MARCH 1967 MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES

The Advisory Committee on Civil Rules met in the Conference Room of the Supreme Court Building on March 9 and 10, 1967. Meeting was convened on Thursday, March 9 at 9:55 a.m. and was adjourned on Friday, March 10 at 3:52 p.m. The following members were present:

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

Others attending all or part of the sessions were Honorable Albert B. Maris, Chairman of the standing Committee; Professor Maurice Rosenberg of Columbia University; Lee W. Colby, member of the Advisory Committee on Admiralty Rules; and William E. Foley, Secretary of the Rules Committees.

The following are excerpts from the tape of the meeting.

Dean Acheson opens the meeting and advises that the procedure will be a little different in that as suggested by some of the members, rather than have the reporter give his reasons for each rule, the discussions will commence with the members' viewpoints.

However, in view of the fact that Mr. Frank is unable to attend this first day, the reporter is asked to state Mr. Frank's position with regard to the

INTRODUCTORY NOTE TO AMENDMENTS OF THE DISCOVERY RULES.

Professor Sacks: John simply raised the question of having an Introductory Note. He says the statement is a good one on the subject matter and helpful to the bar as it considers the rules. "On the other hand I don't think we ought to start publishing overall notes. Notes over the years have become voluminous and I really don't want to find a whole new area to start expanding. Please give this a little thought." In trying to appraise that, what struck me was that, with respect to the [couldn't make out next word] there are three points in the Introductory Note. The first is on the Columbia Study; the second on rearrangement; and the third is essentially on sequence and mechanics. It would not be impossible to put the rearrangement material in Rule 26. The material on sequence, likewise, we could find a place for, although again it relates to more rules than one. The material on the Columbia Study, on the other hand, I think, is something that should be stated, because what the Committee did here is very new in rule making. In addition, Ben Kaplan likes the notion of an Introductory Note and he suggests that not only might the material, though shortened, be kept, but that where there is such a volume of change it would be useful at the beginning of the Note to set forth in numbered sequence, very briefly, the most important changes made in discovery to highlight and call attention to. Just to finish off, I would prefer to have an

Introductory Note. I think Ben's suggestion of a listing of the most important changes is a very good one. I think the material on the Columbia Study should remain. I would be perfectly happy to attempt to condense the balance of it and to move the rest of the material elsewhere.

Judge Thomsen: The Introductory Note is quite different from the notes to the other rules in that is more temporary. After the amendments have been adopted, the Note ought to die and anything in it that has permanent value should be put in the individual note.

Dean Joiner: I look upon this Note as something that appears as a part of the rules that are published for discussion and will not appear when we submit them to the Judicial Conference for promulgation. It's terribly important to have something like this in the current stage of it and if there are things in here that need to be permanent they ought to be part of the original notes.

Professor Sacks: I quite agree.

Mr. Jenner: There are a number of things in the Note that bother me. The reporter is going to revise the Note to state generally what?

Professor Sacks: The only proposal was that at the very beginning it would rather list the more important changes in discovery that are proposed. That would be an additional item. I was not proposing to change the material on the Columbia Study; the other material, it was suggested, could be shortened.

Mr. Acheson: Perhaps we ought to call this the Advisory Committee's Explanatory Statement or something of that sort and then drop it out.

At the present time, let us assume that this is an ephemeral explanatory statement to the bar. If anybody has some suggestions for changes for that kind of an explanatory statement having it be put together now.

Mr. Freedman: I think we are giving up something of real value. If we let the Note die, anyone doing research would have go back into the record to find out what the explanatory note did provide and what was really intended. I personally feel that it would be helpful if it is kept in the rule.

Professor Sacks: I think the suggestion we had is a very good one and what it will amount to is that where something relevant to an understanding of the proposed rule change is in there, it will become important to make sure that it is in the Note to that change.

Mr. Jenner: I think we should not give the bar the impression that we were relying almost exclusively on the survey [Columbia Study]. I would take out the word "serious" in the 2nd line of page 4. On page 8, you say "A party may apply under Rule 30(d) for court protection against an oppressive examination, but ordinarily he will simply refuse to answer. . . ." (a) I don't think that's so. (b) That seems to me to put a stamp of approval by this Committee on the horrible practice of lawyers instructing witnesses not to answer.

Professor Sacks: That can be handled. We don't have to put emphasis on one rather than on the other.

Mr. Doub: I'm opposed to encouraging local rules. I think it is a totally fallacious idea that there should be a local practice set up supplementing these rules.

Mr. Freund: I concur in that.

Mr. Jenner: I share that completely. That is not the point I was making. I was just suggesting a reference in the Introductory Note to the fact that there has been a codification in some districts and the bar can go and take a look at that as what kind of practice may exist.

Mr. Freedman: I think that when you have a reference to local rules you are inviting a local rule which would be in direct conflict with what has been suggested.

Judge Feinberg: I think that you have to distinguish between a local rule that conflicts with the federal rules and a local rule which carries out the intent of the federal rules.

Professor Louisell: I think it would be quite good to have a cross-reference table to show where the provision in our existing rules will then be found in the new rule. Then lawyers would be able quickly to see the difference between their local rules and these federal rules.

Professor Sacks: I think that's a good thing.

RULE 26 - GENERAL PROVISIONS GOVERNING DISCOVERY

There is a discussion between Mr. Jenner and Professor Sacks as to the complexity of the rule as far as numbering and lettering subdivisions and having so many cross references within the rule. There are comments from other members.

(b)(1) In General

Mr. Freedman: The point that concerns me is "not privileged." I thought that we had talked about this the last time and that it

was going to be made abundantly clear that the term "not privileged" shall not protect information in these statements which cannot be privileged except on showing of good cause.

Professor Louisell: The real purpose of that "not privileged" is to refer to the true evidentiary privilege.

Professor Sacks: Your point, Abe, if I understand it. I think Hickman v. Taylor made it perfectly clear that materials prepared for trial are not protected by privilege just because they are prepared for trial. We have a ruling on precisely the question of privilege that, it seems to me, makes it clear that we are dealing with (b)(3) and not (b)(2) when you talk about work product.

Mr. Freedman: I know, but if you don't cover it in the Note that the term "not privileged" does not cover the information in the statements which are a work product of the lawyer, then you are going to get a great deal of confusion.

Professor Sacks: Is it your point that the Note should state that Hickman v. Taylor declared that the trial preparation materials are not covered by privilege?

Mr. Freedman: That's right.

Dean Joiner: I just don't think that anybody would contend that the information is privileged. It's the communication that is privileged.

Mr. Freedman: I am in a case right now where they have simply refused to give any information on the basis that all this information was taken by a lawyer. This is a contention that has been made in different places and I think it ought to be made very clear that the information itself in the statements is not

privileged.

Professor Sacks: That's a (b)(3) problem - not a privilege problem.

Mr. Freedman: Well, would it be any harm in putting it in here, too?

Professor Sacks: Well, just as a matter of the readers' understanding what you're doing, (b)(3) is the place to put it.

Mr. Acheson: Well, let's have it in (b)(3). [A Note saying that the facts themselves remain discoverable as distinguished from the contents of the statement.]

Mr. Colby: I've been requested to call attention to the ambiguity of lines 35 and 36 of the substitution of "discovering" party for "examining party." "Examining party goes only one way, but "discovering party" is thought to be the party making discovery rather than the party seeking discovery. The word, therefore, is not particularly apt.

After hearing comments from several members, Professor Sacks agrees to change wording to "party seeking discovery," wherever "discovering party" appears.

