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CURBING DISCOVERY ABUSE: SANCTIONS UNDER THE FEDERAL RULES OF CIVIL PROCEDURE AND THE CALIFORNIA CODE OF CIVIL PROCEDURE

Richard W. Sherwood*

I. INTRODUCTION

Civil discovery was incorporated into the Federal Rules of Civil Procedure "to secure the just, speedy, and inexpensive determination of every action."1 Proponents of discovery believed that discovery procedures would "make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest possible extent."2 California also adopted discovery procedures, pursuing these same goals. The California Supreme Court has stated that "[o]ne of the principal [sic] purposes of discovery was to do away 'with the sporting theory of litigation—namely, surprise at the trial.'"3 The California court has also expressed other discovery objectives:

(1) to give greater assistance to the parties in ascertaining the truth and in checking and preventing perjury; (2) to provide an effective means of detecting and exposing false, fraudulent and sham claims and defenses; (3) to make available, in a simple, convenient and inexpensive

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. 567
way, facts which otherwise could not be proved except with great difficulty; (4) to educate the parties in advance of trial as to the real value of their claims and defenses, thereby encouraging settlements; (5) to expedite litigation; (6) to safeguard against surprise; (7) to prevent delay; (8) to simplify and narrow the issues; and, (9) to expedite and facilitate both preparation and trial.⁴

To achieve these objectives, discovery has purposefully been given a broad scope. Under the Federal Rules, any matter not privileged may be discovered as long as it is relevant to the subject matter involved in the pending action.⁵ It need not be related to specific issues which have been pleaded. Even if the information sought will be inadmissible at trial, discovery is allowable provided that the information is reasonably calculated to lead to admissible evidence.⁶ This same broad scope—relevancy to the subject matter—was also adopted by the California Code of Civil Procedure.⁷

Whenever rules are written without clear parameters, the possibility of misuse is enhanced, and this possibility has become reality in the area of discovery. Parties and attorneys alike have used discovery techniques to further their own litigative position, thereby abrogating discovery’s original purposes of inexpensive and efficient litigation. Abuse of discovery—the use of discovery devices for purposes not intended by the drafters or the courts—is prevalent.⁸ One judge has stated that: “My experience as a participant in and observer of civil litigation has convinced me that abuse of the judicial

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⁵ “Relevant to the subject matter” has been broadly construed to include any matter that bears or could reasonably bear on any issue in the suit. This construction also encompasses issues which do not necessarily bear on the merits of the case such as jurisdiction and venue. See Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 350-52 & n.13 (1978). See also Hickman v. Taylor, 329 U.S. 495, 500-01 (1947).
⁶ FED. R. CIV. P. 26(b)(1).
⁷ See generally CAL. CIV. PROC. CODE §§ 2016(b), 2030(c), 2031(a) (West Supp. 1981).
⁸ A recent empirical study conducted by the Federal Judicial Center casts doubt upon this thesis. Although the focus of the study was not discovery abuse per se, the authors did make the following observation: “The data do suggest, however, that discovery abuse, to the extent it exists, does not permeate the vast majority of federal filings.” P. Connolly, E. Holleman & M. Kuhlman, Judicial Controls and the Civil Litigative Process: Discovery 35 (1978). For a discussion of this study and a claim that discovery abuse is exaggerated see Schroeder & Frank, The Proposed Changes in the Discovery Rules, 1978 ARIZ. ST. L.J. 475, 476-78.
process, while difficult to detect and prove, is widespread."

Through its liberal interpretation of discovery rules, Cali-
fornia has inadvertently encouraged excessive use of discovery
devices. Parties are permitted to employ discovery devices
even though there is little possibility that usable information
will be obtained. This policy encourages unjustified discov-
ery techniques.

With litigation costs skyrocketing, parties and attorneys
can use excessive discovery devices to bankrupt the opposition
or prolong the action. Discovery answers often require an in-
ordinate expenditure of time. Excessive requests for discovery
force the opposition to spend money it may not possess. Some
parties fail to answer discovery requests for the express pur-
pose of delaying the case, thereby multiplying the costs of the
suit. The upshot of these tactics is that well-heeled parties
can coerce impecunious parties into settling or dismissing
their claims solely because they lack the funds needed to pros-
ecute or defend the case. As one judge stated:

I know full well as do most attorneys that discovery is
often used vexatiously in an effort to obtain a settlement.

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9. Renfrew, Discovery Sanctions: A Judicial Perspective, 67 CALIF. L. REV. 264,
264 (1979). In SCM Societa Commerciale, S.P.A. v. Industrial & Commercial Re-
search Corp., 72 F.R.D. 110 (N.D. Tex. 1976), Judge Porter, in venting his frustration
over the intransigence of both parties to participate in the discovery process, made
the following remark:

Once again this court has been called in to arbitrate the no show and no
tell discovery games engaged in by the parties to this lawsuit. I should
emphasize at the outset that this is not the only game in town. The fact
pattern hereinafter recited has repeatedly surfaced in other litigation
during my tenure on the bench. In fact, I have often thought that if the
Federal Rules of Civil Procedure were in effect in 1492 the Indians un-
doubtedly would have made a motion to suppress Columbus' discovery.

Id. at 111.

10. The California court has remarked:

Inasmuch as discovery of all relevant material during the time of prepa-
ration is the aim of the statute, and since the statute intends that each
party shall divulge, within limits, the information in his possession,
there is nothing improper about a fishing expedition, per se.

Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 384, 364 P.2d 266, 280, 15 Cal.
Rptr. 90, 104 (1961).

