MORGAN: Suppose I say I can't do it without disclosing my strategy and I cite Hickman v. Taylor to you, what are you going to do? Are you going to tell me I have to come along with that list?

JUDGE DRIVER: I think it is always a question of timing as to when strategy is disclosed. Ordinarily the plaintiff has to disclose strategy when he makes his opening statement to the court or the jury, and I don't see that there is any great harm done about strategy being disclosed a few days before the trial rather than at the beginning.

JUDGE CLARK: Hickman v. Taylor is not absolute. This would be discretionary with the court.

DEAN MORGAN: There would be plenty of cases where, if I could make my case without the witness and I thought the defendant would have a hard time without that witness, I would hold back and if the defendant called him I would have a lot of material that I could smash him with.

JUDGE DRIVER: I think it is a matter that is not capable of strict enforcement. How can a defendant possibly tell at the outset of a case what witnesses he is going to call?

DEAN MORGAN: He can't.

JUDGE DRIVER: Even if he knows what witnesses the plaintiff is going to call, he doesn't know what those witnesses are going to testify. The testimony may take a turn which requires him to call witnesses that he never thought of at the beginning of the case. That has to be taken into consideration by the judge.

MR. PRYOR: It may cause him not to call witnesses that he has already given the other side notice he was going to call, too, and it may embarrass him.

DEAN MORGAN: The other side may say they were relying on that.

JUDGE DRIVER: I notice some criticism was that counsel would be inclined to comment, particularly before a jury, on the naming of a witness in a list who was not called. You must remember that in federal court the judge always has the last say. He instructs after the argument. If an attempt were made to do that in my court, I would tell the jury to disregard that; that the court required these people to submit a list of witnesses and that no significance should be given whatsoever to the calling or not calling of a witness who was

listed. I think the judge could control that sort of possible abuse and would do so, I think.

MR. PRYOR: Do you think the jury could be compelled to regard the court's admonition?

JUDGE DRIVER: No. Possibly I would have to give it in connection with an admonition that they are not bound by my comment on the evidence. I think they are usually pretty much influenced by what the trial judge says.

JUDGE CLARK: There is a motion to approve 16(4) in modified form:

"The disclosure prior to the trial of the identity of witnesses expected to be called at the trial".

All those in favor will raise their right hands, please.

MR. LEMANN: What is the motion?

JUDGE CLARK: It is to approve 16(4) with the modification that I have read, the modification which is to insert after "disclosure" the words "prior to the trial".

MR. LEMANN: May I inquire whether under the federal rules some judges are doing it now?

PROFESSOR WRIGHT: A great many are, our material indicates.

MR. LEMANN: There are a great many already?

JUDGE CLARK: Yes, there are, Mr. Lemann.

MR. LEMANN: This would be nothing more than perhaps

an admonition to judges who are not doing it to think of doing it.

JUDGE CLARK: That is right.

MR. LEMANN: It may make the reluctant ones more inclined to do it. I don't know how significant that is going to be, and I am sure you are going always to face a great variety of practices among the district judges. Some of them are hardboiled, some of them are more inclined to consider generally the plaintiff's side, some the defendant's side, and vice versa. Some entertain motions for more definite particulars when others won't. Some of them will let you get by with a pleading when others won't. You cannot eliminate all that, I think.

This would be at most a suggestion that "You better do this more than you are now doing it," isn't that right?

JUDGE CLARK: That is right.

JUDGE DRIVER: I would like to make my position clear. I made this motion in order to get it before the body. I am in no sense a crusader for this particular provision. I am rather lukewarm on it.

I think it is all right to put it in pre-trial for possible use. Personally, I would not use it in every case. I think I would use it only in special cases.

MR. PRYOR: You can use it without this rule.

JUDGE DRIVER: I don't know.

MR. LEMANN: You wouldn't need it, Judge.

JUDGE DRIVER: I think it is a good idea to spell it out.

MR. TOLMAN: I am just a little bit worried, if we should take it out now, that some judges might draw the inference that we didn't think it was a thing which should be done at pre-trial. I think where they do it and get along well with it, it would be too bad to have it stopped. I think it is the kind of thing which depends a good deal upon the habit of the bar locally.

MR. LEMANN: I should think if we adopted it, it might be desirable to add a note for the bar and the Supreme Court saying that this is not to say that the Committee feels that in every case at the pre-trial conference disclosure of the names of witnesses should be required, but this is a matter which addresses itself to the discretion of the judge. The judges already have that power, and the purpose of this amendment is merely to make it additionally clear that they have that power.

MR. DODGE: Suppose a defendant's lawyer says at the pre-trial conference, "I suppose if I have to go into my evidence after the close of the plaintiff's case I shall put the defendant on the stand. As to other witnesses, I cannot say until I hear the plaintiff's evidence whether I shall call a single one of them or not." Does he have to list all of the

witnesses that he might call?

JUDGE DRIVER: The language of the amendment, Mr. Dodge, is the identity of witnesses that the party expects to call at that time. He could very well say, "I did expect to call them then, but I changed my mind, necessarily so."

MR. DODGE: "I shall have to call them if the plaintiff makes it necessary by his testimony. Otherwise, I cannot say that I expect definitely to call them."

JUDGE CLARK: All right, shall we vote now or do you wish to discuss it further? Do you wish to vote on the adoption of the amendment with this modification? All those in favor will raise their right hands. Five. All those opposed. Five.

I don't know. What do we do from that point on? I think maybe we ought to list the gentlemen either way. Let's see if I can recall. I am not sure.

JUDGE DRIVER: We will raise our hands again.

JUDGE CLARK: Yes.

CHAIRMAN MITCHELL: What is this, the ayes?

JUDGE CLARK: The ayes, to leave it in the pre-trial rule. I want to get the names: Judge Driver, Mr. Tolman, Dean Pirsig, myself, and the Chairman, Mr. Mitchell.

Those opposed are: Moore, Morgan, Dodge, Pryor, and Lemann.

JUDGE DRIVER: I don't think we should submit anything which is evenly divided.

MR. TOLMAN: I didn't hear you.

JUDGE DRIVER: It seems to me we should not submit any proposed rule to the Supreme Court on which we are evenly divided. I think the supporters of an amendment have the affirmative of the issue and should show a majority in order to submit a rule to the Supreme Court.

JUDGE CLARK: There was a suggestion, of course, if we did not put this in 16(4), that we give an explanation in a note to Rule 33 which would show pretty clearly that in our judgment the power was not there, which would settle the conflict that way. I don't know what the note to Rule 16 should do, whether that should tell the judge that at pre-trial they do not have the power, or not.

MR. LEMANN: I should think the note would say that the rule as it exists gives the power, and the Committee's information is that many judges are exercising the power and we don't think anything further is required; that it is a matter which addresses itself to the discretion of the district judges in connection with pre-trial procedure.

JUDGE CLARK: Then should there be an affirmative note, a note that this was not put in because the judges have the power? What is to be done? I suggest that it leads to a certain amount of confusion among the judges who are interested. Rule 33 now definitely will leave it out, with the explanation that they have not the power.

MR. LEMANN: They have not the power under 33. After considering all the views that we have received, we have reached the conclusion that this should not be required under 33, and therefore we withdraw that proposal. Under 16 we say, not that they should not have the power, but that we think the power sufficiently exists under the present rule and that the judges are exercising it under the present rule where they think it is proper to do so. There may be cases where it is proper to do so and cases where it is not proper to do so.

JUDGE DRIVER: I was influenced to vote against 33 because I thought it was impractical. A former judge on our supreme court said he was liberal but he didn't think that liberality required him to get his butter directly from the bull. I think it is an impractical measure. I am not retreating from liberality in discovery.

MR. DODGE: The liberality of Rule 26 takes care of this situation.

MR. TOLMAN: What are we going to do as a result of this discussion?

JUDGE CLARK: I am not fully sure, but I thought I would read the transcript and try to make out. I understood from Mr. Lemann that he thought we ought to put in 16(4) some suggestion that there was no rule on the subject here because there was the power, but I am not sure whether that is the general view.

MR. TOLMAN: There will be no suggestion to the Court, but there will be a note explaining the omission of the amendment because the powers are there?

JUDGE CLARK: I understood that was Mr. Lemann's suggestion.

MR. PRYOR: We present to the Court only those amendments that we approve, don't we, and we don't approve this one.

DEAN PIRSIG: I am a little bothered by that explanation. We did put it in earlier at our previous meeting.

MR. LEMANN: I thought we should have a note in our final report something like we have in Rule 8 on the form of pleadings. "As heretofore stated, an amendment requiring the disclosure of witnesses is not necessary."

DEAN PIRSIG: It seems to me that the only conclusion we can draw is that we do not want to strengthen what now is being done. That is the only conclusion that the public is going to draw.

MR. DODGE: I didn't hear what you said at first.

DEAN PIRSIG: By taking it out after having submitted it to the bar and the bench, the only conclusion which can be drawn, if we have a note in it that the judges can now do it, would be that we don't want to strengthen or encourage this particular practice beyond what is now being done. It seems to me that that is going to be the inevitable result, and the trial judges, seeing this eliminated, are going to feel that

this Committee at least doesn't want to urge the judges to do it. It seems to me that would be their position.

MR. PRYOR: I think there is some tendency to confuse this thing. Rule 16 doesn't say anything about the power of the court or that the court has to do anything. It says that these things may be considered. I think the court can consider those things without anything being said about it. It can consider the matter of witnesses, and I understand some courts are doing that.

JUDGE DRIVER: There is no requirement in our procedure that a member must be present in order to vote on a particular proposition, is there? We could submit this to Senator Pepper and have him decide it.

MR. LEMANN: Judge Dobie might also be asked to vote.

JUDGE DRIVER: That is right. I had forgotten about him.

MR. LEMANN: It is a little difficult to vote, I think, without having the benefit of the discussion. I don't know how much weight you ought to attach to a vote where the discussion has not been heard.

Paragraph (7) of the original rule says that at the pre-trial conference the court may consider "Such other matters as may aid in the disposition of the action." Isn't that enough to permit the judge to take up the matter of the disclosure of the names of witnesses?

JUDGE DRIVER: Sure. I think that would have as much weight as if we had never mentioned this at all. I am impressed by what Dean Pirsig said. We cannot escape it. Whatever kind of note we put in there, people will get the idea that we are retreating; at least, as he says, that we do not wish to strengthen the practice which we admit is prevalent in some places.

MR. LEMANN: You don't think you could cover that by a statement in a note?

JUDGE DRIVER: I don't think you can unscramble the eggs. You might try to. I don't think we could possibly correct the impression.

JUDGE CLARK: Let me put it this way. Would there be objection if we draft a slight addition to the note to Rule 16 saying that this provision was not added because the discretionary power exists?

DEAN PIRSIG: I can't get away from the fact that this has been one of the most discussed portions of our recommendations, widely discussed among the bar.

CHAIRMAN MITCHELL: That was my idea when you came to Rule 30.

JUDGE CLARK: Of course, I agree fully with Dean Pirsig. I think this is a very unfortunate retreat and will be taken so by a very large portion of our public. We ought to remember that we should not be entirely defendant's attorneys,

and I think we are going too much that way.

I was willing to give up 33 because I thought at the present stage of our development this was a rational middle course, but to have it all go it seems to me is just an announcement to Dean Roscoe Pound and his confederates -- I will change that to "associates" -- that we are all-out for the defendants, and I am sorry. I agree entirely with Dean Pirsig. After all, we were voted down and there is nothing more I can do.

I am now trying to find out how to record what the vote was. I think the vote was most unfortunate and I expect that there will be times and occasions when we can point out that it is unfortunate, but there it is. We can't change the vote. If the NACCA wants a write-up, I think they are perfectly entitled to write up that the vote was an even division.

CHAIRMAN MITCHELL: I heard somebody over on the left wing of the team here give some very cogent reasons why the rule we are talking about is impractical, for the simple reason that the time of making disclosure involves confusion because you do not know whether you are going to call them or not. That is why I suggested that under Rule 33 we put a note giving the story about the impracticability of this witness rule at an early stage of the case, or even at any point of the case to know exactly whom you will have to call or expect to call, and dispose of the matter as a required procedure under Rule 33 on the ground that we think it is impractical. In such a note we

might refer to some of the later rules which may give a suggestion to the court that he can call for that information. We can refer to Rule 16 as giving him discretionary power under subdivision (7), "Such other matters as may aid in the disposition of the action." Make it clear that we are not trying to disturb the discretionary authority of the court if he thinks it can be practically and fairly done, and still make it clear that we are not requiring the court to do it.

MR. LEMANN: I should think that we could protect against the drawing of the inferences which Dean Pirsig fears by writing a note something like this:

"The Committee has received many comments on the proposed changes in Rule 16, paragraph (4), and in Rule 33. After considering all of these comments, which show a great difference of opinion at the bar, largely perhaps reflecting the experience of writers in the trial of cases as to whether they represent plaintiffs or defendants, the Committee has reached the conclusion that the proposed requirement under Rule 33 of the disclosure of the names of witnesses is not desirable because of the difficulty of knowing at the time at which interrogatories may be propounded what witnesses will be used. In considering the proposed amendment to Rule 16, the Committee is advised that many district judges, under the rule as it now exists and particularly subdivision (7), are exercising

the power to require the disclosure of the names of witnesses. The Committee is of the opinion that in many cases this practice is followed. This will be a matter requiring decision in each case according to the circumstances. This Committee has concluded that it should be left to that situation for the discretion of the district judge and that no further amendment is required."

That can be much improved on, of course, but something of that sort it seems to me would take the teeth out of such criticism as you fear, Dean Pirsig, or such inference as you fear. Or you might do it more effectively by other language. It is all a matter of emphasis and degree.

JUDGE CLARK: In order to get ahead, unless there is objection we will try to work out something after we get your draft from the reporter.

MR. LEMANN: I was talking to Mr. Tolman here, and the Department of Justice has indicated some objections to a number of these changes. We were just wondering how far they will carry their hostility in the way of active representations to the Court.

CHAIRMAN MITCHELL: I don't know, but I imagine when they have taken a stand so positively on some things, they will undoubtedly present them to the Court.

JUDGE CLARK: I may be unduly optimistic, but these seem to be much milder, and I am going to recommend that we take

their new provision on 71A on jury trial. When you come to look at that, it seems to me it is the mildest thing they have suggested yet. It is a long proposal. I don't want to take it up here. I wish there was some way of making a bargain with them that if we took that, they would be nice. I don't know that there is.

I do think, quite seriously, that this is a more moderate statement on that basis than we have had before. Their discussion appears at pages 28 to 31 of the Department of Justice proposal. I think it is well worth considering taking that. That is so much milder than any of the provisions in Congress, and it is not very far from what we have been suggesting. It does reserve the power to have a commission in certain cases.

Many of these other things I don't think they are pushing as strenuously as might be indicated. Take the matter of the discussion that we have last had. They didn't want the interrogatories as to witnesses in Rule 33. They did agree to accept the discovery provision as to identity of witnesses, only they wanted it limited to just before trial. They had that longer provision which I wrote.

We are doing so many things along the line they want, if we gave them the provision they have made so much about, about jury trial, as I am inclined definitely to recommend, I should think they would be a little unlikely or it would be a

little unusual for them to go to the Court.

MR. PRYOR: That isn't greatly different from what we have provided, is it?

JUDGE CLARK: I think there is a very small difference. I was really quite surprised when I read that in the late recesses of last night. I wondered how they had calmed down some of the hotheads in the Department.

CHAIRMAN MITCHELL: You probably know the answer. The Senate committee and the House committee required them to make a report of their experience with commissions and juries, and made them disclose the little fellows being hammered by the jury threat into settling the case for what the government wanted to pay, and the big fellows hiring lawyers and getting enormous increases over what the government had offered. They haven't a good record on that at all.

I think that is beyond the scope of what we are talking about now. We had better not get into that.

JUDGE CLARK: Let us go on with Rule 33, because there are several things that are important.

The next thing in logical course would be the giving up of statements of the parties, "copies of all statements concerning the action or its subject matter previously given by the interrogating party". What have you on that?

PROFESSOR WRIGHT: In the late comments on that we have again the same picture of divided opinion, perhaps the

majority opposed, but counting noses here is even less reliable than with respect to any of the other rules, because so many of the people who are opposed to this misread the amendment. We have gotten so many critical comments which assume that this means that you can get the copy of the statement of any witness, although the language and note are both clearly limiting it to a copy of the plaintiff's own statement.

Judge Nordbye's comments on this were received yesterday and seem to be very clearly reasoned. Judge Nordbye concluded that it was desirable to have uniformity of rulings in this regard among the federal courts, and then he states "in that many states now have incorporated in their rules the unqualified right of the plaintiff to obtain a copy of his statement, the proposed amendment should be adopted. Certainly, a statement of the plaintiff is a document which may be used for the purpose of impeachment or it may be used as substantive evidence, and in keeping with the spirit of the rules, it constitutes an item of evidence which should be made available to both litigants before trial."