Mr. Colby: Mr. Zisgen, many members of the Admiralty bar and a number of members of the Admiralty Committee wanted attention called to the fact that the standard Maritime P & I policy doesn't involve an insuror who is liable "to satisfy" but rather an insuror who is liable to reimburse. Therefore, it is to be expected in the admiralty practice that if this rule is adopted, as here, two things will happen: first, the P & I insurance will be treated as not within the rule, because the obligation is to reimburse - not to satisfy the judgment - and, additionally, under that form of policy

and perhaps, if underwriters should desire to change other forms of policy, the underwriter will simply tell the insuror, "We don't want to know anything about your case. The lawyer conducts the defense. If you lose, and if you have to pay, we will reimburse you." Messrs. Zisgen and McHose don't like the rule at all, but they do want to call attention to the fact that the type of document, which is really one which the party undertakes to satisfy a judgment, is a matter of indemnity. It is not commonly, at least in the maritime field, an insurance policy at all.

Professor Sacks: What happens, under your policy, if the defendant is bankrupt?

Mr. Colby: We never have had it. I don't know.

Mr. Freedman: We have already had it. The trustee in bankruptcy could borrow the money and pay and then make the insurance company pay. Whatever considerations led to the adoption of this proposal here apply with special force in the admiralty field, because of the sometimes secrecy and the complex nature of those insurance policies.

Mr. Cooper: I move that we amend it [line 48 of 26(b)(2)] by adding the words "satisfy, reimburse, or indemnify."

Mr. Colby: Of course this raises the question of why insurance policies should be the subject matter of the rule rather than letters of indemnity or various agreements and contracts where parties are to be indemnified and reimbursed.

Professor Sacks: If the committee desires to broaden this, I think "the contents of any agreement."

Additional words are suggested from several members at the same time --- along the lines of insurance policies or other agreements and to satisfy and reimburse.

Mr. Cooper: I move that we amend it that way in principle.

Mr. Jenner: I'd like to speak in opposition. I favor the idea of exposing insurance policies. I favor the rule as written. If it is broadened, as now suggested, we will have a series of lawsuits in these cases. Is there an indemnity agreement of various kinds and character spelled out by operational law and otherwise, and we will go off on these side questions when there is some kind of indemnity, suretyship, or guarantyship, or whatever it may be. By this process, you will expand litigation and interfere with the administration of justice.

Mr. Doub: But how do you distinguish between an insurance policy and an indemnity agreement?

Mr. Jenner: I don't distinguish. All I am saying is that if you are going to go the whole hog, which is what this motion suggests, then you are thereby going to engender litigation where none exists.

Mr. Coleman: If you don't go whole hog, you just draw a completely artificial line. You say you have to discover an insurance policy but you don't need to discover an indemnity agreement. That makes a distinction that is just totally illogical.

There was a lengthy discussion on indemnity agreements.

Mr. Acheson: The point, now, is whether we should extend this beyond the purpose with which we originally started, where the defendant might not be solvent and you have something behind him and you want to bring that out. Now the question is do we want to go still further and bring out everyone who might be liable to indemnify?

More discussion ensues as to general insurance policies.

Professor Sacks: The reason for trying to limit it is that we have a very controversial problem with respect to insurance policies. We know there is going to be a substantial degree of opposition here. What we were trying to do was to identify the area that most needed changing and to limit it to that because the case to that change is clearest and strongest. It is difficult to draw a line, in principle, between the insurance company case and the commercial transaction that involves indemnity. The difference is that in the incidents of litigation and the need for this data, the cases suggest a big difference. In the need to get at the proceeds of the policy there's a big difference; in terms of securing acceptance of the proposal it seems to be rather important to keep it clear and distinct so people have a very definite idea of what we are talking about and not so broaden it that the whole question of its acceptability becomes involved in all kinds of much larger questions. I rather like the idea of broadening it to the extent that Professor Rosenberg suggested but limiting it to the insurance agreement.

Mr. Jenner: Commercial transactions.

There was a lengthy discussion on coverage of vendors, indemnitors, etc.

Judge Feinberg: I ;gest that we merely make is clear that we are covering all insurance policies, whether they are contracts to indemnify as well as contracts to satisfy the judges.

Mr. Acheson: May we have a vote as to whether we wish to accomplish the purpose which has just been stated by the judge or whether we wish to broaden this out to its logical extreme.

UNANIMOUS APPROVAL OF NOT BROADENING THE RULE.

Mr. Colby: Would it be appropriate, on that background, to simply change "policies" to "agreements" and to add to "reimburse" "or satisfy"?

Mr. Jenner: When you say "agreement", that is not a commercial insurance policy. We just disposed of that.

Voice:- No - insurance agreements.

Mr. Jenner: Alright. Insurance agreement.

Mr. Colby: It says "Insurance Policies" now. I suggested that we say "Insurance Agreements." You understand - the P & I people take the position they aren't policies.

There are more comments on "policies" and "agreements."

Mr. Acheson: May we pass on and let the reporter get these words and report them to us later on.

(b)(3) Trial Preparation: Materials

Mr. Jenner: May I suggest in line 62 you strike "shall be" and insert "is."

Professor Sacks: Uh huh.

Judge Feinberg: Are statements by an insured to his insurance company and by an employee to his employer discoverable under this trial preparation clause or under some other clause?

Professor Sacks: I think the problem is whether or not it is in preparation for trial or whether it is a routine statement made in both cases. The Note says that routine statements made in the ordinary course of business do not come under this. We are simply setting up principles here, in terms of preparation for trial, which are right. There are going to be cases in which the fact situation will be difficult as to whether it is in preparation.

There is extensive discussion on the background of lines 63-69 on page 26-5. This is in response to an inquiry made by Mr. Morton. The Hickman v. Taylor case arguments and the reasoning behind the Jencks Act are set forth by Professor Sacks.

Mr. Cooper: I move we adopt it.

Vote is taken on the motion. MAJORITY APPROVAL of RULE 26(b)(3) as written. Mr. FREEDMAN dissents.

Recess is held at 11:40 a.m.
Meeting is resumed at 12:00 Noon.

Mr. Jenner: Does "a written statement, signed or otherwise adopted or approved by the party" as contemplated by this rule, include managing agent, officer, or agent of a corporation? The way this rule is drafted, it seems to exclude a statement of an officer or agent of a corporation or association.

Professor Sacks: I have in the Note a sentence which reads: "The statement of a party may of course be that of plaintiff or defendant, and it may be that of an individual or of a corporation or other organization."

Mr. Jenner: Alright. I'm happy, Mr. Chairman.

(b)(4) Trial Preparation: Experts

Following a short discussion on the numbering and lettering of subsections and subdivisions, the reporter states that line 54 on page 26-5 would now read "the provisions of subdivision (b)(4) of this rule, a party may obtain."

Dean Joiner: The very first words "Subject to the provisions of Rule 35(b) a party may discover facts known . . . only upon a showing." This is not the only limitation as indicated by (B) of this very rule itself which starts out "As an alternative or in addition. . . ." So, in a sense, we have an inconsistency here.

Professor Sacks: The suggestion is to make 26(4)(A) read: "Subject to the provisions of 26(b)(4)(B) of this rule and Rule 35(b). . . ."

Dean Joiner: That would make it clearer to me. The other thing is a point of inquiry really. What happens, under subdivision (b), if a party does not, when he is requested, name expert A or X, or whatever he may be, and then attempts to call expert X to the stand? What is the sanction?

Professor Sacks: We have steadfastly refused to try to put in what you might call "trial sanctions." We try to avoid telling the trial judge precisely what sanctions he is to use. The obvious sanction in most of these cases is the possibility of excluding the witnesses altogether, but I don't think you would want to make that an absolute or a rigid sanction. For example, there could be cases in which the judge would conclude on all the facts that in this instance he will permit the expert to testify but only after a continuance. That may be a possibility.

Dean Joiner: We have a rule [Rule 37] which deals with sanctions.

Professor Sacks: But not at trial.

Dean Joiner: You say "trial" but we even default people at times, which is even stronger than "at trial." Yet, here we don't give the judge any authority or even make reference to the fact that he might have authority to do something about this witness who is not disclosed when he is asked to be disclosed.