11. See Renfrew, supra note 9, at 266.

12. Spiraling costs, generated to a large extent by abusive discovery tactics, has
evoked much concern among legal practitioners. See Smith, The Concern Over Dis-
143 (1980).

13. See generally W. GLASER, supra note 2, at 12; McKinstry, Civil Discovery
Reform, 14 FORUM 790, 795 (1979); Renfrew, supra note 9, at 267.
The case is settled in such instances for 'nuisance value' and not on the relative strength of the legal rights and liabilities.\textsuperscript{14}

In addition to using discovery to prolong litigation, parties can conceal requested information by disclosing vast amounts of information that was not requested.\textsuperscript{15} This practice compels the requesting party to examine all documents and information disclosed to obtain the needed documents or information. "While our discovery laws were designed to prevent trial by ambush, the most common cry from lawyers is that they are being 'papered to death'."\textsuperscript{16} The primary purpose for discovery, to obtain relevant information, is thus undermined. The very procedures which were developed to assist lawyers in obtaining truthful information are being used to thwart this objective.\textsuperscript{17}

One reason for the proliferation of unethical discovery tactics is the self-policing nature of discovery. The trial judge becomes involved in the discovery process only when one party seeks a protective order, motion to compel response, sanction, etc. An attorney can inundate the opposition with frivolous and vexatious discovery requests unless and until the opposition seeks the protection of the court.\textsuperscript{18} Even if protective orders are finally sought, the delay may be sufficient to make it profitable for the party involved. This dilemma would


\textsuperscript{15} Fed. R. Civ. P. 34 outlines what may be requested of another party for inspection and copying purposes. Unfortunately, as noted by the American Bar Association, "[i]t is apparently not rare for parties deliberately to mix critical documents with others in the hope of obscuring significance." Section of Litigation, American Bar Association, Report of the Special Committee for the Study of Discovery Abuse 22 (1977) [hereinafter cited as ABA Discovery Abuse Report]. This practice has led to an amendment to Fed. R. Civ. P. 34(b) by the Supreme Court. For a discussion of this development, see note 111 infra.


\textsuperscript{17} See SCM Societa Commerciale S.P.A. v. Industrial & Commercial Research Corp., 72 F.R.D. 110 (N.D. Tex. 1976), where the court stated:

The effect of these vexatious discovery tactics has been to substantially hamper the speedy, just and efficient determination of legal disputes in the federal courts. These kinds of practices cost litigants large amounts of money with the collateral effect of tilting the scales of justice in the direction of the party that can best afford to pay.

\textit{Id.} at 112.

not exist if the trial judge supervised discovery from its inception. Improprities could be dealt with immediately, thereby lessening the likelihood of delay.

Sanctions are available against parties who use discovery devices excessively without justification or who fail to comply with discovery requests. However, the courts have been reluctant to fully invoke them. Appellate courts have exhibited an intense aversion to severe sanctions such as dismissal, often reversing trial judges when they believe that sanctions have been improperly employed. Because of this articulated policy, trial judges have been disinclined to impose sanctions except in exceptional cases.

Misuse of discovery, whether it be excessive use of discovery devices or failure to comply with discovery requests, has been a subject of concern to both the Bar and the Bench. Chief Justice Burger has asserted that to prevent abuse in discovery, the trial courts must exercise their authority. Suggestions to limit the scope of discovery and strengthen the authority of federal courts to impose sanctions were adopted as proposed amendments to the Federal Rules. Some commentators criticized these amendments for unduly limiting the scope of discovery. Others argued that structural changes

21. See Renfrew, supra note 9, at 276.
22. As one commentator has written: Those rare occasions on which sanctions are imposed show a pattern of long term patience and permissiveness through violation after violation before any action is taken, and then the action is virtually never directed to the involved attorney. Cutner, supra note 2, at 955.
23. The Supreme Court recently expressed its concern about discovery abuse. "There have been repeated expressions of concern about undue and uncontrolled discovery, and voices from this Court have joined the chorus." Herbert v. Lando, 441 U.S. 153, 176 (1979). In a concurring opinion, Justice Powell expressed his concern over discovery tactics which increase delay and expense in civil litigation. Id. at 179 (Powell, J., concurring). See generally Kennelly, Pretrial Discovery—The Courts and Trial Lawyers Are Finally Discovering That Too Much of It Can be Counterproductive, 1977 Trial Law. Guide 458.
were not needed, but that increased judicial oversight was desirable.\textsuperscript{27} After the Bar commented on the proposed amendments, they were substantially revised.\textsuperscript{28} The revisions were recently adopted by the Supreme Court, effective August 1, 1980.\textsuperscript{29} As adopted, the only modification regarding discovery sanctions is availability of sanctions when a party or attorney fails to obey a court order under the new discovery conference procedure.\textsuperscript{30}

Aside from structural changes in the Federal Rules, discovery improprieties may be limited by local rules enacted under the authority of rule 83.\textsuperscript{31} Courts may also impose costs on attorneys under other statutory authority.\textsuperscript{32}

This article examines the requirements for imposing sanctions under the Federal Rules of Civil Procedure and the California Code of Civil Procedure. Although federal courts have traditionally been reluctant to employ sanctions,\textsuperscript{33} a new trend has been emerging since the Supreme Court validated the use of sanctions for deterrent as well as remedial purposes.\textsuperscript{34} This trend will be examined as will the new amendments to the Federal Rules. Rule 37 is the primary authority

