PARTIAL TRANSCRIPT OF THE MEETING OF THE
ADVISORY COMMITTEE ON CIVIL RULES

November 11, 12 and 13, 1965

The Advisory Committee on Civil Rules convened in the Ground Floor Conference Room of the Supreme Court Building, Washington, D. C., on November 11, 1965, at 9:30 a.m. The following members were present:

Dean Acheson, Chairman
William T. Coleman, Jr. - absent 11/11/65
Grant B. Cooper
George C. Doub, absent 11/13/65
Shelden D. Elliott
Wilfred Feinberg
John P. Frank
Abraham E. Freedman
Arthur J. Freund
Albert E. Jenner, Jr.
Charles W. Joiner - absent 11/12 and 13, 1965
David W. Louisell
W. Brown Morton, Jr. - absent 11/11/65
Louis F. Oberdorfer - absent 11/12/65
Roszel C. Thomsen
Charles E. Wyzanski, Jr.
Benjamin Kaplan, Reporter
Albert M. Sacks, Associate Reporter

The meeting was also attended by Judge Albert B. Maris, Professor James W. Moore, Professor Charles A. Wright, Professor Maurice Rosenberg and Professor William Glaser of Columbia University and William F. Foley, Secretary.

The Chairman called the meeting to order by welcoming the two new members: Judge Feinberg and Mr. Cooper.

The first topic for discussion was Item No. 1 of the Suggested Agenda, Rearrangement of Provisions in the Rules. Professor Sacks: Our principle purpose is to have a Rule 26 which is applicable to discovery generally and which thereby accords a convenient vehicle for dealing with problems that are applicable to various of the methods of discovery. In prior discussions we have noticed that we [illegible] a [illegible] rule and think of a location for it. It

may be the scope of discovery and trial preparation materials and every location is awkard because our aim is to make the provision on scope of discovery applicable across the board so far as it applies. Similarly the same would be true of discovery against expert witnesses and there are certain procedural problems which do in fact apply to more than one device and it is convenient to have a location for this in a rule covering discovery generally. This change would be useful not only for the present proposed revisions but it gives us a vehicle which would be useful in the future as well. There is a countervailing situation of importance. Insofar as we can there is an advantage in keeping rule numbers about the same. First, they become familiar to bar and bench, second, because state rules are patterned on Federal rules, and third, there is a problem about the treatises and texts that are out and useful to the practitioner. Any change should be carefully scrutinized and justified. The particular change recommended in the draft is minimal and I hope justified . . . (explains the proposed changes).

Mr. Evans: I wonder if on arrangement, only, if this is a particular matter we should ponder until the next meeting, and settle the question of arranging after we have decided what it is we are arranging. I . . . [illegible] estimates from their . . . [illegible] concerned about . . . [illegible]

[illegible] arrangement . . . [illegible]

would avoid this a all cost. I would have th ght this could have been very easily accomplished under Rule 32. The additional material you put at 31.1 could well follow Rule 32. The second question is there are general provisions relating to discovery both to depositions oral and depositions written. It would be helpful if we could figure out way to deal with these in general way but I haven't been able to figure out how to do it.

Mr. Freedman: Appears it would be simpler to do it this way. Would simplify the system if you do it now so that everything can fall into place rather than waiting until later when there will be additional complications which work itself into substantive features.

Prof. Elliott: ~~App~~ I move we approve the approach of Rule 26 as drafted by Professor Hacks.

Prof. Moore: I don't care one way or the other. I think you are placing a lot of emphasis on structure and symatics. I don't think it will turn out for any greater clarification for the bar or the practitioner and if I were doing it I would make such changes as I felt should be made and call it a day. As far as I am personally concerned I don't care one way or the other.

Prof. Wright: Like this arrangement. Do think if we sort out cost as John suggests that it will be very substantial, . . re costs of volumes. Use re confusion to researc . . . should give serious thought t . . . ar . . . e make changes because they seem logical

[illegible]

additional research which would be required in every case to go back and pick up whole case and analyze with regard to interpretation of rule, the bar becomes accustomed to this from law school on and when things are changed it takes another generation to become accustomed to it. I don't think we can make this, and I think Mr. Frank's suggestion to proceed to discuss the substance of the proposals is a good one. And then the Committee will acquire a feeling or sense of whether this rearrangement is compelling in that it will assist the bar. The bar fears shifting of material in the rules.

Prof. Elliott: Not persuaded by Bert's argument. Every time the state consolidates or revises a statute the same thing happens. References to old statutes have to be checked. I feel no compunction about changing this.

Mr. Oberdorfer: I suppose the sense of thegroup was that you should attempt to comply with Mr. Jenner's idea of avoiding any structural changes and just do an editing job. Has this been attempted and, if so, would it be feasible?

Mr. Frank: I would like to stress that there is such great force in what Al says, I really only want to defer the question until after the rules have been discussed.

Judge Thomsen: I am generally in favor of doing this for two reasons but think we should wait and see how many changes are made. If we make as many changes as recommended we will have to buy a new book anyway. There is something to what Mr. Jenner says about changing things and I feel the average run of the lawyer is bothered with this.

Prof. Louisell: Ion't have any o jection to waiting for a final decision on this. I think we will e disappointed in anticipating the cost as it will be so great. The states will also have to catch up with the rules. However, whenever a statute is changed this has to be done so I don't think this is significant.

Prof. Sacks: Understand proposal it is to leave this and come back to it, and we can consider again just where it stands and what the accounting pro: lem is.

Mr. Acheson: We will proceed to consider changes and will come back to this matter.

Prof. Moore: Oncething trou bles me and that is how disturbing it would be to the state practice. One of the things that has been stated in favor of federal rules is whether a model of states is adopted. So far as Federal system goes it seems to me we ought to make changes that are needed but I wouldn't make changes just to be making something just a little bit better looking. Without taking into consideration what it is going to do to state practice.

Prof. Elliott: Seems to me the one basic issue is do we approve in general the approach of Rule 20. Consolidating as Al Sacks has done the various after related rules into one consolidated approach. I am not against going ahead with the changes but I think the principle should be esta blished now. I so move.

Dean Joiner: I hope we can get as much unanimity as possible and I think, Sheldon, that your motion will carry. However, I do think we should discuss the su stance first. I would like to suggest that you withdraw your motion.

Prof. Elliott: I withdraw my motion.

Mr. Acheson: I again state that we will go ahead with the su stance

of the changes for the rules of discovery and then we will come back to the form in which we want them presented.

Item No. 2 - Trial Preparations Materials

Prof. Sacks: We will now talk about specific proposals for the rule and then come back to the other matter:

There are several sources of confusion. The problem of the existing rules have no specific provision for these materials. We operate under the Hickman-Detailer Doctrine and good cause requirement of Rule 34. Prof. Sacks explained the problem and stated we have a question of the extent of the Hickman Detailer Doctrine itself and the extent to which it applies to persons other than lawyers. Explains different views of Altmont, Guilford, Hickman, etc. There is also confusion as to degree of justification. . . . Explained the difficult copies which asks for copies of witness statements, other document which do not contain in direct fashion the lawyers' theories but which may raise a risk that something along that line may be disclosed. Finally, question of whether all statements of witnesses obtained should not be made discoverable. This does not do that. This takes the view of the Guilford case that if the parties are on a parity. If they have equal access to the witnesses, a simple disclosure as matter of right would not lie.

Prof. Moore: Do you deal here anywhere with problem of Justice Jackson discussed in the note of Hickman Detailer that a request to require a person who took oral statement to reduce that to writing and produce that.

Prof. Sacks: Not specifically. If you mean is it specifically adverted to - the answer is no.

On the merits the question, as I see it, is whether or not it should simply be a matter of right and I suppose what I am suggesting is that given a situation where parties have equal access to the witnesses there should not be a right to production. The problem should be on the terms of what showing is needed.

Mr. Doub: Why in lines 50-58 do we tint this in the negative implying that there can be no production except on exceptional showing? Would it not be better to say in 50-51 "subject to provisions of subdivision (1), a party may require another party to produce." . . . and at the end of 57 "upon a showing that denial or production." I think it would be better although the result may be the same. I don't like the idea of laying down a general negative exclusion.

Mr. Oberdorfer: Are there are real reasons for wanting to suppress evidence that would impeach witness or what genuine reason is there for refusing production of statements to be used for impeachment.

Prof. Sacks: I find myself in the position of being told by Mr. Freedman and Dean Joiner that I haven't gone far enough with respect to discovery in these materials and by Mr. Frank and others that I haven't gone far enough in protecting against discovery and it seems to me that I would suggest that the impeachment problem is a special one and should be handled separately and specially. We ought to be in a position to say to Mr. Frank if we think impeachment evidence should get protection then we would write it into a rule in such a way as to make that clear. Impeachment evidence may be obtained as part of trial preparation; impeachment evidence may be obtained and it may turn out to be not a part of trial preparation.

Judge Wyzanski: I don't think you can tell whether a matter is impeachment evidence.

Prof. Sacks: I would like to say lets hold this matter, with assurance to John, that we will deal with it as a separate matter. There remains two items which are central to this problem which are should statements of witnesses be made producable as a matter of right which is one point of disagreement in the draft, and the other is does the draft fail to reflect a proper view of Altmont and Guilford and if it does fail to reflect that view should it reflect that view. It seems to me we ought to be able to take these in some series.

Mr. Freedman: Seems the discussion has developed to where we want "good cause" or we don't want it. If we take "good cause" out I think we would have eliminated most of our problems. I suggest we find out what is the sense of the Committee to remove "good cause" with the protections which could be worked in such as they presently exist under 30(b), and subject only totthat I would suggest the question be put to the Committee whether or not we want good cause.

Mr. Cooper: I second the motion.

Mr. Acheson: I thought we had reached this point once and decided not to do it in this drastic way and I suggest we continue to do what we were doing which is work on the draft.

Mr. Jenner: I suggest we given consideration to these factors. We may reach this conclusion but we should not do so at this early time.

Cooper
Mr. Acheson: Prof. Sacks, what would help you?

Prof. Sacks: I had thought that this issue is so crucial that we have to deal with it straight forward. It might be that before voting on it, to consider what it is the draft accomplishes - what does the draft do with these witness statements - so that we have a clear picture of what

the draft does and what in turn Mr. Joiner suggests we should do. It seems to me that at some point the issue has to be faced squarely -- in the sense that if witness statements are made producable as a matter of right, then we have to start from that premise and then comes the question whether certain exceptions should be added.

Dean Joiner: Would it be helpful to move, and I merely ask before moving, that the reporters be requested to prepare a draft substantially along the lines that verbatim recorded witness statements are made in anticipation of litigation shall be subject as a matter of right to discovery, and to suggest a place where this would fit into our current draft. I suggest this as a way of pointedly putting the issue of requesting you to do some work, and if you don't believe in the philosophy you shouldn't do the work.

Prof. Sacks: No.

Mr. Freedman: I move that the provision relating to "good cause" for production of these documents be deleted from these rules. Motion was seconded.

Mr. Frank: I move we table Mr. Freedman's motion to be taken up later and go on with the agenda.

Prof. Sacks: The "good cause" has been deleted from Rule 34 and the only showing that we are talking about is a showing in 26(b)(3).

Mr. Frank's motion was seconded and carried by a vote of 9 in favor (There were 14 members present - no negative vote was called for).

Mr. Doub: I suggest that we start in at the beginning ofRule 26 and take them up seriately.

Prof. Sacks: (Explains the provisions of Rule 26.)

Mr.Doub: I am questioning the word "only" in line 18. (It was agreed that this word should be stricken.) This was taken from the rule dealing with depositions, but in the change the word has required a more restrictive meaning and should be deleted.

Mr. Jenner: In drafting Evidence Rules, the Committee is using the device of using illustrative but not exclusive.

The Chairman inquired if there was any further discussion on subdivision (a) and there was no indication that there way.

Subdivision (b)

Mr. Joiner: I suggest that since the word "only" has been removed it was the only reason for this particular subsection and I suggest that this subsection be deleted and start off with subdivision (b).

Prof. Sacks: One of the problems I had was whether we needed this subdivision and I must confess I was influenced by the desire to keep 26(b) as 26(b).

Mr. Doub: This is a clear reorganization of these rules and the titles should be picked up in subdivision (a). It would not be clear starting off with (b).

Judge Maris: This is a detail of reorganization and should be decided after you have decided whether you are going to reorganize the rule.

Mr. Oberdorfer: In line 28 of (b)(1) there are thewords "not privileged." Privilege is protected from the beginning.

Prof. Sacks: The test relevancy to thesubject matter and not privileged are taken verbatim from the rule.

Mr. Jenner: In line 47 the words "in accordance with these rules," consistent with decision made in 18, should be stricken.

After discussion it was decided this phrase should remain in therules.

Subdivision (b)(2)

Mr. Frank: I move that the proposed rule is right and should be adopted.

Prof. Elliott: I feel full disclosure in this area should be permitted. There is no reason in this day and age why one existence of a policy to the limits of that policy should not be made available.

Consensus was that this should be adopted.

Mr. Jenner: I suggest this be in present tense, also. "Is not," rather than "shall not." "Is not by reason of disclosure admissible."

Mr. Frank: Prof. Sacks, could you send the members clean copies of the revised drafts so they would not have to take notes on small changes.

Mr. Jenner: I take it that it is unanimous that there should be discovery of insurance. Lines 42-43. I would like to comment on this. I don't think rules should be drafted in terms that a party may require any party to do something else, but rather that the rule should be self operating to say that the party may obtain discovery of the existence, terms, ... I think the word "and" limits.