The argument of those who have been critical, of those who understand what the amendment properly means, is that this would be an invitation to perjury; that the only reason the plaintiff would want his own statement would be so that he could conform his testimony at the trial to what he told the claim agent.

Among some recent letters that came in in opposition, there is one from a lawyer in Cincinnati by the name of Philip Schneider, who is opposed to the proposed amendment requiring copies of plaintiff's statement. "Frequently statements are taken hurriedly at places where concentrated thought is difficult if not impossible, and neither the witness nor the party should be so bound by the same."

MR. PRYOR: Judge Nordbye was against this in principle, though, as I understood you.

PROFESSOR WRIGHT: No. Judge Nordbye is for this.

MR. PRYOR: He wound up stating that for the sake of uniformity he was for it, but he was against the principle of it, as I understand it.

PROFESSOR WRIGHT: I don't think that is quite right, Mr. Pryor. He states the arguments both ways. At page 13 of the comments of Nordbye which we got yesterday he states the argument which the people who are opposed to this present, that it would be an invitation to perjury. He states the argument in favor, that it is unfair to deprive the plaintiff of information. Then he says, "My view is that it is desirable", and he lists three reasons, (1) to get uniformity of rulings, (2) since many states now have statutes which call for this, and (3) "in keeping with the spirit of the rules, it constitutes an item of evidence which should be made available to both litigants before trial."

I should think Judge Nordbye is in favor of the principle.

MR. PRYOR: You may be right, and I suppose you are.

JUDGE CLARK: In this connection, you might want to look again at the note which appears in the green booklet, page 29, and the first full paragraph, which deals with this:

> "The amendment resolves another mooted question," and so forth. "Such amendment is consonant with the public policy evidenced by such statutes as," naming several statutes.

Those are the types of statutes that I take it Judge Nordbye has in mind. It seems to me this is desirable, and I hope it will be adopted.

Now will you discuss it?

CHAIRMAN MITCHELL: Exactly what amendment are we discussing now?

JUDGE CLARK: I am trying to divide up the question as to Rule 33. Look at the green booklet, page 28, looking at the italicized lines. We have stricken out the part down to the comma in line 35, and what we are discussing at the moment is "copies of all statements concerning the action or its subject matter previously given by the interrogating party". That is all we are taking up at the moment, because we shall have to consider separately the rest of them. We are taking it degree by degree.

JUDGE DRIVER: Judge Clark nods at me. I think perhaps I have been talking too much already. I am in favor of this provision. It applies to both parties. Practically it would be usually the plaintiff who gives a statement in a personal injury case shortly after the event. It is a very important piece of evidence.

CHAIRMAN MITCHELL: He cannot remember what he said. That is the point.

JUDGE DRIVER: I think the plaintiff's attorney is entitled to that piece of very important evidence. Certainly it offers an opportunity to make his testimony conform to it, but that is true of all these liberal provisions of the discovery rules. I don't think anybody would seriously contend that a plaintiff should not be given a copy of his deposition which is taken early in the proceedings, and yet here is something he has said which it might be in the interest of truth not to let him see again until the trial, but I think that the plaintiff should be entitled or either party should be entitled to a statement which has been given.

MR. LEMANN: Is it plain that the plaintiff can get a copy of the deposition which has been taken?

JUDGE DRIVER: Oh, yes, unless the parties agree. The rules require that it be transcribed and filed with the clerk, unless the parties agree otherwise. Of course the plaintiff doesn't agree otherwise if his own deposition is taken.

CHAIRMAN MITCHELL: Can't we vote now on the question of whether the party who has given a statement of his position in the case should be entitled to receive a copy of it, whichever party he is and whoever has it?

JUDGE DRIVER: That is what we are considering now.

CHAIRMAN MITCHELL: Let's vote on that.

MR. PRYOR: Personally, I am against this, but I can see some merit in it. The fellow who is truthful doesn't need to remember what he said in his statement, because he has stated the facts and memory doesn't very often play tricks with the fellow who is truthful. At the same time, I can see the possibility that if he is furnished with his statement it may prevent his telling a different story at the trial.

DEAN MORGAN: The point they make is that it will give him plenty of opportunity to think up an explanation.

MR. PRYOR: He would have that, all right.

MR. DODGE: Suppose there is a statement taken by the lawyer for the defendant in the course of his preparation.

JUDGE CLARK: Of course this would require any statement to be given when it is a statement of the parties, whether it was a statement taken by the lawyers or anybody else. It could be so awfully harsh really that I think this ought to be true. Take a fellow who is knocked down, and after the accident a claim agent appears and takes down what he says.

CHAIRMAN MITCHELL: At the hospital.

JUDGE CLARK: Yes, or maybe even before he is carted to the hospital. The lawyer comes in later and the case is all fixed up against him, and the lawyer cannot even get what his own client has said. It seems to me awfully harsh. It may be if the lawyer gets the statement he will say, "My case is gone, and I will get out if you will give me the costs," or something like that. It may facilitate disposition of the case that way.

Any way you look at it, it seems to me it is an awfully harsh requirement.

MR. PRYOR: He cannot get what his client has said before his client found out what was necessary in order to make a case.

JUDGE CLARK: That, of course, goes on the supposition of believing the worst possible of human nature. That would dynamite all the discovery, of course. That is the favorite general argument against discovery, because it does give a chance for perjury, and so on, and no one is wise enough to test it. We say we take our chances, so to speak, with perjury. We bring everything out in the open and believe that that is the best all-around measure.

MR. PRYOR: I am just presenting the other side of it. I am going to vote for it.

MR. LEMANN: To preserve the apparent unanimity of opinion in the comment which has been received among the lawyers for defendants, reflecting their poor opinion of the

veracity of a person who brings a suit for damages. I get the impression from reading the comments that most of the people who bring damage suits are perjurers and more or less rascals, and it seems rather depressing to see the opinion expressed to that extent.

Of course, we always have a small percentage of such people in trying cases, but if you have read these letters I think you would get the view that perjury was very common.

DEAN MORGAN: Of course, the people who are objecting to this kind of thing most strongly would be the insurance people, because they have their claim agent out getting a statement just as quickly as possible, and then usually they frame the statement so it is highly misleading when it is given that way.

MR. LEMANN: I think also some of the people do not realize that this new provision would apply only to the statement of the parties. Some of them have read this as an attempt to break down the barrier to the production of documents. While we have said in our note that it doesn't, I think perhaps we could make that statement somewhat more emphatic.

DEAN MORGAN: There are statutes in some states which provide that any statement taken from the plaintiff while in the hospital, by any lawyer or any person who is not requested by the plaintiff to take it, shall not be admitted, just to overcome this kind of evil. I agree that this personal injury

game is rotten, but the rottenness isn't all on one side.

JUDGE CLARK: There is a Minnesota statute that way.

". . . if the statement was by an injured person, it may not be used in evidence unless a copy is given the injured person within 30 days after the statement is made, and if the statement was taken within 30 days after the injuries were sustained, it is presumably fraudulent." Minnesota Statute 602.01.

CHAIRMAN MITCHELL: Good old Minnesota!

JUDGE DRIVER: The more experience I have on the bench, the more I am inclined to think there is a lot of subconscious testimony to conform to self-interest. If you have a collision on one of these streets and two drivers get out, the echoes haven't died away until each is reconstructing the accident and the facts to conform to his own idea of what should have been done rather than what was done.

MR. LEMANN: Plus the education which you receive in the interval from able counsel.

JUDGE DRIVER: It does improve with time.

JUDGE CLARK: We will vote on this particular provision. All of those in favor raise their hands. Ten. All those opposed. There is none. That is voted for.

Next we come to the rest of that provision, lines 38 to 42 of page 28 of Rule 33, "or copies of such documents, papers, books, accounts, letters, or photographs, not privi-

leged, as are relevant to the answers required, unless opportunity for their examination and copying be afforded."

Let me give you a little background unless you already have it. The question here, I take it, is largely raised as to whether you should have to go to the court first and whether you should show good cause. Before this, of course, there was no direct provision in this rule. There was a provision in Rule 34 to which we are coming soon, providing for documents.

A good deal of question has developed as to whether you did not always have to go back to 34, that is, some steps of pure formalism. What you might well have to do is first to address an interrogatory under Rule 33 as to whether there was any such paper in existence. Learning that there was, then you proceed by separate proceeding under Rule 34, and that seems like undue and unnecessary formalism.

That came up, as a matter of fact, in the Hickman case, you may remember. The question there was which rule the request there should come under.

It seems as though if the statement is procurable, we are making too much fuss as to the ways and means.

So this regularizes the procedure. You will see that this is not a general provision, but it is a direction in effect to attach, in answering questions, answering interrogatories, copies of the documents that are relevant to the answers required or, if that isn't feasible, the answerer offers

opportunity for their examination and copying.

I must say I am surprised there is so much discussion about this. This would seem to be a rather simple regularization of something which would come up in rather natural course.

Mr. Wright, what have you on that?

PROFESSOR WRIGHT: There have been a number of recent comments on it and some pretty good comments taking several different positions. Among the recent letters there have been a number of eminent people who favor the amendment as it stands, people like John Lord O'Brian. Professor Field of Harvard says, "The practice has worked well for a century in my own State of Massachusetts." Judge Nordbye says it will avoid circuity of motions. The Department of Justice says it will put an end to the present cumbersome practice. That is what we perhaps call the favorable position.

There have been a number of letters which reject the amendment on either of two grounds. Some of them say this will wipe out the Hickman decision and will result in wholesale invasion of lawyers' files. There are others who say this is not so, but that the burden of producing documents is so cumbersome upon the defendant, so onerous, that we ought to have the special procedure of motion.

A third position seems to be taken by some of the leading insurance lawyers, among others, Mr. Stanley Morris, the President of the Insurance Counsel Association, who approves

of allowing an interrogatory calling for a copy of a document if you further provide that on a motion for a protective order as to the document, that the person trying to get the document would have to carry the burden of showing cause to get it, rather than the party who seeks to protect the document having the burden of showing why he should not give it up.

There is one other point on detail which you may wish to consider, and that is that a lawyer in St. Louis raises the question whether or not this should not state "designated dlcuments", as a similar phrase does in Rule 34. He says if you don't so limit it, people are likely to use the words of the rule and send an interrogatory saying "Please send such documents, et cetera, not privileged, which are relevant to your answers to interrogatories," without giving indication of just what these may be.

JUDGE CLARK: All right. Will you discuss it?

DEAN MORGAN: I think our note says it does not affect the Hickman case, but the lawyers on both sides say it does. If the lawyers who are reading this on both sides assume it does, it seems to me there is no sense in our saying we have it drawn so it doesn't affect it.

We get in the position, as I said before, of the old yearbook judge who, when counsel was arguing for a particular construction of a statute, said, "Don't gloss this statute. We drew it. We know what it means."

JUDGE DRIVER: I think that argument would have more weight if our comment were informed comment. So much of this comment is obviously uninformed. The NACCA has written out to its members, "You ought to write in now about Rule 33 and see that you ask them to adopt it," and then some defense association, I presume, has sent the word out to the other people. A great many of these comments are uninformed, and I don't think they should be given a great deal of weight as to whether this has encroached upon Hickman or not. I don't think it has, and I don't think it will.

MR. PRYOR: I don't think it affects the Hickman case, but I am somewhat impressed by the suggestion referred to about using the words "designated" in there; "designated documents, papers, books, accounts, letters, or photographs, not privileged," leaving out "as are relevant" and so forth.

CHAIRMAN MITCHELL: You want the word "designated" in, do you?

MR. PRYOR: Yes.

JUDGE DRIVER: I think in that connection we should bear in mind that submitting interrogatories is a discovery device. A party may not know whether a certain document is in existence. As I understand it, what we are trying to do is to make one step instead of two here. We don't want to have him find out whether there is a document in one proceeding, and then try to get it in another, as has been the case formerly

under Rules 33 and 34. I don't know how broad the designated restriction would be, but a party should be able to ask, "Is there a letter of such-and-such date in your possession?" or "Do you have a contract so-and-so?" and then the next question, "If so, set out a copy or give me an opportunity to examine it and copy it." That privilege of finding out by interrogatory whether there is a document, and then of demanding it if there is, should be protected.

MR. TOLMAN: Isn't the language of this amendment pretty broad, though, and justifies the assumption that this is a kind of "Open Sesame" for any kind of document at all? I wonder if it isn't possible to make it more restrictive.

MR. PRYOR: You do that by saying "designated".

JUDGE DRIVER: I quite agree, I don't think they should be given blanket privilege to say, "Bring in all the documents you have which are relevant to your answers." There might be a truckload of them.

MR. TOLMAN: I think the breadth of the language here is what makes people think that the Hickman case is overruled.

PROFESSOR WRIGHT: Judge Driver, you asked about what the scope of "designated" would be. I was looking through some material prepared for the Committee two years ago. The recent decisions have very uniformly given a liberal reading to the word "designated" in Rule 34. There were some early decisions

which restricted it and said you must be quite specific in order to comply with the word "designated." In 1946 the Committee in a note said it wasn't going to amend the word "designated". It said it would be unnecessary, and indicated in its note that it approved of a liberal interpretation of that word. Since then the cases have been holding generally that all that is necessary by "designated" is that you must describe them so that when a person looks at a document he can tell whether it is a document which is wanted or a document which is not wanted. No greater degree of specificity is required.

MR. PRYOR: That is an argument for inserting the word "designated."

JUDGE CLARK: I think we might put in the word "designated." When Mr. Pryor read this over, I understood him to leave out later on in line 40 "as are relevant to the answers required". I don't think I object. Didn't you leave it out?

MR. PRYOR: I didn't mean to leave that out.

JUDGE CLARK: Then I take it back.

MR. PRYOR: If I said that, I didn't mean it.

JUDGE CLARK: I thought that was broadening it a good deal. That probably was not intended.

I think the proposal at the moment is to insert after the word "such" in line 38 the word "designated", "such designated documents," et cetera, "as are relevant to the answers

required".

CHAIRMAN MITCHELL: What you mean is, there should be a sufficient description to identify what you are asking for.

MR. PRYOR: That is correct. I think that is clear in the Committee's previous note.

JUDGE DRIVER: It could be at any stage of the interrogatory conditional upon there being such a document.

PROFESSOR MOORE: Assuming we want to keep the Hickman v. Taylor rule, it seems to me as this is now drafted it runs afoul of Hickman v. Taylor.

DEAN MORGAN: I think so, too.

PROFESSOR MOORE: This says the party under Rule 33 can have these materials and that he doesn't have to show cause. Hickman v. Taylor said that the matters in the attorney's files were not privileged. As it is now broadly drafted, I don't see what would keep one side from framing interrogatories and in effect requiring the adverse party to turn over everything he has in his files in the way of statements taken.

MR. DODGE: It certainly comes dangerously close to the Hickman decision. The words "not privileged" had to be construed anew in the Hickman decision in a way much broader than the old fashioned lawyer's privilege.

CHAIRMAN MITCHELL: Couldn't we state in a note --

DEAN MORGAN: But the lawyers on both sides don't

agree. The thing that convinced me not to vote for this was the statements of plaintiffs' lawyers. They say without this we have to show a good reason for getting these statements which have been taken right after the accident, and so forth. Now we just have to go in and get them. There were several letters of that kind. When you find the defendants' lawyers doing the same thing, what is the use of our sitting here and using our note for an interpretation of it? If that is true, we ought to be able to draft it so people would not misunderstand it.

JUDGE CLARK: How could it do to insert after the words "not privileged" in line 39 "or otherwise immune from discovery"?

MR. DODGE: That would help.

MR. PRYOR: Yes.

CHAIRMAN MITCHELL: Then your note would say that the word "immune" was intended, among other things, to prevent the required production of material quasi-privileged under the Hickman case.

PROFESSOR MOORE: The trouble with that is that the Hickman case said those statements in the attorney's files were not privileged and they were not immune from discovery, provided the plaintiff showed good cause for getting them. I don't see what these few additional words, "not immune from discovery", are going to do. Hickman v. Taylor said those

statements were not immune from discovery under proper circumstances.

DEAN MORGAN: They said specifically you had to show good cause.

PROFESSOR MOORE: And if you could show good cause, you could see those statements.

DEAN MORGAN: Yes.

MR. PRYOR: Here we are not requiring a showing of good cause.

MR. DODGE: A good many of these papers must necessaily be in the files of the attorney, which comes within what the Court says in the Hickman case.

> "Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney."

These papers if in the files of the attorney are exempt from discovery unless the court orders that they should be.

JUDGE CLARK: The way this would operate, I take it, is that if the person interrogated wanted to urge or answer that the papers could not be discovered, that he could not be required to produce them, the moving party would seek an order under Rule 37(a) compelling him to produce the document. Then in response to one of the suggestions from, I think it was the head of the Insurance Counsel, I should suppose that there be

would have to show the reasons for it. That is, on this question of who has to show risk, I should think it would have to be the moving party. We could put in an extra provision so stating, if it was important. We could of course put it in here or we could put it in Rule 37(a), where the penalties are given under Rule 33.