\footnotesize{\textsuperscript{27} See, e.g., Pollack, supra note 24, at 227; Shapiro, Some Problems of Discovery in an Adversary System, 63 MINN. L. REV. 1055, 1057 (1979).}
\textsuperscript{31} See generally Cohn, supra note 18.
\textsuperscript{32} 28 U.S.C. § 1927 (1976). A court may also dismiss a plaintiff for failure to prosecute, to comply with any order of court, or to comply with the Federal Rules. FED. R. CIV. P. 41(b).
\textsuperscript{33} See Renfrew, supra note 9, at 271; Werner, supra note 20, at 302; Note, The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions, 91 HARV. L. REV. 1033, 1038 (1978).
\textsuperscript{34} National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) (per curiam). Some commentators contend however, that this trend may be more illusory than real, noting that even after National Hockey League "trial judges continue to be reluctant to impose sanctions except for flagrant violations of discovery orders and reviewing courts continue to reverse a substantial portion of cases where discovery sanctions have been imposed." Epstein, Corcoran, Krieger & Carr, An Up-Date on Rule 37 Sanctions After National Hockey League v. Metropolitan Hockey Club, Inc., 84 F.R.D. 145, 147 (1980) [hereinafter cited as Epstein].}
for imposing sanctions in the federal courts. Alternative bases for sanctions, local rules, 28 U.S.C. § 1927, and "inherent authority" will also be discussed.

Section 2034 is the primary authority for discovery sanctions under the California Code of Civil Procedure. An important element of these sanctions is California's liberal policy that discovery be presumptively permitted; only in rare cases will it be denied. California's sanctions will be compared against sanctions under the Federal Rules, and their dissimilarities will be examined in detail.

II. SANCTIONS UNDER THE FEDERAL RULES

Rule 37 operates when a party fails to comply with a discovery request or makes an objection to that request. It was the intent of the drafters that this rule would only be invoked where there were otherwise unresolvable disputes. Attorneys representing the parties involved must first attempt to resolve disputes outside of court. Then, where good cause is shown, a party may move the court for a protective order against oppressive discovery requests or requests for discovery in privileged areas. If a party objects to discovery but does not move for a protective order, the party seeking discovery can move to compel discovery under rule 37(a).

35. Before undertaking an examination of rule 37, it is important to remember that most trial court decisions imposing sanctions are interlocutory and therefore not appealable. The federal courts usually require that a decision be final before it is appealable. 28 U.S.C. § 1291 (1976). Interlocutory decisions can generally only be appealed if an order granting or refusing an injunction is involved. Id. § 1292. If a controlling question of law is involved, however, the trial judge may certify the issue for immediate appeal and the court of appeals in its discretion may permit an appeal. Id. § 1292(b).

Appellate courts may also issue writs of mandamus or prohibition in order to review a trial court discovery decision, although this is rare. All Writs Act, 28 U.S.C. § 1651 (1976). See, e.g., Evanson v. Union Oil Co. of Calif., 619 F.2d 72 (Emer. Ct. App., cert. denied, 101 S. Ct. 102 (1980)) (writs of mandamus and prohibition would not lie to overturn sanctions imposed by trial court when none of the trial court's actions constituted a usurpation of power or a clear abuse of discretion).

Discovery issues may also be appealed through operation of Fed. R. Civ. P. 54(b) which permits the trial court to enter a final judgment if multiple claims or multiple parties are present. See generally Perlman, The Federal Discovery Rules: A Look at New Proposals, 15 New Eng. L. Rev. 57, 71 n.85 (1979); Shapiro, supra note 27, at 1056 & n.85.

36. See Cohn, supra note 18.

37. See Fed. R. Civ. P. 26(c). The court may impose expenses in relation to this motion. Id. at rule 37(a)(4).
A. A Survey of Rule 37 Sanctions

Under rule 37(a) a party may apply for an order compelling discovery when the opposition fails to answer a question propounded in a deposition, fails to answer an interrogatory, or fails to permit inspections as requested. An evasive or incomplete answer is deemed a failure to answer. Before the 1970 amendments to the Federal Rules, rule 37 could not be invoked unless a party "refused" to comply with a discovery request. This language created confusion among the courts as to whether or not "refusal" required a showing of willfulness.

The Supreme Court resolved this dispute in Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers, holding that a party "refuses" to obey an order under rule 37(b)(2) by simply failing to comply with it. The Court found that willfulness or good faith did not affect noncompliance, but was only relevant to the specific sanctions which the court might impose. To remove doubt about the meaning of "refusal" and to comport with the decision in Societe Internationale, rule 37(a) was amended to include any "failure" to answer a discovery request. All failures to comply with a discovery request, including objections and evasive answers, are now subject to this provision.

If the motion to compel discovery is granted, the court is required to assess reasonable expenses, including attorney's fees, against the noncomplying party, deponent, or attorney unless the court finds that opposing the motion was substantially justified. If the motion is denied, the same standard is

40. Id.
42. Even negligent failures may be sanctioned. See Marquis v. Chrysler Corp., 577 F.2d 624, 642 (9th Cir. 1978).
43. The party moving the court has the burden of proof in showing that the materials or information sought is discoverable. See, e.g., Barnett v. Sears, Roebuck & Co., 80 F.R.D. 662 (W.D. Okla. 1978) (court overruled motion to compel answers to interrogatories holding that plaintiff failed to prove that the information sought justi-
used to determine whether or not the party or attorney bringing the motion should be assessed expenses.\textsuperscript{44} This provision is thus designed to award expenses when a party or attorney opposed a motion or made a motion to compel without substantial justification. Its purpose is to deter parties and attorneys from bringing frivolous discovery requests or objections before the court.\textsuperscript{45}

Although awarding expenses and fees was conceived to be the most important sanction in deterring parties from seeking unnecessary motions to compel, it has been rarely used.\textsuperscript{46} A poll of federal judges taken just two years after the 1970 amendments became effective revealed that seventy-seven percent of the responding judges had not awarded expenses more frequently than under the prior provisions.\textsuperscript{47}