Mr. Cooper: I disagree ~~that~~ as I think it expressed it well.

Mr. Jenner: What we are addressing ourselves to is that we want to see the policy from the top of the page to the last rider.

Prof. Sacks: If you put emphasis on production, you are emphasizing one device when you really mean to cover the availability of all devices. It will read:

> A party may obtain discovery of the existence, terms, and limits of any insurance (suggestion was made that [existence

terms and limits be changed - precise language to be worked out]

Mr. Freedman: Suppose the party has lost his policy.

Prof. Sacks: The way Mr. Jenner made the suggestion it would read "the party may obtain discovery of". This is the broader reach.

Mr. Freedman: It is not limited only to the party who may have lost his policy.

Prof. Sacks: That is correct.

Mr. Freund: Would lines 48 and 49 conflict with the practice in those states that permit direct action against the insurer.

Prof. Sacks: I don't see why. The words suggested would read the information concerning insurance policy is not by reason of disclosure admissible in evidence -- there is an independent basis for admissibility.

Mr. Frank: The note should make this real clear.

LUNCH

Mr. Doub: Suggest we skip 26(d) and cover more ground. Come back to this provision later on. This suggestion was approved.

Rule 26(d)

Prof Sacks gives run down on this.

Mr. Doub: There is a question in my mind whether we should make such a distinction in such classifications between experts.

Dean Joiner: I think you might bring forward to this section the requirement in e(1) of continuing obligations to bring a witness this would be particularly important. You can drop out who you want. I don't know how you will dispose of that. But the general proposition is: At this point ~~that~~ it is proper if you are going to require the name of an expert witness in advance then you say you are only going to call a and b and then later decide you are going to call (c) you should at that time call him because this is purely in the control of the lawyer

himself.

Mr. Frank: I am going to support this because I am going to take the view when we get to it that we should not have it at all. The one exception would be if you have to keep your witnesses current.

General Discussion

Mr. Frank: I move we revise section (b) to eliminate the possibility of compelling testimony by experts in the area of their expertise if they are not going to be called as witnesses.

Mr. Acheson: I understood from the reporter that this is merely to identify somebody.

Prof. Sacks: This identifies and then it goes a step beyond. It does permit discovery if there is a showing . . . . I mean to include both fact and opinion.

Discussion but no action taken on motion

Mr. Frank: I move we settle this as a matter of policy and that we wish to deal in this rule only with experts who are going to be called as witnesses.

:Further discussion - no action taken.

Mr. Freedman: Let me amplify the problem Judge Wyzanski put in a moment ago. This is a particularly sensitive area in the field where you get a case against some doctor and this conspiracy of silence makes it impossible to get a doctor. What happens is, you go to a very good close personal friend of yours, and say tell me what the lowdown is on this. And he will talk to you without wanting to get involved because it could mean his license. He could be tossed off the board. Therefore, he would only talk to you if there is absolute assurance it won't be passed on or that he wouldn't be named and it wouldn't be.

discovery of testimony from experts who are contemplated to be witnesses with the safeguard Abe has in mind.

Prof. Sacks: If we strike section 4(b) and limit it to 4(a) it is essential that we accompany it by a note that makes it clear that existing law, somewhat which is along the lines you paved, continues. It would be close to a disaster if you wrote in 4(a) and that would be construed to mean this is the only discovery possible against experts. It would have to be done in a form to make it clear that the existing law of discovery against expertise remains.

General Discussion.

Mr. Jenner: If I vote for this do I understand that the names of all experts consulted must be disclosed? If so, I am opposed to it.

Motion as stated by Professor Sacks:

The normal rules of disclosure of persons who have information about the case emerge from the general doctrine of 26(b). I had assumed myself it covered even the case of just a simple consultation. Judge Wyzanski says "no", that is not so. Whichever it is, it does come from 26(b) -- I would note that the effect here of what we are doing is to lay a foundation for the showing of this 4(b). You would be permitted to get identification. If you have a basis for showing you couldn't get the information yourself. This would entitled you to find out from the other side if they had the facts or opinions by an expert which you could obtain under this rider -- which you could obtain under this rather rigorous showing.

Motion was voted upon and 8 voted for the draft.

Mr. Doub asked to be recorded as not voting on Rule 26(4).

Mr. Frank: I was prepared to vote "yes" until Prof. Sacks' answer to the last question, but in light thereof I voted "no" because I won't vote for

any proposal under which you have to turn over the names of the people you talk to.

Mr. Jenner: He is doing two things. First, he is saying "no," you don't have to disclose," and then he is saying "it may be you do have to disclose."

Prof. Sacks: Explaining why this is being done.

Judge Cooper: I would like to be recorded for this reason for voting against it: I feel that circumstances Mr. Doub related and others like that, in principle, that it is unethical to suppress that evidence.

kProf. Louisell: I too would like to go as far as (b), but the reason I couldn't vote for it is the consideration made by Prof. Moore on the deplorable situation where the government sets aside and takes advantage of the type of situation brought out here. I wonder if it is feasible to ask if it iwould be practical to make an exceptional rule in this connection with the government in view of the fact that the expert's being paid for by the public.

Mr. Frank: Mr. Jenner and I, at least, do not wish to have to respond at all as to whom we have interrogated as experts. We are prepared to turn over the man who is to testify but we don't wish to turn over any others. We are perfectly prepared to go along with you on the hardship test as it stands as long as we don't have to submit a list.

Prof. Sacks: We could continue to have 67-70 as the scope of the provision and then (a) would remain about as is; possibility of putting it second rather than first is there; (b) would not state

that on a showing that a party could not without undue hardship obtain information on the same subject through independent investigation or the retention of other experts or both, he would be entitled to secure identification . . . .

Judge Wyzanski: (reads rest of the draft as he sees it)

Judge Feinberg: There is a difference between consulting experts and consulting experts and getting an opinion from them. (b) as it is now drafted, with the revisions the reporter suggests, includes experts you have consulted but have not gotten an opinion from. I mean opinion in the sense of formal opinion, not informal canvassing. Does it include theeeeexperts, because I think that is what all the shooting is about. Most of the men who are objecting to this don't want to reveal the names of all experts who they had preliminary talks with.

Mr. Acheson: It would be helpful if therreporter would rewrite this paragraph, along the lines of thediscussion and put (b) first and then (a), and then another draft putting it in the same order as it is now and being careful in using different expressions at different times.

Meeting recessed at 5:00 p.m.
Reconvened, Friday, November 12, at 9:30 a.m.

The Reporter distributed the redraft of Rule 26.

Judge Maris: In (b) are you referring to experts not included in (a)?

Prof. Sacks: They are two separate and independent basis for discovery. Are you suggesting we do need an introductory (interrupted).

Judge Maris: In order words, an expert retained or specially employed in anticipation of litigation may well be one who will be called for a witness.

Prof. Sacks: The scope of the two is separate. These are meant to be independent and cumulative.

Judge Maris: Yes, but you need a little language somewhere.

Prof. Sacks: It is a good point. The point about having them separately was intended to clarify the scope in each instance. I think this is worth trying to do and we can do it.

Judge Maris: Otherwise, I think this is excellent.

Mr. Jenner: This sharpens up and presents a problem which I think the Committee will have to face. Probably haven't reached firm judgment on this, but in cogitating for the next meeting it is one thing to afford the other side discovery as to what your expert may have on his mind, as to what his opinion is he has given, but it is quite a different thing to that expert for the purpose of (a), exacting from him opinion of the two main reasons in support of your own, and (b) it is quite a different thing to permit that expert, as I gathered would happen here, under the second sentence of proposed (a), to vigorously cross examine and the whole thing, alternative and other suppositions, so that infrequently in many instances your expert is moving along. You haven't really gotten him down to the point where he will be when you put him on the stand and to permit, I submit a very dangerous thing here to have your expert cross examined, you put your expert on the stand and he is subject to cross impeachment which will not be a proper impeachment with respect to an expert -- now, didn't I put this question to you and didn't I ask you to assume these figures back 3 or 4 weeks ago and wasn't your response so and so. If this is permitted it will interfere with the advancement ofthe ascertainment ofthe truth and the orderly conduct of the trial. The issue here is, as I see it, one of the issues are we to afford discovery as to those experts whom we have determined to call

and I take it we are inclined to say unanimously that we should. I could go along that far and I think the bar, with some rumbling, will go that far too, but we will hear loud protest, even up to that point and if you are to permit your witness to be destroyed in advance of putting him on the stand and before you even firm up your own views, really as to your expertise, then I think the bar would have a real legitimate complaint.

Mr. Acheson: I don't quite understand how far you would like to go or are willing to go, and how far beyond that you feel you are being pushed by this draft.

Judge Wyzanski: We are willing, are we not, to have the examination go this far: Discover from the expert of the other party the facts known, or opinions given, or are to be given on direct examination by the expert. What we are really afraid of is the expert is going to be examined with respect to opinions on the general subject matter which is beyond those you would ordinarily give on the record on examination.

Mr. Jenner: That is right.

General discussion continues.

Professor Sacks: I think counsel would be able to state the subject matter narrowly but there is something to Judge Thomsen's point that he may be afraid becuase there is a sanction operating here that the problem of trial as to whether he has boxed himself in. If, in fact, the Committee disagrees with Mr. Frank and wants it restricted in the fashion described by both Judge Wyzanski and Mr. Morton who want it to be limited to opinions previously given, or to be given on direct examination. I don't know whether this is the best language, and the grounds thereform If this is what is desired, then I would like to be told and I will attempt to find language to do this. John is opposed to that view and it seems to me that is the issue on which I need guidance.

Mr. Frank: Do you want a motion on this? I move we agree in principle with the draft.

Judge Wyzanski: In order to test, I move amendment to themotion to strike out word "relevant" and insert "restrict." I don't mean this has to be the final wording.

Prof. Sacks: Do I understand correctly, to limit in effect to the opinions previously given or to the (blurred by cough) and the grounds therefor.

Mr. Jenner: May I suggest, as I understand it, theparties be permitted to discover the opinions of experts but only discover their _____. That the expert is not to be used for the purpose of obtaining on examination opinions on things other than, or phases other than, in the opinion of the expert that he has reached that (voice trails off).

Judge Maris: That would come under (b). Have to take a showing of hardship.(b) is broader.

Mr. Jenner: I hadn't that in mind.

Judge Maris: (b) is safety valve for person who can't get expert any other way.

Mr. Jenner: (Summarizes) The issue is are you going to permit a party to obtain the opinions of an expert who is going to testify for the opposite party, and I take it we all agree that we should go that far. Are we then to permit in addition (1) the vigorous cross-examination of that witness, or (2) permit his examination on opinions or re-forming whatever views he has obtained to assist the examining party in presenting (Mr. Acheson interrupts).

Mr. Acheson: We have already had that stated by the two judges on one side and John on the other side. Now what we want to find out is how we vote on it.

Mr. Acheson: May we have a show of hands on this. Who are in favor of restricting (a) to Judge Wyzanski's, Judge Thomsen's, and Judge Feinberg's views (the judicial view) -- (Mr. Jenner adds: and my own).

6 voted for themotion. *

Mr. Acheson: Now those not in favor of the Judicial view, but who want to go further: 7 voted.

Mr. Frank: I now move that we approve the draft in principle.

Motion was seconded: Vote - 7 for and 6 against

Mr. Freedman: I wanted to ask a question before we voted. I want to be sure it does go as far as I think it goes. Otherwords, it would encompass these things that Bert has suggested shouldn't be included. That is the principle I am in favor.

*Mr. Doub: I would like to be recorded as not voting on either issue.

General discussion on subdivision (c)

Prof. Sacks: Responding to a suggestion made yesterday I did make a change in (c) so that the final provision at the bottom of (c), sub-section (B), those orders are now limited to discovery under (B). That is true. That was in response to a point John Frank made yesterday. Now you are suggesting that discovery under (a) is so broad as you see it that that limitation should be deleted. I would personally favor that with the express point being made that it is discretionary with the court. That is, it does not require such an order _____ if authorizes, and in some instances it seems to me it could well be ____ so that one way of meeting the point, Judge Wyzanski, is to eliminate that limitation that I added overnight.

Mr. Frank: I suggest that if we are this much divided we need further thought. Couldn't we perhaps take this as agreement in principle with the understanding to ask Bert, before another meeting to give us an actual draft to reflect his point of view and maybe we could agree on the

draft and if we circulate it with the next material maybe we could find something we can be unanimous about.

Mr. Jenner: I would undertake to do that. I am concerned with the close vote. With this committee standing at such a close vote with members abstaining and two members absent.

Mr. Acheson: I am never really impressed with these preliminary votes. It is really for the purpose of seeing where we stand.

Judge Wyzanski: I want to explore what Judge Maris said that under (b) you can get most of this if it is _____. Really in a particular case and I think it will be most likely in a case where it is appropriate (b) would be quite sufficient except (Interrupted).

Mr. Freedman: Yesterday the basic reason for this rule was to be able to cross examine the other fellow at the trial. This is responded out of that assumption.

Mr. Acheson: We have discussed (a) and have decided that we will have another draft for the next meeting.

Judge Thomsen: Are we recorded as opposing this.

Mr. Acheson: I think it is indicated on the record that the vote was 7 to 6.