PROFESSOR MOORE: I don't think the person who has sought these documents on interrogatories need go to Rule 37(a) necessarily. Rule 37(d) also deals with failure of a party to serve answers to interrogatories submitted under Rule 33. If he doesn't comply there properly, the court can "strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party."

MR. DODGE: In other words, you have to spell it out in Rule 33.

PROFESSOR WRIGHT: In my book, at least, I take the view that only 37(a) would apply in these circumstances, since he would serve an answer to the interrogatories and therefore 37(d) would not apply. Instead, you have to proceed under 37(a) by a motion to compel an answer.

PROFESSOR MOORE: What is the answer to the proposition, though, that under 33(a), as amended now, the interrogating party has an absolute right to these copies, and so on? If he can show that, say, the defendant has failed to answer

those interrogatories properly, to wit, by attaching copies of papers, documents, and so on, why isn't he entitled to the sanctions of 37(d)?

JUDGE CLARK: I should think it might well be desirable in 37(a). It seems to me what Professor Wright says about 37(d) must be the situation. There is no failure here to make the answer. You are seeking to get a fuller interrogation. Therefore, we turn to 37(a), and I think in 37(a) there might well be inserted a new provision after the reference to Rule 33. I don't want to require you to frame such a sentence offhand, but the general intention would be something like this: "If a party seeks the attachment of copies," and so forth, "to interrogatories under Rule 33, he must show" -- and now I am not sure just how to word this, but here again I will say "he must show that the matter is properly to be discovered to him."

As I say, I am not trying to fashion the language, but that is the general line.

We are trying to fashion a workable rule which will cover various situations, and there are always difficulties in that. But if we don't take any of these devices, do we want to require the formalism which probably in a great many cases, and I think probably in the majority of cases, will be necessary? I think there is a good deal of idea nowadays of trying a case not by concealment, that the better way is to yield up

what you have. If there are parties and counsel who want to do that, we ought to have the machinery to do it. The formalism of taking two steps for this is really burdensome all around, and we ought to be able to devise some way of providing for the very simple thing of attaching the ordinary documents to the interrogatories. That is the easiest way of doing it.

I suggest that something of the kind that I have put in, which is the admonition to the court to go slow, would cover the situation and yet allow the ordinary and I still believe it would be the usual case to run along simply as it would if left to itself.

MR. LEMANN: Your suggestion amounts to this, as I understand it. Where you didn't have to show good cause to get these things, if the party whom you are asking says, "I won't give them to you because I don't think you should have them," then no penalty could be visited upon the fellow refusing to give them unless good cause were shown.

JUDGE CLARK: That is about what it amounts to, yes. It is to get machinery which will take care of the ordinary cases, and then when you get the more difficult ones, yes, just so.

MR. PRYOR: It puts the burden on the proponent in order to enforce his request.

JUDGE CLARK: Yes.

MR. LEMANN: He would not be much better off, I should

think, in many cases under Judge Clark's present suggestion than he would have been under the original rule. Under the original rule he would have had to show good cause to begin with. Under Judge Clark's rule he would have to show good cause to enforce his right. It is just a question of when he shows the good cause, and mechanically it may be in a moot case you would take something off the burden of the district judge because you would get the order in the first instance ex parte without it. That might be a compromise suggestion.

JUDGE DRIVER: One thing that impresses me is how infrequently lawyers come to the judge with their deposition and discovery problems. I have very little difficulty with it. The lawyers learn what is required and they work out things between themselves. If they think there is good ground for refusing, they come in usually and present it to me on a specified motion day, and I decide whether discovery is proper or not. We have no practical difficulty on that score.

MR. LEMANN: I was wondering whether there had been any study made to indicate in what districts most of these cases come up. I suppose naturally there would be a larger number of cases from New York because that is where you have the most litigation.

MR. TOLMAN: I think more of them come from Philadelphia, don't you think so, Judge Clark? That seems to be a very litigious place.

CHAIRMAN MITCHELL: That is where Hickman v. Taylor came from.

MR. TOLMAN: Yes.

JUDGE DRIVER: There is a lot of complaint about discovery depositions in New York.

MR. TOLMAN: There is. A lot of the business on their heavy motion calendars is discovery, enforced answers to interrogatories.

JUDGE DRIVER: I may be unusually fortunate, but in discussion with other judges on the Pacific Coast, there is not much difficulty there as far as I can see.

MR. LEMANN: Mr. Pryor, have you had much experience with objections to depositions?

MR. PRYOR: I don't think we have had as much of that in the federal courts as we have in the state courts.

MR. LEMANN: You have a pretty broad discovery statute.

MR. PRYOR: Practically the same as the federal.

MR. TOLMAN: Your judges' report bears that out, I think.

DEAN MORGAN: General, wasn't it true that when we discussed Rule 34 originally there was a great deal of debate and a good deal of opposition to it unless there was an order to show cause or good cause shown with reference to the documents? As I remember it, Rule 34 caused a tremendous amount of

debate, and Senator Pepper was particularly strong in his opposition to it unless there was good cause shown in advance. He said rummaging into the papers and documents of a person was not to be done by a person who was just on a fishing expedition for the purpose of getting additional material for lawsuits, and so forth.

JUDGE CLARK: I am afraid I can't remember that. Senator Pepper has a suggestion on this rule, but he hasn't made any on the present point.

DEAN MORGAN: I remember that to be particularly in the beginning, and now as soon as you throw this into interrogatories, of course there is no provision for showing cause in advance.

If what Mr. Lemann has said is true, that there is no penalty for refusing to answer in a case of this kind, the sooner the defendants find out or the people who object find out, they are just going to sit still and not answer. Then you have to get an order to show cause under one of these other rules. That will cause a tremendous amount of delay.

JUDGE CLARK: That isn't the correct interpretation, Eddie. If they sit still and do nothing, they surely come under 37(d). These are interrogatories, and they have to make some answer under (d).

DEAN MORGAN: Then the burden is upon them to come in and object to the interrogatories?

JUDGE CLARK: To the interrogatories, yes. But this isn't a question of answering the interrogatories. They are objecting to giving the documents.

DEAN MORGAN: Yes, I know that. When you ask for the interrogatories plus the documents, then they object to answering it with the documents. You can't have a complete answer if they don't put in the documents.

CHAIRMAN MITCHELL: Could you cure it by sticking in lines 33 and 34 a statement, "may require on good cause shown", and leave it to the courts and the lawyers to work out the procedure?

PROFESSOR MOORE: General, then I think you are back to Rule 34, as you now have it, not as it is proposed to be amended but as it now is.

PROFESSOR WRIGHT: Professor Moore, I think there would be a penalty if the lawyer refused to give up a document properly subject to discovery. If he objected and said, "I don't have to give this up," and then he made a motion under Rule 37.01, the court, finding no substantial justification for the refusal, can require him to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fee. So you have that sanction.

But if you have a document which is within or possibly within the Hickman rule, and he says "Objected to as immune from

discovery," which you have said in Rule 33 you don't have to get, then if the plaintiff on the hearing under Rule 37.01 establishes good cause in the Hickman sense, enough to bring it out of the immunity, I should think no penalty would then attach because he would have had substantial justification. The plaintiff would not then have made the showing required by Hickman.

MR. DODGE: How would it do to insert "designated" before the word "documents", as has been suggested, and after the words "not privileged" add the words "or otherwise not a proper subject of discovery without an order of the court"?

JUDGE CLARK: That is what I thought we were doing by the language "not immune from discovery". This may be a better formula for that.

MR. PRYOR: I was repeating what you suggested, "or otherwise immune from discovery". That was the language used.

DEAN MORGAN: But it isn't immune from discovery. The Hickman case says specifically it is not immune from discovery on good cause shown.

MR. LEMANN: "otherwise not a subject of discovery under the circumstances of the case".

MR. DODGE: The opinion of the Court in Hickman v. Taylor says that the lawyer's papers "falls outside the arena of discovery and contravenes the public policy underlying the

orderly prosecution of the defense of legal claims."

DEAN MORGAN: But that is qualified.

MR. DODGE: "Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney."

DEAN MORGAN: Yes, but that is the impressions of the attorney.

MR. DODGE: The files and the impressions.

JUDGE CLARK: Although I do it with fear and trembling, being in the minority, I suggest that Mr. Morgan is a little mistaken. I think they are immune from discovery until you get an order from the court showing they are properly subject to discovery.

MR. LEMANN: I read from the headnote of the Hickman case prepared by the learned editor of the Federal Rules Service. I presume he wrote that note. Of course it may be inaccurate.

"Written statements of witnesses, private memoranda of conferences with witnesses, and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties are not subject to discovery in the absence of a showing of necessity or justification. While discovery may be had of written statements and documents in an attorney's file if they contain relevant and nonprivileged facts, the burden is on the party seeking

discovery to establish adequate reasons to justify production."

That is from the headnote of the Hickman case which purports to summarize accurately the Court's decision.

JUDGE DRIVER: Use Mr. Dodge's language rather than Judge Clark's, "or otherwise not subject to discovery".

JUDGE CLARK: I think it would be better to take that, yes.

MR. DODGE: I move the adoption of that part of Rule 33 with those two insertions.

JUDGE CLARK: It is so moved.

Dean Pirsig has a comment.

DEAN PIRSIG: I was going to suggest the possible breaking up of the part which is italicized, the new material, and dealing with this subject in a separate sentence. The present sentence begins, "Interrogatories may require". The new sentence would be:

> "They may also require copies of such designated documents, papers, books, accounts, and so forth, as are relevant to the answers required, if they are not privileged or are subject to discovery only on cause shown."

That happens to be about the identical language.

JUDGE DRIVER: Would you mind reading that again? I didn't follow it.

DEAN PIRSIG: "if they are not privileged or are subject to discovery only on cause shown." That makes it a little easier to deal with.

MR. LEMANN: Not privileged or subject to discovery.

JUDGE CLARK: I am not sure. Mr. Dodge's formula seems to me a little clearer. I don't object to this. It is a question of which carries the idea. It seems to me that Mr. Dodge's formula does a little more. It may be a good idea to break these up in two sentences.

MR. LEMANN: How about expanding the suggestion a little bit by using the words after "not privileged", "or not subject to discovery in the absence of a showing of necessity or justification".

MR. DODGE: Say that again, will you? Not subject to what?

MR. LEMANN: "not subject to discovery in the absence of a showing of necessity or justification". That is the language before me.

PROFESSOR MOORE: Who has to show that, Mr. Lemann?

MR. LEMANN: I would say the party who wants it has to show it under Hickman v. Taylor. That brings you back very near to a showing of cause, but it limits it a little bit, perhaps, because the words "good cause" would apply to any papers called for, whereas the language we are now debating I take it would be applicable only to papers coming within the

scope of the Hickman decision.

JUDGE DRIVER: I think if we still put the burden, as is contemplated now apparently from the discussion, on the person who requests the document to show that he has a right to it, I think it is preferable to make the amendment here, and then the court will have to pass upon these questions only when there is objection made, and not in every case at the outset as would be true under Rule 34 as it is now. But all we are doing here is putting it forward at a little later stage than it was under Rule 34, showing of good cause.

MR. LEMANN: As I understand, one of the things we are doing is to clear up the uncertainties as to whether you can get these things by interrogatories. We are doing that by the amendment to Rule 33. Some courts have held and the Supreme Court apparently has suggested that you can get them under Rule 34. Now we are permitting them to be gotten under Rule 33.

The suggestion of Mr. Dodge, following Judge Clark's suggestion, I think would meet the objection of the people who don't like the removal of the words "for good cause". I think it sort of brings it in the back door.

JUDGE DRIVER: It is sort of like cause of action.

PROFESSOR MOORE: Let me see if I understand how it would work. The plaintiff submits an interrogatory to the defendant. "Did you take statements of witnesses prior to the

commencement of the action?" Then the next, "If your answer to the foregoing interrogatory is 'yes,' attach copies of those statements to your answer."

What do you say under this proposed amendment? Suppose they are in the attorney's file as they were in the Hickman case?

MR. LEMANN: "In answer to the foregoing interrogatory, I decline to produce these documents because they are not subject to discovery in the absence of a showing of the necessity and justification, and no such showing has been made."

Then he proceeds under the other rule if he has a showing, or he goes forward with his showing.

PROFESSOR MOORE: I think you have to look at Rule 34, too. It would still require an order when you take out the requirement of good cause. What is the person going to show when he asks for the order? Is it just a pro forma order, or does he have to show some basis for it?

MR. LEMANN: I think, Mr. Moore, we would have to make a corresponding insertion in line 15 of Rule 34 where it says "not privileged", using the same language that we are putting into 33, "or not subject to discovery in the absence of a showing of necessity or justification."

DEAN MORGAN: If you leave 34 without striking out "for good cause shown," then the good cause shown would have to show that it wasn't part of the attorney's files.

MR. LEMANN: That is right. I think the result would be substantially the same as if you left the rule as it is, but I can see some advantage stylistically in the proposed amendments to make Rules 33 and 34 consistent or similar in their wording. The people who do not like taking out the words "good cause" will be consoled by the language, "not subject to discovery in the absence of a showing of the necessity or justification", and the people who don't like that limitation will have to put up with it because that is what the Supreme Court has said.

DEAN MORGAN: Who has the burden?

MR. LEMANN: The party calling for it.

DEAN MORGAN: You mean the objector is going to have the burden now?

MR. LEMANN: No, the man who is calling for the papers has the burden. That is the decision in the Hickman case.

DEAN MORGAN: He has the burden of showing it is not privileged?

MR. LEMANN: He has the burden of showing that there is a necessity and justification. I think that is the necessary result of the Hickman decision, don't you, Professor Moore?

PROFESSOR MOORE: Yes.

JUDGE CLARK: We will have to stop pretty soon if we have to be downstairs at one o'clock. Is it time to vote, or

shall we wait until we come back?

Mr. Dodge has moved, and his motion incorporates the words "otherwise not a proper subject of discovery". For my part, I think that is the neatest formula, although I don't object to other formulas.

MR. PRYOR: I would be in favor of making the addition that Mr. Lemann suggested.

JUDGE CLARK: What do you want to do about your motion, Mr. Dodge?

MR. LEMANN: Are you willing to accept my amendment?

MR. DODGE: My only question is whether you should add "is not a proper subject of discovery without an order of the court."

JUDGE DRIVER: What was the language you suggested, Mr. Lemann?

MR. LEMANN: I suggested that we add "not subject to discovery in the absence of a showing of necessity or justification". That is the language of the Supreme Court.

JUDGE CLARK: All right, can we vote on that? All those in favor raise their right hand. Nine. Those opposed. One.

I think we had better adjourn now. This will include "designated" and the other suggestions made, including the phrase that Mr. Wright is jotting down. If there is any question we can have it read over when we get back, but I think we

had better go now.

... The meeting adjourned at 12:55 o'clock p.m. ...

Dudley
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THURSDAY AFTERNOON SESSION

March 10, 1955

The Advisory Committee on Rules for Civil Procedure for the United States District Courts reconvened at 2:40 p.m., William D. Mitchell, Chairman of the Committee, presiding.

JUDGE CLARK: Shall we go back to the rules. There is one thing more on Rule 33. Senator Pepper has suggested that this rule ought to provide that interrogatories may be served within 10 days after service of the complaint rather than as at present, after commencement of the action, without leave of court. I am rather hesitant about taking this up separately. Let me state a little of the background as to that.

First, Senator Pepper says that others in Philadelphia made the recommendation. His idea is that you should not have to answer interrogatories until you have the complaint. He suggests certain circumstances under which you might have the service of the request for interrogatories before you had the complaint served upon you.

That is possible. There is no doubt about it. I must suggest it would seem to me a little unusual, and there are various time limits that you can avail yourself of. You see, the rule now is that the time interval dates from the commencement of the action, and the commencement of the action is the filing of the complaint. That has some reference to the provision that if you start serving interrogatories at once,

within 10 days, you have to get the permission of the court, but if you make it longer than 10 days you don't have to get the permission of the court, although the defendant can come back and ask for more time.

It so happens that all this matter of instituting discovery procedures and how it is to be done has engaged our attention at practically every meeting. It has been a matter of some difficulty, and we have been subject to considerable criticism from the admiralty bar for delaying too much. That is one point on which we have never been able to get together with them, because they claim that there should be no restriction; that seamen are about to depart on ships, and there ought not to be this somewhat formalistic requirement in this rule and other rules.

We have discussed matters of this kind. I gave a reference in my comments to our last discussion. At the meeting in 1953 when we were considering these, I suggested that interrogatories should not be served upon the party "until or as a part of the service of a summons and complaint upon him." This was rejected, Transcript 1953, pages 211-214.

Earlier in that meeting we had rejected, as to Rule 26(a), a suggestion of the admiralty bar for removal of all restrictions. Transcript 1953, 187-204.