Professor Sacks: The rules, in other words, as devised confronted that problem and the resolution was to leave it to the trial judge. The obvious sanction which will be requested and which he must consider is exclusion. This problem pervades the discovery area. The rules have not attempted to study what the sanctions at trial should be.

There follows a lengthy discussion on inherent powers, the refusal to disclose, and difference sanctions.

Professor Sacks: Let me suggest two things. First, I'll take another look at the cases and see whether I can find any information in which there has been this kind of embarrassment about which you are talking. I have the feeling that we are going to find two types of situations - one is the situation in which it is apparent before trial that material which a party needs has not been produced. In that case the philosophy is that he should take the necessary steps to get it before trial as soon as it is apparent to him. In that situation, I think Rule 37 is abundantly general. The other situation in which it arises is at trial, when it becomes apparent, because the other side produces something which for the first time it discloses, that some discovery obligation was violated. The lawyer now sees it for the first time. By far the most difficult sanction in that situation is exclusion or some lesser sanction. I'm willing to explore a simple statement, which will simply invoke the general power of the array of sanctions that we have spelled out elsewhere.

Mr. Doub: I move that 4(a) be adopted.

Professor Sacks: Could we deal with (A), (B), and (C) together? Two questions have been raised: one, is there any possibility of a negative pregnant here? I think the answer on the cases has been, thus far, no. But then Judge Wyzanski says: "Suppose the sanction usually called for is a very heavy sanction. Doesn't there need to be something there?" Again, I don't think we can point to any instances. But I am going to try to respond to these questions [after looking into more cases].

Mr. Doub: In 26(4)(B) in line 81 there appear the words "interrogatories served under Rule 33 a reasonable time." That clause is really implicit in every discovery rule and I don't see why we couldn't omit it unless there is some particular reason for it in this particular rule.

Mr. Jenner: It occurred to me, when I read it, as to whether it was necessary. What is a "reasonable time prior to trial?"

There is a discussion on "reasonable time."

Professor Sacks: Let's take it out. [Words "a reasonable time prior to trial" in lines 80 and 81 on page 26-6].

Mr. Jenner: Lines 92 and 93 on page 26-7. I would suggest the deletion of "In addition to orders issued under subdivision (c)." Then, in lines 95 and 96, do you need "with respect to discovery permitted under subsection (A)?"

Professor Sacks: Frankly, I would prefer not to have it.

Mr. Acheson: With respect to discovery permitted under subsection (A). Just strike that.

Mr. Doub: Is the sentence contained between lines 89-91 on page 26-7 really necessary?

Professor Sacks: It was put in at the request of those on the Committee who wanted to avoid a "Roman Holiday" in going after the expert. Therefore, they wanted to limit it in some way.

Professor Rosenberg: The question was raised as to whether the limitation in lines 95 and 96 following to subsection (A) should be stricken. I think that you are undoing something which you did deliberately, if you are going to strike it out, because it was thought the court should have, in the case of retained experts as distinct from trial experts, the power, in the case of retained experts who were being put through the discovery process by an adversary, to award half the cost or some proportion of the expert's fee to the now discovering party. That is not true as to trial experts as distinct from retained or consultant experts, because the situation is completely different. You did this deliberately.

Mr. Jenner: If we did, we made a mistake.

Professor Sacks: We certainly want to have the language that requires the party to pay a fair portion of the fees and expenses where he is getting a retained expert.

Mr. Jenner: I move for question on 4(A), (B), & (C).

Vote is taken. MAJORITY APPROVAL. Mr. FREEDMAN objects as he thinks they are too restrictive.

(c) Protective Orders

Professor Sacks: Ben's [Kaplan] suggestion is that we strike "maintained in confidence [lines 185-186] and insert "confidential" after the word "other" in line 184 [page 26-12]. In addition, the question was raised last time whether "commercial information" gets us into any trouble. There are lots of cases . . . and I think we are alright.

Mr. Jenner: Theoretically, a trade secret includes confidential commercial information.

Mr. Cooper: I move that we adopt the amendment.

Vote is taken. UNANIMOUSLY FAVORED. Thereby (7) in lines 184-186, page 26-12, now reads: "(7) that a trade secret or other confidential research, development, or commercial information shall not be disclosed or shall be disclosed only in a designated way."

There is a general discussion on motions being made seasonably, and it is agreed to take the word "seasonably" out of line 165 on page 26-11.

Lunch - 1:07 p.m.
Meeting resumes - 2:07 p.m.

Mr. Cooper: I move that it be retained as is. [wording in lines 168-170 on page 26-11].

Vote is taken on (c). UNANIMOUS APPROVAL.

Mr. Jenner: Direct your attention to line 178. The thrust is a method of discovery other than that designated by the party seeking discovery. This will arise more often in cases in which discovery is in the process of being had. It isn't a question of the party seeking discovery designating a method of discovery. Did you have in mind that some formal designation be made? Shouldn't that be "designated or being pursued?"

Voice: How about "selected?"

Judge Maris: "Selected" would be better.

Professor Sacks: Yes.

(d) Sequence and Timing of Discovery

Professor Sacks: I would suggest an editorial change - striking at line 197 "in its discretion." The other change is to delete

"otherwise" in line 197, and in line 199, after "justice," add the words "orders otherwise."

Mr. Colby: I think we should say, in the rule, that "unless the court on motion", etc.

Professor Sacks: The position being taken here is that unless there is express provision for a local rule to vary it, Rule 83 comes in.

Judge Feinberg: I only this suggestion. The Note should make clear that this means that local courts cannot adopt local rules which give priority to one or the other.

Professor Kaplan: I move that (d) be approved.

Vote is taken. UNANIMOUS APPROVAL.

RULE 29- STIPULATIONS REGARDING DISCOVERY PROCEDURE

Mr. Doub: *I move the Committee reverse its decision of the last* meeting by deleting the unless clause in lines 1 & 2.

Mr. Cooper: I second the motion to strike "Unless the court provides otherwise by rule or order."

There is a general discussion on the reasoning behind changing Rule 29.

Mr. Oberdorfer: I move that we modify by deleting reference to rule and leaving (1) and (2) in.

Vote is taken. UNANIMOUS APPROVAL.

RULE 30 - DEPOSITIONS UPON ORAL EXAMINATION

Professor Sacks gives background.

Mr. Cooper: I move that we keep the 100 miles rule.

Professor Sacks: At line 51, I want to change the words "is not admissible" to "may not be used." [To conform with Rule 32(a)].

Mr. Freedman: I would like to suggest that there be an added phrase in 30(a) providing that where counsel appears on behalf of a defendant that there be no time limitation on the right of the plaintiff to take depositions of the defendant.

Mr. Acheson requests Professor Sacks to inform Mr. Jenner of conversations which took place during the interval that Mr. Jenner had to be out of the room.

Mr. Jenner: I suggest you substitute "desires" or "seeks" for the word "is" at line 5 on page 30-2.

[A number of members concur with using "seeks".]

Professor Sacks: Alright.

Mr. Doub: I would like to call attention to lines 25-29 on page 30-3. What you are requiring are two pieces of paper containing the same thing.

Professor Sacks: I would like to suggest a couple of changes - deletion in line 27 of "copy thereof or" and in line 29 "attached to or."

Judge Thomsen: I don't want to take out the "attached to" because the easiest way to include it in the notice is to attach it to it.

Discussion ensues on attachments.

Mr. Jenner: How was this resolved?

Professor Sacks: The proposal is to strike "copy thereof or" and that has not been objected to. On the other hand, the proposal to strike "attached to or" is objected to, so that the suggestion is to say "shall be attached to or included in the notice."

Mr. Jenner: Can't you save a few words? A subpoena can only be issued under Rule 45, so you don't need "pursuant to Rule 45."

Professor Sacks: I have no objection to striking them.

Mr. Coleman: I'd like to comment on lines 5-7, where we prevent the plaintiff from taking a deposition until 20 days after the service of the summons and complaint. The first problem is that the plaintiff will not know when the summons was served, unless he goes down to the U. S. marshal's office.