Judge Wyzanski: May the record show that I said to Al that I think it is very important for him to check on what is appropriate to cross examination because the three judges here evidentally think this is not appropriate cross examination and several lawyers think the opposite. Maybe there is some case law on the subject.

Mr. Frank: If you are ready for the motion, I would like to move the approval of paragraphs (b) and (c).

Prof. Elliott: Separate them John.

Mr. Frank: Okay, (b)

Mr. Coleman: I have two questions: What mechanics do you have for finding out who these people are that have been consulted but who are not going to be used in trial.

Prof.Sacks: We had some agreement yesterday.

Mr. Coleman: Okay, then does this mean that the expert that you can sell, and then you don't go forward with when he doesn't give you what you want, and the other side can find that out and use that information.

Prof. Sacks: My best effort here. Attention would be as it stands the language about retaining or specially employed is intended to eliminate any effect so far as this provision is concerned. Any effect of broadening the allowable discovery of "experts informally consulted." It seems to me this would not permit or broaden whatever right now exists to find out about persons informally consulted. It deals with persons retained or specially employed. The Note should make that clear. In (b) we now use terminology of retained or specially employed.

Mr. Freedman: How would you identify these individuals. Is it implicit in this rule that you would be able by interrogatories,or other methods, to develop identities of these individuals who have been restrained.

Prof. Sacks: Of persons retained or specially employed? Yes, it would be/a necessary inference from this that you might be able to obtain this information.

Mr. Freedman: In order to dispell any doubt about it, do you think it should be incorporated in the rule?

Prof. Elliott: No, I don't think so.

Mr. Freedman: I think it would eliminate confusion if we were to take out of (b) the words, ?To obtain facts and opinion on the same subject." What I have in mind to these witnesses, as long as you make a showing of undue hardship without stating that you can't get any other experts, then

I think this would perhaps alleviate not only this particular situation but it would also assist (a)(2) and take care of those situations Judge Maris and Judge Wyzanski were referring to.

Judge Maris: I don't follow that.

Mr. Freedman: You said before, if the party gets on cross-examination on the matter which is perhaps related to the particular issues, that matter may be involved and may be excluded. You suggested he could come in under (b), but under (b) he can only come in if he can show that he can't get an expert of his own. Why do we have to get involve there? You suggested, Judge Maris, before that if you really want to get into the other person's case you could get in (interrupted).

Judge Maris: I didn't say that at all, Abe. Not even approaching it. If you can't get any experts at all of your own, then you can go in to the other man's experts for this showing and get your own opinions from him, but only if you make the showing that you can't get one yourself or by manifest injustice.

Mr. Frank: I will be interested in hearing Brown's views as soon as h has time to meditate this. I would like us to approve in principle paragraph (b).

Motion was stated as those approving paragraph (b) in principle: Count was 6 for (Mr. Doub abstaining) (I presume the Chairman voted "yes" but did not raise his hand). The Chairman stated the motion carried.

Motion was stated for approval of paragraph (c) in principle: Count was 9 for -- Motion carried.

Prof. Sacks: We do want to have some discussion about 26(c), Protecti Orders, and to take up impeaching evidence, which relates to this rul

Mr. Acheson: Lets proceed with impeaching orders.

Mr. Frank: Since we don't have a precise piece of text and the reporter simply wants instruction on this point, may I make a motion to the effect that the reporter be requested in giving us the next draft to provide that discovery shall not be allowed as to matters which are to be used primarily for impeachment. Mr. Chairman, the problem is this: Almost all rules provide, particularly in local rules in district courts, that sometimes impeachment and sometimes rebuttal material should not be subject to discovery. Taking them separately, those are the classis exceptions, at least as far as they go. On the matter of impeachment evidence, the general theory is that this material shall not be discovered essentially because it is a good policing protection against perjury. It thus becomes an exception to the rule against surprise. Because this is an area in which a deliberate policing judgment is made that you would rather have the surprise than not. That the value of policing against the perjury is greater than the value of preventing surprise. The classic example may be that (states example). The question then is must you reveal this in advance? The essential argument for it, I believe, has been that if you don't you are simply tutoring the other fellow how to tell his lie. There is enough perjury in the court that you don't have to guarantee what the fellow has to lie around.

General discussion.

Prof. Wright: I think, John, that you have overstated the matter somewhat more broader than you intended. There is a distinction between the material you already have in your file and the material which you intend to use for impeachment, and you don't want the other side to be able to get, and used by you as discovery as a means to obtain the material to impeach the plaintiff. It is only the former situation you are in doubt

Mr. Frank: Oh, by all means.

Prof. Sacks: Yesterday there was a question put about the negative and affirmative. 26(b)(3) provides extra protection for trial preparation material. That is the best provision, and 26(b)(1) and the protective order provisions which is just what we have now and under which impeaching evidence doctrines are involved. 26(b)(3) says certain materials may not be produced except on a showing. It just seems inevitable to me that 26(b)(3) should not be taken to deal comprehensively with all the many items under which protecting orders are given. Because they have some particular claim to protection. This may include such matters as grand jury minutes, tax returns, etc., which are recognized as having special problems and upon which the courts act by decision. Impeaching evidence seems to be of that character. In terms, 26(b) is neglected, and it is the trial preparation feature that is protected. It seems to me it would benentirely in order in the note to make that perfectly clear. I am quite happy to do that but I don't think the text codifies that.

Mr. Frank: Mr. Chairman, do you want a last expression on this?

Mr. Acheson: I would take it that what you want from the Committee is that you don't want it codified out.

Mr. Frank: We want to be good and sure we are not doing that and what is troublesome is page 26 5-6, lines 65-66n. These are factors which are supposed to be taken into account. We fear we have codified this out.

Mr. Acheson: I think that what we want to do now is to see if all agree to make sure it isn't codified out.

Mr. Jenner: Motion: It is the sense of the Committee as a matter of policy to redraft Rule 26 in no fashion to interfere with the present development of the law, by district judges, in the area of discovery and

impeaching evidence.

Vote: 12 for to 1 opposing (Mr. Freedman).

(c) Protective Orders

Professor Sacks: (explains changes)

(Discussion was held on the bracketed portion of lines 182 and 193.)

Judge Wyzanski: (Suggested along here it follow the language of line 179 re "the court." (Voice was low and could not understand reason).

Prof. Sacks: One of the troubles is that it may be incomplete. This is the trouble with codification of such a thought that there may be an additional point which should have been included. For that reason I think I would eliminate it.

Judge Wyzanski: Why don't you eliminate the words "the degree of,", leaving "taking due account of importance."

Prof. Sacks: This would be all right.

Mr. Morton: Al, I agree with you that it is unnecessary because I thought it was merely stating one of the necessary matters raised by the use of the word "Undue burden" or respect.

Prof. Elliott: I move we not include the bracketed portion on lines 182 and 183.

Mr. Doub: We have enumerated all reasons why court should not be permitted discovery in protective orders and it does seem to me that there should be defined the major or counterbalancing factor, and I believe, (cough - but sounded like) it should be left in.

Motion: To eliminate bracketed portion. 8 for - motion carried.

Mr. Frank: I would like to note two points for the reporter. (Mr. Frank stated these were covered in paragraph 5 of his memo to the reporter on the subject -- he also explained his points).

Prof. Louisell: There is an additional problem: Who owns it in the sense of being allowed to sell it. Such as a publication right.

Mr. Frank: I suggest that more attention be given to the local rules all over the country.

Mr. Jenner: I suggest we ask the reporter tollook into this problem. I feel this is a special field.

Judge Wyzanski: May I ask. Is this a procedural question or is it a substantive problem not to be covered by the rules?

Discussion

Mr. Acheson: I think we should just have the reporter to check.

Mr. Frank: I have a completely new thought. I would like for the reporter to advise us, as a by-product, of our own work in the field of Rule 4(e) in years past, we have revolutionized really the matter of interstate handling of law suits to a very marked degree. This is very radically changing the nature of the practice in taking distant depositions and that requires a whole new look at the matter of costs in conjunction with depositions in terms of costs of taking them and of where you take them, how people are to be protected, etc. This arises, and belongs under this subsection.

General discussion

Mr. Doub: I have one question. In lines 184-185 did you not intend that it would mean that the court may order that the moving party or person; - shouldn't the word "moving" be in there?

Prof. Sacks: Certainly that is the case one thinks of immediately. I am not entirely sure about it. You may have motion by one but there may be other objecting parties as well. If there were objections for several, I doubt we would want to limit it.

Mr. Doub: If you don't put in something.

Prof. Sacks: I see the problem.

Mr. Coleman: Do you have any objection to providing that once you file the motion for a protective order that that automatically stays in taking the depositions until after the court can dispose of the motion. Mr. Jenner was asked how he felt. He replied he was not prepared to say.

Prof. Sacks: When you said you are not prepared to say, what objection do you see to the automatic. . . . (voice trails off)

Mr. Jenner: Well, if it is in good faith then it should be automatic.

Prof. Rosenberg was asked what his report shows.

Prof. Rosenberg: Well, I can't tell you from the report about it but I suggest that this would be dangerous in some cases. If the witness was about to leave, for example, by the simple device of taking motion for protective order the party anxious that the witness not be deposed could get rid of him and any flat rule making or the motion for the protective order will stay the taking the deposition would be dangerous. Present practice is that if the discovering party wants to take the deposition and the responding party wants that it not be taken pending the outcome of the order, then if both want their wishes hard enough there will be this extra motion before the court. But it seems to me that there isn't any avoiding it.

Mr. Morton: I think one of the alternatives is that you could resort to Rule 37, and tell him not to answer.

Mr. Coleman: If it is non-party, when you serve notice if it doesn't bring him in you also serve the subpoena; then the protective order, when you file it, will state deposition but subpoena remains in effect and, if the court rules, the original subpoena will bring him. I'm just saying to take a look at it.

Prof. Sacks: I agree to do this.

Mr. Frank: I would like also to ask that we give consideration to this from the standpoint also to somehow we can avoid use in penalizing in some sharp way, the viewing out, but it is true, gentlemen, that in sparsely settled states this is a serious problem. In Chicago, as Mr. Jenner states, you can always find a judge. But this is not true in some places.

Mr. Acheson: Is there any further discussion on protective orders. Is it the Committee's view that we should now return to Rule 26(b)(3).

Mr. Jenner: I want to move on.

Prof. Sacks: We do need a resolution of this problem with respect to the Joiner proposal about written statements before we adjourn. Some guidance or instructions. I am suggesting it is a question of whether to do it now or later.

Mr. Frank: I believe it would be a destructive business to do it now. The fact is that it needs, on the part of each of us, more meticulous work than we can give it at this meeting. We have to reread Guilford carefully and consider whether we do, or do not, feel this gets it or doesn't get it. We have so many matters that don't take real research on the part of each of us that I believe there would be great merit to put it aside until the next meeting.

Mr. Acheson: I believe it is the thought that we don't have to do it at this minute.

Mr. Freedman pursues the issue.

Mr. Doub: We just don't want to hear any more discussion on this. I suggest we move on.

Mr. Jenner: I would also, Mr. Chairman, and may I arise to a point of personal privilege, I don't feel prepared to meditate on this or reach

a decision. I received the material only a week ago and I have not had an opportunity to read all the cases. This is so important that I want to have done my homework and I don't feel prepared to vote if it is taken today or tomorrow.

Judge Thomsen: I suggest we do not take any vote on 26(b)(3) at this meeting but we continue to explore individual problems which will help crystalize our views on this when we do come to vote on it.

One reason is the recent Fourth Circuit opinion by Judge Sobeloff.

Approved by consensus - no vote taken.

Mr. Acheson: This was the view of the Committee and that we would move forward and take this matter up at the next meeting.

Rule 26(d) Timing of Discovery

Prof. Sacks: (Explains the draft and mentions number of days when deposition is to be taken.)

Judge Thomsen: Inquires about 10 days.

Mr. Morton: I have no particular view about numbers - 10, 20, 30 - or otherwise, but isn't the commencement of the action the wrong touch though. Should it not be after service of summons, because when the commencement of the action starts the running of the statute and it may be sometime before, for not fault or whatever, before notice of service is either made in person or publication or otherwise. Isn't that the real danger.

Prof. Sacks: I had the same problem and I will go back and change this to service, but I must point out the commencement is the standard use (interrupted).

Discussion

Prof. Sacks: I would be perfectly content, so long as that is the problem, to change that.

Mr. Frank: We have in our circuit a deep feeling that rule changes should be made for purpose of solving felt needs of community or profession but not otherwise. . . . and I do feel that priority matters are not creating any great problem at all.

Mr. Doub: I disagree with Mr. Frank. I favor the adoption of this change (gives illustration).

Mr. Morton: I think George Doub is right. First place, I have never understood why the priority problem existed in suits considered to be limited to a situation of race but discovery I don't think that. I think priority is step which was created in S. Dist. of New York but after years they solved it. . . .

Prof. Moore: Does the rule take care of the difficulty that the Admiralty Committee had. They felt it necessary to put in a special amendment in 26(a) to provide taking depositions de benne esse. I should hope you would be able to devise someway you could have the same rule.

Prof. Sacks: I completely agree every effort should be made as this particular disparity is not justified by any functional difference. . . .

Judge Maris: The point here is that the real problem is to find a judge. It is all right in New York and Philadelphia but there are maritime districts like the Southern District of Georgia where you can't get to the judge at times. Saying you can get leave of court isn't answering this particular problem.

Mr. Acheson: May we leave the Admiralty problem for the moment. I am still not quite clear whether or not you left out the first sentence -- you don't alleviate your problem.