\textit{Ohio v. Crofters, Inc.}\textsuperscript{48} is a case which departs from the norm. The trial court awarded expenses and attorney's fees of $59,949 against the defendant Anderson for its failure to produce documents that plaintiff had requested. The court included costs associated with opposing defendant's appeals and petitions before the court of appeals and the Supreme Court, finding that these expenses were incurred in pursuing plaintiff's discovery rights. Applying rules 37(a) and (b), the court found that Anderson had withheld documents to which the plaintiff was entitled and had willfully violated court production orders.\textsuperscript{49}

In \textit{SCM Societa Commercial S.P.A. v. Industrial and
the judge imposed monetary sanctions for failure of a party to comply with a court order to answer interrogatories, and aggressively gave notice to all attorneys in that jurisdiction that unreasonable opposition to discovery requests would not be tolerated. He stated that parties behaving in this manner would be assessed expenses under rule 37(a) unless their opposition was substantially justified.

If a deponent fails to be sworn in or answer a question after being directed to do so by the court, then this may be treated as contempt of court under rule 37(b). Additionally, if a person or party fails to obey an order, including a rule 37(a) order, to provide or permit discovery, then the courts may: a) order that the matters discussed in the initial order be established for the purposes of the current action; b) order the disobedient party not to support or oppose designated claims; c) order that pleadings be stricken, dismiss the action or render a judgment by default; or (d) treat as contempt of court any failure to obey court orders. In lieu of or in addition to the preceding orders, the court may also require the party failing to obey the orders or his attorney to pay reasonable expenses, including attorney's fees.

It should be noted that, similar to rule 37(a), subsection (b) uses the term “failure,” not “refusal”; thus, no showing of willfulness is required to apply sanctions under subsection (b). Although willfulness is not generally required to impose sanctions, dismissal and default do require a greater showing. The Supreme Court in Societe Internationale was concerned that dismissing an action without affording a party an oppor-

51. Id. at 112 n.3. See also Marquis v. Chrysler Corp., 577 F.2d 624 (9th Cir. 1978) (court ordered Chrysler to pay $2,000 to plaintiff's attorney as compensation incurred by plaintiff's attorney in bringing a rule 37(a) motion to compel production of documents).
52. Rule 37(b) sanctions cannot be imposed unless a court order has been entered. See, e.g., EEOC v. Carter Carburetor, Div. of ACF Indus., Inc., 577 F.2d 43 (8th Cir. 1978), cert. denied, 439 U.S. 1081 (1979) (appellate court reversed sanctions imposed by trial court finding that defendant had failed to move for further answers to interrogatories rendering the procedures used to bestow the sanctions highly suspect); Britt v. Corporacion Peruana De Vapores, 506 F.2d 927, 932 (5th Cir. 1975) (court upheld refusal of trial court to levy sanctions citing the fact that plaintiff failed to obtain a court order).
54. See Flaks v. Koegel, 504 F.2d 702, 708-09 (2d Cir. 1974).
tunity for a hearing on the merits of his case could violate fifth amendment due process guarantees.\textsuperscript{55} In order to prevent due process violations, the Court held that: “Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner’s noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner.”\textsuperscript{56} Thus, “willfulness, bad faith, or fault” must be shown to employ dismissal, but any “failure” is sufficient to impose less drastic sanctions.\textsuperscript{57}

Courts have been reluctant to impose the most drastic sanction, dismissal with prejudice.\textsuperscript{58} Although appellate courts frequently reverse sanctions which are outcome determinative,\textsuperscript{59} recent decisions indicate that this pervasive attitude may be changing.\textsuperscript{60} This changing trend is primarily due to

\textsuperscript{55} 357 U.S. at 209-10. See Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909) (court held that a state court could strike the answer and render a default judgment against the defendant who refused to produce documents in accordance with a pretrial order, noting that such action was not applied as a punishment, but was applied under a presumption that refusal to produce evidence was an admission that the asserted defense lacked merit); Hovey v. Elliott, 167 U.S. 409 (1897) (court held that due process was denied a defendant whose answer was struck since it lead to a \textit{pro confesso} decree without a hearing on the merits; defendant had refused to obey a court order pertinent to the suit).

\textsuperscript{56} 357 U.S. at 212.

\textsuperscript{57} See Stanziale v. First Nat’l City Bank, 74 F.R.D. 557, 559 n.2 (S.D.N.Y. 1977). The second circuit held that “fault” as required by \textit{Societe Internationale} for the imposition of dismissal encompasses gross negligence. In this case, the court found that counsel’s failure to cure deficiencies in interrogatories was gross negligence, that the trial court could properly order the preclusion of this evidence, and that because of the importance of this evidence, its preclusion was tantamount to a dismissal under rule 37. Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062 (2d Cir. 1979). For an analysis of this decision see Note, \textit{Civil Procedure: Discovery Sanctions} 53 TEMP. L.Q. 140 (1980).

\textsuperscript{58} See generally Werner, supra note 20, at 317.

\textsuperscript{59} See, e.g., Wilson v. Volkswagen of America, Inc., 561 F.2d 494 (4th Cir. 1977), cert. denied, 434 U.S. 1020 (1978) (appellate court overturned sanction of dismissal imposed by the trial court for defendant’s failure to produce documents as ordered by the court even though the trial court had found defendant’s action to be willful).