There is an overall discussion on hearings and appearances with relation to plaintiffs being able to take deposition after service of the summons and complaint.

Judge Feinberg: I suggest that we approve this rule and look to other alternatives - either give the marshal's office a push in the local district or perhaps provide for other forms of service, or perhaps get the local clerks' offices not to give out copies of complaints to defendants unless they appear.

Professor Sacks: I think the problem is to see if we can work into this a special dispensation when an appearance is entered. The question we are worried about is whether we should allow the discovery immediately upon appearance or whether the 20 days period should [did not finish].

Mr. Acheson: It seems to me that the question is that as the rule is now framed, it is based upon a supposition of fact which is not true and that supposition of fact is that the service will be made fairly soon by the marshal. Now, it appears that service may not be made for three months. Therefore, what you have to do is have some alternative. If that is the situation and the plaintiff knows damn well that the marshal won't serve this for three months, he can speed up the time by an alternative procedure, which is to mail a copy of the summons and complaint to the other fellow. This is all you need to do. Whether you remedy the twenty days is another matter.

Professor Sacks: The real problem is the long waiting period.

Judge Thomsen: I move that we appoint Mr. Sacks and any help that he needs to check with the Administrative Office of how long, throughout the country, it takes to have a process served by the marshal. Then we will be in a position to have the facts at our next meeting.

Mr. Cooper: I move that 30(b)(2) be approved in principle.

Vote is taken. UNANIMOUS APPROVAL.

Recess - 3:55 p.m.
Meeting resumed - 4:07 p.m.

(c) Examination and Cross Examination; Record of Examination; Oath; Objections

Mr. Jenner: May I direct the reporter's attention to line 144?

Professor Sacks: I have deleted "shall", Bert, and I'll take it out wherever we have that language appearing.

Mr. Cooper: I move that the rule be adopted.

Mr. Coleman: When a deposition is taken of an officer of a corporation and then you're going to waive the signature, who waives it?

Professor Sacks: The witness would have to waive it.

Vote is taken on adoption of Rule 30(b) through (f). UNANIMOUS APPROVAL.

RULE 31 - DEPOSITIONS OF WITNESSES UPON WRITTEN QUESTIONS

Mr. Cooper: I move it be approved.

Vote is taken. UNANIMOUS APPROVAL.

There is a short discussion as to the type of print which should be used, for emphasis on certain points of the rules, in the published draft to be presented to the public.

Professor Sacks: We were thinking of using some boldfaced heading and putting that part which is covered by the boldfaced explanation in a heavy bracket and then perhaps italicizing the few words that are changes. We would explain in the boldface what we were doing.

Mr. Doub: I move it be adopted.

Professor Sacks gives background of parts of rule to Mr. Freedman.

Mr. Jenner: Mr. Reporter, would you take out of line 54 on page 32-5 "shall not be deemed to" and change it to "does not."

Professor Sacks: I've got it.

Mr. Freedman: In subsection (3) I would suggest that we add to those circumstances to make it include when the witness is out to sea.

Professor Sacks: Abe, would this do it? In line 23, after the word "States" add "or at sea."

Mr. Freedman: R. ht.

Professor Sacks: I have no objection to that at all.

Mr. Acheson: Any further discussion of the rule?

Dean Joiner: I move it be approved.

Vote is taken on approval of Rule 32 as amended. UNANIMOUS APPROVAL.

RULE 33 - INTERROGATORIES TO PARTIES

Mr. Colby: I would like to suggest that in line 10 after the word "upon" we insert "or appearance for." That's commensurate with earlier problems. [Will be treated when earlier problem is resolved.]

Mr. Morton: The second sentence seemed unnecessary.

Professor Sacks: It was fairly important, in terms of the discussion we had, that we pin down the propriety of serving interrogatories with the summons and complaint, and "with or after" was thought to be quite important. In addition, the present rule has provision on leave of court, and it seemed to me that when you are making a change it will create a good deal of confusion unless you spell out what the change is you are making.

Voice: I move that Rule 33 be approved.

Mr. Cooper reads Simpson's objection. [J. E. Simpson ltr dated March 6, 1967, to John P. Frank.]

Vote is taken on motion to approve Rule 33. MAJORITY APPROVAL. Mr. JENNER is in favor of rule with exception of provision allowing interrogatories to be served with complaint. JOHN FRANK was not in the room at this time but his dissent is registered by Mr. Jenner, since they are in agreement.

RULE 34 - PRODUCTION OF DOCUMENTS AND THINGS FOR INSPECTION AND OTHER PURPOSES.

Dean Joiner: We discussed the question of whether this rule should be broadened to permit at least the surveying or photographing of land that does not belong to one of the parties. Was that disposed of?

Professor Sacks: It was. We voted on it.

Dean Joiner: I think it is a very bad mistake on our part not to permit this, because I think we are closing the door on evidence here that would be very easy to get under court control and protection and, conceivably, could adversely affect the hearing of justice.

Professor Sacks: We had great difficulty about going that far because specific instances of people attempting to do this and being prevented from doing this with the effect you are talking about have not come out. The combination of the difficulty plus the absence of instances were the most persuasive of a variety of points.

Judge Feinberg: I move that we adopt the rule.

Vote is taken. UNANIMOUS APPROVAL.

Meeting is adjourned - 5:00 p.m.
It is resumed on Friday - 9:35 a.m.

RULE 35 - PHYSICAL AND MENTAL EXAMINATION OF PERSONS

Professor Sacks gives background of rule.

Professor Rosenberg: In line 22, I don't think you need "request and."

Professor Sacks: Yes, "request and" could clearly come out. I would take that out.

Mr. Jenner: You don't need the "such" either.

Professor Sacks: At line 22, it would read "After delivery the".

Mr. Jenner: I move it. [Adoption of Rule 35].

Vote is taken. UNANIMOUS APPROVAL.

Mr. Jenner: In the reporter's note, second paragraph, page 35-6, "examining physical includes result of all tests made, such as X rays and cardiograms." Those aren't results.

Professor Sacks: I see. It's the "such as X rays and cardiograms" that you're talking about. Okay. I'll fix that up.

RULE 36 - REQUESTS FOR ADMISSION

Professor Sacks: I have one editorial change at 36-3, line 17, after the word "been" add the words "or are", on the theory that unless they have been or are otherwise furnished or made available for inspection. That should be past and present. This was Bill Coleman's suggestion. Bill, now that we've added it this way, could we just simplify the whole thing by simply saying "shall be served with the request unless otherwise furnished or made available for inspection and copying."

Mr. Cooper: On lines 22 and 23 - I wonder if this shouldn't be consistent. Yesterday, we discussed the question of numbering or enumerating. I think we should use the same language for consistency. That's all.

Professor Sacks: Alright.

Mr. Oberdorfer: With respect to sentence beginning at end of line 53, page 36-5, does this mean that even though a defendant believes that a request for admission brings an issue which he wants to be established prior to trial, he must, nevertheless, answer the request for admission.

Professor Sacks: That's right, and the answer would be in the form of a denial or a statement of the reasons why he cannot admit or deny.

Mr. Oberdorfer: It is not a correct response to say that this is an issue for trial.

Professor Sacks: The rule tells him either to answer or to object. The difficulty we have been having is that a good many parties have been objecting to the request for admission, saying that it is an objectionable request because it is in dispute.

Mr. Jenner: What you really mean is that he does not file an objection saying that it is an improper interrogatory or question put to him because it does present an issue of fact. What you want to do is go through the motions and entitle this paper an answer rather than an objection.

Professor Sacks: Would it clarify it if instead of saying "he shall answer" we say here "he shall deny or state reasons why he cannot admit or deny."

Mr. Jenner: That would make it clearer.

There is discussion on the wording to be used and it is decided that a new draft will be submitted.

Mr. Doub: In lines 64-66, did you have in mind denying the court power to determine it at the trial.