Mr. Frank: This is the point I want to make. The discussion we have heard clearly indicates two separate rules but so far as this is concerned it is fully taken care of by the second sentence hereof which gives the court adequate discretion to handle these problems. The question

of who comes first and what you do with plaintiff's priority of defendants we will get to in another rule.

Judge Maris: I am not quite clear about this. As I see it there is a general feeling that there is a priority adopted around the country which is observed and so it seems to me the first sentence has this effect. It indicates to the bar that there is such a priority and therefore encourages the bar to settle between themselves with reports to district judges. If you take this out doesn't that greatly increase the likelihood of . . . with the district judge, as counsel will think there is still priority and you have to go to the judge to get it eliminated; whereas, if you put this in it is notice to the bar there is no prority and you fellows can get down and decide what dates you are going to use.

Mr. Jenner: I move to delete the first sentence of Rule 26(d).

2 voted for (Mr. Frank and Mr. Jenner)

Mr. Doub: I move adoption of Rule 26(d) in principle:

11 voted for and 2 against.

LUNCH

Rule 26(e) Discovery Procedures

Prof. Sacks: Explains the draft.

Mr. Doub: I suggest a contrary view as to (1) and (2) -- not important enough to embody in the rule. We are not trying to write treatise on discovery rules. We are not trying to make them so elaborate that they are going to cover every feasible minor matter. In most cases you don't have this problem and I raise the question whether (1) and (2) are really important enough to deal with them.

Judge Thomsen: I think it is important for people moving from district to district to know what the practice is.

Mr. Morton: I recommend it be national one way or another.

Mr. Frank: I feel more as George does. . . . states 2 problems.

Prof. Wright: I would like to call to the attention of the Committee a very recent case decision from Louisiana by Judge Ainsworth in which the party had the chance that Judge Thomsen suggested. (Recalls the case for the Committee). I think this issue goes beyond Judge Ainsworth's case. It is true, is it not, Al, that in every reported case, the issue has been about names and witnesses.

Mr. Frank: You should keep the list current. It is information about accounting and that sort of stuff.

Judge Thomsen: Are you saying there should be no rule, George's position was, I believer, for a modified rule.

Mr. Frank: I am troubled. Al, I would make them do is keep a list current.

Mr. Doub: I don't think we should prepare a rule on assumption that each case is the lawyer's life work and that he has nothing else to think about. In complicated case with hundreds of interrogatories, it could readily be an argument whether you shouldn't have added something later. I think it should be called specifically to that lawyer's attention by the notice before trial.

Discussion continues.

Mr. Jenner: I suggest it be the sense of the Committee that we are proposing, that in the absence of any specific court order, a party would submit his interrogatories and they would be answered and there would be no continuing duty to supplement, except with names of witnesses having relevant facts. There would be freedom on the part of the interrogating person to file supplemental interrogatories asking that the matter in specified instances be updated. That would be the normal practice

in the absence of a court order. The order has complete power under the draft we are proposing either to _____ this by imposing a particular duty in a particular instance or by cutting off discovery as it now can or whatever.

Mr. Freedman: In most districts today you have a rule of court or some unwritten rule which provides that, as of a given date, the discovery is going to end either at the time of the pretrial conference, or, etc. As of that time discovery ends and has to be a continuing duty so that if either party comes into possession of information he is under duty to furnish it prior to time of going to trial. If this is incorporated in the rule, then it solves the problem.

Mr. Morton: I unddrstood this motion to mean order of court in a particular case; you don't mean general local rule.

Mr. Jenner: I agree.

Prof. Kaplan: This is plainly limited to interrogatories and admissions.

Prof. Sacks: If document discovery becomes subject to a notice method it would be applicable to that to, but not applicable to depositions.

Vote: All voted for the motion except one abstaining (Mr. Freedman).

Rule 26(e)(2)

Prof. Sacks proposed this be -

Mr. Jenner: I move we take reporter's recommendation and delete (e)(2).

Discussion

Judge Feinberg: We have a rule in Southern New York similar to the rule mentioned by Mr. Jenner in Illinois, but I see no reason why Federal Rules have to have this provision for us to have local rules. I think the suggestion of referring to the local rules might be in the notes, -, but I agree with the reporter that this should not be in the Federal Rules.

Mr. Doub: I so move.

Motion was carried unanimously.

Rule 26(e)(3)

Prof. Sacks explains the draft.

Mr. Frank: Mr. Chairman, I was one of those who wanted this and I do like very much the way Al has given it to us. This is what experienced people do but there are inexperienced ones who _____. I would put it in the interrogatory rule and it seems to be duplicated in admissions. This is really a matter of detail. I have one related point: I feel deeply we ought to be publishing forms for interrogatories of a simple sort along the forms as they related to the other forms which come out with rules. It is at this point, it arises as we are now on, I believe, it relates to how the answer and question should be. We ought to have some form of interrogatories then that would be thinking if such fashion that in normal cases the answer and the question would come together and would be available easier..

Discussion

Mr. Frank: I wish to find out whether the gropp does wish to encourage the reporter (perhaps he wants to hire someone else) to study and advise us whether it would be useful to have some form interrogatories to use in conjunction with the three we are now working at. Ask Maurie also if that might not help meet the problems he has raised.

Mr. Acheson: They will both be glad to look into that.

Mr. Jenner: I would like to have the reporter inquire into whether the use of stock interrogatories as it has developed in the outlying state courts and other jurisdictions subjected parties and courts to very serious abuses; whether the interrogatory applies to particular or peculiar types of the cases or not; the stock interrogatories were filed by insurance companies for defense, by plaintiff's lawyers for

the plaintiff (interrupted).

Mr. Acheson: I wonder if you would send the reporter a list.

Mr. Jenner: I will be glad to do so.

Mr. Freedman: I would ask too that the stock interrogatory that was proposed and adopted in the Eastern District. . . .

Mr. Acheson: Send him copies of those.

Judge Thomsen: I want to make a strong protest to our attaching any form of stock interrogatories. I think it would be a calamity.

Judges Maris and Wyzanski: I agree.

Prof. Sacks: John, may I inquire about the inquiry to be made -- you are talking about form interrogatories in substance, i.e., a set of form interrogatories that would be usable in a particular type of law suit -- personal injury, litigation, set of form interrogatories.

Mr. Doub: Lets vote on that.

Judge Maris: I hope we don't do it.

Mr. Doub: I am absolutely opposed to it.

Mr. Acheson: We will vote on it. Mr. Sacks, please state it.

Prof. Sacks: Mr. Frank has asked the reporters and Prof. Rosenberg and has addressed himself to the advisability of the Committee's issuing a set of form interrogatories. I just inquired whether he meant substance in personal injury cases -- a set of interrogatories of whatever number. He said "yes, this is what he has in mind." If a majority of the Committee is for that there is a job to be done but if, on the other hand, a majority is against it, then I would like to know so that this need not be done.

Mr. Frank: I realize that anything Judge Thomsen is against is a disaster and that if Judge Maris thinks it is wrong, may be an undue hardship, but I would like to say -- in my region they feel strongly

about this -- in this one instance I disagree even with Judge Maris. What we are finding is that immense amounts of time are being easted in costs, etc., because people use variations which they ineptly make up themselves of stock things which can perfectly be scrutinized. The survey data shows that where every lawyer uses form interrogatories, the adversary has few complaints about his discovery. Beyond that, what is happening is the most severe single abuse. The thing that discredits discovery and interrogatories more than anything else is what Bert is talking about -- which is the use of greatly sccepted numbers of interrogatories -- the use of stock bundles.

Judge Wyzanski: I admit there are all kinds of judges but every time you put in a standard form you are interfering with an excellent judge as well as whether you interfer with a poor judge. You are making him conform to the lowest common demonator. I have never in my whole life used standard instructions and I never intend to.

Judge Thomsen: It seems to be this is an ideal subject for local rules. I agree with you, it is desirable for the bar to have a standard set of forms, but I question whether it should be uniform nationally.

Prof. Rosenberg: Judge Thomsen has said much of what I was going to say. It is true that interrogatories is in use in discovery practice. It is true that that is the chief objection which you can distill. I have ouotations here, some of which rend your heart, about the use of mimeographed and prefabricated voluminous interrogatories, many of which are irrelevant to the case at hand. That is the major source of objection by defendants and plaintiffs. It is also true that approved form interrogatories, of the types adopted by local rules in many districts, have apparently achieved a salutary purpose and it may well be that because the type of business varies from district to district that the

way to handle it is by encouraging local district rules which take account of the special character of the type of law suits that come into the district; take account of the character of the bar; nature of practice, etc., and then do approve so that the bar will know what forms of interrogatories in given cases are going to stand up and are going to be insisted upon as answerable in that district. I would think Judge Thomsen said it when he said it could be done on local rule better than here. It is the prefabricated form of interrogatories that causes the problem.

Prof. Elliott: I movedthat canned interrogatories be not a part of the rules. Seconded by Mr. Doub.

Mr. Frank: Mr. Chairman, I have the wit to get out of the way of a steamroller when it is coming my way. You can't fire me -- I quit!! I move we adopted(3) as salutary. I don't know whether it belongs here or elsewhere.

Judge Maris: It seems to me to be a very small matter of formal way of preparing papers. I question whether it should go into national rules. If we should go into this kind of detail we could fill the rules with pages and pages of detailed instructions. I wonder whether it is really necessary. It is a good idea - there is no question about it but (interrupted).

Prof. Kaplan: It might be carried over to pleadings. Allegation and then saying denying.

Mr. Acheson: May we have an expression as to whether the Committee is in favor of retaining (c)(3). Favor of, please raise hands:

5 voted to retaining it.

Mr. Freedman: I would like to ask before I vote. Is this designed primarily to set out as a matter of procedure the question (several voices).

Judge Maris: This is just to set out whether it is important enough to give to the Supreme Court or whether it should be in local rules.

Judge Feinberg: For those who don't feel it has attained importance enough to be put in rule, I wonder if it should be put in ~~xkm~~ note rather than rule.

Mr. Jenner: Why should it be put into every local rule in the country when it could be put in this rule once?

Vote was again taken: 5 voted for retaining it -

7 voted against retaining it; Judge Thomsen abstained.

Prof. Sacks: Lets turn to Rule33. Might we pass by 34 for the moment. Pass by Item 9 and turn to Item 10 which involves the mechanics of discovery procedure and particularly as it relates to Rule 33. We have been talking about interrogatories in Rule 33 and it might be that by doing that first we will get a better understanding of what will be ultimately accomplished in 34.

Rule 33.

Prof. Sacks: I am speaking of Rule 33 and what I call the change in mechanics of discovery procedure and I would note that similar changes are made with respect to Rule 36 and the revised Rule 34. . . .

Mr. Doub: I would like to remind the Committee that the changes made in Rule 33(a) are those we agreed upon should be made at the last meeting. I think this is a tremendous improvement over the present interrogatory rule and is excellent. The only query I have is about lines 35 and 36 "the party submitting the interrogatories may proceed against the party". I don't like this explanation. Should be a better way of saying that what we mean is that we may move for relief.

Prof. Sacks: I think that language could certainly be approved.

Mr. Jenner: My view is why do you need it at all?

Prof. Sacks: (Explains why he did this.) (This was a fullblown rule, etc)I We will take this out.

Mr. Frank: I have one problem. I would not eliminate the 10-day provision. What we are doing is this: We are now providing the interrogatory may be served with the complaint. The abuses of the large scale interrogatory by this proposal will be that the plaintiff's counsel will simply in automobile accident cases tell girl to prepare complaint and plaintiff decided damages are such and such and will send in interrogatory Form 14 which will be a large bundle. I am well aware to put it back to 10 days means the fellow can send the same bundle 10 days later but I do not believe that universally he does so. It just takes an extra move, and by the very act of having the extra move, I believe we will get fewer of the form interrogatories shoved down people that otherwise is the case.

Judge Maris: I would like to raise this point: There was agreed to as a temporary solution in order to get on with the union of civil and admiralty procedure, in the rule which you have just now referred, but there is a great feeling on the part, certainly of the standing Committee, and I think generally, in which the standing Committee solicits as much possible help from your Committee, to work out a solution which will be applicable across the board and reasonably satisfactory in every case including admiralty cases, and not to have to continue special exceptions referring back to ancient obsolete statutes are setting up a whole new procedure for this little classification in these rules. Therefore, unless there is really very cogent reasons for continuing a decisive procedure, which cannot be applied in case of a vessel which is sailing this afternoon or tomorrow morning, I

would hope you wouldn't do it. I would hope a real effort be made to work out some type of procedure which can be applied across the board. I think this is it. The 10 days is inadmissible in this type of admiralty case as you can all see. The ship can't be held for ten days.

Mr. Acheson: We did decide this once, didn't we?

Mr. Frank: Yes, but I don't want to stand on that. If we decided it wrong, let's change it.

Prof. Sacks: I think our original consideration of this, at the time the admiralty committee raised it, was done before we had tackled the problem of priority and the general change in mechanics.

Judge Maris: That is right because you had postponed discovery, but they had to come up against discovery. Something had to be done preliminarily to this present discussion which you are now having.

Prof. Sacks: I think we should tend to eliminate the 10-day provision unless, as Judge Maris says, there is strong reason for it, and I don't think there is.

General Discussion

Prof. Sacks: I think the problem is whether we have a good reason for insisting upon deviation. Bert, does your point go to the question of the 10-day delay or whether it goes to the question of whether it should be counted from commencement of the action.