\textsuperscript{60} E.g., Laclede Gas Co. v. G.W. Warnecke Corp., 604 F.2d 561, 566 (8th Cir. 1979) (court of appeals upheld dismissal of defendant’s counterclaim for willful failure of defendant to adequately and timely answer plaintiff’s interrogatories as ordered by the trial court); Dependahl v. Falstaff Brewing Corp., 84 F.R.D. 416 (E.D. Mo. 1979) (trial court struck defendant’s affirmative defenses and counterclaims for bad faith and willful refusal of defendant to completely answer interrogatories as ordered by the court).
the Supreme Court's holding in *National Hockey League v. Metropolitan Hockey Club, Inc.*\(^{61}\) that dismissal must be available as a sanction, not only to penalize those whose conduct warrants such action, but also as a deterrent against those who might be tempted to use similar tactics.\(^ {62}\)

Some courts have precluded parties from introducing evidence at trial for failure to comply with discovery orders. In *Riverside Memorial Mausoleum, Inc. v. Sonnenblick-Goldman Corp.*\(^ {63}\) the judge precluded plaintiffs from offering any evidence related to certain interrogatories served by defendants. Notwithstanding a court order to promptly answer, plaintiffs' answers were late and insufficient. Similarly, in *Ohio v. Crofters, Inc.*\(^ {64}\) the district court held that in light of the defendant's continued failure to produce documents that had been ordered, defendant would be precluded from using these documents at trial.

While courts do not assess expenses under rule 37(a) as a matter of course, they are more willing to employ them when a party fails to comply with a court order under rule 37(b)(2). For example, in *Stanziale v. First National City Bank,*\(^ {65}\) the court refused to dismiss plaintiff's action under rule 37(b) for failure to answer interrogatories, but did assess expenses against the plaintiff because there was no substantial justification for his conduct. In *Surg-O-Flex of America, Inc. v. Bergen Brunswig Co.*,\(^ {66}\) plaintiff failed to comply with an order to answer interrogatories and produce documents. Plaintiff's counsel rationalized this failure by claiming he was unfamiliar

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\(^{62}\) See text and accompanying notes 85-102 infra.


\(^{64}\) 75 F.R.D. 12, 25 (D. Colo. 1977), aff'd sub nom. Ohio v. Arthur Anderson & Co., 570 F.2d 1370 (10th Cir.), cert. denied, 439 U.S. 833 (1978). See also United States v. Sumitomo Marine & Fire Ins. Co., 617 F.2d 1365 (9th Cir. 1980) (court upheld trial court's sanction of precluding the government from introducing evidence of its damages since the government had willfully disregarded the court's order to produce this information to the defendant); Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062 (2d Cir. 1979) (court ordered plaintiff precluded from offering evidence as to damages for failure to answer defendant's interrogatories; this preclusion was tantamount to a dismissal since damages were a required element of the cause of action).


with the Federal Rules, even though he had been a member of the Bar for twenty-two years. Exercising its discretion, the court declined to order dismissal, but did award $1,335 in attorney's fees to the defendant.

An important issue under rule 37(b)(2) is whether attorneys should be assessed expenses as provided by the rule, or whether a client should be held responsible for the attorney's actions. In Link v. Wabash Railroad the Supreme Court upheld dismissal of plaintiff's action for failure to prosecute when counsel failed to appear at a pretrial conference. The client argued that this imposed an unjust burden on him, but the Court stated: "Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent." Whether or not it is equitable to impute the sins of the attorney to the client in all circumstances is questionable. One judge has asserted that it is equitable, arguing that the client is more responsible, and that a malpractice action against the attorney is the client's remedy. However, this solution may be unrealistic because some clients will not recognize that their attorney was responsible for dismissal of the suit, while others will not be able to bear the expense of initiating a malpractice suit. If the client does little more than hand the case over to the attorney, it is unjust to hold the client accountable for the attorney's derelictions. Additionally, monetary sanctions would have more impact if attorneys knew they would be held personally accountable for failure to obey court orders.

In Associated Radio Service Co. v. Page Airways, Inc.
Judge Porter instituted a novel solution to this dilemma. The attorneys involved on both sides of this antitrust action failed to comply with court orders directing them to hold a discovery conference to resolve their differences, and to file a joint conference report. The judge found that failure to produce the report was the fault of the attorneys, not the parties involved. The judge therefore ordered plaintiffs' attorneys to pay defendants' costs in preparing and attending the hearing, and defendants' attorneys were similarly ordered to pay plaintiffs' costs. To ensure that the attorneys felt the brunt of this sanction, the law firms were ordered to receive no compensation from their clients for this assessment.

Even when attorneys are ordered by a court to pay monetary sanctions, it is a difficult sanction for a court to enforce because many attorneys will seek indemnification from their clients. The Supreme Court however, has recently reaffirmed its support for rule 37(b) sanctions, emphasizing that counsel as well as parties may be held personally liable for expenses and attorney's fees if they fail to comply with court orders. 72

In United States v. Sumitomo Marine & Fire Insurance Co., 73 the court of appeals upheld the imposition of a personal $500 sanction against the government attorney for failure to answer interrogatories. The court held that this sanction was within the discretion of the trial court. Other courts have also imposed costs and attorney's fees against attorneys for failure to obey court orders. 74 Orders imposing costs against both cli-