Professor Sacks: It loses its significance if it is determined at the trial because the whole purpose of this rule is to dispense with the need of accumulating proof, and once you get to trial, the ruling would be of no significance at all.

Mr. Jenner: It could be beyond pre-trial conference but before trial. The handling of pre-trial across the country differs. Would it be alright to say that final disposition of the request should be made at a pre-trial conference or at other point prior to trial?

There is a discussion on wording. Professor Sacks says he will draft something and read it to them later in the day.

Mr. Morton: Would the reporter mind inserting, at line 12, the language "for the purposes of the pending action only"? That protection of Rule 36 is one of the greatest reasons why it is an efficacious device.

Professor Sacks: Could we just put this particular suggestion in the framework? There's no dispute at all about the principle involved. We have a specific statement in 36(b). The only question raised by Brown Morton's is whether the repetitive should be put earlier in the rule.

Professor Louisell: I'd prefer not to have the repetition, because it spells out with great specificity in (b) now than you would possibly be able to repeat.

There is further discussion on the wording.

Mr. Morton: "An admission made by a party under this rule may not be used against him in any other proceeding." [Substitution for lines 79-83]. Puts purpose in early part and consequences in the end.

Mr. Cooper: I second the amendment.

Professor Sacks: Then up in line 12, we would insert after the word "admission" "for the purpose of the pending action only."

Mr. Jenner: I would like to speak against the motion. A request for admission is made and the words "for the purpose of the action only" are not included in the request. A response is made. Then the argument arises that the person was asked to admit and the person asking did not say that it was for the purposes of this action only. Therefore, the admission is broadened. There isn't anything in the rule now that says affirmatively that it is for the purposes of this action only. Those words "for the purposes of the pending action only" stated in general in the rule are the heart of the protection which the party gets.

Mr. Morton: I would like it to be simply put in both places.

Mr. Acheson: Why don't we put it in both places.

Mr. Jenner: If lines 79-83 are not otherwise amended, I would strongly recommend that in line 81 you strike out "constitutes neither" and say "is not", and add the word "it" after "may" in line 82.

Mr. Acheson: Where do you stand, Brown? [Regarding line 12].

Mr. Morton: I would like to have "for purposes of pending action" added after the word "admission."

Mr. Acheson: Alright. We are all agreed on that.

Mr. Frank: Could we not meet the more conservative point of view on this a little by making even clearer than the Note now does that we are meaning to reach questions of fact and mixed questions of law and fact, but we are not meaning to allow admissions to become quiz games about the law. Pure questions of law are not within the scope.

Professor Sacks: There has been no problem about the pure question of law. Not many cases, but a number of cases, knocking it down and saying this is not contemplated at all. These are by judges in the interrogatories area who are prepared to allow questions which enter into the mixed fact and law area, and they indicate that.

Mr. Frank: Shouldn't you import that here? We are making a real change. If you can put in a paragraph along the line of what you just said, I would think it would help to set minds at rest. Just to make it clear that all we are doing is transferring interrogatories to admissions.

Professor Sacks: Yes, that's fine.

Mr. Jenner: In line 65, the word "should" should be stricken; the word "shall" in line 67 should be stricken; and in line 77 the word "would" should be "will."

Professor Sacks: I think that's fine.

Vote is taken on Rule 36 as amended. UNANIMOUS APPROVAL. [Adoption is subject to submission, by the reporter, of a redraft of 18-20.]

Alternativ rafts of Rule 30(a) - Lin . 4-9

Professor Sacks gives background on considerations made by himself and Professors Kaplan and Rosenberg.

Judge Feinberg: I would prefer to leave it the way it is. If there is a problem on service, perhaps the whole idea of having service done by marshals is anachronism now, and that should be changed, but I don't think we should change it this way.

Judge Wyzanski: I think that what Judge Feinberg said is really not relevant to the problem. Supposing that there were immediate service. What difference would that make if the defendant begins the discovery?

Dean Joiner: If the defendant starts discovery, why shouldn't the plaintiff, at that point, have the right to start discovery also - regardless of the delay problem?

Mr. Coleman: When you get multiple cases, you get two defendants. One is served and the other one isn't. Then the one served gets about 20 days start on the one who was not served yet. I really think that by shifting the time to go ahead to commencement plus service you have completely changed a lot of things, and you ought at least to say that the game could get started when the defendants begin to indicate that they are going to go ahead.

Mr. Cooper: Why should we bow to the marshals?

Mr. Doub: The principle involved here has nothing to do with when service is made by the marshals. The question is where the defendants start discovery why should the plaintiff go in and have to get a court order to do likewise within the 20 days period?

Mr. Freedman: I move the adoption of the [principle of] third alternative.

Mr. Acheson: The thing to do is to take these things [First, Second and Third Alternatives] and see how we stand.

Vote is taken on Alternative 1. FAVORED - 6.

Vote is taken on Alternative 2. - OPPOSED UNANIMOUSLY.

Vote is taken on Alternative 3. FAVORED - 11.

PRINCIPLE OF ALTERNATIVE 3 THUS APPROVED BY MAJORITY.

A general discussion on restrictions of alternative follows.

Mr. Acheson: Let's have a vote on whether what the defendant does should be restricted to the discovery field.

Vote is taken. UNANIMOUS APPROVAL. [See later action below.]

There was still further discussion on restrictions.

Mr. Acheson: Gentlemen, let's have the vote over again.

Judge Feinberg: Mr. Chairman, what are the alternatives?

Professor Sacks: Limiting it to discovery as against motion. The question is whether sub (1) should be limited to some effort to obtain discovery or whether it should extend more broadly to other actions that a defendant might take.

Mr. Acheson: Now that we understand the issue, let's vote again on it. Those in favor of limiting this to the discovery field.

MAJORITY APPROVAL. Mr. FREEDMAN objected.

Mr. Coleman: I move that we adopt Alternative 3 as written but strike the parentheses.

Recess is taken - 11:03 a.m.
Meeting is resumed - 11:17 a.m.

Mr. Frank: If Bill will permit, I move that we strike out the words "or otherwise sought discovery" [in Third Alternative].

Vote is taken on that amendment. FAVORED - 4; OPPOSED - 11. MOTION LOST.

Mr. Acheson: May we now vote on the Third Alternative?

Vote is taken. FAVORED - 8; OPPOSED - 7. THIRD ALTERNATIVE [including bracketed material] IS THEREBY ADOPTED.

Mr. Cooper: I move to amend subdivision (c) to add "or by any other person who is not a party and who is not less than 18 years of age."

Mr.Frank: If Ben would permit, I'd like to move to table his motion until the reporter can give us a report on the subject and can get from the Administrative Office relevant information.

Mr. Cooper: I don't quarrel with you, John.

RULE 37 - FAILURE TO MAKE DISCOVERY: SANCTIONS

Mr. Frank: On this one, I think it's the best darn thing we're doing. Three Cheers!

Professor Sacks: The precise issue, just to state it very briefly, is presented by the fact that the present rule says that when the judge has ruled in favor of one party [Rule 37 motion], he may, if he finds that the losing party has acted without substantial justification, he shall impose cost. What we provided, in lieu, was that unless the court expressly finds that the opposition to the motion, or the motion, whichever it was, the losing party's action, was substantially justified, he shall impose cost. One point that was brought out to me is that we do not now state "upon motion of any

party," and it might all say that.

Mr. Jenner: What the real problem here is is the abuse of lawyers generally in directing witnesses not to answer questions in the courses of the taking of depositions.

Mr. Frank: The plain fact of the matter is that when a deposition is interrupted and the parties have to go to court, by definition, it has to cost somebody. The point that moves me is that if the cost has to fall somewhere it really ought to fall on the fellow who caused it.

Mr. Cooper: I think it should be "on motion."

There is a general discussion on using "motion" or "notice."