Mr. Jenner: I think the right to serve and responses should run from service of process and not commencement of the action.

Mr. Doub: It is immaterial when the interrogatory is served -- what is important is that the minimum time lag to answer 30 days is not running before the defendant has been served. You have taken care of that in lines 24-27. What difference does it make to the defendant whether the interrogatory is served with the complaint or 10 days later.

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Prof. Sacks: I think the problem is whether we have a good reason for insisting upon deviation. Bert, does your point go to the question of the 10-day delay or whether it goes to the question of whether it should be counted from commencement of the action.

Mr. Jenner: I think the right to serve and responses should run from service of process and not commencement of the action.

Mr. Doub: It is immaterial when the interrogatory is served -- what is important is that the minimum time lag to answer 30 days is not running before the defendant has been served. You have taken care of that in lines 24-27. What difference does it make to the defendant whether the interrogatory is served with the complaint or 10 days later.

What is important is when he has to answer and he doesn't have to answer the minimum period, unless there is a court order, until 30 days after he has been served.

Prof. Sacks: I wish it were taken care of. But I don t think it is. Bert suggests it run from the service of complaint and summons and the rule as it was, and as I have revised it, makes it run from commencement of the action.

Mr. Doub: No in 26.

Prof. Sacks: 26 refers to service thereof meaning service of interrogatories.

Mr. Doub: Oh, that should refer to, of course, the complaint.

Prof. Sacks: I take it the instruction or proposal is to have this run from service of the complaint and summons, and that I am prepared to do.

Mr. Jenner: "Served with the complaint" doesn't bother me any but it is any system under which the interrogatories would be functioning before process is served.

Judge Maris: This would take care of the admiralty because if the claimant is responsible for the ship which is liable it is a proceeding in rem against the vessel that happens to be here. They can get their answers even though they don't have to file them for 30 days. They have an opportunity to obtain the information before the answer.

Mr. Acheson: Does that meet your point?

Mr. Frank: No, but I take it no one else is concerned. My point is that I would not allow interrogatories to be served with the complaint in a civil action, but I take it my brothers are not concerned with that.

Mr. Morton: Lines 16-17 you suggest the answers and objections should be signed by the same person. I understand the California rule makes a distinction as, quite clearly, if the answers were signed by Mrs. Doe. the injured party, she would know what she was saying; but about

objections -- reduce her signature to nothing, objections are made by counsel and should be signed by counsel.

Prof. Sacks: I agree.

Mr. Jenner: This will require some revision, won't it?

Prof. Sacks: Yes. While we are on 33 why don't we take up the additional material which is not very elaborate or complex. There is (1) the elimination of the reference to adverse parties. I rather assume that has general approval.

Mr. Coleman: Al, in lines 45 and 48 what you are trying to say is that the mere fact you had discovery by depositions doesn't bar you from having interrogatories. Is that right? (Prof. Sacks answers "yes.") It could be interpreted to mean that you couldn't do the interrogatories until after you finish with depositions or vice versa. What you really mean is simultaneously or one after the other. At least, I hope that is what you mean.

Prof. Sacks: I was really trying to simplify the language. As it now reads -- 45 on -- "Subject to the provisions".

Mr. Doub: Why don't you say interrogatories might be served either before or after.

Prof. Sacks: The language there is the language of the present rule.

Mr. Cooper: What about inserting the words, "vice versa", after the word, "answers."

Mr. Coleman: The way I read it I have trouble with it.

Prof. Sacks: I have no objection to changing that.

Mr. Jenner: May I raise a point that is disturbing me and see if the reaction of the Committee is that it disturbs them. In lines 59-57, is that sentence, as revised by the reporter, to have a stark affirmative provision that the number of interrogatories and sets of interrogatories

to be served is not limited. It seems to me an anjoinder on the district court judge. Whereas, heretofore, it said, the number of interrogatories ____to be served is not limited except as justice requires to protect the party from night's expense _____. I anticipate the reporter had in mind that he was going to provide in a protective order the language somewhat of that character. Here we have a problem, which always faces you when you take language that now exists and make a change, as evidencing and intention. It appears to me that if you are going to do that I would prefer to have the whole sentence come out rather than to say starkingly and affirmatively only that the number of interrogatories or sets to be served is not limited. I do not see why we should strike out that language.

Suggestions from floor: Why not strike out the whole sentence.

Mr. Jenner: I would rather see the whole sentence come out than the way it is.

Mr. Morton: Wouldn't it meet everybody's point to take the whole sentence out of Rule 33 and put in a general statement in Rule 26, that there is no arbitrary limitation on the number of depositions, interrogatories, requests for admission, or requests for documents. All, of course, subject to Rule 26.

Mr. Jenner: I would suggest that we think the reporter now has the sense of what is troubling the Committee and he will handle it either by restoring the language he crossed out or by a general provision in the other rule.

Mr. Jenner's statement was accepted as the consensus of the Committee.

Prof. Rosenberg: May I ask whether that general provision could go to the types of discovery devices. You might say there are no limitations

on types of discovery devices and you could get rid of 46 through 48 as well.

Prof. Sacks: It is a good point. The problem will be to draft something of a general character that will fit into 26.

Subdivision (b) was approved with clarifications from the floor.

The Chairman announced that (a) and (b) had been approved.

Mr. Coleman: Do you mean in (c) that if you attach the document that that is all you have to do? That you may not be called upon to make further explanation if the document itself doesn't give the inquirer the answer he thinks he ought to get?

Prof. Sacks: (Replies to this inquiry.)

Prof. Kaplan: I think Bill has a point. The language you have here merely says "may be obtained." One way of confusing the issue beyond any change of getting at the facts is to throw hundreds of documents and books at the inquiring persons. Seems to me some tightening of the language in line 59 would be in order so that they certainly may be obtained without undue harassment. Then the furnishing of documents should be sufficient.

Mr. Coleman: Suppose for example, how many times you three fellows met, instead of saying, we met 15 times at such and such place, he says on such and such date copies of our diaries of all employees, and you get an answer. You will be about a year going through the diaries and then you might not get the right answers.

Short recess.

Mr. Acheson: Gentlemen, all papers willbe sent to members at least a month before meeting and possibly five or six weeks.

Mr. Acheson: We have approved in principle (a) and (b) to be revised along the lines of discussion.

Discussion continued on subdivision (c).

Prof. Sacks: Charlie Wright points out one change from the California Statute which probably is unwise. California Statute refers to business records, i.e., uses this general language but it is the instances when answers may be obtained from business records and I have used the term "records." Charlie's point is that business records would themselves be admissible in evidence and thus the material derived from them would be admissible and that gives you the equivalent to answer of interrogatories. If you go beyond that, you do not have equivalence. I will look at that again and, I suspect, will come back to the California language on that. That does not meet Bill Coleman's problem, which is whether or not this is tight enough to insure the interrogating party that he can in reasonable fashion obtain the answer. I certainly do not have the language that might do this in mind at the moment. We would have to defer that. I would like to hear from David Louisell about the California provision.

Prof. Louisell: The California provision, I have it verbatim here. But I will not take time to read it unless you want me to. It is a little tighter not only with respect to business records but in a few other details. The California Statute really hasn't given the trouble that you anticipate might be given under the new federal proposals. It is largely to be self-corrected if a person upon whom the interrogatories are served does something ridiculous like submitting 100 or more documents. Of course, the corrective order would be available to the proponent and if the answer is not reasonably apparent from what is submitted then, of course, the propounder has the right to

an answer. So it is largely self-corrected; nevertheless, I don't believe the California law has given any trouble along the lines mentioned by Mr. Coleman. However, I don't have any objection to trying to tighten up your new rule.

Mr. Jenner: I fear this rule. No problem has arisen in this area because under those circumstances the responder moves and obtains an appropriate order rather than have the party respond to the interrogatory. What I fear, that even the freedom under the California Rule, which I think is superior to the draft Al has in that it is much tighter, at least to abuse . . . . It seems to me this may afford in actual practice a shifting of the burden quite properly placed under the present rule on the respondent back to the questioner. In the absence of some evidence of showing that there has been a need in this field, I would have doubt because this may well be a Pandora's box and cause the district courts to be subjected to more motions than when the responder wishes to say -- the thing we do today is (then explains present practice).

General Discussion

Mr. Acheson: Ben, do you have any helpful ideas?

Prof. Kaplan: Well, I think the problem there is to find and express the conditions for the use of subdivision (c) and it should be thought about and redrafted, and maybe even rejected.

Mr. Jenner: I have no objection to another attempt which doesn't create problems that don't exist now and afford a responder who doesn't want to give information (interrupted by everyone talking).

Prof. Sacks: I take it the suggestion to me is to see what tightening can be done and maybe I should report back that it is not worth the effort, that you can't tighten enough without creating the problems.

Prof. Rosenberg: I think the only thing that emerges from the complaints about interrogatories is, as you say, there are two separate issues involved: one, is the issue of imposition and expenses of responding party which he would like to shift to the interrogating party; the other is the question of making the responding party take the position on his theory of the facts as those facts are derived from a large body of written material and nothing should be done to avoid the possibility of getting from the responding-party a commitment of his theory on the facts.

Mr. Doub: If I were counsel I would use that remarkable word "No."

Mr. Acheson: Just where do we stand now.

Prof. Sacks: It is left to me to attempt a redraft but I gather there is a good deal of skepticism and fear about it that any draft will cause more trouble than we now have.

Mr. Frank: There is also enthusiasm for your proposal so we cheer you on.

Prof. Sacks: (Summarizes) That a tightening is desired in order to assure the asking party that he will not find himself with materials he cannot reasonably be expected to go through because he doesn't understand them or the burden on him is excessive. There is a fear that also he shouldn't have the burden and Judge Wyzanski says there is a real problem as to whether you can identify those and I am not at all sure you can and beyond that I don't have any clear sense. There is great skepticism.

Judge Thomsen: A man should not be allowed to use this as a device to avoid commitment on issues he should commit himself. This is an element.

Prof. Sacks: I will attempt to talk to the California people as to what if any like we can derive from that draft with respect to those objections.

Prof. Wright: I think that all you have done on Rule 33 is fine, but I raise the question of whether the Committee has done everything necessary. John has spoken several times about Rule 33 being a very troublesome spot in discovery. I see it myself in doing my current docket

parts -- I receive numerous inquiries about rule for particular kinds of interrogatories, questions about asking about matters of law and matters of fact. Has the Committee addressed itself to which there is anything that can be done to relieve this kind of difficulty?

Mr. Frank: I do not have an affirmative suggestion but I do feel we are simply totally striking out on this. We are really fiddling around on minor points of Rule 33 when the truth is that, according to Prof. Rosenberg, 67 percent of our problems or some other prodigious number, in which we are simply abusing the hell out of each other on the use of interrogatories in which we are dancing away from answer by all sorts of evasions. This is the number one sinkhole in discovery right now and we are just not getting anywhere.

Prof. Rosenberg: Reads from the Survey the figures on the sorespots.

Judge Thomsen: Could we ask Prof. Rosenberg to write a letter to Prof. Sacks with copies to all of us telling us not only what we read in the report but giving us the benefit of his judgment as to which items of abuse, or claims of abuse, you feel can be handled by our rules.

Prof. Rosenberg: I will be glad to do this.

Judge Thomsen: Also, why doesn't Charlie Wright do the same thing.

Prof. Wright: Nobody has given me a billion dollars, but I will do my best.

Mr. Acheson: Shall we leave Rule 33?

Mr. Frank: Yes, with the understanding it remains wide open for further discussion at the next meeting and that we encourage the reporter to give us all possible ideas for the interrogatories problem and that we expressly ask Prof. Rosenberg and Prof. Wright to circulate to all of us concrete notions on this subject.

Meeting recessed at 5:00 p.m.

Reconvened Saturday, November 13, 1965

Rule 34

Prof. Sacks: States the draft presents a proposed new rule, and explains the major changes.

Mr. Coleman: Question, on line 32 you say "entry upon designated land or other property" -- is "other property" limited to real estate? Someone mentioned ship which was discussed yesterday and stated it was discussed the first day and the things it should include.

Mr. Coleman: I just think that when you read it you could limit it to real estate.

Prof. Sacks: Do you suppose that is a point that could be taken care of in the note to clarify it.

Mr. Coleman: Yes.

Lengthy discussion held on this rule.

Prof. Elliott: I would like to ask for preliminary showing re court order.

Judge Thomsen: We want to make it as nearly automatic as we can. Whether we leave "good cause" in or provide some other language instead of good cause, we want to avoid the necessity of a court order -- making it automatic. If a man objects to the interrogatory, he doesn't have to go to court simply because he objects. He only goes to court if the plaintiff says "I want him to answer anyway", after the objections are effected by the plaintiff. But if the plaintiff files an interrogatory and the defendant says "I object" for some reason, when they come in to us more than one half of the objections are accepted by the plaintiff. . . . either getting up or rewriting that question to ease objection and it is an awful waste of time.

Prof. Sacks: In each of those instances what we are trying to do is make it automatic, that is extra judicial, so that nothing will come to court except a dispute, but you will notice in our scope provision

we do impose burdens on parties seeking discovery at times and on some matters we are now agreed on that and in others we have deferred and seems to me that could be deferred. By the principle of having the discovery extra judicial and putting to the court only genuine disputes with respect to 33, 34 and 36 and the deposition practice is what is the issue.