CHAIRMAN MITCHELL: Excuse me, Charlie. Isn't the important thing not the question of when the demand is served

but the time when it shall be answered, and one of the key things we have come to is the idea that a fellow shall not be called upon to do anything until he has had the normal time to get a lawyer.

We have made several changes in the time for doing things on the ground that he was required to do it before he had time to hire a lawyer. Normally he has 20 days to hire a lawyer to answer, and the question is not when it is served but when it is to be answered. We provide generally that no answer shall be required until 10 days after the complaint has been served upon him, something like that.

JUDGE CLARK: I think it is more properly a question of the answer. That is one of the comments I made. We should extend that time if we are going to do it.

In line with that is the thought that I also brought up, that if we were going to change this part at the beginning, it would seem logical that we would have to do it in all the other discovery rules, starting with 26 and going into 33, 34, and so forth, which I think is a little too bad.

I should think, therefore, if you wanted really to do anything along this line, as the Chairman said, it would be a question of the answer. Of course this is a suggestion beyond our amendments. This I suppose might be termed for the moment new business. If you look at the rule proper, we have enough in this draft so you can look at it. If you look at

page 27 of the green pamphlet down about line 18, the party served "shall serve a copy of the answers on the party submitting the interrogatories within 15 days . . . unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Within 10 days after service of interrogatories a party may serve written objections thereto", and so on.

You could put some sort of definite qualification as the Chairman suggests. I wonder if it would not be better just to extend the time and make this within 20 days here and in line 22 within 10 days, or something of that kind, of a definite nature.

CHAIRMAN MITCHELL: Would it not be better to hook it up with the time for answer?

MR. DODGE: Are you referring, Judge Clark, to Senator Pepper's letter?

JUDGE CLARK: Yes.

MR. TOLMAN: Has everyone seen Senator Pepper's letter? It is a letter to me of January 31. I sent it around to you.

JUDGE CLARK: It is summarized and I think you will get a good deal of the gist of it, if you wish, at page 33 of the summary.

MR. TOLMAN: I have the letter here if you would like it.

MR. DODGE: Senator Pepper is very urgent that we should change this time. What is the objection to making it 10 days after service of the complaint instead of 10 days from the beginning of the suit? Certainly it would be very rarely that a plaintiff would file interrogatories as soon as that. I never have known interrogatories to be filed in any case so shortly after the suit is brought. All he wants us to do is to make it 10 days from the service of the papers.

CHAIRMAN MITCHELL: Complaint.

JUDGE CLARK: That is right, the service of the complaint.

MR. LEMANN: If we do that, Professor Wright points out that we should make corresponding amendments in 36(a).

MR. DODGE: Is there any other rule that we have to change?

MR. LEMANN: Rule 36(a) also refers to commencement of action. Theoretically, commencement of action may considerably precede any notice to the defendant, because you commence the action by filing the complaint.

Apparently he has had cases where the marshal hasn't gotten around to serving it for quite a long while. If you wish to give the fellow a chance to get a lawyer, you ought to make the time date from the time he learns he is being sued, which would not be the commencement of the action but the service of the papers, the service of the summons. I am rather

inclined to think we ought to change that word in all these rules.

CHAIRMAN MITCHELL: Possibly you could say somewhere that in no event do any of these things have to be done before the expiration of 10 days after service of the complaint.

JUDGE CLARK: Why isn't the more important point, as the Chairman suggested, the time which they have to answer the interrogatories, not necessarily the time for them to be served.

CHAIRMAN MITCHELL: A man is in no position to answer interrogatories or even to frame answers, certainly not to answer, until he has been served and knows he has a lawsuit, and until he has had time to hire a lawyer and begin to gird up his loins for the battle. Service of summons is the only way he can know it.

MR. LEMANN: You have the same point coming up in 36(a), I believe. Under 36(a) you can make a demand for admission after the commencement of the action, and the only limitation is that you have to get an order of court if you do it within 10 days after commencement of the action.

MR. PRYOR: I am inclined to agree with that idea, because the commencement of the action really hasn't much significance.

MR. LEMANN: That is right.

MR. PRYOR: From this standpoint.

Not long ago I commenced an action in the federal

court in Des Moines, and it was two weeks after that before the service was made.

MR. LEMANN: It seems illogical to make these time limits run from the mere filing of the papers, when the defendant doesn't know anything about it.

MR. TOLMAN: Why is it that the admiralty people wanted it earlier, Judge?

JUDGE CLARK: They wanted particularly to take out this provision in the second sentence of 26(a) that you have to seek leave of the court. They made a great point, even going to their draft of the rules which they filed asking the Supreme Court to adopt their special rule leaving this out.

CHAIRMAN MITCHELL: To seek leave to file demands or serve responses?

JUDGE CLARK: In the admiralty bar they took it up particularly with respect to discovery generally. They wanted no restriction on discovery at the early stage because they said they had to get seamen on the fly, so to speak. They made a great point that they could not get the order from the court, which I thought was going quite a way, because it seems to me there is a good deal of formula for getting an ex parte order. I don't believe they amount to too much either way.

That is one of the great points that the admiralty bar made against these rules, saying that they could not use them.

MR. TOLMAN: Aren't they applicable to them?

JUDGE CLARK: No, these are not.

CHAIRMAN MITCHELL: What did they want? I suggested that the responses to the demand should not be required until after the service of the summons. Do they object to that?

JUDGE CLARK: I don't remember that they discussed Rule 33 separately, but what they did object to was Rule 26, the provision in the second sentence beginning, "After the commencement of the action the deposition may be taken without leave of court". They have not objected to that. What they object to is the next: "except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 20 days after the commencement of the action."

That is one of the great talking points the admiralty bar used to urge the Supreme Court that the civil rules were not workable in admiralty. I will say that a committee of the Section of Judicial Administration, upon which I have served with Judge Hartshorne, Judge Rifkin, and Judge Irving Kaufman, have urged the Supreme Court to appoint an advisory committee with the idea of adopting the civil rules in admiralty. Those proposals have been before the Supreme Court for a year or so, and the Supreme Court does nothing, which I think perhaps is not too bad a way of settling it for the time being. But I will say that that has been one of the

great emphasized positions.

What do you say, Mr. Lemann, to the admiralty assertion in this regard?

MR. LEMANN: Their emphasis that there is too much delay?

JUDGE CLARK: That we require too much delay and therefore the rules are not workable in admiralty, where they have to catch a seaman as he leaves on a ship for South America, Africa, India, Bombay, or Manila.

MR. LEMANN: We were not impressed by that. In any event, I should not think that you should change the words "commencement of the action" in 26(a) to "service of the summons". You can always still get leave of court under the proviso that you can do it sooner with leave of court. That seems to me to take care of their objection.

The only objection to 26(a) and 36(a), as I thought, is that nobody has kicked about commencement of the action as used in those sections. Am I right?

PROFESSOR WRIGHT: I don't think that is entirely right, Mr. Lemann. The criticisms in 1953 were directed principally to 26. I never heard many complaints about 36(a). But the Philadelphia lawyers wrote a number of letters, since the last time we amended the rules, complaining about 26(a). I think they must have some special problems in Philadelphia because it is the only place in the country we hear from. They

say people are delivering summons and complaint with instructions to the marshal not to deliver it for quite a long time, and then taking depositions.

At this time Senator Pepper and his partner have been concerned about the use of interrogatories in somewhat the same way.

MR. LEMANN: They are consistent, then. I was wondering why they had not been consistent in complaining, but they have been.

PROFESSOR WRIGHT: Yes, they have been.

MR. LEMANN: As an original proposition, it doesn't seem to me sensible to make the phrase "service of summons" in all these instead of "commencement of action".

CHAIRMAN MITCHELL: There is a vast difference between making a demand for information and answering. I can understand how they want to make a demand for information as soon as possible, but it ought not to be required of a defendant to answer interrogatories until he has been served and knows what the case is about.

MR. LEMANN: Suppose I am a defendant and within 10 days after the commencement of the action but before the complaint has been served on me, the plaintiff comes along and asks me to admit the genuineness of a document. I don't even know I have been sued up to that time. That is the first time I have heard that I have been sued, and he asks me to

admit the genuineness of a document. It seems to me that is the very kind of case you are talking about where a man needs a lawyer so he can decide whether or not he is going to admit the genuineness of the document. I think a man's admission of the genuineness of a document is really quite as important as an answer to an interrogatory. I think he needs a lawyer just as much in that case.

CHAIRMAN MITCHELL: I tried to distinguish between those two cases. In either case you demand something of the defendant which he is not equipped to respond to until he has had the complaint served on him and knows what the case is about and has time to collect his senses and get a lawyer who will advise him what to do. That is my point about it.

MR. LEMANN: I agree with you, but I think the problem occurs under all three of these rules the way they are now worded.

CHAIRMAN MITCHELL: I don't think it makes any difference when they serve the demand or inquiry. It can be made as soon as the suit is started, if you like. The important thing is how soon it has to be answered.

MR. LEMANN: That would accomplish the same result, I should think, perhaps in a little more indirect way.

MR. DODGE: Would you take care of Senator Pepper's suggestion, Mr. Chairman, with respect to the time limit of the answers rather than of the filing, "within 15 days after service

of the interrogatories or after the service of the process, whichever is later"? Do you have in mind to put it in there?

CHAIRMAN MITCHELL: Yes. I didn't pick the point to put it in. I was thinking of the general proposition. If we have to amend three or four rules to provide that a man does not have to answer interrogatories until he has a lawyer and has been served with the complaint, I think we ought to do it.

JUDGE CLARK: If we make the change you have just suggested, we would not so clearly have to make the other changes. This would not be inconsistent if we just --

CHAIRMAN MITCHELL: The point is that I think it ought to be the rule that no response to the suit or to interrogatories should be required to be made until 10 days after the complaint has been served.

JUDGE CLARK: Let us put in Rule 33 something of that kind.

MR. LEMANN: What is the suggestion?

JUDGE CLARK: In line 18, "within 15 days after the service of the interrogatories or after the service of the complaint, whichever is later".

MR. DODGE: Yes, that would cover his point.

CHAIRMAN MITCHELL: Yes.

JUDGE CLARK: Then I should think that probably we should do the same in line 22.

JUDGE DRIVER: You should have a comparable time for making objections to them.

JUDGE CLARK: "Within 10 days after service of interrogatories or of the complaint, whichever is later, a party may serve written objections", and so forth.

Is there agreement on that, or is there objection?

MR. LEMANN: What are you going to put in? Will you read that again?

JUDGE CLARK: "Within 10 days after service of the interrogatories or of the complaint, whichever is later".

MR. LEMANN: You are assuming now that he doesn't get an order immediately after the commencement of the action. You would have an order immediately upon the filing of the action, wouldn't you? Then the language you are going to put in would give you 15 days after the service of the complaint, is that right?

JUDGE CLARK: That is right.

MR. LEMANN: If he served his complaint right away, that might cut you down in answering interrogatories from 20 days to 15 days.

JUDGE CLARK: That is what it always has been. You can't quite say it is cutting anything down, because that is what it always has been.

MR. LEMANN: Theoretically, here you might have less than 20 days to answer the interrogatories, but the plaintiff

would have to move pretty rapidly to put you in that position.

JUDGE CLARK: Either it has to be a total of 25 days before you get an answer or you would have had to go to the court and get a special order.

MR. LEMANN: It would not be 25 days after you got service of the complaint. It would be 25 days after the commencement of the action, isn't that right?

JUDGE CLARK: That is right.

MR. LEMANN: Which might not be very long, which might not be more than 15 days after the service of the complaint. Do you see what I mean?

JUDGE CLARK: Yes, I see what you mean, but it seems to me that is plenty of time, because he can go back and get further time if he needs it. If necessary, of course, we can extend the 15 days to something more, but I still suggest that it seems to me that this is plenty of time.

There is one thing I remember Senator Pepper himself said in another connection, but I wonder if he has changed his views. He said if anything happened in a lawsuit for two months, he would eat his pants.

MR. LEMANN: I personally think 15 days are enough, because that is what we have in our state practice. In fact, normally we have only 10 days. Twenty days seems a lot to me. I just wanted to be sure we realized that we were perhaps cutting down the time.

MR. DODGE: Perhaps doing what, cutting down the time?

MR. LEMANN: Cutting down the time.

MR. DODGE: What is that?

MR. LEMANN: In which a man may be required to answer interrogatories, to the period 20 days after he has been served with a summons.

MR. DODGE: Whichever is later. The 15 days after service of the interrogatories may be extended, but it cannot be cut down.

MR. LEMANN: But the 15 days after service of the interrogatories might be less than 20 days.

JUDGE DRIVER: But that is already in the rule as it is. That is there now.

MR. LEMANN: That is right. So is the whole thing.

JUDGE CLARK: This particular provision, of course, is in the equity rules. There are no complete discovery rules yet in admiralty. Admiralty does not have Rule 26, but admiralty does have these particular rules, 33, 34, and 35. The interrogatory rule is in 36, and also in 37. The interrogatory rule is 31 of the existing admiralty rules. You will destroy uniformity with admiralty, which may or may not be important, but I think it certainly should be mentioned.

We must do something and go ahead.

DEAN PIRSIG: I move the language suggested be

incorporated in Rule 33.

JUDGE CLARK: You will have now to specify it. Is it the language which I suggested, or is it more language?

DEAN PIRSIG: The language you suggested in line 19 following the word "interrogatories", adding there the words "or of the complaint, whichever is later"; and at the end of line 22 the same words.

JUDGE CLARK: All right, all those in favor raise their right hands, please.

MR. DODGE: That goes in line 19, doesn't it?

JUDGE CLARK: Nine. Those opposed. No opposition.

I think that takes us to Rule 34. On Rule 34 I should take it that we want to put in language similar to that which we voted in Rule 33. Do you have where that would come, Mr. Wright?

PROFESSOR WRIGHT: In Rule 34, line 15, following the words "not privileged" we would add, as we added in Rule 33, "and not subject to discovery in the absence of a showing of necessity or justification".

MR. LEMANN: Or.

PROFESSOR WRIGHT: It would have to meet both tests, Mr. Lemann. It would have to be both privileged and not subject to discovery. We may have trouble in Rule 33 in the same way.

MR. LEMANN: I should think "or", offhand, but perhaps you are right.

JUDGE CLARK: What is the difficulty? "not privileged and not subject to discovery". What is the difficulty?

MR. LEMANN: Professor Wright wants to use the word "and" and I would use the word "or".

JUDGE CLARK: I tell you what we will do. We will put "and" and a line and then "or".

PROFESSOR WRIGHT: No, this is more important than that, Judge.

JUDGE CLARK: Go ahead, Mr. Wright.

PROFESSOR WRIGHT: If it is not privileged, it can be gotten. The phrase we are using in Rule 33 which I just quoted is "not subject to discovery in the absence", et cetera, and if it meets that test then it cannot be gotten, so we can't add a simple "and" or a simple "or", because one of them describes a class of things which are subject to discovery and the other one describes a class of things which are not subject to discovery.

JUDGE CLARK: You are right about that. I will take back anything I may have said.

Can't you do it by saying, "or subject to discovery only" so-and-so? Can't you phrase the language that way, "or subject to discovery only on a showing"?

MR. LEMANN: Can't you do it by expanding Rule 33, line 39, by putting in "which are not privileged or which are not subject to discovery"?

PROFESSOR WRIGHT: That runs into the same trouble, Mr. Lemann. Things which are not privileged you can get. The things which are not subject to discovery you cannot get. It is the "not" that causes difficulty.

MR. LEMANN: Let's leave it to the Reporter to work it out.

JUDGE CLARK: Can't you do it the way I suggested, "subject to discovery only", and so on? I should think that would do it.

CHAIRMAN MITCHELL: I think that is better. That shows that you can get it, but you have to get a court order.

PROFESSOR MOORE: What do you have to show to get a court order? Do you just walk up to him and hand him an order and if he says, "What is your reason for it?" you say, "I don't need to state a reason. They just took the requirement out to show a good cause." What is the answer to that?

JUDGE CLARK: The answer, I suppose, is that you have to show him what you had to show in the Hickman v. Taylor situation. These rules, of course, are very considerably broader than the Hickman v. Taylor situation. We have often centered on that and that is an important part of it, but I suppose the day-to-day activities of the courts dealing with all sorts of books, accounts, and so on, will not raise any particular question and will not raise the particular issue of Hickman v. Taylor.

I was going to bring up next, of course, what we were going to do about "for good cause". We have not decided that yet here, and we must consider it. It would be my own idea, if it is of any importance, that having made this addition which I think so clearly does cover the important Hickman v. Taylor situation, we would not need to do anything more. I would be inclined to leave out, as we have already done, "for good cause".

I shall have to add, quite frankly, that I don't know that I care too much. I think that is the orderly and straightforward way to do it, because I don't think this "good cause" stuff means anything that the lawyers put into it. The idea of going around and getting a formal order for good cause seems to me not to mean very much. I don't think it means enough to oppose it. So while I would leave it out, I am not going to go home sick if you put it in. I trust that is an answer.