Judge Feinberg: I am all for this rule as proposed, but I think it is worthwhile to spend a minute or two on how costs would be imposed. I agree that if you leave it to the lawyers to initiate, then probably nothing would happen. On the other hand, we don't want costs imposed without the attorney who is going to be assessed with them having an opportunity to address himself to prepare himself. Do we really think that the way this will be done is that a motion for discovery will be decided and then a judge will say "Now, I think this cost should be imposed. Let's hear from the attorneys on the other side."

Mr. Jenner: That may be or it may be a motion by counsel himself. I agree with Judge Feinberg and the other observations here that this may be such an interference with the administration of justice that the district court judge should say "This is an abuse not on as to the parties but as to court. Now I will hear the matter of assessing expenses."

Judge Feinberg: The specific proposal I was getting to was that if you do put in some words here, you should say either "on motion of the parites or at the initiation of the court on notice."

General discussion ensues.

Professor Sacks: What we are trying to do here is get the judge to pay attention to the cost factor and to deal with in a very regular way - to give a reason why he thinks he is not going to make the award in this case. "An award of expenses unjust" is very broad language.

Mr. Morton: What I want to point out was that rule, as proposed, goes not only to attorneys but also to parties. I would prefer to see the matter of disciplining attorneys dealt with directly, but we seem to have agreed that it should go in here.

There is discussion on assessment of costs against practicing lawyers.

Mr. Coleman: I was wondering if the language could be changed to sort of shift the burden as follows: beginning at line 57, "attorney's fees, if the court expressly finds that the opposition to the motion was not substantially justified or unless other circumstances make an award of expenses unjust."

Mr. Doub: Would the Committee permit a minor change in line 57 - the words "expressly finds" to "concludes."

Mr. Jenner: I don't know what "concludes" means. I would not object to striking the word "expressly."

Professor Sacks: Nor would I.

Mr. Doub: I'll go for striking the word "expressly."

Mr. Acheson: Alright. We'll strike it.

Professor Sacks: Yes. We'll take it out twice. [Lines 57 and 65-66].

Mr. Acheson: Are we ready to vote? Are there any amendments you want to propose?

Mr. Coleman: I proposed an amendment which shifted the finding to say that he has to find that it was not substantially justified.

Mr. Acheson: Alright.

There is a vote on Mr. Coleman's amendment. FAVORED - 7; OPPOSED - 8. AMENDMENT IS LOST.

Mr. Frank: I move we approve it [Rule 37] through section (4). [37(a)(4)].

Vote is taken. FAVORED - 10; OPPOSED - 5.

Mr. Coleman: What is the result if a protective order is filed, and there has been no hearing yet, and the party does not show up for the deposition. Is there any default? Any penalty? Or does the mere filing of the motion state a deposition?

Professor Sacks: What we have done is address ourselves to that indirectly at page 37-11, lines 172-175.

There is a discussion on subpoenas and motions.

Professor Sacks: I think, if I follow you Bill, you are talking about the effect of a protective order. One possibility would be to try to resolve it in Rule 37 by changing this language to read "The failure to act may be excused if, and only if, the party failing to act has applied for a protective order." The alternative would be new language in Rule 26(c) providing that the motion operates as a stay.

Mr. Frank: If we do have a rule, I would like for the reporter to have a reasonable chance to consider, and please consider the

problem of the small states, because we can't do this. We don't have judges available. Don't require it automatically that we are going to be in contempt if we don't get an order.

Professor Sacks: What you're saying, John, is that you want the motion for a protective order to operate as a stay.

Mr. Frank: I'm aware that this is incoherent. I just don't know how you solve it. I agree it needs solving, but I'm asking you not to adopt a solution that guarantees that you must have an order first, because in the Rocky Mountain states, you Couldn't get one.

There is a discussion on local rules with regards to motions and stays.

Mr. Cooper: What harm would come from a stay of everything except where appearance is requested? I'm just putting the question.

Mr. Frank: Where this is likely to arise is in the equity special risks emergency branches of the practice, because that's where this maneuvering is likely to arise. . . . Shareholder's suit where there is going to be a stockholders' meeting next week. Somebody's moving for an injunction; somebody else wants to cut it off. You need it for emergency discovery. Somebody wants to file for protective order - anything to keep it from happening. At this point where within a few days there must be a lot this problem of maneuver arises. The direct answer to Grant's question is that in those cases you'd kill the other side if the mere filing of an application for an order without hearing. Mr. Chairman, may I request that the reporter mail us something representing his meditative thoughts?

Professor Sacks: If this maneuvering is going on and the side that wants the thing to go forward in the deposition, uses the subpoena, am I correct in thinking that there you do have to get a motion to quash passed on then and the subpoena quashed?

Mr. Frank: I have no doubt that that's true. Where the problem arises is where you want to ask somebody some questions; a motion is made; everybody's in a hurry, and what's the effect of filing when you can't find the judge?

Professor Sacks: The problem arises when they didn't use the subpoena - just used notes.

There is further discussion on stays, motions, and local rules.

Mr. Frank: I would move that we ask the reporter to circulate a draft representing his best thoughts on this subject. If we are able to agree by mail and include it in this draft, we will do so. If not, we'll simply have to take it up after we hear from the bar.

Mr. Doub: Could this paragraph [lines 172-175] just be dropped out?

Professor Sacks: It seems to me that it does resolve the conflict in the cases. This is the situation in which people have been served with a notice to appear. The type of case that arises here is that a witness or a party is served with a notice to appear. He does nothing about it; he files nothing; he doesn't seek a protective order; he just sits tight. Other people show up for the taking of the deposition, but the man does not appear. Rule 37(b) states that in that situation he is subject to sanction for his failure to appear. There are cases in which that having happened

and he now being brought before the court for sanctions, his point now is that he does have an objection to the discovery. He could seasonably have filed an objection or a request of some sort, but he just hasn't. Some courts in that situation have said "We'll now listen to the objection", and if it's objectionable, nothing happens. Other courts have said "Oh no. Where he has failed to appear and he hasn't filed for a protective order, the fact that he might have made some objection is not relevant to whether he should be subject to these flexible sanctions." It seemed to me that here where we are dealing with a fairly serious default, the man, even though he might have made an objection, since he didn't make it, he should be subject to the sanctions of the provisions of Rule 37.

Mr. Cooper: I second John Frank's motion.

Mr. Acheson: I think the motion is to approve the rest of the rule subject to John Frank's suggestion that the reporter try to work this matter out; send it to us by mail; if we can approve it, fine; if not, leave it alone and take it up again when we hear from the bar.

There is a vote on the motion. UNANIMOUS APPROVAL for ADOPTION OF RULE 37 - SUBJECT TO REPORTER'S RE-WORDING.

Professor Sacks: May I, with respect to the cost problem? I looked at the law. What it provides is that costs may be imposed on the government in civil actions not including attorneys' fees or expenses. From the point of view of discovery sanctions, it is not

a very useful statute. At the same time, I would make this suggestion. In our 37(f) we have a flat provision that says: "Expenses and attorneys' fees are not to be imposed on the United States under this rule." I wonder if we wouldn't be wise to put in a provision that eliminates what you might call the "bar of the rule" against imposition of costs against the United States. Simply to change it to read "Expenses may be imposed upon the United States in accordance with statutes.", or drop it out altogether. If we drop it out altogether, we do have a problem, because then the general view has been taken that the government is subject to the civil rules of procedure, and wherever there has been a special government problem, it has been handled specially.

There is a general discussion on wording to be used.

Mr. Jenner: How will that read?

Professor Sacks: "To the extent permitted by statutes, expenses and fees may be imposed upon the United States.

Mr. Cooper: I move that it be adopted.

Vote is taken. UNANIMOUS APPROVAL of 37(f) as amended.

RULE 5(a)-SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

Voice: Move we approve.

Mr. Jenner: Would it help to say "Except as otherwise provided in these rules and unless the court orders otherwise, ..." Strike out "unless the court otherwise orders" in lines 6 and 7, and in line 4, and insert in after "rules" in line 2.