Mr. Jenner: The effect in Illinois in the Northern District if precisely this: the approach there of the judges was that when counsel approaches with a motion respecting to discovery that is served but they attempted to work it out in advance. If unable to it is distilled down to a dispute between the parties -- whether on interrogatory, order for answer, etc. Maybe that is too cumbersome a way of getting at it but that is the objections which Judge Thomsen and I quite thoroughly are articulated. I would move that by this device or some other device or of the device of the Northern District, or both, as the case might be, that as a matter or principle, I would urge the Committee to accept that.

Prof. Sacks: I would ask for this degree of specifity. Bert, recognition that that philosophy and attitude calls for a shift in Rule 34 from a requirement of a court order in every case to a request form of discovery.

Mr. Frank: Could I see if Bert would welcome an amendment. Part of the problem here is, as a practical matter now, the defendant, as the thing now reads, is not called upon to worry with the documents or worry or deal with them until after his answer because the motion has to be filed and the motion takes time. It must be responded and gets on the calendar. So a byproduct of eliminating that provision is that the request can go out with the ~~xixmixxixngxxhaixxpxxxx~~ interrogatories and the plaintiff now gets (a) his complaint out, (b) his interrogatories out and (c) his request for documents -- all go at once. Could we achieve the benefit;

you and J dge Thomsen want to get and at the same time avoid tilting the scale by providing that the request for documents under the rule may be filed any time after 20 days.

Mr. Jenner: I thought I had expressed that in my comment which was that as far as possible we make this discovery process as automatic as we can. I think in large part it will work out that interrogatories will not be served with complaints; that requests for documents will not be served before answer; that the automatic objection in those instances where there is no answer on the file you don't know what the issue is until the answer is filed and normally I would say in 99 out of 100 cases the district judge will say -- you may not know what the issues are -- I certainly don't know what the issues are -- but there is an answer on the file. So he will postpone. . . . My thought at this moment, John, has been not to try to tie down the reporter to specific time limitations but at the next round of this we will have a whole we will be able to look at interrogatories, documents, depositions, and receive an impact of what might be done here.

Mr. Acheson: May we just push the issue - what we want to get out of this discussion is not general debate about everything but find out from the Committee if they agree with general statement that was made by Mr. Jenner for the guidance of the reporter on 34.

Mr. Jenner: I revise mymotion that it be the sense of the Committee that the reporter redraft to make discovery as automatic between counsel befores it reaches the court room as possible and we will see the balance he works out.

Judge Maris: To bring only actual disputes in the courtroom.

Motion was seconded.

Motion carried. 11 voting for motion.

Mr. Frank: I would like this portion of the record to show the totality of my thoughts: I want to vote especially my agreement with Judge Thomsen. This is not a personal injury matter. So far as I am concerned everybody should get paid -- and this would be great, but what we are talking about are the other types of matters and it concerns me deeply on this precise point for example, the SEC. It comes after people with temporary restraining orders obtained ex parte. We will be getting in the same bundle interrogatories and demands for production of documents are one effective protection now against what frequently I see is a plain heavy overweighing on the part of the government cases which are prepared, as has been aptly said, by Judge Thomsen, for months in advance and _____ taken up by surprise is the time given to get up off the floor in connection with the timing of this matter. Now, Bert, my concern is I don't know what we have done here about the timing of these things.

Mr. Cooper: Bett's motion was a very limited one. And he mentions the fact that the question of time -- these are the things we can consider later.

Mr. Frank: In that case, the time is wholly unprejudiced, is that right? If you can't lick them, join them.

Mr. Jenner: Look at the time provisions that the reporter suggests. Such that you don't overbalance one side or the other having in mind trying to get at the truth that Mr. Freedman says and which was originally said at the Committee meeting back in 1960 and to which theCommittee adheres.

Prof. Sacks: I have simply referred to the fact that there is testing and sampling inserted into this provision and I have called attention to the new 34(c). There is virtually moving along and unless there

is strong feeling that someone wants to suggest about either of these I would suggest going to some other things on which I would like some light.

Prof. Elliott: As I recall testing and sampling came from Charlie Joiner in connection with the Michigan Rules.

Prof. Sacks: It came from Charlie Joiner and there is a provision in the Michigan Rules which refers expressly to testing. The reference to sampling is not in the Michigan Rule but it was suggested by Charlie Joiner. I think probably the term testing, if standing alone, very likely would permit sampling in a proper case. I think there is virtue in spelling it out.

Mr. Jenner: Mr. Chairman, this is done today (explains a case). All I am thinking about now is to invite counsel now automatically relatively -- saying all right now it is reasonable that I should be able to test this mechnical process or your mechnical device and take a look at it and before we bother the judges with anything let them try law suits and reduce the congested calendars. That is what they are trying to do.

Mr. Acheson: Bert, areyou against it.

Mr. Jenner: No, I am for it. He is introducing another rule,specific invitation is not there but which counsel in trial of cases have already worked out.

Prof. Elliott: Do you want it in therule or not?

Mr. Jenner: We want it in the rule.

Mr. Acheson: I'm glad you are perplexed also.

Prof. Sacks: Is there any comment on Rule 34(c)?

Very little general discussion.

Mr. Acheson: Then I take it we will go to Rule 35.

Rule 35 - Physical : Mental Examinations

Prof. Sacks: (Stated the aspects of the rule)

General discussion

Prof. Sacks: For the moment I am simply reportingon the inclusion of the term employee and I am recommending that it be included with the information I have given to you.

Prof. Wright: The employee bit was an idea of mine about 12 years ago which I sold to Judge Clark and he in turn sold to the old Advisory Committee. I did,as Al said,some of the checking on the experience of the states which had adopted it. They seem to think it is not much used but it works okay. I must say that the wisdom of old age has now come to me and it seems unnecessary. In the rare case where you are interested in knowing the physical condition of the employee, why not name him as a defendant. I realize the tactical advantage that plaintiff' counsel simply had in naming only the corporation rather than the individual, but I don't know that this tactical advantage is sufficient of importance that in order to preserve it we should get into a matter which involves perhaps an uncourseful court order, involves, by very great likelihood, that theSupreme Court will not like what we are doing. It seems to me that the thrust of the Schlagenhauf opinion is that we don't want to do this sort of thing. I think you are going out on a limb which we need not do.

Judge Thomsen: I think that one reason you are making a solomon out of the judge that I don't think but a very few judges could handle. The test is whether the employee is not beingsubmitted to examination because he has objected or because his employer is objecting.

Prof. Sacks: I agree with Charles that inclusion of employee is obviously not an important point because the experience we have

indicates it is little used. I don't have any great problem -- if theCommittee says strike it out. Seems to me on balance I would keep it in but it is a fine point and we can go one way or the other.

Mr. Cooper: I move that we strike it, just to bring it to a head.

Prof. Elliott: I second the motion.

Vote: 8 voted for taking it out - Motion carried.

Mr. Acheson: We will strike itout temporarily anyway -- until somebody moves to put it back.

Prof. Sacks: May I say that I made a change about what should be in the reports of positions when they make their exchange of reports and I think our language I finally used, lines 22-25, I believe I took from the Illinois Rule. Charlie Joiner suggests it should be more specific and should provide explicitly for copy of X-rays, cardiograms and instead of giving copies of them -- would they be expensive -- instead they give results of all tests made, diagnosis, together with like reports that findings result of all tests which I suppose means their description of the result of the X-ray and the cardiogram. Charlie's suggestion is whether copies should be included as a matter of course.

Judge Maris: Results could mean interpretations.

Prof. Wright: Al, I think you have misunderstood what Charlie wants (goes on to explain).

Mr. Jenner: I don't see any reason for spelling out rules.

Prof. Elliott: I do, Mr. Chairman, I am concerned with the process of technology anyway and today's rule may speak today's practice but we don't know what will happen in years from now (cites television viewing of the internal organs). I would leave it the way it is.

Mr.Freedman: Cites examples of taking counsel withyou for medical examination.

Mr. ACheson: I think we are all agreed that we don't need this in the rule.

Mr. Cooper: I so move.

Vote: Carried - Almost all hands raised but Mr. Freedman voted against it.

Prof. Louisell: What we have done now with Rule 34 means that the only instance of discovery where there must be an original court order is with Rule 35.

Rule 36. Requests for Admission

Prof. Sacks: Explains the draft.

Mr. Frank: Gentlemen, it does seem to me that there should be no idea so novel that we don't look at it. This in this reppect presents the rule with the largest single potential if we wish so to use it in changing the American practice. Because we could use this rule by pushing it only a little bit harder to put the whole cost of law suits upon the loosing party. That it would be by just using this device and expanding that we could adopt the English system for such modification as may appeal to us and by permitting a party to ask admissions on the whole case, then put the other side in the position if it denies those matters and if they later prove having the loosing party pay the bill. I am in doubt about the wisdom of that -- my inclination is the other way but Brown raised this point two years ago and I have given it a lot of though as to whether we should seriously either consider (a) going all the way, or (b) not going all the way but achieving some compromise or intermediate position. (continues speaking re costs). It has

an assistant to the reporter, or someone, ot get a report from somebody that would tightly evaluate whether Rule 36 should be used to shift the cost of litigation either in whole or in part. I am very much for the rule as the reporter drafted it. I think it is grand. The question is whether it shouldn't go much farther and how should it bear on the total cost problem and the precise place where that bears is exactly now what he is now talking about, which is the relationship to the scope on admittance on one hand with the sanctions on the other.

Prof. Elliott: This should be reserved for Rule 37.

Judge Feinberg: Mr. Chairman, I have one point. Professor Sacks, can you give me some idea how many times courts have imposed costs on this.

Prof. Sacks: I think I have seen one or two.

Prof. Wright: I kthink there may be about ten.

Judge Feinberg: Except for the possibility that Mr. Frank has just raised, I have some doubt whether this rule serves any purpose at all. I think at least we ought to focus on this question if only for a moment.

Prof. Elliott: About Rule 36 as a whole.

Judge Feinberg: Yes, Rule 36yas a whole. It seems to me if the rule is not used very much and if it is ignored by evasive answers and if courts do not impose sanctions then what purpose is it.

Mr. Freedman: We use it extensively.

Judge Feinberg: That is what I'm trying to find out.

Prof. Sacks: The point is a lot of things aren't admitted. When you get a lawyer who does deny or gives reasons for not admitting or denying, the test applied in that situation is whether or not it was abusive and we have very few instances in which we have recorded cases

that that was the case -- the threat is there.

Prof. Elliott: Could we go back to the first point you made -- the deletion of two words. I had to close discussion on this but we can work on that and then move forward. At least we might make some progress.

Mr. Frank: Mr. Chairman, I hate to insist but I would like to get the sense of theCommittee on this.

Mr. Jenner: John presented a matter, Sheldon, and he is entitled to (interrupted).

Prof. Elliott: Entitled to have it put up. I am simply trying to get rid of what may be a less controversial item, Bert.

Mr. Acheson: John, would you like to present this?

Mr. Frank: I would like to make this motion, but only if the reporters welcome it. That the reporters be requested, if possible, to advise us, working out with you how they finance it, prior to final vote on this subject, whether the whole matter of Rule 36 should be reexamined. Whether there is merit in Judge Feinberg's view that in the absense of sanctions it is a worthless rule, (and I don't think, however, that that is true), whether on the other hand it is a suitable tool for covering the case of really abusive law suits or gross costs, whether the proper device is the one suggested by Judge Wyzanski opposing damages wholly apart from Rule 36, whether it is usefully approached in terms of Rule 36, or whether the matter should be simply ignored as Dave has suggested may be the case as contrary to the basic efforts of our litigation. But could we have recommendations on that based on somebody's contemplative study and comparisons of this world system?

Prof. Sacks: I regard the study as Mr. Frank as requested as really being quite separate from discovery. It has only a nominal relationship of Rule 36 and a study which would take on the question of revamping and revising our system of costs in litigation which has all other kinds of cases. The question whether the Committee wants to embark on that study is one question. I don't think it should be tied to what we do under Rule 36.

Judge Wyzanski: I am quite persuaded that Judge Feinberg knows what goes on in New York but in Massachusetts and in Maryland, according to Judge Thomsen, I understand this practice is utilized and very useful. But a general request, if I may say something about John Frank's request, unless I am much mistaken the problem of costs is a problem of substance and not procedure.

Mr. Cooper: That would be my view.

Judge Maris: If it did, gentlemen, we would have to have a very high level Judicial Conference decision on whether we went into it.

Mr. Cooper: I suggest we get along with the motion so we can move ahead.

Prof. Elliott: I had a motion before it and I come back doggedly.

Mr. Acheson: Could we just dispose of John's very interesting suggestion. I think what the Judge has just said is very important. His Committee is our boss. John's suggestion, I think, is important and ought to be considered. Would it be satisfactory to you, John, not to have this attached to any rule but let both reporters and me talk with Judge Maris and see whether this should be pursued and if so how and whether he wants to talk to the Chief and therefore I would not think it wise for this Committee to be making recommendations

that our superiors don't want us to get into. On the other hand, if they do want us to get into this, we ought to do it.

Mr. Frank: That is all right with me. I am just deeply troubled.

Mr. Acheson: I think this is the way to do it. We may now go back to Professor Elliott's suggestion.