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73. 617 F.2d 1365 (9th Cir. 1980). It should be noted that attorney's fees cannot customarily be awarded against the United States in the form of sanctions. 28 U.S.C. § 2412 (1976). This is the reason for the imposition of fees by the court against the government attorney personally.
74. Dorey v. Dorey, 609 F.2d 1128 (5th Cir. 1980) (costs and attorney's fees imposed against counsel and client for failure to answer interrogatories); Independent Investor Protective League v. Touche Ross & Co., 607 F.2d 530 (2d Cir. 1978) (client and counsel ordered to pay defendant's expenses in bringing motion for sanctions because of failure to comply with order requiring that interrogatories be answered); Barker v. Bledsoe, 85 F.R.D. 545 (W.D. Okla. 1979) (costs and attorney's fees levied against counsel personally for failure to answer interrogatories, failure to appear at pretrial conference and concealment of information); Chesa Int'l Ltd. v. Fashion Assoc., Inc., 425 F. Supp. 234 (S.D.N.Y.), aff'd, 573 F.2d 1288 (2d Cir. 1977) (attorney held to be jointly and severally liable for expenses imposed for failure to comply with discovery order since he contributed significantly to the delay). Courts do not always impose expenses on attorneys, however, as noted by some commentators: "Although Courts seem happier in imposing sanctions where there is an indication that the cli-
ent and counsel, however, are frequently ambiguous regarding the apportionment of the sanction. 75

Some parties have attempted to secure discovery delay and prevent sanctions from being imposed by complying with the court order just prior to the hearing on the motion for sanctions. In most instances, this tactic has not been successful. Defendants in Perry v. Golub 76 failed to obey a request for production of documents, forcing the plaintiff to file a motion to compel. After the motion to compel was granted, defendants sought a protective order and still refused to produce the ordered documents. Sanctions were then sought by the plaintiff under rule 37(b). At the hearing, defendants expressed a willingness to produce some of the documents, but the court found that this belated offer did not justify a lesser sanction. The court dismissed a petition which the defendants had filed in the case.

In G-K Properties v. Redevelopment Agency of San Jose, 77 a motion for sanctions was brought because plaintiff failed to produce documents that the court ordered. The trial court refused to accept a tender of the documents at the hearing, noting that a late acceptance would encourage litigants to withhold vital information. The trial court’s action was approved by the appellate court which found that the last-minute tender could not cure the problems that the plaintiff had created; dismissal with prejudice as levied by the trial court was upheld. 78

As outlined by rule 37(c), if a party fails to admit the gen-

75. See generally Epstein, supra note 34, at 172.
76. 74 F.R.D. 360 (N.D. Ala. 1976).
77. 577 F.2d 645 (9th Cir. 1978). In Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1068 (2d Cir. 1979), the court found that belated compliance with orders should not be given great weight stating: “Any other conclusion would encourage dilatory tactics, and compliance with discovery orders would come only when the backs of counsel and the litigants were against the wall.” See also Ohio v. Arthur Anderson & Co., 570 F.2d 1370 (10th Cir. 1978); David v. Hooker, Ltd., 560 F.2d 412 (9th Cir. 1977).
78. In some instances, however, courts have been lenient with belated compliance attempts. See, e.g., Vac-Air, Inc. v. John Mohr & Sons, Inc., 471 F.2d 231 (7th Cir. 1973) (default for failure to answer interrogatories was too severe when answers were subsequently filed one month after they were due); Kozlowski v. Sears, Roebuck & Co., 73 F.R.D. 73 (D. Mass. 1976) (conditional default judgment entered for failure to comply with court order to produce documents, but court said default would be removed if defendant subsequently complied).
uineness of any document or the truth of any matter requested under rule 36, and the requesting party then proves the genuineness of the document or the truth of the matter, that party can apply for a court order requiring the other side to pay the reasonable expenses incurred in making such proof. Before the 1970 amendments, this subsection applied only to sworn denials. By stating an inability to admit or deny, a party could thus circumvent this sanction. The present language contains the term "failure", which encompasses all failures to admit, including an inability to admit or deny. Now a party need not make a sworn denial before the rule 37(c) sanction can be imposed.

Under rule 37(d), the court is given broad authority to order discovery. If a party or person fails to appear for a deposition after being served with notice, or to serve answers or objections to interrogatories, or to serve a written response to a request for inspection, the court may make such orders as it regards as just, including actions authorized under rule 37(b)(2)(A)-(C). The party failing to act or his attorney will also be required to pay the reasonable expenses, including attorney's fees, unless the court finds that the failure was substantially justified or that other circumstances make the award of expenses unjust. A failure to act cannot be excused on the ground that the discovery sought is objectionable, unless the party has applied for a protective order under rule 26(c).

The 1970 amendments eliminated the requirement of "willfulness" which previously existed in rule 37(d); now lesser sanctions can be applied for a mere failure to comply. However, where dismissal is imposed, due process requires that

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79. The party seeking expenses must prove the truth of the matter requested at trial by a preponderance of the evidence. 4A MOORE'S FEDERAL PRACTICE ¶ 37.04 (2d ed. 1980).

80. The court is required to make the order unless it finds:
   1) the request was held objectionable pursuant to Rule 36(a), or 2) the admission sought was of no substantial importance, or 3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or 4) there was other good reason for the failure to admit.

FED. R. CIV. P. 37(c).


“willfulness, bad faith or fault” be shown.\textsuperscript{83}

Courts have imposed dismissal under subsection (d), although the language of the rule leaves discretion to the trial judge to determine what sanction should be imposed. In \textit{Anderson v. Air West, Inc.}\textsuperscript{84} plaintiff brought a shareholder action against Howard Hughes for alleged securities violations. Hughes was ordered to appear for a deposition, but he failed to do so. The plaintiff then moved for sanctions under rule 37(d). In imposing a default judgment, the court found that Hughes’ failure to appear was due to his bad faith and willful disregard of the judicial process.