Judge Thomsen: I think it is a mistake to change rules just offhand because some think it's a good idea, without the reporter having looked for the snakes. We are here to go over the discovery changes, and however desirable Mr. Jenner's idea may be, I don't think we ought to publish changes of rules which are just brought at a meeting here, when nobody has had a chance to think about them.

Mr. Doub: Well, let's leave it to the reporter. If he finds he can contract it some, fine.

Dean Joiner: I'd vote against that. I want to leave it just as it is, because I don't think we ought to change it.

Professor Sacks: I'd be inclined to leave it as it is.

Mr. Acheson: May we vote on adopting Rule 5 as proposed.

Vote is taken. UNANIMOUS APPROVAL.

RULE 9(b) - PLEADING SPECIAL MATTERS: ADMIRALTY AND MARITIME CLAIMS

Professor Sacks gives a short background.

Mr. Freund: I move we adopt it.

There is a vote. UNANIMOUS APPROVAL.

RULE 16 - PRE-TRIAL PROCEDURE; FORMULATING ISSUES

Professor Sacks gives background and in summing up says: "I would junk it, and I think that's the thing to do."

Judge Maris: My problem here is not with this particular addition but with the fact that we're dealing here with an important rule of procedure and we are not really indicating that we have given it any study. There may be other areas of pre-trial procedure that ought to be dealt with and to make a proposal with respect to the pre-trial

rule without any discussion whatever of the way the rule is going to be changed or amended strikes me as less than doing our duty.

Professor Sacks: The last time around, it was quite the contrary. The pre-trial subcommittee spent some time on it, and they issued a very flat report on this saying they did not want to see any [could not make out the next word] on it at that time.

Judge Maris: Now, if after a long and careful study of the whole pre-trial procedure, you came up with a conclusion that this Rule 16 as it stands needs no change whatever excepted from adding it to sanctions, that would be another thing.

Mr. Frank: I move that we table this suggestion fully without prejudice and that our minutes should in some fashion show this, so that if sometime when he is here, Charlie [Wright] wishes to raise it, we have in no wise decided it - we've simply put it off in case he wants to take it up sometime. Otherwise, let's forget it.

Mr. Cooper: I second the motion.

Vote is taken. UNANIMOUS APPROVAL TO NOT AMEND RULE 16 AT THIS TIME.

RULE 45(d)(1)-SUBPOENA FOR TAKING DEPOSITIONS

Mr. Jenner: I move its adoption.

Vote is taken. UNANIMOUS APPROVAL OF RULE AS WRITTEN.

DISCUSSION ON MINORITY VIEWS

Mr. Acheson: It has not been our practice to have names of dissenters go up. I strongly urge the Committee to follow that practice. If anybody wishes his view indicated it should be drafted by the reporter somewhere that there was strongly urged upon the reporter a contrary

view that adopted along the following lines.

Mr. Frank: I had submitted in my own memo two or three points in which I simply was not with it and have therefore asked that those go forward. This was simply in blundering ignorance on my part. I just didn't know what the proper procedure was. I received from Charlie Wright a letter telling how that was supposed to be handled traditionally, and I then immediately wrote a letter to Al. [He reads the letter.]

There is a general discussion on how minority views might be presented.

Mr. Jenner: The way we handled it before was a nice and delicate way. We just simply said we particularly invite comments from the bar. We didn't say whether there were differences in the Committee or a 6 to 5 vote or minority view.

Mr. Cooper: I move that we follow precedent.

General discussion ensues.

Mr. Freedman: I would want to feel free, unless the Committee tells me otherwise, to express the views which I have in connection with any particular rule.

Mr. Frank: I do not wish to discuss these matters outside the Committee. I think that is part of the oath we take. I believe that if any member of the Committee, for the purpose of exercising his final judgment, wishes to ask the reporter to direct particular rather precise attention to matters which concern him, that that ought to be the prerogative of any member of the Committee - not in the fashion of indicating dissent at all but in the fashion of making sure that we

get attention to the matters on which we eventually have to make up our minds. If that is not desirable, Mr. Chairman, of course we shouldn't do it.

Mr. Jenner: I move that we follow precedent.

A free for all discussion follows.

Mr. Acheson: We do not wish to have every difference of opinion aired. I am sure that if there is anyone on the Committee who believes that it is very important to invite particular attention to comment on a particular rule, he can get in touch with the reporter. This does not have to be dealt with by formal motion. I think we understand.

Meeting is adjourned for lunch at 1:12 p.m.
Meeting is resumed at 2:00 p.m.

RULE 26 - SUBDIVISION (e)

Professor Sacks gives background.

Mr. Jenner: I move that on the subject of identity of witnesses the Committee vote on the principle in sentence 1.

Vote is taken. UNANIMOUSLY FAVORED.

Mr. Freund: I bring up the question of whether the word "response" or "reply" would not be preferable to "answer" inasmuch as "answer" may be misunderstood.

Professor Sacks: "Response" would be fine. It is the broader term and would include everything.

Mr. Jenner: In lines 207-209. I assume you mean the identity of the person and the subject matter upon which that expert is to testify. You could do it by saying "and the identity of each person who will

be called as an expert witness at the trial and the subject matter upon which he will testify."

Professor Sacks: Yes. I have that.

Mr. Morton: What I want to do is to require an answering party to state whether or not he will, in that particular instance, assume the duty [to supplement his answers].

Mr. Frank: I feel that in the commercial and anti-trust cases, it's just plain cruel and unusual punishment and damn big waste to require supplementation. I am wholly of this point of view. That would not be my view as to the tort cases, and the tort lawyers raise a legitimate question as to whether, in the personal injury cases, [doesn't finish sentence]. Maybe there should be supplementation. Maybe that's a reasonable line to draw. The functional reason for the difference and the reason that we don't want supplementation is that we don't want to give people, in substantial cases, the endless costs of rechecking accounts and getting other detail of that sort. I doubt if we would feel that way in the personal injury cases. My real question, in view of the fact that these fellows do feel very strongly, is: Is there some legitimate way in which we can split the difference here and perhaps have supplementation in personal injury cases . . . and still not have supplementation in the kind of commercial cases which do concern me? I just don't have the experience to make up my mind.

Mr. Freedman: I strongly recommend against any supplementation except to the extent as the reporter has it in his original rule.

Mr. Frank: I withdraw my own request. In view of Abe's views, I abandon that question.

Mr. Doub: I'm wondering whether the line of demarcation might be, if he is under a duty to modify any answers that he knows are incorrect or discovers incorrect.

Mr. Acheson: Aren't you going to get into trouble with "whether he knows or ought to have known"?

Mr. Jenner: That's a worse trap than the other one, George.

Judge Thomsen: In those places that do have a rigid rule on no further discovery, I think we ought to have a footnote making it clear that it is the intention that a reasonable supplementation of the questions may be had even after pre-trial at a reasonable time before the trial.

Mr. Oberdorfer: I have some suggested language. At line 214 "or at any time prior to trial, through further reasonable requests for supplementation of prior responses."

There is discussion on suggested wording.

Professor Sacks: Can't we eliminate "reasonable"? It is subject to protective orders.

There is a general discussion on what "order" means.

Judge Thomsen: Would it be desirable to have a general statement at least in the discovery rules in Rule 26 saying that when the word "order" is used in the rules, generally, it means orders of court entered in the particular case and not local rules or standing orders? Could you write something like that?

Professor Sacks: Um huh.

There now follows a general discussion on "reasonable time".

Professor Sacks: The last two lines would read "except by order of the court, agreement of the parties or at any time prior to trial through further requests (we don't want further, do we - just requests) for supplementation of prior responses."

There are a few comments.

Mr. Acheson: Will you read the language again and see if anybody wants to amend the language?

Professor Sacks: "except by order of the court, agreement of the parties, or at any time prior to trial by requests for supplementation of prior responses."

Mr. Jenner: "Through requests for supplementation of prior responses."

Mr. Acheson: Very well.