Prof. Rosenberg: The study illustrates the great difference between the judicial part of theiceberg -- that visibility to the judicial and that going on in the field -- the percent of cases in which requests for admission aremade runs around 10 percent -- about 10 percent of the cases requests ~~are~~ or admissions are made and that you might want to compare with the example in depositions which occur in about 50 percent and interrogatories and inspections occur in about 33 percent of the cases. Requests for admission are well down the line in the point of frequency. Now seldom do motions about requests for admissions come before the court and very rarely indeed are sanctions applied for refusal to admit under circumstances when the admissions might have been made. We, you sitting, and in the court, see very little of this because it goes on extrajudicially.

Judge Wyzanski: Is there a great difference (cough blurs out).

Prof. Rosenberg: I can't give it to you offhand, though I could look it up.

Judge Thomsen: May I (pause) if we could cut out two words we have been talking about, do you think that would increase the number of requests for admissions appreciably.

Mr. Jenner: I think it would increase the amount of litigation for and motion for _____.

Prof.Rosenberg: What Mr. Jenner says is so. Objections made about requests for admissions are often made on the ground that they call for opinions, legal theories, and for judgment and conclusions -- that is indicated. Presumably those additional complaints would generate more court procedures. However, if therule were amended so that it wiped out opinion as a basis for objecting that might have quite a different effect. That is to say, if it is known that you are going to lose it and you went to court objecting that it was opinion and that might damp down the number of court motions.

Mr. Jenner: No matter what we put into the rule as to a conclusory statement as to whether the defendant or plaintiff or plaintiff's contributory was engligent, or defendant was negligent, as a matter of fact you, as the administration, are never going to be able to have responses which admit the case and I think it would be a very sad day if we came to that. We have a system of justice now in which the trier of fact sees or hears the witness' testimony and the jury and the judge, without a jury, weigh that evidence and they reach a conclusion, and to force a party, be he plaintiff, third-party's defendant etc., that he be forced to strike at justice as to testimony and everything else which is still not before the court is very unwise and we are talking about, I think, a serious fundamental. If you go to the extent that is now suggested you iwill change materially the practice of administering justice.

Prof. Elliott: I can't see why the reporter's suggestion is not acceptable. We have provisions for protective orders and other orders amply covered as well as to sanctions in Rule 37 and I would like to see those two words stricken. Maybe Bert feels you ought to clench a nail

which we have, at least in principle, adopted. Do you want to confuse it by singling this out here?

Prof. Sacks: Might I say that what we were talking about here was a request to theother side to admit that the whole case is simply nothing to the whole case and that is the end of it. If that is all we were accomplishing, I wouldn't propose it. What is involved is that you have a series of issues in the case and as the best example I can give is the scope of employment issue which is certainly a question of law as well as fact and there are questions which are only issues in the case, not the whole case which involves opinion as well as fact, and the cases show there is great confusion about that and conflict and what we are talking about is whether or not we want to make clear that one side can ask the other side to admit. That X was acting in the scope of employment. An issue in the case which could thereby be eliminated. We arenot attempting to write a rule which simply says to the party to admit the whole case. The rule isnot serving one of its important purposes which is to get an admission which eliminates one of the issues in the case and the issues here sometimes called ultimate, or what have you, necessarily involve at times questions of opinion, to some extent law. That is what is involved.

Mr. Coleman: Couldn't it be handled by stipulation or pretrial conference?

Prof. Sacks: If you have one.

Mr. Coleman: It seems to me it is thetype of issue that has to be worked out on both sides and I agree with Bert that by having it done by admission that you are forcing one side to make a judgment as to how the jury comes to find an undisputed fact.

Prof. Sacks: (replies to Mr. Coleman)

General discussion continues.

Mr. Morton: What we are talking about is two words,"of fact", whether they stay in the rule and what you are talking about is something quite different.

Mr. Jenner: I am talking about effect if you strike those two words.

Mr. Morton: But you are saying that that effect will be to cause people to try to get people to admit themselves out of court entirely. If the presence of the words of fact or absence of them don't really bear on that all that the presence of the words "of fact" do now is to give the chiseling non-admitters to go and bother the court. You ask them something that is called a mixed question -- that isn't really the issue. For example, if you ask him to admit that Smith owns a Chevrolet -- that, of course, is a question of law. It could be a point of a law suit. Then the request could be improper. But if the real question in the law suit is something where you agree that it is only a question so that, my experience has been, people seize on the words "of fact" to obviate the purpose of the rule which is to get noncontested matters out of the way, whether they are facts or law. It is the rule which has been decided about theSupreme Court that enfringement of patent is a question of fact. It has been said numerous times (I am not sure whether it is right or not) but nobody in a patent case that I have ever heard of just asks the other side to admit whether it is enfringed, whether it is fact or not. I don't think the answer you are getting now is really determined by the presence or absence of the words "of fact."

Mr. Oberdorfer: I wonder whether we arenot trying here to achieve by admission out of the presence of court what can be more effectively accomplished when the matter is right to be brought to the court's

attention in a pretrial conference.

Prof. Sacks: There is a great virtue if you have a pretrial conference addressed to it. I have Uniform Practice of Pretrial and it seems to me that that is one of the problems. Another feature is it really depends on the degree of contest. As Brown Morton says, there are some cases that are really uncontested and you can get rid of it early and it doesn't turn on whether it is fact or opinion of law. It depends on whether it is uncontested. When you get to the harder ones where party denies or refused to admit, it may well be that although he denies at earlier stage or explained why he denied at the pretrial, there is a change.

General discussion continues.

Mr. Morton: Let me give you an example in lieu of where we use this rule. The statute makes a document printed and published abroad for certain legal affects. It would appear that if I ask that such and such catalogue is printed, published which appears in France on 5th day of May, 1961. The words, "printing and publishing," clearly involves application of law of fact because so many copies came off the press and so many were sent out, etc., and you tell him why you think so. (continues with this example). But it is no good to wait until the pretrial conference to see if you have to go to France.

Mr. Frank: Could I join Brown who completely persuades me on this whole matter and remind you that in my own community we have these identical rules in our state courts. We have 19 trial judges. Not more than 3 or 4 are competent to run a pretrial conference well. So that would never happen in pretrial. We are using admission now and it is helpful and I think Brown is thousand percent right about this.

Judge Wyzanski: I would like to change my position after listening to all of this, but I think this is going to bring about an early pretrial. It will be quite all right in our district because cases are signed the moment they are before the court, but I am more sure it will work out favorably where matters are heard before one judge for discovery and another judge in connection with pretrial and trial and that is the real danger.

Judge Feinberg: I think what Judge Wyzanski said is perfectly applicable to the Southern District. There is a danger that this will crop up before a motion judge and some other judge will be pretrial judge. Not only a danger, but probable, as rarely does it work out that the same judge that heard the preliminary motion hears the pretrial. On theother band, I am impressed by what Mr. Morton said and I am inclined to vote to delete the words "of fact."

Prof. Rosenberg: (Asked if he understood correctly and stated the matter as he understood it.)

Judge Wyzanski: I think it will arise this way. The question will be put as a question of fact of law and he will deny it with either "yes" or "no" and will answer "I must wait until further investigation of the matter," -- that will become the answer. Thereupon what will happen will be the requested party will then bring the matter before the judge at that stage and it is going to be a pretrial right then and there.

Mr. Oberdorfer: What is the incidence of pretrial conferences?

Prof. Rosenberg: As best we can figure out, about 50 percent of the federal civil cases.

Judge Wyzanski: If you leave out personal injury cases, wouldn't it

counsel could do it.

Mr. Acheson: I believe there are two members of the Committee who want to keep the words in and everybody else wants to take them out. Am I right?

Prof. Elliott: Lets have a showing of hands, Mr. Chairman.

Mr. Acheson: Just for fun lets have a show of hands. Who would like to strike the words "of fact"? Mr. Acheson started the count and reached Prof. Louisell who stated that he was still troubled and would like to make further comment before voting. (Mr. Acheson continued to count and then accounced that 5 were troubled and the rest wanted to strike the words.) Now, you may make some more comments. We just wanted to see about how it stood.

Prof. Louisell: It seems to me that ____ to be discussed is one of the most difficult and perennial problems of litigation -- that seems to be fact of law. Now if you take it in a pleading contest a plaintiff is only supposed to plead facts. I can put a complainant under oath and compel defendant to put answer under oath. Only facts. But we know it never worked very well as a matter of pleading. The distinction between what is law of fact, what is law, and what is merely _____ of fact was terribly confusing and one of the real reasons we had rules. Now you will remember yesterday we were discussing somewhat the same problem in the contest of interrogatories to adverse parties and we realize the need for distinguishing facts from law and that contest. On the other hand, when you come to summary judgment where the test is you are entitled to summary judgment if it is most genuine issue of fact, no material issue of fact, it hasn't been much trouble and wonder if the reason is you are before a trier himself, namely the judge.

Mr. Jenner: And you have presented all the facts. After that he looks

at the facts and decides one way or the other.

Prof. Louisell: I sense the real feeling here that at pretrial, of course, despite the lack of the same kind of authorative sanction in the sense that an absolute financial sanction, that you have under Rule 36. I sense that some of what Lou has been saying and that Judge Wyzanski thinks would advance the reality of pretrial, that it would be called here before the judge, that psychologically permits a satisfactory _____ of law and fact and therefore I am wondering, although I would like more time to think this over because originally my reaction was all in favor of the reporter's suggestion, whether the inherent difficult is that you can't do this by mere exchange between the parties. You require the presence of the judge to really distinguish law and fact.

Mr. Frank: The thing I like about this is that that is what it gives us, as I read the draft. In Brown's comments to Bert there ought to be some better reason for not admitting than that you are arguing over whether it is law or fact.

Mr. Oberdorfer: May I invite attention to the language in Rule 16 relating to pretrial which authorizes the court to require parties to appear before a conference to give consideration (1) simplification of the issues and jumping down to (3) the possibility of obtaining admission of fact and of the documents which will all add unnecessary proof and suggest if you want to do this, just as a possibility, that perhaps ;you might achieve what you want to achieve by amending Rule 16 to say possibility of obtaining admissions of matters.

Mr. Freedman: By this time, Lou, you will have been too late because pretrial is on the eve of trial.

General discussion continues.

Prof. Sacks: We have here, however, the question whether there isn't another set of circumstances to which the pretrial conference solution as it now develops is just not the answer and whether we need to take care of those -- the F le .. change.

Mr. Acheson: I wonder if we could get any further by discussing this point now. I think we have brought out that there are five members of the Committee (I don't know how George Doub would feel and I take it that Charlie Joiner would not be worried) who do not agree with this and all the reporter needs to know is that most of the Committee would not be upset by this.

Mr. Oberdorfer: May I offer a suggestion for continuation of this in recess for their consideration as to whether this problem we have just been discussing is susceptible of solution in whole or part by further treatment of these (voice trials off).

Mr. Acheson: I think that is already the feeling. The other aspect of the problem of scope is one I mentioned before as to whether or not it is desirable to amend the basis of objection to requests to admit so that it would spell out thattthe objections would be irrelevance, privilege, or undue burden or expense and thereby making it clear that the objection to a request if "disputed" on there is a clear conflict in the cases would be resolved in the terms of new standards, disputed issue would not be a defense unless it was unduly burdensome to respond and in the ordinary case it would not be, and similarly it would not be an objection that there is an effort to secure admissions on a series of matters upon, in some

logical sequence, unduly burdensome to respond.

Mr. Cooper: I move we approve the amendment.

Motion was seconded.

Mr. Jenner: Why do you want to eliminate in line 30 the words "is otherwise improper."

Professor Sacks: (Answers Mr. Jenner's question.)

Judge Wyzanski: Would it help to add "or in the opinion of the judge ought to await trial."?

Prof. Sacks: All right.

Judge Maris: That might solve it.

Discussion between Mr. Jenner and members.

Judge Thomsen: If that would be added to this list in line 34, two items (1) that it is permitted or should await proof and (2) or is otherwise improper -- and I don't see why you should handcuff a defendant, plaintiff or whoever it is that is responding (interrupted).

Mr. Jenner: Or to handcuff the judge.

Judge Thomsen: For all time in the future he can never think of any other reason for denying -- this handcuffs and to protect us if we put in "otherwise improper," and the judge aske what do you mean by "otherwise improper." The very good amendment that Mr. Sacks has worked out through 43-53 will take care of it and clear that up in advance of the trial and I think when you read the whole rule together it would be quite unfair to the answering party, the asking party, the plaintiff, defendant, and court, not to allow counsel to think of some other possible reasons subject to being slapped down promptly on 43.

Mr. Cooper: And this will take care of the trip to Moscow.

Mr. Acheson: I think you have persuaded all of us, Judge Thomsen. Lets agree to that

Prof. Sacks: May I raise one other aspect of 36 and that is with respect to binding effect -- Rule 36(b) which runs from lines 54-68.

Mr. Coleman: How about Brown Morton's hypothetical about call to Russia saying this is okay and finds out two months later he never talked about it and Mr. Kruschev didn't know what he was doing -- you mean I ought not be able to come into court and now present it. How would you be able to do that because I couldn't show that he wasn't prejudice. You say only grounds to be able to withdraw is to show that the party is prejudice.

Prof. Sacks: Prejudice in this sense drawn on the whole problem of prejudice in the pleading field, and what is involved is . . . .

Mr. Jenner: The question Mr. Coleman has raised is a sound point. It isn't merely that the party requesting will be prejudice but also is that the man who made the admission of thedenial was ill founded will be prejudice also and the way you drafted this you exclude that possibility.

(Several people talking)

Prof. Sacks: This calls for something similar to what we did to experts.