MR. DODGE: I think those first words should be restored, and I have the support of the Department of Justice in that. They want the requirement of the preliminary decision by the court that all of this is proper.

JUDGE CLARK: If you are going to do it -- and I should like somebody to show me where that isn't just a pious hope -- what does it mean really? You go up for an ex parte order and you present an affidavit. It does permit an occasional

judge perhaps to get excited and pay some attention, and if you are counsel that he doesn't trust he may do something, but by and large he will take the formality from counsel who seem to know their business.

That is why it seems to me that this has been blown up to immense proportions with very little actual practical meaning.

PROFESSOR MOORE: Then why should we not cut out the requirement for an order?

JUDGE CLARK: Cut out what?

PROFESSOR MOORE: The requirement of getting a court order. If it is a pro forma matter, let's eliminate it.

JUDGE CLARK: If we were starting this anew and it were not going to bring down the wrath of 233 defense attorneys, I would agree with you fully; but as we know it would, I don't want to do it, because I don't want to take on that many, certainly.

MR. LEMANN: Would you write a letter to the other fellow and say, "I hereby demand," without an order?

PROFESSOR MOORE: The same way you proceed to take a deposition.

MR. LEMANN: I am talking about Rule 34.

PROFESSOR MOORE: Yes.

MR. LEMANN: Then he has to go get the order.

MR. DODGE: You are providing for a motion to the

court in your new language without stating what the nature of the motion is or what the movant is supposed to show. I do not see why the lines which you struck out do not properly define that motion.

JUDGE CLARK: If you want to put it back in, as I say, I am not going to make much objection. I do think that it should be done in connection with line 10 rather than to restore lines 1 to 5. The only point of that is that we are trying to make some integration of the rules, and to give some indication of the place in the picture of Rule 34 as compared with Rule 33. Therefore, I would rather like to have in those first few words or sentences, "In addition to the right to obtain the production", and so forth.

If you would like to restore this, as I say, I am not going to bleed much over it. You can say in line 10, "subject to the provisions of Rule 30(b), and upon good cause, for an order upon another party", and so forth.

MR. DODGE: The notice to the other party is covered in your new suggestion by the reference to Rule 30(b) because that calls for notice and not an ex parte order; but you object to stating that it shall be upon motion filed by him showing good cause therefor.

JUDGE CLARK: That wasn't what I was saying. I said I would like to keep in that language which correlates this rule with Rule 33. I would like to keep in the words, "In

addition to", and so on, and I would put your "good cause" provision in line 10.

MR. DODGE: "subject to the provisions of Rule 30(b)" means it would be an order upon notice.

JUDGE CLARK: Yes.

MR. DODGE: So all it would be necessary to do would be to define the object of the motion as one to show good cause for the relief asked.

JUDGE CLARK: Yes, that is right.

MR. DODGE: Why wouldn't that be all right?

PROFESSOR WRIGHT: I didn't get Mr. Dodge's language.

JUDGE CLARK: I would say in lines 9 and 10, "may move the court, subject to the provisions of Rule 30(b) and upon a showing of good cause, for an order upon another party".

MR. DODGE: I should think that would cover it.

JUDGE CLARK: As that stands, that means these two additions to the amendment: The first is the addition just suggested now by Mr. Dodge which restores the expression of the requirement of good cause. The second is the amendment suggested by Mr. Lemann covering this addition to matter not privileged. What would you like to do about that? Do you want to adopt the amendment with those additions?

MR. DODGE: The amendment was in line 15 after the words "not privileged".

PROFESSOR WRIGHT: The language that Mr. Lemann and

Mr. Morgan and I have worked out, which would be used both here and back in Rule 33, where we have the same concept, would be to say, "such documents," and so forth, "as are not privileged and as are subject to discovery without a showing of necessity or justification".

CHAIRMAN MITCHELL: I have one suggestion to make there. Suppose it is not subject to discovery and it is subject to showing. That isn't exactly what you mean, is it, "is not privileged"?

MR. LEMANN: Not privileged and as are subject to discovery without the shoring.

CHAIRMAN MITCHELL: Because no good cause has been shown. If it has been shown --

MR. LEMANN: Under that formula, without coming to the other suggestion of Mr. Dodge, you would not have to make a showing of good cause except in the cases to which the Hickman rule referred, and in those cases you would have to show some justification.

CHAIRMAN MITCHELL: Your exclusion of the obligation to disclose is not because they are subject to hearing for good cause, but because it hasn't been made. They may be subject to it and yet not have gotten an order for good cause. It is subject to it but has it been done?

JUDGE CLARK: Yes, it has been done here.

Didn't you think, Mr. Lemann, seeing that we have

restored "good cause" here, that we ought to leave this out?

MR. LEMANN: That could be. I was just discussing one against the other. I was rather assuming if we adopted the other suggestion we would continue to omit the words "for good cause", since we had sufficiently covered the point where it was important to cover it, by inserting the reference to the necessity of showing special justification as to matters within the protection of the Hickman rule.

Maybe those who criticized the amendment thought we were abrogating the requirement of the Hickman rule. This would show them we were not doing it. At the same time, the defendants' bar, which is organized into a class --

JUDGE CLARK: We ought not to have both in this rule, though, I think.

MR. LEMANN: I agree to that. I would not do both. I think I would be inclined to retain the proposal to omit good cause and be content with the provision which preserves the Hickman rule. If you go back now to restore the requirement of good cause, I think you may be construed, as Dean Pirsig said in another connection, as sort of playing up the necessity for making a showing. So this really would be in the nature of a compromise suggestion if we just contented ourselves with preserving the Hickman rule and let the requirement of good cause go out as such. You still would have to make a showing.

CHAIRMAN MITCHELL: I would like to have Mr. Wright read to us the proposed insertion after the words "not privileged". That is my point.

PROFESSOR WRIGHT: Yes. We proposed expanding it a little bit by saying, "as are not privileged and as are subject to discovery without a showing of necessity or justification".

CHAIRMAN MITCHELL: You have changed it, you see; without being subject to that. Suppose it is subject to it and you have consent, you have the order. There may be a showing of good cause.

PROFESSOR WRIGHT: I think myself it is true that this language is not needed in Rule 34, and that it actually would be a limiting kind of language in Rule 34. I should prefer to see us put good cause back in. Otherwise, if we put the rule in in this form, it is open at least theoretically to the reading that the rule makes no provision for your ever getting, in any kind of procedure that we have here, a document which is within the Hickman rule, because the class of documents which we then describe here as being able to get by virtue of Rule 34 would be only those documents that are subject to discovery without a showing of necessity or justification, and there would be no provision in the rule for your ever getting the document even by making a showing of necessity and justification.

MR. PRYOR: You certainly do not need the requirement of a showing of good cause in both lines 10 and 15.

JUDGE CLARK: No. As I understand, these are now alternatives. If "good cause" is inserted up in line 10, then we don't have the addition after line 15.

MR. PRYOR: That is right.

JUDGE CLARK: If we have the addition after line 15, we don't have the insertion in line 10.

MR. PRYOR: It would be better to put it in line 10.

MR. DODGE: That is where it belongs, it seems to me.

MR. LEMANN: Could you cover this perhaps more satisfactorily in Rule 33 by adding in line 42, after the word "afforded", a semicolon "and provided that documents, papers," et cetera, "which are not subject to discovery in the absence of a showing of necessity or justification, may not be required to be furnished in the absence of such a showing."

JUDGE CLARK: Of course the idea of that is all right. Isn't that just saying with somewhat more use of words what we have in there now, what we voted to add?

MR. LEMANN: I was just wondering myself if what we voted to add is itself perfectly clear. Some question has been raised as to how you would get the order. I thought that was what Mr. Mitchell was discussing.

If you wanted to reach a case which came under Hickman v. Taylor, you would get the order by making a showing that

there was a special justification. That is why I added that language.

CHAIRMAN MITCHELL: Do you see my point, Monte? I don't know that I have made my point clear.

MR. LEMANN: I am not sure that I have it.

CHAIRMAN MITCHELL: When you say "is not privileged or is subject to special order", it may be subject to special order but you may already have gotten the order. There is a difference between saying a thing is subject to the discretion of the court on an order, and saying that even if it is subject to that, the requirement has been satisfied. You have not expressed that idea.

MR. LEMANN: I thought I was covering it by saying that you cannot get things which are not subject to discovery in the absence of a showing of necessity and justification, without making such showing.

CHAIRMAN MITCHELL: That is what I mean, that you have to make the showing or have done it already, and then you can get it.

MR. LEMANN: That is right, without making or having made such a showing.

CHAIRMAN MITCHELL: It may be subject to it, but you have satisfied the condition.

MR. LEMANN: I wonder if it would make it any clearer to say, "Books, papers," et cetera, "which are not subject to

discovery in the absence of a showing of necessity or justification, may not be required to be produced in the absence of such showing."

CHAIRMAN MITCHELL: "in the absence of such showing" may do it, but I didn't understand Mr. Wright to include that in it.

MR. LEMANN: Maybe not. It is pretty hard to catch these things quickly. Perhaps this other language would be a little clearer.

MR. DODGE: Wouldn't your point be covered if we said, "if not otherwise a proper subject of discovery", "otherwise" meaning without an order and good cause shown.

MR. LEMANN: This might be a little plainer. Sometimes the more concise you are, the more obscure you are.

DEAN PIRSIG: As I understand, in Rule 33 we are using that language as language of exclusion.

JUDGE CLARK: Yes.

DEAN PIRSIG: It is not a question of under what conditions you get discovery. It is only that by an interrogatory you cannot get discovery in this class of cases.

CHAIRMAN MITCHELL: You can if you satisfy the conditions. That is a discretion the court exercises.

DEAN PIRSIG: That would come under Rule 34. If we continue to include "good cause" there, then it seems to me that whenever the Hickman case applies, you proceed under 34;

and the language we are adding in Rule 33 merely says that that is not the rule in that type of proceeding.

JUDGE CLARK: Yes, I think that is correct. The language in 33 excludes this material from that rule. The language of 34 will be adequate to cover it.

CHAIRMAN MITCHELL: You mean will include it.

JUDGE CLARK: Will include it.

I think the real question at the moment, then, is whether under Rule 34 we prefer the addition in Rule 30 of good cause, a kind of restoration of that, or whether we prefer in line 15 after "not privileged" the language which Mr. Wright has been reading.

MR. DODGE: May I have that read again? I couldn't quite understand it.

PROFESSOR WRIGHT: In line 15 of Rule 34, you could get such documents, and so forth, "as are not privileged and as are subject to discovery without a showing of necessity or justification".

MR. DODGE: What is the difference? Does that have any substantial difference from the words I suggested, "or not otherwise a proper subject of discovery"?

CHAIRMAN MITCHELL: That leaves my point well taken care of, because it is subject to discovery if you have the discretion of the court exercised in its favor. You have obtained an order. I think Mr. Dodge has the solution.

PROFESSOR MOORE: Then you would not need any showing of good cause to go upon designated land and other property.

MR. DODGE: Why not?

PROFESSOR MOORE: I thought you were going to eliminate "good cause".

MR. DODGE: Not in line 10.

PROFESSOR MOORE: You are going to keep it there?

MR. DODGE: Yes, upon a showing of good cause.

PROFESSOR MOORE: I shouldn't think you want both.

MR. PRYOR: I see your point. I think you are quite right. If you put the requirement of good cause in line 10, you do not need it down below.

JUDGE CLARK: Are you ready to vote? I call first for those who prefer the adding of "good cause" in line 10.

MR. LEMANN: Before we vote, I wanted to inquire. In some of the letters there was a criticism of our explanation in the note about the necessity for eliminating the words "for good cause". What do the cases show about the trouble that that requirement has given?

PROFESSOR WRIGHT: Mr. Lemann, I think you can make a pretty good showing that it has caused trouble. It has caused trouble principally in that there is very little uniformity in the interpretation which has been given to it by the judges.

As I understand our correspondence and the cases

that I have read, in the normal event it is a very formal matter. The judge has a large motions calendar. You come in with an affidavit and the judge says "Fine" and grants the order. But for some reason or another, in very similar circumstances the judge will say, "No, you have to show more than this before you can go upon land or get a document."

What makes it all unclear is that there are two kinds of good cause which have been involved which neither our correspondents nor the courts themselves have kept very separate. One is the good cause for getting a document, and the second is what has been called the Hickman good cause, the showing of justification and necessity, which has been quite a different thing but which has been tied to the good cause. I think this perhaps more than anything else has led to some confusion and uncertainty because the two concepts have not been clearly distinguished.

MR. LEMANN: I wonder if the courts which emphasize good cause would consider this good cause. Ordinarily I would guess that the applicant makes an affidavit that he needs it in order to prepare his case and the judge signs it, but apparently some judges have refused to sign it where the issue has been raised that there must be some showing made under this application. I really say to myself, What is all the argument about good cause? How much trouble has it given? If you leave it in, what kind of showing do you have to make?

MR. DODGE: There was tremendous opposition from the trial bar as to the elimination of the requirement of good cause.

MR. LEMANN: That is right.

MR. DODGE: I read all those letters and was very much impressed by that. It is stated in the comments here by Professor Wright that to eliminate the requirement of good cause from Rule 34 was proposed by 42 of the 57 lawyers who commented on it. There were a great many very well reasoned letters opposing that elimination.

There has to be a motion here anyway under the rule as it stands, and what is the allowance of that motion to be based upon but a showing of good cause?

JUDGE CLARK: All right, now are you ready to vote?

DEAN MORGAN: I don't quite understand where you are putting in "good cause".

JUDGE CLARK: I would put it after 30(b) in line 10, "subject to the provisions of Rule 30(b), and upon a showing of good cause".

DEAN MORGAN: "and upon a showing of good cause". I see. Thank you.

MR. TOLMAN: Why is that better than to go back to the language of the original rule?

JUDGE CLARK: That is what I was suggesting a moment ago. I think it is desirable, although not absolutely

necessary, to link this rule up to Rule 33 and indicate how it comes into the picture. This rule has been thought at times, you see, to exclude and to supersede Rule 33. We are trying to make the whole thing mesh together. It seems to me it is rather desirable to do that. That is all I can say.

MR. TOLMAN: Could we do that by a note? The thing that bothers me a little bit is just grammatical. It seems to me the language is a little inelegant. "In addition to the right to obtain the production . . . any party may move the court". It seemed to me that was not the best way to say it.

MR. DODGE: That means he must show good cause for his motion.

MR. TOLMAN: I think so. But if you go back to the old language, it seems to me it shows clearly you are not changing anything. It has that advantage.

DEAN PIRSIG: I take it to the extent these two rules overlap -- and they do overlap with respect to documents, papers, books, accounts, letters, and photographs -- there would be a sufficient showing of cause if those came within Rule 33. The order would be granted automatically because you could get them under Rule 33, under an interrogatory. I presume that is the case.

JUDGE CLARK: Yes, I think so.

DEAN PIRSIG: In addition, it would emphasize that right. The new part would substantially mean that good cause

would have to be shown as to objects, tangible things, cases coming under the Hickman doctrine, and two, entry upon land. Is that about a correct description of what this would do?

JUDGE CLARK: Yes, I think so. I cannot say anything more than I have. It seems to me that this makes it more logical and tightens it up.

PROFESSOR WRIGHT: There are at least three other, it seems to me and some of our correspondents, linguistic problems with the language in italics in lines 5 to 10. Maybe it is the result of confusion. At least they should be brought out.

First is that we say in lines 5 and 6, "In addition to the right to obtain the production of any document or thing for inspection in connection with an examination under Rule 26 or interrogatories under Rule 33" -- people point out that interrogatories under Rule 33 have nothing to do with the production for inspection; that they have to do with the attaching of copies.

MR. PRYOR: It is an additional right, though, isn't it?

PROFESSOR WRIGHT: It is an additional right, but it is something more limited. Under Rule 33 all you can do is get a copy of the document. Under Rule 34 you can get the original if you want to use the original, for example, at the trial, rather than being confined to having a copy for discovery

purposes. That is one point people make.

The second point which they make is similar. They say you cannot get a thing under Rule 33 because in Rule 33 we have only used six of the eight nouns which appear in lines 13 to 15 of Rule 34; that we have left out "objects or tangible things" and that they can only get copies of documents, papers, books, accounts, letters, and photographs.

The final criticism is that we say "in connection with an examination under Rule 26", but that Rule 26 itself provides no authority for getting documents or things, and that what we must have had in mind was proceeding under Rule 45(d) by subpoena to produce these things at the taking of depositions.

All these are questions of language and may be rather picayune, but I believe they should be brought before the Committee.

JUDGE CLARK: All I can say on that is that of course many of these things can be brought up, but it seems to me that our language covers the matter. I do not think that in Rule 26 we need to say "in the course of the taking of a deposition for which we have issued a subpoena duces tecum". I think the idea of a deposition is that it may include subpoena, both subpoena to the witness and subpoena to produce.