B. Sanctions Since National Hockey League

\textit{National Hockey League}\textsuperscript{88} grew out of a massive antitrust suit concerning professional hockey. Defendant had served interrogatories on one of the plaintiffs, who then requested and received numerous extensions. The district court finally ordered the plaintiff to answer the interrogatories. Seventeen months later, the plaintiff still had not given meaningful answers. The court felt this inaction constituted flagrant bad faith, and dismissed plaintiff’s case. “If the sanction of dismissal is not warranted by the circumstances of this case, then the Court can envisage no set of facts whereby that sanction should ever be applied.”\textsuperscript{88}

\textsuperscript{83} See text accompanying notes 54-57 supra.

\textsuperscript{84} 542 F.2d 1090 (9th Cir. 1976). See also Al Barnett & Son, Inc. v. Outboard Marine Corp., 611 F.2d 32 (3d Cir. 1979); Jones v. Louisiana State Bar Ass’n, 602 F.2d 94 (5th Cir. 1979); Dellums v. Powell, 566 F.2d 231 (D.C. Cir. 1977); Hall v. Leon County Bldg. Supply Co., 84 F.R.D. 372 (N.D. Fla. 1979); Goodsons & Co. v. National Am. Corp., 78 F.R.D. 721 (S.D.N.Y. 1978); Conrad Music v. Modern Distrbns., Inc., 433 F. Supp. 269 (C.D. Cal. 1977); Roberts v. Norden Div., United Aircraft Corp., 76 F.R.D. 75 (E.D.N.Y. 1977). \textit{But cf.} United Artists Corp. v. Freeman, 605 F.2d 854 (5th Cir. 1979) (court of appeals overturned default judgment imposed by trial court for failure of defendant to answer questions at deposition finding that defendant had done so believing he was privileged because of ignorance, not because of a willful disregard of the judicial process); Griffin v. Aluminum Co. of America, 564 F.2d 1171 (5th Cir. 1977) (per curiam) (court held that dismissal of plaintiff’s action for failure to appear at deposition was inappropriate since plaintiff was proceeding \textit{in forma pauperis} and did not understand his discovery obligations); SEC v. Research Automation Corp., 521 F.2d 585 (2d Cir. 1975) (rule 37(d) could not be invoked where defendant was uncooperative at his deposition since rule 37(d) only applies when the person fails to appear for the deposition).

\textsuperscript{85} 427 U.S. 639 (1976) (per curiam).

\textsuperscript{86} \textit{In re} Professional Hockey Antitrust Litigation, 63 F.R.D. 641, 656 (E.D. Pa. 1974).
Although the court of appeals reversed the decision, the Supreme Court in turn reversed the court of appeals, noting that reviewing courts tend to be unduly influenced by the severity of dismissal. According to the Court, dismissal must be available to district courts, not merely to penalize those who have merited the sanction, but also to deter those who might be willing to engage in similar conduct. The Court held that the trial court had not abused its discretion in dismissing the case.

This decision has prompted many trial courts to be more strict in imposing sanctions. It has also induced appellate courts to more readily uphold imposition of the ultimate sanction of dismissal. Emerick v. Fennick Industries Inc. illustrates the emerging judicial attitude. In this case, the defendant only partially complied with requests to produce documents and answer interrogatories even though the trial


89. In upholding a trial court's dismissal of a case for plaintiff's willful failure to produce documents even though the documents had finally been produced after the motion for sanctions was made, the court of appeals in Margoles v. Johns, 587 F.2d 885, 888 (7th Cir. 1978), stated: "Any effort on the part of this court to promote leniency rather than the harshness of an outright dismissal would undermine important objectives of Rule 37." But cf. Griffin v. Aluminum Co. of America, 564 F.2d 1171 (5th Cir. 1977) (per curiam) (court held that trial court had abused its discretion in imposing dismissal since the plaintiff did not fully understand his discovery obligations); Edgar v. Slaughter, 548 F.2d 770 (8th Cir. 1977) (court held that since the client was not in bad faith in failing to answer interrogatories because of counsel's dilatoriness, dismissal should not be imposed).

In dismissing plaintiff's case for failure to comply with discovery requests, even after being cautioned that failure to make discovery would result in dismissal, the court in Denton v. Mr. Swiss of Missouri, Inc., 564 F.2d 236, 240-41 (8th Cir. 1977), stated that counsel had engaged in conduct which amounted to flagrant noncompliance with the court's orders. Noting that a party is responsible for his counsel, the court stated that dismissal should be imposed against the party because to do otherwise would be tolerating tactics which cannot be condoned by the judicial system.

In Independent Investor Protective League v. Touche Ross & Co., 607 F.2d 1054 (9th Cir. 1979), the court upheld the dismissal with prejudice of plaintiff's complaint, holding that the trial court had not abused its discretion. The trial court originally granted a motion to compel response, rule 37(a)(2), because the plaintiff and his counsel failed to answer interrogatories. When plaintiff failed to comply with this order, defendant moved for dismissal which the trial court granted after an evidentiary hearing had been held. The court also imposed expenses on the plaintiff and his attorney. See also Szilvassy v. United States, 82 F.R.D. 752 (S.D.N.Y. 1979); Dependahl v. Falstaff Brewing Corp., 84 F.R.D. 416 (E.D. Mo. 1979). See generally Epstein, supra note 34.

90. 539 F.2d 1379 (5th Cir. 1976).
court had ordered compliance. In upholding the trial court's imposition of a default judgment against the defendant, the court of appeals cited *National Hockey League* saying: "Although we could infer that, following imposition of a more lenient sanction, the chastened appellant might have complied with the district court's orders, the Supreme Court has emphasized the deterrent aspect of Rule 37(b)(2) sanctions."\(^\text{91}\)

Notwithstanding *National Hockey League*, constitutional limitations remain on the propriety of dismissal. In *Campbell v. Gerrans*,\(^\text{92}\) the Ninth Circuit Court of Appeals reversed the trial court's dismissal for plaintiff's failure to answer several interrogatories. The court of appeals held that since the plaintiff had invoked the fifth amendment in regard to the interrogatories, the trial court committed an abuse of discretion ordering dismissal. A refusal to answer interrogatories based on the fifth amendment cannot automatically be characterized as a willful default justifying dismissal.