Dean Joiner: On line 211, we use the word "complete." You say there's no duty to supplement complete answers. Does this need "and accurate"?

Professor Sacks: I think we should add.

Mr. Jenner: It would aid this if you struck out "that was complete when made" so that any answer . . ..

Dean Joiner: I thought about striking out that whole clause - " a party is under no duty to supplement his answer", but what we would be doing is saying "there is no duty", and I don't think we want to say "there is no duty", when the answer is incomplete or inaccurate. I think that what we have got to do is to leave it in there so that we are pinpointing the elimination of a duty only when it is complete and accurate. I move to insert the words "and accurate" after the word "complete" in line 211.

There is general discussion on the meanings of "complete" and "accurate".

Judge Thomsen: To bring it to a head, I move that the language be modified by substituting the words "believed to be truthful when made" in place of "complete when made".

Dean Joiner: I think the word "complete" is terribly important in here.

Professor Sacks: There are cases where an answer is incomplete and it is understood between the parties that there's a duty to supplement, because it's incomplete. "Complete", I think, we surely want.

There is further discussion.

Mr. Acheson: I take it that we now have a motion before us which in some appropriate words says that if what you said was correct, complete, and accurate, then you have no duty; if it turns out that it was not complete and accurate, then you have a duty. And you have a duty if you have after acquired information that makes it incomplete.

A general discussion follows.

Professor Sacks: The point here is that you are trying to draw a distinction that there is new information developing subsequent to your answer; that that is not the same as information which you had at hand when you made your answer. The whole supplementation problem has been thought of in terms of new information developing. We are addressing ourselves to that and saying that there is no duty as to new information developing.

Mr. Oberdorfer: I have something that is slightly different so that it would read: "A party who has responded to any other request for discovery with an answer that was a complete and accurate statement of the facts then known to the answerer is under no duty."

There is still further discussion on "complete".

Mr. Acheson: What is the state of the matter?

Professor Sacks: Leave it the way it is - "complete".

Judge Wyzanski: How about this? "a party who has responded to any other request for discovery with an incorrect answer is under a duty to correct his answer to include matters thereafter acquired."

Mr. Doub: Can't we say the same thing by merely adding "[U]nless the court orders otherwise a party who has responded to any other request for discovery with an answer that is believed to be complete and accurate when made and is not later ascertained to be incomplete or untrue is under no duty to supplement."

Judge Wyzanski: What I'm really trying to do is impose a definitive obligation when the man knows he has made an error. I'm not trying to impose upon him an obligation to find out whether he has made an error.

Mr. Jenner: I move the Wyzanski proposal.

Mr. Cooper: Seconded.

Vote is taken. UNANIMOUS APPROVAL.

Mr. Acheson: We have adopted Judge Wyzanski's proposal. It will be reduced to writing and circulated.

Professor Sacks: There was one sentence to be redone. During the course of the morning, various people were scribbling different drafts. We have the drafts here. They are in hopeless conflict with one another, and my suggestion is that I attempt to come out with a sentence. It will have to be checked in some fashion with some individuals in advance, and we will have to get it to you. This is the sentence in Rule 36 involving the genuine issue for trial problem, which we put over this morning.

Mr. Jenner: What we intend to do is to make it clear that when you are required to answer, rather than resort to an objection, to raise the question at presentation of genuine mutual facts so you can't admit matters submitted. It is referred that in the answer you may state at this point that this presents a genuine mutual fact that has to be [rest of sentence not clear].

Mr. Acheson: Do you want to discuss at this time any future meetings or do you want to leave that until we have circulated all this material and get answers back?

There is a general agreement that it is too far in advance to discuss at this meeting.

Mr. Frank: Is it right that these materials will be cleared and sent out and we are not to meet on these again until we hear from the bar?

Mr. Acheson: That's right.

Mr. Freedman: I would like put on the table - I want to add to Rule 65 a proviso.

Mr. Acheson: Why don't you circulate something?

Mr. Freedman: Alright. Maybe that would be much better and more orderly way to do it.

Mr. Colby: Is it intended to have another meeting for purposes of minor cleanups and what not matters?

Mr. Acheson: It is not intended to have such a meeting. This is very strongly the desire of Judge Maris, who wants to get these particular rules finished at the earliest opportunity. He wants to get the discovery rules out to the bar.

There is a general discussion on future business.

Judge Feinberg: Then somewhere along the line, don't we want to consider doing away with the rule that only the marshals can serve?

Mr. Jenner: Or do something about these restrictive local rules that are varying the thrust of the overall rules. In order for us to get a new start really, have the reporter assemble a whole bushel basket of agenda of things that have come to his attention. The Committee can then begin to form a new perspective.

Mr. Frank: Gentlemen, as we wind up this work, I have a sense of accomplishment and a sense of the tragedy of lost opportunity. The matter which concerns me is this. In terms of the history of Civil Procedure, we have had the major leadership of Chief Justice Taft. Then we have had Charlie Clark and Bill Moore and that generation, Mr. Mitchell, picking up Taft's work and making it real. That was before this Committee began its real function, except that there was what we'll call a Taft-Clark leftover, and we did that leftover in the first few years of our existence. We picked up the 1955 proposals. We then moved into a major division in the history of civil procedure in our time and in kind of a Kaplan period. This was a new chapter. What we have not done and what we

haven't got off the dime at all is what I would call a Warren-Acheson era in the history of civil procedure. One of the really great social problems of our days is the total failure, I think, of the laws to serve the needs of the community. Everyone of us has heard the Chief Justice repeatedly say that more judges aren't enough but all we do is add more judges. The question arises as to whether from our combined thinking we are capable of creating some kind of agenda of matters to be explored which transcend the question of whether the marshal can make service or whether he can have a helper. It would seem to me that this group very possibly can do that, and my own thought is that in some fashion we ought at least to try to take a session at which we deliberately eschew questions of the meaning of complete and accurate, etc. There ought to be some point of thought in this group as to whether there is an area for such profound reform in civil procedure that it's worth serious thinking about, whether by legislation, whether by action of this Committee, but in some way. I wish we could have time out for a real period of thought about that. Thank you very much.

Mr. Acheson: I agree with everything you said and I think somebody, somewhere, ought to do something about it. There is some doubt whether this Committee as a Committee ought to be the one. This is a matter about which we must deal with some discretion and some care. I think we can do that. I would suggest that quietly and conservatively we go ahead and explore this a little further. At some time, when we have another meeting, let us be prepared to take a half day for the purpose of thinking how this can be done and where can it be done being very careful about the position of the Court.

Several members made reference to other Committees which take on studies and felt that perhaps some of the Civil Rules Committee members could be extremely useful and extremely busy in doing their part of this job under and in association with the Judicial Conference Committee.

Judge Thomsen: I see our function as being constantly thinking of new rules and sending to the reporter things for him to study so that he will have something ready for the next time, and also, being ready to do our part in cooperation with all these other committees in working out these major problems.

Dean Joiner: I think we have a function of trying to see that this job is done in some way. We may not be the proper group to do it, but I think we do have a function in telling somebody and encouraging that somebody or group to organize, to staff, and to have a project of this kind carried forward.

Mr. Freedman: I would certainly say that John's idea ought to be followed through and I think he should be recommended for initiating it.

Mr. Acheson: I quite agree, and hereby you are commended.

Mr. Frank: Ben [Kaplan], would it be possible to plan at one of our meetings, either half day or a day, in which we could at least make an inventory of the possibilities to the end of seeing what may be ours and what belongs to somebody else.

Professor Kaplan: More important than that is to figure out more precisely what is to be the substance of the research and the hammering that has to be done by some kind of interim committee or what not preceding one of these meetings.

Mr. Frank: I would simply ask if it should be the sense of the meeting that we turn to our brother, Kaplan, and ask him to think for awhile and report to you as to whether we can have a meeting of our own in this area or whether we can't.

Mr. Acheson: I think we can.

Meeting is adjourned at 3:52 p.m.