All I am saying is that these seem to me to be reading our rule hypercritically; that no one for a moment in real life

will make any of these objections. They would not make them to a judge. They sound to me a good deal like Mr. Longsdorf. I really don't think that these are very real. I don't think a judge would pay any attention to them.

All I can say is, there it is. The propositions now before us are these: Mr. Tolman has suggested in effect that we go back to the original and put all our apologia in the note. Mr. Dodge has accepted at least the provision as written here, adding after 30(b) "and upon a shoring of good cause". Mr. Lemann has suggested alternatively adding after the words "not privileged" the words which you have heard several times.

I think perhaps we should vote alternatively on "good cause" or this later language in line 15. We can later decide how we are going to state "good cause". Suppose we vote on that.

All those in favor of restoring "good cause" raise your hands.

PROFESSOR MOORE: Pardon me. That would leave Rule 34 just as it now is?

JUDGE CLARK: No, not necessarily; pretty nearly as it now is, but not absolutely.

All those in favor raise their hands. Seven.

All those in favor of Mr. Lemann's alternative. That would be one.

PROFESSOR WRIGHT: "as are not privileged and as are

subject to discovery without a showing of necessity or justification".

CHAIRMAN MITCHELL: Suppose they are subject to discovery and there was a showing of good cause. That is what I was driving at.

MR. LEMANN: I suggested an alternative phrase to cover your point, as I thought.

CHAIRMAN MITCHELL: I didn't hear it.

MR. LEMANN: Did you note that, Mr. Wright?

PROFESSOR WRIGHT: I am sorry, I didn't.

MR. LEMANN: I suggested something for both these rules, putting in a clause reading as follows: "provided that where the books, papers," et cetera, "are not subject to discovery in the absence of a showing of necessity, they may not be ordered to be produced without such a showing." Would that cover your point?

CHAIRMAN MITCHELL: Yes.

JUDGE CLARK: I think we voted against that, unless somebody wants to call for some sort of rehearing. The vote was seven to one, I take it, in favor of "good cause".

MR. DODGE: The words "not privileged" are to be followed by words something like this: "or not subject to discovery without an order of the court", something like that.

JUDGE CLARK: I don't believe we ought to put both in.

CHAIRMAN MITCHELL: Robert, my point was that it might be subject to discovery upon showing, and that the showing may have been made. You are excluding the material because it was subject to showing, without regard to whether the showing has been made or not. That is my point about it. If the showing has been made, you are not worried about it.

You had some provision a minute ago that seemed to me to cover it.

MR. DODGE: I don't care about these words so long as they cover the subjects of discovery which are not discoverable without an order of the court.

DEAN MORGAN: That is right. We have good cause right in there now (indicating).

JUDGE CLARK: The next suggestion is whether we take the statement of good cause in the language of lines 1 to 15, or in the language of lines 5 to 10, adding the words suggested after "Rule 30(b)". Perhaps I could put it in the old way or in the modified new way.

All those in favor of the original language, lines 1 to 5, raise their right hand. Two. All those in favor of the substitute language raise their right hands.

MR. PRYOR: That is the insertion following 30(b)?

JUDGE CLARK: Six.

What was the statement, Mr. Pryor? I did not hear it.

MR. PRYOR: What we were voting on was whether or not

we would insert that language "and upon a showing of good cause" following 30(b), is that right?

JUDGE CLARK: Yes.

We go on to Rule 35.

MR. LEMANN: I would like to ask one question. The question is raised in the correspondence whether the statement of a party may be obtained if it is within the Hickman rule. We have taken it out of the Hickman rule, I should think, by what we have done.

PROFESSOR WRIGHT: That is right.

MR. LEMANN: That raises in my mind the question whether the Supreme Court would be pleased at taking it out, or whether if advised and informed it would take exception to its being taken out.

JUDGE CLARK: I thought we considered all these things earlier. It is just that you want a rehearing, do you?

MR. LEMANN: Yes. I hadn't realized that the Hickman case might apply to a statement of the party himself.

JUDGE CLARK: You see, that has been covered, as we pointed out, by these statutes in various places, in Minnesota and so on. It is a question of public policy which is beyond or in addition to the Hickman policy. Certainly our intent was to take it out of the Hickman case.

I should not suppose it was anything the Supreme Court should object to. Why should they? If they object to it, of

course they probably won't adopt it, but I should not think it was the kind of thing which was troubling them particularly, because this is such a separate thing with different motivations of public policy, with this background of state legislation, and so forth. If they do object to it, then all they have to do is say "We disagree with the policy of it."

I should think there is very good ground for supporting Hickman generally, but not supporting it as to these statements gotten from the plaintiff in a comatose condition, and so forth.

Shall we go on to Rule 35? Do you want to say something about comments, Mr. Wright?

PROFESSOR WRIGHT: The comments on Rule 35 are quite decisively favorable, but there are a great many suggestions, more here, I think, than on any other rule, for ways of amending the amendments, with a number of people thinking that we have not gone far enough.

Thus, the Department of Justice says that we ought to include in the list of people whose physical examination can be required the "alleged parent of a party". They say that there are cases involving declaratory judgment action involving the citizenship of a minor, and while the minor's parent is not a party to the action or in the custody or under the legal control of the minor, nevertheless you may want to make a blood test in order to see whether or not the minor

really is the child of these people.

JUDGE CLARK: By the way, that is big business now. We have six cases pending on that. They involve the Chinese. That has been a great thing. The blood tests show that these are not the sons of a Chinese father who is entitled to be here in this country.

PROFESSOR WRIGHT: The committee appointed by Judge Holtzoff here in the District of Columbia says you ought to include in this list of people that you can examine, the non-party spouse in an action for loss of consortium under the doctrine of Hitaffer v. Argonne Co.

A wife brings an action for loss of consortium after injuries to her husband. The husband is not a party to the action. The District of Columbia people think you should be able to examine him to see if he has been injured and if there has been loss of consortium.

Somebody else suggests that the rule is not broad enough for blood tests; that there are other kinds of tests that you might want to make, such as urinalysis and things of that sort, which should be covered, although with regard to that point it could well be argued that this is already implicit in the rule, that it is a part of the physical examination of a person.

The committee out in Fort Scott, Kansas, suggests that in lines 25 and 31 of Rule 35, instead of saying you can

get reports of all earlier examinations of the same condition, you ought to substitute the word "person" for "condition", so you can get all reports of all earlier examinations of the same person. Their argument is that there will be cases in which, in order to determine whether or not the person really has suffered a particular disease or injury, you want to know what other kinds of diseases or injuries he has had in the past.

On the other hand, Mr. Lon Hocker would limit the resort to reports of previous examinations to those which were made under court order. His argument is that you do not want the plaintiff to know what medical examinations you can find out about. He may get up on the stand and lie and say, "I was never hurt before," and you can surprise him by having gotten to some doctors and finding out they have examined him for the same condition a number of other times.

Finally, the suggestion which is in the summary at page 35 has been brought up again by several other people, and personally I think has much merit. That is that the notice of motion for examination should go to the "person to be examined and to all parties". In our draft of the rule, notice of the examination would merely go to the party against whom the order was sought and to all other parties, and thus you could provide for, say, the agent or the minor being brought in for a physical examination without ever having notice himself that this order was to be sought.

JUDGE CLARK: What would you like to do? Would you like to expand the rule? Does anybody have any suggestions or motions?

MR. PRYOR: If the person served with the notice has legal custody or control of the other person, I don't think the latter needs to be served with notice. I think the amendment is all right as it is.

JUDGE CLARK: For example, do we want to try to cover these citizenship matters? Those are questions of asserted paternity.

JUDGE DRIVER: It runs through my mind, Judge Clark, that the flood has been stopped by statute. That is, there is a definite time limitation, and no more of those can be filed where the applicant has been born outside of the United States.

It is true there is quite a large number pending on the West Coast, particularly in the Northern District of California, where I think they have 200 or 300, but when these present cases are tried I think that problem will not come up again. It is a transitory problem, in other words. Most of those cases will probably be disposed of by the time this rule becomes effective.

JUDGE CLARK: We have quite a bunch, as I said. The first of this week we decided and stuck the poor Chinese using the paternity case. In that case we got them to submit to blood

tests, so we didn't have any difficulty about it.

I suppose they may be thinking of cases where they have not been able to have the test taken. But maybe that is not necessary to do.

MR. DODGE: What do you say about the recommendation of the Department of Justice that there should be provision for the examination of the "alleged parent of a party" where a child is the party?

JUDGE CLARK: That is just what we have been discussing. That is what these Chinese cases involve.

MR. DODGE: Is there anything in that suggestion that we ought to follow?

JUDGE CLARK: Certainly there have been a lot of cases around. Judge Driver is suggesting that they cannot apply much longer and that there probably will not be many more cases, but there is the possibility.

In this case it was very important that these Chinese show that they were the children of Chinese who were Americans, and the paternity tests were used to show the negative, that they could not possibly have been children of these parents, and out they went.

MR. DODGE: Is it necessary to cover that?

JUDGE DRIVER: Yes, it is very important in those cases. I have I think about four or five of them left; and, as I told Judge Clark a while ago, there are several hundred

of them in the Northern District of California and the San Francisco district.

Perhaps that same sort of problem may arise again in the future. I simply pointed out that I think the statute now bars any new cases being filed on behalf of an applicant who was born outside of the United States. Most of these have come from Hong Kong, of course. The Communists have driven these people down into Hong Kong and there are large numbers of them there who are very eager to get into the United States. A large number of them were applying on the theory that they are the children of Chinese who visited back in China, Chinese who were born in this country and who therefore are citizens of this country. A great many of them would make periodic visits to China and they would marry there and their wives would remain there. They claim now that a lot of these people are their children, mostly sons as it happens to be. Of course the Government cannot bring any contrary evidence in, because the birthplace is usually some little town now in Communist China. You cannot get any documentary or other evidence out of there. It makes it a very difficult problem for the Department of Justice to contest those cases.

One thing they have resorted to is the requirement that they submit to blood tests. The father usually lives in this country. The mother usually is in China, but she may be in a place where she is available for a blood test. You

cannot prove that some child is the child of a particular parent, but you can prove negatively in some instances where the conditions are right that they could not possibly be. So sometimes the test is useful in a negative way.

MR. DODGE: Does the parent ordinarily refuse now to submit to a test?

JUDGE DRIVER: In some cases they submit. In some they refuse to. In one case I have where there has been a refusal, a blood test of the father taken when he entered the service indicates that the child might not be his. They have refused to submit in a good many cases, and there is no way of compelling them to now.

JUDGE CLARK: Would you want to cover this by changing the word "party" to "person" in line 3 and making some other changes of the same sort?

JUDGE DRIVER: I think it would be helpful in those cases. I personally would not think it important enough to make any great change in the rule, but if it can be done it would be helpful.

JUDGE CLARK: There are other cases, for instance that one of Judge Holtzoff's involving the wife or something.

PROFESSOR WRIGHT: The husband of a plaintiff who lost consortium.

JUDGE CLARK: Of course I don't want to do this rapidly. To change "party" to "person" would considerably

expand it.

MR. PRYOR: Couldn't you reach the kind of case you are talking about by adding after the word "control" in lines 9 and 10 "or, where parentage is in issue, the parent of the party."

JUDGE CLARK: Of course that would do this specifically. Then would we go on to the husband-wife case, the consortium, and so forth?

MR. PRYOR: I don't know what to do about that.

JUDGE CLARK: I don't know how far we are going to expand this. If we change "party" to "person", you would think you would have it well broadened.

CHAIRMAN MITCHELL: If you mean a person who is not a party, what sanction do you have to enforce a rule for physical examination?

JUDGE DRIVER: About the only practical sanction is, I think, giving the court power to find the facts as they would be if the blood test turned out unfavorably.

CHAIRMAN MITCHELL: How would that work in a case where the person who refused to submit to examination is not a party to the action, and you penalize the party to the action for the failure of somebody who is not a party?

JUDGE DRIVER: That is the only possible sanction you could have.

CHAIRMAN MITCHELL: When we had the original rule for

physical examination up, there were all sorts of sanctions short of forcing physical examination. Decide the case against them, find the facts against them, and all that. But when the fellow who refuses is not a party, you have no sanctions at all. The result is that the rule is a nullity. You are going to strike out "party" and put in "person". How can you penalize a party because some person who is not subject to his control refuses to submit for examination?

JUDGE DRIVER: I don't think you could. You should not, anyway, if a showing is made that the party is unable to compel compliance by the person, by the agent or by the parent.

As a practical matter, I think in all of these cases in my district, and I think it is true generally of the cases in other districts, usually the father is the one who is actually bringing the action. The minor child is in Hong Kong as a rule, and the father usually brings the action as next friend or guardian ad litem of the minor. Of course there are some instances where they are of age when the action is brought, but as a practical matter the father who is in San Francisco goes to a lawyer and gets the action started and is trying to get in the claimed son in Hong Kong, who sits over there until he can get the case to trial and get the plaintiff here or take a deposition.

I don't think it presents too many practical

difficulties if you put a provision in there that a sanction could be applied by finding the facts as to the blood test adversely to the plaintiff if it appears that he is able to compel compliance under the circumstances, or should be able to if acting in good faith, and has failed to do it.

CHAIRMAN MITCHELL: You remember that case in the Supreme Court several years ago where a party refused to submit to an examination and, instead of imposing sanctions on the party, defeating the case or finding of facts against him, or otherwise, the judge ordered him to be imprisoned for contempt. They took the case up to the Supreme Court. I filed a brief in behalf of this Committee at that time, pointing out that there is nothing in the rule that authorizes that. You have to refrain from imposing that kind of sanction. The case went off on that point.

JUDGE CLARK: I think at the moment I would be inclined to recommend that we not try to cover all these things.

DEAN MORGAN: I really don't see how we can cover people who are outside this statement as we have it here now.

JUDGE CLARK: Yes.

DEAN MORGAN: What are you going to do in those immigration cases? Are you going to keep the child out because the father refuses? You have no penalty against him, have you? He can sit quiet. Suppose the mother over there doesn't want the child to come to this country, and so on. I just

don't see how you can cover that.

CHAIRMAN MITCHELL: All our sanctions for refusal are listed in Rule 37(b)(2) on pages 37 and 38 of this new print. They are all in the nature of penalties in the action. They are all cases where it is the litigant who refuses, and loses his case because he is not in conformity. He won't obey the order of the court. They can impose a penalty on him by finding the facts against him.

If you strike out the word "party" and insert "person" there, you have no sanction against a person who is not a party if you are going to say you can put him in jail or hold him in prison indefinitely.

DEAN MORGAN: "person to be examined and to all parties" to the action. That is the proposed amendment, I think.

JUDGE DRIVER: We have an interesting thing in these Chinese cases. Judge Goodman, very able district judge at San Francisco, pointed out the difficulties in these cases: that the government couldn't get the proof; that it is hard to determine the credibility of the Chinese, anyway, because they are poker-faced as a rule and unemotional. He said he would not find parentage in these cases unless it clearly appeared. The Court of Appeals in the Ninth Circuit reversed him and said the Chinaman was on the same basis as anyone else; that he didn't have to prove his case by clear and convincing

evidence, that he had only to prove it by preponderance of the evidence.

JUDGE CLARK: We read that. We have gone all through that in the last week or so. I think we are going to say that he doesn't need any more proof than anyone else, but then we end up by saying judgment against him affirmed.

I think I would suggest that we leave this, merely accepting the amendments as they appear on pages 32 and 33. Is there any objection?

DEAN MORGAN: I would like to have that amendment providing for notice to the "person to be examined and to all parties".

JUDGE CLARK: That appears in my letter on page 4. At lines 12 and 13 the words "person to be examined and to all parties" might well be substituted for the words "party against whom the order is sought and to all other parties". Unless there is objection, we will take that as approved with this modification.

JUDGE DRIVER: I think the person examined is entitled to notice all right, but as I understand this rule there is never any sanction to be imposed upon the person if he is an agent and not a party, isn't that true, no sanction of any kind?

JUDGE CLARK: That is right. We tell the agent when he appears to strip himself.

Then we will pass to Rule 36. Is there anything you

want to say about that, Mr. Wright?

PROFESSOR WRIGHT: Yes, there is. This is one of the few cases where I think the late letters resulted in a rather different picture than that which we had before. The communications which I commented on at page 36 of the summary were very largely critical; 20 out of 29 were critical. There has been quite a different picture in these last letters. In the last group, the group since I wrote the summary, we have had 14 letters which are favorable to the amendment, and only four which are unfavorable.

This is of course somewhat judgmental, but it seems to me that the bulk of the unfavorable letters were from people who mechanically listed themselves as being opposed to Rules 16(4), 33, 34, and 36, that comparatively few of the critical letters were reasoned letters, nor did they realize that what we are saying here is what is already the rule according to a majority of the cases and according to the leading commentators.

DEAN MORGAN: There was one suggestion to substitute the words "not reasonably available to him" for the words "not reasonably within his power." Was that from Youngquist?