Mr. Frank: Could I suggest that we consider Rule 60(b) and the general standards there and how that should apply, otherwise we will be in position compeled to make the admission and then you would be able to have the whole case set aside later because of excusable neglect.

Mr. Oberdorfer: Prof. Rosenberg points to the pattern which would do what Judge Wyzanski suggests, Rule 16 has language to prevent manifest injustice.

Mr. Jenner: May I ask the reporter to consider instead of saying"withdraw the amendment shall not be permitted", to say "withdraw or

Prof. Sacks: I take it that the notion that its having the conclusively binding effect subject to withdrawal or amendment is accepted.

Prof. Wright: I raise a different question if the Committee is happy with that. In all other discovery rules express reference is made back to the scope of discovery set out in Rule 26(b). Here it is not and I think this raises a possible problem a person should not be required to admit that which is privileged. Equally obviously, any judge who gets an objection for request on groundsthat this calls for privileged matter will say, "why, of course, you don't have to answer that." It seems to me it might be a comforting safeguard if the concept of privilege would end.

Unidentified Voice: Doesn't this come in through line 29?

Prof. Sacks: It comes in through the back door, Charlie.

Prof. Wright: I withdraw, I am sorry. I will now get to the real point of what I wanted to say. That is privilege against self-incrimination

. . . .

Prof. Sacks: I would like to have guidance on two matters: (1) with respect to Rule 37, the provision on assessment of costs in Rule 37(a) where we have two alternatives. If we can do that with reasonable dispatch, I would like to get it. (2) Also, want guidance particularly on some aspects of Rule 30.

Prof. Sacks: I am just limiting it now on Rule 37 to this issue.

(Explains the draft.)

Judge Wyzanski: I think there is a deeper resistance here than we are facing up to and just on policy grounds I don't like to have to take the initiative instead of a voluntary _____.

Mr. Frank: I move approval of alternative. It does modify the earlier

suggestion but I do think it is adjusted to a good amount of modification. On behalf of my own bar, and there is no subject the lawyers feel more strongly about than this, they are finding the deposition procedure made a mockery by utterly capricious instructions and refusals to answer, and then we get to court and again litigation bars aren't very large and when the thing is worded as it is it becomes difficult for judges, especially state judges who have to run for re-election, to assess these charges. This would not be much of a change, but it would serve the inertial force and as a modest experiment to see if we can't do something about that abuse, I think it would be helpful. It becomes even more modest under Al's modification but we ought to experiment with it for ten years.

Mr. Jenner: May I add to what John has said. That the practice of lawyers arbitrarily instructing the witnesses not to answer is in my experience, at least since 1933, the greatest abuse there is in the discovery practice. It adds tremendously to the expense of litigation -- you have to prepare petitions, etc. . . . . And not only do you answer this particular question but you answer the initial ones which indicate the thrust. You have to print, or type, or xerox -- until you say this litigationis just killing me. This is especially so in personal injury litigation. It cuts both ways. If we just change the emphasis slightly and let the bar take a look at it and see what we are actually getting at.

Judge Feinberg: One of the vices of practice in the Southern District is the unnecessary motion practice. I say unnecessary in that a great deal of it is brought about by the unreasonable position

privileged positions, taken by attorneys which are best known to them. Any change in emphasis which will make it more difficult for such positions to be taken, I am in favor of. And, therefore, I would vote for this change.

Mr. Cooper: I share that view strongly.

Mr. Freedman: I would support everything that Bert has said.

General discussion.

Mr. Acheson: Should we say that this alternative should be put in the next draft?

Professor Elliott: I second it.

Mr. Acheson: That will be the instructions.

Rule 30. Depositions Upon Oral Examination

Prof.Sacks: If I can get to what I have here, I will, but I would like first to raise a question about what I do not have here. There are in Rule 30 a series of requirements of procedure such as -- that there be both the taking of a stenographic testimony and transcription unless the parties otherwise agree. There is a provision that the witness must sign the depositions and presumably unless there is a waiver of that, if I understand, there is a series of other procedural requirements and suggestions have been made to me that this should be turned around in some instances. Charlie Joiner suggests the rule be turned around as to transcripts that it not be transcribed unless the party demands transcription, and in that instance payment involves. It also has been suggested that similarly with respect to the witnesses signature that it should be turned around. And I think the Michigan procedure does this. That it should not have to be

signed unless the request is made -- again turning the inertial force around.

Mr. Morton: Why is there any necessity of relaxing what is the ironclad procedure of when people are mad with one another and want to make the witness mad too. When Rule 29 says if they aren't mad they can do it anyway they want. We never pay any attention to the ironclad procedure unless we are in that stage of _____ where it is necessary. Then I think it is better the way it is. Maybe you haven't seen a bum stenographer but some can do wonderful things with English and the witness would be seriously prejudice if he didn't have the right to look at the transcript and comment on it.

Prof. Sacks: I just wanted to get the sentiment.

Mr. Morton: I think the ironclad _____, side by side, takes care of every situation.

Prof. Sacks: Would you carry that to the point of Charlie Joiner's notation which is on transcription saying that if anybody demands transcription they would pay for it?

kMr. Morton: I suppose that does no harm. We always stipulate.

Prof. Sacks: I had any number of people's suggestions that it was, and there are state variations on this suggestion,some states prefer this approach and I didn't have any clear judgment. May I then ask two remaining questions about what I do have here. In Rule 30(b), which is the old 30(a), Notice of Examination, as you know the present rule simply requires the giving of reasonable notice. I put in "not less than 10 days" and meant that to be a bracketed suggestion which comes from the fact that one sees this in many of the state rules and in a variety of the local rules. That is,there are a

good many examples where a specific number of days are set as a minimum norm subject, of course, to the power of the court to enlarge or shorten. I have found no evidence in the cases that reasonable notice is a problem and therefore I raise it but I don't myself see the need for a specific number of days and I wanted to hear from you.

Mr. Frank: On the Rule 30 point the largest single question in it is obviously none of these. That large question is whether we are going to change the priority of taking depositions in the introductory period. And my judgment on these other points -- the one you are now mentioning -- is going to be controlled by how we decide that larger point. Mr. Jenner and I have both been registered in heaven that we are going to be killed on this floor before we change that particular provision. Is that a fair statement, Bert?

Mr. Jenner: I don't know that I want this killing business, but pretty close.

Mr. Frank: I would like to make this suggestion -- my thought would be to break at this point and start next time with Rule 30.

The consensus was that this be done.

Mr. Acheson: The next meeting will be, I hope, on the 20th and 21st of May. The material will be in your hands at least one month before the meeting, and before that if the reporter can. We hope that those who can make suggestions will write in and do it so that they can be adopted and we won't have to discuss them at the meeting and leave the meeting for really important matters.

Mr. Jenner: May I suggest to Al that he need not wait until he has everything in one bundle.

Mr. Acheson: Send it as soon as you have it ready.

The meeting adjourned at 1:00 p.m.

Prof. Moore: Would that be within the purview of this draft?

Prof. Sacks: I would take it that that would be as the court said a very strong fact against discovery and if there is notion that the draft does not make it clear then I would add a provision to that effect. I thought this was clear, and that it would be a very strong factor against -- so strong that all are agreed that virtually never would it be ordered produced.

Prof. Elliott: Is there something that came up in Hicman against the introduction of his statement of what the witness said?

Prof. Sacks: (Explained rule) It is true partly that there is a fear that the lawyer is disclosing something of his own views about the case that is much more likely to be true of a rendition of an oral interview. I think we have to say it is a simple desire to protect the lawyer against testifying at trial that somebody did or did not say something different from what is asserted and if there is a motion that this is not taken care of, I would take care of it.

Dean Joiner: I do not think it is taken care of as far as the parties statement is concerned but it is taken care of so far as the witness' statement is concerned and I would add at lines 60 "a copy of a statement."

Judge Thomsen: I think you have to figure this on the damage suit on one side and the other kind of cases on the other . . . . I would think that the suggestion made at the end of page 26-28 "In appropriate cases the court may order a party to be deposed before his statement is produced, citing McCoy v. General Motors and Parla v. Matson Navigation Co. seems to be the minimum protection to this and ought to be left (voice trails off) and might be elevated into the text so that it will be seen that people are not required to give up statements which

invites perjury - not perjury but tailoring the testimony -- so there will be the opportunity to let a man tell his story first without being permitted to do that. I think that the point I have raised on looking at it from the point of thedefendant in damage suits and trying to average the two out are not necessarily controlled (blurred by cough) but I think the rule should do what it can to protect this situation.

Mr. Freedman: . . . we have a question of whether or not a lawyer's taking of a statement orally should be protected specially against disclosure. This not only because there are possibilities of mental impressions but more particularly that it involves the problem of the lawyer being called to testify.

Mr. Frank: This problem you just mentinned has nothing to do with lines 60-65.

Prof. Sacks: Charlie Joiner suggested that because the lines 60-64 in flat terms provide that a copy of the statement shall be given without any showing he suggests that that unqualifies, that it doesn't have any provision in it to protect against the oral taking of a party's statement.

Mr. Freedman: An investigator could have recording machine in his pocket and this would not be a written statement.

Judge Wyzanski: It should be a statement in very words -- not a summary of it.

Prof. Moore: Wouldn't that consist of an oral statement?

Judge Wyzanski: You can imagine if theoral statement was transcribed. I don't see why that shouldn't be released if there is a machine to record it.

Prof. Moore: In the Hickman case one of the questions was "did you take any oral statements?" If so, attach copies of precise statements given

and others like myself can come out and look like an entirely different statement from what the man gave to us.

Judge Wyzanski: I don't see why anybody would think that the precise statement of parties shouldn't be available regardless of how it was recorded or witnessed or whatnot.

Prof. Louisell: What we really want here is a concept of a statement accepted by the party at the time he gives it.

Prof. Sacks states the consensus:

Aim would be to meet the point as Judge Wyzanski suggested in terms of the language of the witnesses is what is producable and a summary made by someone about what he said.

Judge Wyzanski: Maybe the words should be "copied verbatim."

Prof. Sacks: On the broader question of the party's statement I took it that we were in agreement that the party assuming we are dealing withiit in the terms we just agreed it was producable as a matter of writing. It is the question of the language in the Note. I would simply suggest Judge Thomsen that it is better in the note. To put it into the text would suggest that the taking of a deposition in advance is the norm and is to become the routine. I think it should not be tilted one way or another. To put it into the text would be to put in an item that looks like detail. We don't normally try to cover in text all the varieties of order of discovery and it would make it seem this is to be the normal routine.

Judge Feinberg: Is this statement to deal only with the statement of an individual party. What about an defendant who was not an individual would that be a situation where a statement would be required by a corporate defendant. I take it from the discussion which is centered about a plaintiff's being able to obtain a copy previously given that if

it is written with the idea of enabling the plaintiff to get something, Is it also written to encompass a corporate defendant?

Judge Wyzanski: Would you add "or his authorized agent"?

Judge Feinberg: The thought occurred to me there might be such a situation, and since I wasn't in on the earlier discussion I wanted to ask.

Mr. Frank: I think Judge Feinberg is bringing to our attention something that has been overlooked and it should apply to both plaintiffs and defendants so that if the fact is that the plaintiff is of course a trucking corporation if there is an accident the driver is interrogated by the insurance company the plaintiff corporation should have that just as fully as if it were an individual person.

Prof. Sacks: It seems to me in principle the answer should turn on whether it would be regarded as a party's statement, admissible as such against that party, (several people talking) but should we try to spell that out. That is we are talking about a statement of a party it in terms applies to plaintiffs and defendants, clearly whether in this particular provision which is dealing with one special problem we would it be wise to try to clafify all the law as to what is or is not binding.

Dean Joiner: No, don't do that.

Prof. Sacks: In that case we are better off with the language as is. It is applicable to defendants as well as plaintiffs. It doesn't say party plaintiffs. If it is a statement of the corporation it would be subject to this rule. The question whether it is a statement of the corporation is the problem on which there is difficulty and I am suggesting we shouldn't try to resolve that.

Judge Feinberg: You realize though by putting into the rule a provision that flatly requires turning over a copy of the statement for the first

time that if there is this unanswered question not delat with in any way, you may be doing something much more than you think you are.

Mr. Frank: I suggest the note make clear it applies to both defendants as well as plaintiffs (mumbles few words about corporation).

Prof. Wright: I am sympathetic with what Judge Thomsen says but I think we should go beyond by excluding the statement of the secretary and truck driver in lines 60-64. We are not saying this is not discoverable. We are simply saying this is not discoverable to a matter of right. Why we single out certain statements in lines 60-64 to make the matter of right. The principle which I think supports this is that the statement of the party is admissible in evidence while the statement of the witness are useable only for impeachment or heresay. . . .

Prof. Sacks: Summarizes: The question that has been raised is the question of a statement of a witness - we are not now talking about a party as such as we have a specific provision to take care of the party. And the question is whether as a matter of right all statements of witnesses should be producable.

Mr. Ahheson: Where does the witness come in. We were talking about party.

Prof. Sacks: It comes in only in a negative way. The provision as it is now written requires a showing that in order to obtain a statement of an ordinary witness a showing of undue prejudice, a showing of hardship or injustice, etc. that then means a statement of a nonparty witness is not producable as of right in the draft as it now stands. The statement made by Abe Freedman and Charlie Joiner before that it ought to be producable as a matter of right and that is the issue that is being raised. As far as the existing law, the Guilford case does establish that some showing should be made, the case is a court of appeals decision, there are many district court decisions to the same effect. . . .