PROFESSOR WRIGHT: No. That is Judge Sheehy. That appears at page 37 in the summary. I myself think it would be perfectly acceptable. It seems to me it says the same thing.

DEAN MORGAN: He thought "within his power" was a good deal broader than "not reasonably available to him."

JUDGE DRIVER: I assume the proper implication there is that if the information or knowledge are reasonably within his power, he should go to the trouble of getting the information and answer. Isn't that correct?

PROFESSOR WRIGHT: Yes.

MR. DODGE: Some have objected to that because of the great cost that is once in a while involved in going through old files which may be in a different part of the country. But that would be perhaps not reasonably within his power.

JUDGE DRIVER: That is true.

JUDGE CLARK: Do you want, then, to approve of the amendment changing the words "within his power" to "available to him" in line 44?

DEAN MORGAN: What do you think about that, Charles? I haven't any stubborn opinion on it.

JUDGE CLARK: To be perfectly frank, it seems to me to be about the same thing. I am not at all sure that it would make any difference in the construction if I were construing it.

DEAN MORGAN: You mean if a trial judge were construing it. I should think that is probably true.

MR. LEMANN: Most of the comments are unfavorable.

PROFESSOR WRIGHT: No. With the late ones I believe it works out, Mr. Lemann, to 23 favorable, 24 unfavorable.

MR. LEMANN: They came in with a rush.

PROFESSOR WRIGHT: The returns from the outlying precincts were very good for the amendment.

MR. LEMANN: I wonder if the word went out, "How many votes do you need? O.K., we will provide the votes." I wonder if this represents an organized effort.

PROFESSOR WRIGHT: No, I would say distinctly not.

MR. LEMANN: It is very hard for me to read all this stuff. The majority of the District of Columbia committee objects to the proposed amendments. They say, "This amendment along with the proposal for amendment of Rules 33 and 34 was among the most controversial of all the matters considered by the committee, and the differences of opinion are irreconcilable."

PROFESSOR WRIGHT: Among the late votes coming in from the outlying precincts, Mr. Lemann, were from such people as Lee Loevinger, famous antitrust attorney in that part of the country, Judge Nordbye, the Department of Justice, and other people of that sort.

MR. LEMANN: The Department of Justice is for it?

PROFESSOR WRIGHT: The Department of Justice is for it, yes, sir.

JUDGE CLARK: All right. Shall we go ahead?

MR. LEMANN: I am glad to see Mr. Hocker approves it. It must be all right if he approves it.

JUDGE CLARK: Which do you prefer of those last words, "within his power" or "available to him"?

DEAN PIRSIG: There is only one suggestion to that effect?

JUDGE CLARK: That is right.

DEAN PIRSIG: I move that we approve the amendment as it stands.

JUDGE CLARK: Dean Pirsig moves that we approve the amendment as it appears in the green booklet.

MR. PRYOR: I second the motion.

JUDGE CLARK: All those in favor raise your hands, please. Nine. All those opposed. There are none. Nine to nothing.

Mr. Tolman is not here.

CHAIRMAN MITCHELL: I am afraid nine to nothing won't be understood by the Supreme Court. It is usually five to four.

JUDGE CLARK: Now we are down to Rule 37, aren't we? Is there anything you want to say about that?

PROFESSOR WRIGHT: No.

JUDGE CLARK: I suggest that this be adopted. It would seem to me that there is much to be said for some of Youngquist's suggestions here. He said he would strike the repetitious language of lines 7 to 11, making it conform to what we did in lines 12 and 13, that is, strike out after "Rule 34" the words "to produce any document or other thing for

inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property". You see, that is what we did in Rule 35. We strike it out.

Then he suggests down in lines 52 to 54 to substitute the words "another for examination" in place of "for examination his agent or a person under his custody or legal control".

And the final one is the substitution of the word "shows" for "makes a proper showing" in line 57.

Those of course are textual changes only, but it seems to me they do make the thing clearer and simpler as suggested by Mr. Youngquist of the Minnesota committee and as states on page 37 of the summary.

Is there any comment on that?

JUDGE DRIVER: I have a note here that I thought they were good suggestions.

JUDGE CLARK: All those in favor, therefore, of the amendments with these textual changes which I have read --

PROFESSOR MOORE: Judge, I am in favor of that --

JUDGE CLARK: All right, go ahead, Mr. Moore.

PROFESSOR MOORE: -- but I want to ask what sanctions you have now for a party who fails to attach copies of documents, and so on, to the interrogatories under Rule 33.

JUDGE CLARK: I forgot about that. I guess we should have brought that up. It is a question whether we should add some of the matter we were discussing before. That would be

37(a). We can put in here what we discussed before. Of course we took no action because we had not gotten there.

Do you have the language we discussed before in Rule 33, Mr. Wright? The third sentence of 37(a) provides for an application for direction to answer under Rule 33. We could put in here "upon the refusal of a party to attach to his answers the documents specified in Rule 33, the proponent of interrogatories may on like notice make like application for such an order, but must show good cause when these documents are the work product of the attorney."

I am not putting that out as the proper form to be used. I think I would want to go back and see what we were saying before. But that would be the general idea.

The first question is, Is it necessary? Haven't we covered it because we put in several more things after our discussion first came up. I should think that we had limited this whole thing by Rule 33 and Rule 34. My own suggestion would be that this is not necessary in the light of the additions we made.

PROFESSOR MOORE: I am inclined to think probably the court would work it out the way you suggest, but 37(a) as it is now drafted does not gear too well to Rule 33 as it is amended.

JUDGE CLARK: Do you think it is really necessary, in light of the further additions we have made to Rules 33 and 34?

PROFESSOR WRIGHT: I suggest, Mr. Moore, that the rule has been lacking all along. This is not a problem confined to this new addition to Rule 33. There has never been any specific provision in Rule 37 in so many words for compelling a person who has answered an interrogatory but hasn't answered it fully, to give you a more complete answer. The learned treatise in Moore's Federal Practice and Wright's Minnesota Rules both take the position that this is implicit in Rule 37.01, and if a party doesn't give you a full and complete answer you can proceed under Rule 37.01 to compel him to do so, but of course the treatises may be wrong.

PROFESSOR MOORE: I hope not.

PROFESSOR WRIGHT: Me too.

JUDGE CLARK: That seems to demonstrate quite conclusively that we don't need to make any change here.

MR. LEMANN: I have been reading the comments, Judge Clark. I don't know what is being discussed.

JUDGE CLARK: I take it that nobody is objecting. We have accepted 37(b) with the modifications suggested by Youngquist, and now we have turned back and are looking at 37(a) as to which there is no written out suggestion.

Let me ask, is there any objection to that action as to 37(b), which is the material here before you? I thought there was no objection.

PROFESSOR WRIGHT: I have one question, Judge. When

you read the proposals of General Youngquist's amendments at pages 37 and 38 of the summary, you did not read the last one I have there, the deletion of "in good faith" in line 58, and I wondered if you intended to follow that suggestion, also.

JUDGE CLARK: Yes, I make that suggestion, to strike out "in good faith" in line 58. I don't see that that adds anything. Is that accepted?

All right, unless there is some request for a vote or something, we will mark that accepted as to 37(b).

MR. LEMANN: May I bring up something with respect to Rule 37(b)? Rule 37(b) speaks of an order under Rule 34 to produce documents or other material. It doesn't make any reference in 37(b) to complying with the answers to interrogatories under Rule 33. Refresh my memory as to why that is.

JUDGE CLARK: We never have had anything more than we have here. That is what Mr. Wright was speaking of a moment ago. From the beginning there has been no specific language providing what should be done if the answers to the interrogatories are insufficient. Moore's Federal Practice and now the new book, Wright's Minnesota Practice, take the position that even though not expressed in explicit language, it is really covered by 37(a) and does justify an order without spelling it out.

MR. PRYOR: Is that on the theory that an insufficient answer is not an answer?

CHAIRMAN MITCHELL: Who is the author of that Minnesota book?

JUDGE CLARK: Mr. Wright. That book has just come out.

MR. PRYOR: Judge Clark, is that on the theory that an insufficient answer is not an answer within the rules?

JUDGE CLARK: Yes, I presume so, although perhaps the authors had better speak up.

MR. PRYOR: I think that is sound.

PROFESSOR WRIGHT: The position I have taken, Mr. Pryor, is that it would make a sham of the interrogatory process if you could comply with everything merely by giving some patently insufficient answer when obviously an answer must mean a responsive and complete answer.

MR. PRYOR: Partial compliance is not compliance.

JUDGE CLARK: Does anyone want to do anything about this? If not, we will pass on to the next. You are all satisfied to go ahead now?

MR. PRYOR: Yes.

JUDGE CLARK: The next is Rule 38(d). This is the suggestion as to jury trial.

MR. LEMANN: Are you past Rule 37?

JUDGE CLARK: I understood that nobody made any question about Rule 37. I didn't put a formal vote. I will put the formal vote.

I understand the action taken on 37(b) is that we

have approved it with several textual changes which I read.

MR. LEMANN: Did I hear you say something about 37(a)?

JUDGE CLARK: About 37(a) we have done nothing.

MR. LEMANN: Did I hear you refer to it or not?

JUDGE CLARK: Yes, we were referring to it.

MR. LEMANN: But you decided that nothing needed to be done there?

JUDGE CLARK: That is right.

MR. LEMANN: You don't think it needs any expansion in view of the expansion of Rule 33? This reads now, "upon the refusal of a party to answer any interrogatory submitted under Rule 33". That doesn't say anything about refusing to produce documents, but maybe that is implied. You are now told in Rule 33 that you must produce documents. Perhaps you would say to me, "I think a dumbbell would know that this covers that."

JUDGE CLARK: That is about the way we worked it out, I think. I started to talk about 37(a). Mr. Moore asked that question. I said that it could be covered by an addition to 37(a) of the type that I was indicating. I then went on to suggest that it didn't seem to me, in the light of the construction of 37(a) generally, and what we had done in 33 and 34, that it was necessary. My final suggestion was that it was not necessary and that we not do anything. With that, nobody else did anything, and we were about to pass on.

MR. LEMANN: I hope the courts don't go wrong, but as I have remarked before, I don't think we can prevent them going wrong occasionally.

JUDGE CLARK: Would you like to suggest some addition, or what?

MR. LEMANN: No.

DEAN MORGAN: Rule 37(a) has always been regarded as applicable to an imperfect answer, hasn't it?

PROFESSOR MOORE: Yes.

DEAN MORGAN: If documents are not attached, it is an imperfect answer, isn't it? If they refuse to do it on the ground that it is privileged or not subject to discovery without an order, then you get your order, and then you have that covered under refusal to obey an order.

PROFESSOR MOORE: I think it works out.

MR. LEMANN: It is a little inartistic to leave 37(a) as it is. I should think your pride of workmanship would make you want to change it. However, if that doesn't appeal to you, I don't think I should get excited about it.

CHAIRMAN MITCHELL: You mean it is being inartistic?

MR. LEMANN: Yes, inadequate. I should think you would have proposed an amendment with as much force as some of the other amendments that have been passed on.

JUDGE CLARK: I don't want to be found wanting at all. Do you have, Mr. Wright, what I gave before? It is getting a

little painful for me to remember what I have said here. Do you have what I gave previously?

PROFESSOR WRIGHT: I am sorry to say I did not take that down.

JUDGE CLARK: The general gist of my suggestion was that we say that when the deponent answered that he had not attached the documents because he was not required to attach them, then the moving party, the interrogator, could ask the judge to order him to produce the documents, but must have the burden of showing good cause for them if they were within the Hickman rule. Of course we wouldn't use that language, "within the Hickman rule". We would use this other phraseology. But that was the idea.

MR. LEMANN: That would go in 37(a)?

JUDGE CLARK: That would go in 37(a), and I think quite naturally that would go in after the third sentence and before the fourth.

MR. LEMANN: On the whole, Mr. Reporter, I think we would get some protection from the professors and the editors of the Federal Rules Service, and so on, if we made that insertion. I move we make it.

JUDGE CLARK: I don't object at all.

Mr. Lemann moves an amendment, and I certainly would like to join him in moving the amendment. We would have to work out the wording of it in more detail. I cannot do it now

without going back and looking at some of these other expressions we have used. We would want to make it the same.

Have you the proposition sufficiently in mind to vote on it?

DEAN PIRSIG: I haven't, no. The language which now appears is "upon the refusal of a party to answer any interrogatory submitted under Rule 33, the proponent of the question may on like notice make like application for such an order."

Under the amendment as we have it, this will be in the form of an interrogatory which will include in it a request that designated documents shall be attached. It seems to me perfectly clear that if the answer comes in without the documents, it is a partial and incomplete answer. It seems to me more clear than some of the ordinary and basic questions that you get in an interrogatory that does not involve documents. The documents are either there or they are not. If they are not there, the answer is incomplete. I don't think you need any additional language.

MR. LEMANN: He answers it but doesn't attach the documents.

MR. PRYOR: Then he hasn't answered.

MR. LEMANN: I trust Judge Clark's language would take care of the situation where there was a controversy as to the applicability of the Hickman doctrine. You spell out

how that would be handled.

JUDGE CLARK: I think so. Do you want to vote on it, or what?

MR. DODGE: Just what is the proposed amendment?

JUDGE CLARK: The amendment would come in before the words -- you have to go back. It isn't in this book. You have to go back to the general rules.

MR. DODGE: Rule 37(b)?

JUDGE CLARK: Rule 37(a). After the third sentence and before the words beginning "If the motion is granted".

Now, Mr. Wright, did you take down what I said last?

PROFESSOR WRIGHT: What did you say last? I don't have anything down on 37(a). If you have been saying things, I have certainly missed them.

MR. PRYOR: If it is to be inserted, definitely it should be inserted here. We have not inserted anything in 37(a) in the way of a proposed amendment to the bar and bench, and I don't see that it is needed.

MR. DODGE: What is it that it is proposed to insert there?

JUDGE CLARK: This in effect was an additional provision that on the refusal of a deponent on an interrogatory to attach the papers, the moving party, the interrogator, could ask the court for an order directing the delivery of the papers, but that he would have to show good cause if it were within the

Hickman rule. That would be the idea.

That is of course what we have in effect indicated in Rule 33 already. I think the real question is whether or not we should, if I may say so, gild the lily.

MR. LEMANN: That is what it would be.

JUDGE DRIVER: It seems to me we should keep to the minimum, amendments which we have not circulated to the bench and bar. I think we should do that only where it is clearly necessary.

JUDGE CLARK: Mr. Lemann?

MR. LEMANN: I would only answer that by saying I would not have made a number of these amendments, but the majority has voted to make them. We are amending Rule 33, and when these revised rules go out to be studied by the text writers and the judges and the professors, I am sure that there is going to be some question raised as there is now that this Committee was not aware of the fact that they amended Rule 33 and didn't make corresponding changes in the other rules, and they did a sloppy job by not taking that into account. I think there would be some force in that criticism. As I have said before, you can't avoid all criticism. It is a matter of judgment.

DEAN MORGAN: If you were on the other side and they didn't give the documents to you, what would you do? Wouldn't you move for an order?

MR. LEMANN: Sure.

DEAN MORGAN: Why do you have to have a statement that you may do it?

MR. LEMANN: I would do a lot of things that we have spelled out here, without having them spelled out.

JUDGE CLARK: All those in favor of Mr. Lemann's amendment raise their right hands. One. All those opposed raise their right hands. Eight. Eight to one. I fear it is lost.

We come next to 38(d), and that is the addition of the sentence clarifying the provision as to waiver of jury trial. Judge Nordbye in his good paper says, "There should be no valid objection to this proposed change, and indeed the addition seems to be present by implication in the present rule."

What does the Department of Justice say?

PROFESSOR WRIGHT: They favor the amendment.

JUDGE CLARK: In this new group of material which has come in from Judge Gourley of Pennsylvania, a number of amendments are included, including this one, which he says seems to be well considered. He also goes on to say particularly change Rule 56 relating to summary judgment.

I think myself this is a helpful thing. I don't think it changes the law as it has been worked out. I don't think it changes it particularly as in the first phase of the rules it developed, but there came along some changes that

raised some question about this, and it seems to me not improper to say that there has been a considerable wave of cases which raise the proposition. That is only natural, because when litigants are given an idea they like to take it.

I know in my own court we have had a great deal of question about this, the parties now coming to us on petitions for mandamus or something of that kind. I think in the last few years we have not granted a single one, perhaps not any since 1947 that I can remember. It may be that they have slowed up the process somewhat. At any rate we have had quite a good many. Of course these petitions for mandamus slow up the whole process, too. Everything stops and the case cannot go ahead and be heard until we have gotten together and passed on it.

It seems to me that the smooth working of jury and jury trial waiver is one of the main things we need to control the jury situation. I will add, of course, that I don't mean that this is going to revolutionize things. This is one of the things which adds to confusion on the jury calendar.

I think here it is worth while and will help to clear it up. That is what we are doing. We are just helping to clear up one of the points in this area of great difficulty in getting cases along.

In the good address of Justice David Peck in New York last week, reporting to the citizens of New York on the situation

in that very busy state court, he says what I think all of us know who have anything to do with these congested courts. The real delay is in the jury calendar. That is the thing that has been four years behind in the state court. He points out that through somewhat superhuman efforts they have been able to bring it down to three years, and he now points out how much better off they are than is the federal court in the Southern District of New York.

I think he is throwing a few bouquets to the state courts that may not be fully justified, although I do not object to the general idea he has in mind and I don't object particularly to the fact that he is at the moment drawing a contrast with the federal courts, because I think we need attention and help in New York in various ways.

He says that some litigants are now going into the federal court merely to get the extra delay they can get.

As I say, I don't suggest that these things are going to take care of the New York situation. They just iron out a matter which has given a good deal of difficulty, particularly locally, and I think they make it orderly and fair and prevent one litigant having delayed, perhaps having changed his attorney as is often the situation, that he does not get a new chance to go back and retrace his steps when he had a perfect right before.

It does seem to me that this is one of our better

jobs of clarification. That is what it is, not a change but a clarification.

DEAN MORGAN: You disagree with the Bereslavsky case, then.

JUDGE CLARK: Yes.

PROFESSOR MOORE: You disagree with two other circuits, too, the Sixth Circuit in Bereslavsky v. Kloeb, and the Third Circuit in the Canister case.

DEAN MORGAN: In this particular case he could not have claimed jury trial the first time.

PROFESSOR MOORE: That is correct.

MR. DODGE: Suppose the plaintiff in his original complaint asks for specific performance, and by an amendment he waives that claim and claims money damages, has the defendant any more claim to trial by jury?

JUDGE CLARK: I should think where the only change is in a shift of the remedy required, that he should be; that you should make your claims at the beginning and you should not be able to shift around depending upon remedy.

MR. DODGE: He wouldn't have any right to claim it at the beginning.

JUDGE CLARK: The case it seems to me is really the case we had, which is one of those cited here, the Gulbenkian case which was in our circuit, an opinion by Judge Swan. You see, under another rule dealing with demand for judgment, the

demand for judgment does not limit the relief once you are in court. The demand for judgment limits what you can get where the defendant does not appear. Where he appears, the judgment must be of the kind that the issues call for.

The Gulbenkian case was one where originally specific performance was asked for. It was held that specific performance could not be given and that the only relief available there would be money damages. To the objection that jury trial would be had, one of the answers the court made was that no claim had been made within the time of the pleadings and therefore it was waived. That is the case of Gulbenkian v. Gulbenkian, cited on page 39.

DEAN MORGAN: Was that a case, Charles, where before the fusion equity could not have given him damages?

JUDGE CLARK: That was the other ground stated by the court. Judge Swan wrote the opinion and said there were two answers.

DEAN MORGAN: He wasn't waiving anything in this particular case. I don't think that is an authority against the Bereslavsky case at all.

JUDGE CLARK: Why isn't it, when the court expressly stated that the jury was waived? There were two grounds for the decision, and the court stated them both equally.

How far do you think the mere change in the relief under 54(c), which isn't the control, should allow revival of

the right of jury trial?

DEAN MORGAN: I think you are confusing two things that ought not to be confused -- the right to trial by jury at the beginning, and the right to relief that you get at the end. They are two quite different things. The relief you get at the end is based on the notion that the evidence has fallen in a particular way and so on, and you are entitled to any relief that you ought to be entitled to. But that does not mean that you could go back and demand a jury if you hadn't originally done so. But if you get an opportunity and your motion for an amendment is made and it is not made simply for the purpose of getting trial by jury, it seems to me that you have the original question that you have not answered in your comment. That is all I can say.

JUDGE CLARK: What would be your decision in the Bereslavsky situation? That was a case of the plaintiff suing on a patent --

DEAN MORGAN: I think Judge Frank was right. It was Frank who gave the opinion, wasn't it?

JUDGE CLARK: Yes, that is right.

DEAN MORGAN: I should have said he was entitled to jury trial.

JUDGE CLARK: Let's go back.

DEAN MORGAN: Because you have him in a situation where he had to pay damages without an injunction, he would

rather have a jury assess the damages than to have the court assess them. You distinguish that by the fact that it was government action, practically, that got him to postpone the case so he could get an injunction.

JUDGE CLARK: Let me for a moment go over what happened there. In that case he claimed an injunction in an ordinary patent action. He then came in after some time had elapsed and claimed just damages, leaving out his injunction, and at that time the judge, who was Judge Mandelbaum and who wrote a little opinion on it, said "This amendment is unnecessary. Since he wants to do it, I am disposed to let him do it. It is asserted by the opposition that he is making this amendment as a basis to claim the right of trial by jury." Mandelbaum said, "That issue is not before me and I won't go into it."

Mandelbaum therefore granted the amendment, which affected only the grant of judgment.

I ask first, Should he have done that? Because how is the demand for judgment at all amendable. There have been suggestions in some of the cases since that it is not to be amended because it does not restrict the relief and therefore there is nothing to amend about it.

DEAN MORGAN: But it does restrict the right of trial by jury. You are getting relief mixed up with trial by jury. They are entirely different.

JUDGE CLARK: That is what I am coming to. May you

restore your right of trial by jury -- because this was the plaintiff all the way through -- may you get back your right of trial by jury which you have waived by the mere device of amending your prayer for relief which would have no other effect on the case than to restore a right which you had waived?

DEAN MORGAN: That doesn't necessarily follow, because the court may deny your motion for amended relief, and so forth, if that is all there is to it. But if there is a perfectly good reason why you should not or could not have claimed your trial by jury in the beginning and something has happened which really gives you the right of trial by jury and the right to amend, it seems to me you have an entirely new question. I am talking about issues, not causes of action.

JUDGE CLARK: The difficulty is that you haven't anything new at all unless it is the right of trial by jury. In the actual case you haven't anything new at all.

MR. DODGE: The original rule, 38(b), said, "Any party may demand a trial by jury of any issue triable of right by a jury". He is limited to that. If the complaint as stated sets up no issue triable of right by a jury, he has no right to file a claim for one.

DEAN MORGAN: That is right.

JUDGE CLARK: Of course, that we have not decided yet, whether there is any issue set up or not. You decide this by the basic issues involved.

MR. DODGE: The defendant certainly isn't called upon to claim a trial by jury in any issue not triable by jury merely because under our rules any kind of judgment might be finally entered. He does not have to foresee amendments which will present an issue triable by jury.

DEAN MORGAN: If it was the defendant who made it, it would be clear.

PROFESSOR MOORE: In the Gulbenkian case, the plaintiff had given notice about two years before trial that if he were denied equitable relief he would seek damages. Judge Swan, in a note in the case, said:

> "We do not now decide the extent of a defendant's right to jury trial where the plaintiff, without previous notice to defendant, is allowed to conform his pleadings to the proof and in so doing changes the action from one triable to the court to one triable to a jury."

MR. DODGE: He didn't decide that question.

How can a defendant be constitutionally deprived of a trial by jury?

JUDGE CLARK: Of course when you ask that question, the answer is clear, he cannot be deprived of trial by jury, and this rule starts out by saying he cannot. The real question is, Is he being deprived of trial by jury? It is not only the defendant, it is the plaintiff. In the Bereslavsky case it was the plaintiff who was involved.

DEAN MORGAN: I was arguing the case for the plaintiff before. If my argument means anything or amounts to anything for the plaintiff, it is four or five times as strong for the defendant, because the defendant could not demand trial by jury in that case, either.

MR. DODGE: He is charged with waiver of it.

DEAN MORGAN: How could he be?

JUDGE CLARK: I think he could, and I think of course the plaintiff could, too, and I think he should, too. But let us see where we are coming out. I want to get a little clearer what the trial court is to do.

Here is a motion to amend the demand for judgment. Objection is made to it on the theory that it is absolutely useless. We have from time to time held that there should not be an amendment there because it doesn't do anything. But he says, "I want to get my trial of right by jury back," and that is the only purpose of the amendment and it is the only purpose the amendment can serve, really, because in the trial of the case it doesn't have any effect.

What should the trial judge do there? He should say, "As an excuse to get away from the waiver that the passage of time would mean, I am going to go through this otherwise useless thing of amending the demand for judgment."

DEAN MORGAN: Are you talking now about the plaintiff or the defendant?

JUDGE CLARK: I am talking about the plaintiff.

MR. DODGE: The motion to amend is a subterfuge to get a jury by hypothesis.

JUDGE CLARK: Of course it is, and that is what came up in the Bereslavsky case. It was put up to the trial judge that that was the purpose of it. He went ahead and said --

DEAN MORGAN: In that case it seems to me it didn't make any difference whether that was the purpose of it. I suppose it was the purpose of it because at the government request he had let go the opportunity to get an injunction. As long as he was asking for injunction in damages, he couldn't get a jury and they wouldn't let him bring it on for trial, requested him not to bring it on for trial until after peace was declared.

He postponed the trial, postponed everything. I suppose if he hadn't postponed it there might have been an intervention that would have gotten it postponed. Of course he said "The reason I want to amend is so as to get a jury trial."

PROFESSOR MOORE: It is not fair to say that this amendment on his part delayed the trial of the case. The trial of the case had been delayed because of the war, and as soon as that was over and he could no longer get an injunction because the patent had expired, he wanted to try the issue of damages to a jury. It doesn't seem to me that that is an improper desire at that point.

I think you are whittling down the right to jury trial

if you deprive the plaintiff of the right to amend under those circumstances, and certainly the right of the defendant to demand a jury if the court permits the plaintiff to amend.

JUDGE CLARK: May I just continue on this, because I think this is an important question with the trial judges.

Eddie, suppose that Mandelbaum had denied the amendment, which I think is perhaps the more usual practice, because --

DEAN MORGAN: That is all right. He had a right to trial by jury to begin with because equity, having once gotten jurisdiction of the thing, keeps it. It can go on and give damages anyhow.

In the case where he starts out and has no right of trial by jury, then the whole question is whether you can amend or not when you get to a place where an issue is raised where there is a right of trial by jury for the first time. You have drawn Rule 38 not on causes of action, but on issues.

JUDGE CLARK: I don't have in my mind what you said in answer to my question, which is simply this: Does the right of trial by jury in that case depend on whether the district judge granted the amendment or not?

DEAN MORGAN: It depends on whether he had a right of trial by jury as a constitutional thing at the beginning. If the issues are such that he has no right to trial by jury at the beginning, if it is the kind of case that would have been

triable in equity before the fusion, then he has no right of trial by jury and he could not demand it. If he demanded it, it would be denied, absolutely denied, just as in the __________ __________(?) case you don't like particularly in New York, in fact you think it is terrible. At the beginning he wanted dissolution of partnership accounting. Suppose he had asked for jury trial then. He would have been thrown out on his neck to begin with because there wasn't any right of trial by jury under New York law or under the original common law.

MR. DODGE: On page 40 of Professor Wright's digest there is a quotation from Clark on Code Pleading. It says "See generally Clark, Code Pleading. "If a right to jury trial existed from the beginning, neither party can complain if he is held to waive such right by failure to make timely demand. But if the right did not exist at the outset, and came into being only when the amendment was made, both parties must have a constitutional right to demand a jury, since the Seventh Amendment would prohibit holding either of them to waiver of a right which they never had."

JUDGE CLARK: Of course that is what I believe in thoroughly. I was about to add that nothing I intended to say or wanted to say could change the situation. We are now, of course, dealing with certain different interpretations of an admitted rule. Both of you are starting with the assumption in these cases that there never was a right of trial by jury

until the prayer for relief was amended. It seems to me that that gets in violation of the other principle that the prayer for relief does not determine the cause of action.

I perfectly agree, once you have it settled that there wasn't any jury case until you have the new matter brought in, of course I agree quite thoroughly that then --

DEAN MORGAN: That isn't the Bereslavsky case. There wasn't any right of trial by jury.

JUDGE CLARK: Of course I don't think it was, but after all --

DEAN MORGAN: You show me one theory under which there could have been a right of trial by jury there.

JUDGE CLARK: That was only a question of right to relief. The body of the complaint wasn't any different.

DEAN MORGAN: The whole difference between law and equity is the right to relief. My heavens, what are you talking about. If there is a right to equitable relief, and that is the kind of relief I want and I ask for that, then equity gets jurisdiction, and it keeps it. And if you break the right to equitable relief, and damages are given in place of that, of course I am not entitled to a jury.

But when a new situation arises so I am not entitled to equitable relief, for the first time I have a right to trial by jury. You say at the beginning I have to waive the question and take nothing but damages for the violation of the patent

right.

JUDGE CLARK: Of course there isn't any question, as I have said before, I cannot waive trial by jury and I do not intend to, and I do not think I am. These are matters of interpretation. These are matters of directing the emphasis of the trial court in certain things. If my conception is wrong, I have not changed the law or the Constitution.

DEAN MORGAN: I am still unconvinced, and I am going to vote against the amendment. There is no use in my talking any longer. I have given you all I have to say. I am just reiterating what I said, and you just reiterate your stuff about right to relief. There is no use going further on that.

JUDGE CLARK: I guess that is right.

MR. PRYOR: What were the results of the comments on that?

JUDGE CLARK: I had better let Mr. Wright answer that.

PROFESSOR WRIGHT: Altogether we got 16 favorable responses, 7 unfavorable, including most recently favorable responses from the Department of Justice and Judge Nordbye.

JUDGE DRIVER: The Department of Justice favored it?

PROFESSOR WRIGHT: Yes.

JUDGE CLARK: I don't see that there is anything to do but vote on it. I think perhaps there is not much more to say. All those in favor will raise their right hands, please. Five. All those opposed. Five.

There you are.

MR. DODGE: I think, Judge, you are a little inclined toward this amendment by virtue of your dislike of the old phrase "cause of action", because the note on page 40 indicates that you are much disturbed because sometimes it has been held that the cause of action was changed by an amendment such as we are dealing with here.

An amendment changing a cause of action from a claim for equitable relief into a claim for damages was not a new cause of action, as you say. If it does change an equitable issue to a legal issue, you have a constitutional right to a jury.

CHAIRMAN MITCHELL: I would like to know why this proposed amendment to 38 has anything to do with the situation you speak of. It starts out, "A waiver of trial by jury is not revoked by an amendment". You are all telling me that he didn't have any right to trial by jury at the start, so he didn't waive it. How can you waive anything you don't have? I do not understand that part of it.

JUDGE CLARK: That is quite right. We were making different interpretations. That is why I said that certainly in any case where there has been no such right of trial by jury, and where it is first brought in by amendment, I have said right along that that is the case where you could get a trial by jury, and that is why I have said in this selection from my book --

DEAN MORGAN: The last sentence, General, was put in largely because of the trick that was played in Massachusetts, for example, for a long time, where it was the party that didn't want a trial by jury who would put the demand in his pleading, and then the other party, relying upon the fact that he demanded jury trial, would let it go by; and then the first party would withdraw his demand. Then he said, "You are too late."

I know at the particular time when we went over this, I called attention to that Massachusetts business. It was to cover that kind of trick that we had this language in here.

MR. DODGE: That has been taken care of by the last sentence of section (d).

DEAN MORGAN: The demand cannot be withdrawn without the consent of both parties.

CHAIRMAN MITCHELL: I suppose in a patent infringement case the patentee may start out with a suit for damages and not have any case for injunction at all, can't he?

DEAN MORGAN: I didn't get that.

CHAIRMAN MITCHELL: I say, in a patent infringement case the patentee brings a suit for damages in the first instance, even though he has a right for injunction and does not ask for it.

DEAN MORGAN: That is right.

JUDGE CLARK: If he leaves it that way, he has a right

of jury trial on the question of damages.

DEAN MORGAN: That is right.

JUDGE DRIVER: I just want to make this inquiry. Is there any doubt that we can finish this tomorrow if we adjourn at a seasonable hour tonight? You younger men may not get tired, but I get tired at these long sessions and my mind does not work as well.

DEAN MORGAN: Bob Dodge and I don't get tired. You youngsters should not get tired.

JUDGE DRIVER: I don't think we can finish tonight unless we run very late. If we can finish tomorrow anyway, why not adjourn and take it up tomorrow.

JUDGE CLARK: I should think we could finish tomorrow. I cannot promise. I should say there were four major problems in these remaining amendments, and then there may be some additional ones, such as whether we want to consider the Department of Justice's new theories of trial by jury in the condemnation cases. So I should think as a matter of prhphecy, yes, we can finish, but I don't want to give any guarantee.

DEAN MORGAN: We should be through by tomorrow evening easily.

JUDGE CLARK: I should think so. I would suspect that there will be discussion particularly on Rules 50, 52, 54, and 60.

JUDGE DRIVER: If we meet at 9:30, I should think

we will get through.

CHAIRMAN MITCHELL: Let's adjourn now until 9:30 tomorrow morning. We will bar all discussion about waiver of jury trial tomorrow.

... The meeting adjourned at 5:10 o'clock p.m. ...