Some courts have nevertheless upheld dismissal sanctions against constitutional due process claims. In *G-K Properties v. Redevelopment Agency of San Jose*,\(^\text{93}\) the court determined that *Societe Internationale* does not mandate invalidating a dismissal order unless the party can show that failure to comply with discovery orders was due to circumstances beyond his control. In *DiGregorio v. First Rediscount Corp.*, the Third Circuit Court of Appeals asserted that sanctions only violate due process when the sanctions invoked constitute "mere punishment."\(^\text{94}\)

Since *National Hockey League*, some courts have expressly indicated that parties who flaunt the rules cannot expect to receive light sanctions. The district court in *Perry v. Golub*\(^\text{95}\) dismissed one of defendant's petitions because he continually refused to obey a court order to furnish documents. In articulating its policy that parties cannot withhold documents and then expect light sanctions by later offering to

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91. *Id.* at 1381.
92. 592 F.2d 1054 (9th Cir. 1979). *See also* United Artists Corp. v. Freeman, 605 F.2d 854 (5th Cir. 1979) (court of appeals reversed trial court's imposition of a default judgment finding that defendant had refused to answer questions asked in deposition because of ignorance, not willful disregard of the judicial process).
93. 577 F.2d 645, 648 (9th Cir. 1978).
produce them, the court stated: "After having refused to com-
ply with the Court’s Order, the defendants now ask for a light
sanction by agreeing to do what they were ordered to do al-
most a month ago." The court also cited National Hockey
League in arguing that sanctions are needed as a deterrent
against disregarding orders.

In Dellums v. Powell, the court held that the trial court
could not refuse to dismiss a plaintiff for failure to answer in-
terrogatories. This case is unique because the appellate court
imposed a stricter sanction than did the trial court. The trial
court originally dismissed three plaintiffs for failure to answer
interrogatories under rule 37(d). On motion by the plaintiffs,
the trial court then reinstated them. The court of appeals
found that one of the plaintiffs completely understood his ob-
ligation, but refused to answer interrogatories. Citing the de-
terrent purpose of sanctions as discussed in National Hockey
League, the appellate court held that it was an abuse of dis-
cretion to reinstate the plaintiff who knowingly refused to an-
swer the interrogatories. In effect, this decision requires dis-
missal of a party for intentional misconduct.

Most appellate courts have not adopted this strict ap-
proach. Instead, they permit the trial court to exercise its dis-
cretion in determining what sanctions should be employed.
Although the court in Surg-O-Flex of America, Inc. v. Bergen
Brunswig Co. found that the plaintiff, by failing to satisfy
the court’s discovery order, had clearly manifested the type of
flagrant bad faith needed to impose dismissal, the court de-
clined to impose this sanction. Instead, the court exercised its
discretion to estop plaintiff from using any documents which
were the subject of defendant’s discovery request, and im-
posed attorney’s fees.

96. Id. at 365.
97. 566 F.2d 231 (D.C. Cir. 1977). Other courts have also flatly refused to apply
light sanctions when parties and attorneys have flaunted the rules. See Cine Forty-
Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062 (2d Cir.
1979)(court dismissed party’s suit for gross negligence of his counsel in failing to com-
ply with order); Riverside Memorial Mausoleum, Inc. v. Sonnenblick-Goldman Corp.,
80 F.R.D. 433 (E.D. Penn. 1978)(plaintiffs were precluded from using evidence at trial
for failure to timely answer interrogatories when judge had cautioned plaintiff that
disregard of orders would not go unnoticed); SCM Societa Commerciale S.P.A. v. In-
98. 76 F.R.D. 654 (D. Conn. 1977). See also Kozlowski v. Sears, Roebuck & Co.,
The Supreme Court has recently reaffirmed the holding in National Hockey League. In Roadway Express, Inc. v. Piper, plaintiffs failed to answer interrogatories and failed to file a brief as ordered by the trial court. The Supreme Court ruled that by not complying with the order, plaintiffs had exposed themselves to liability under rule 37(b). Emphasizing the fact that rule 37 sanctions must be diligently applied, the Court remanded the case to the trial court indicating that the court could impose monetary sanctions against the plaintiffs.

In EEOC v. Carter Carburetor, however, the Eighth Circuit Court of Appeals reversed a discovery sanction imposed upon the Equal Employment Opportunity Commission (EEOC) for willful refusal to answer interrogatories. The EEOC originally filed suit against Carter Carburetor alleging racial discrimination in its employment practices. When the defendant served interrogatories on the EEOC requesting the names of all persons affected by the alleged discriminatory hiring practices, the EEOC sought a stay in answering these interrogatories. The judge denied it.

When the EEOC responded that it was unable to identify other instances of discrimination until discovery had been concluded, the defendant moved for sanctions. The parties failed to resolve the problem among themselves, and the trial court entered its order of sanctions. These sanctions prevented the EEOC from offering evidence of discrimination on behalf of any person except those identified in the original complaint, and imposed a $500 monetary sanction on the plaintiff to pay defendant's attorney's fees.

The court of appeals issued a writ of mandate, finding that the district court exceeded its judicial power in imposing sanctions, since the defendant had never filed a formal objection to the response filed by the EEOC, nor had moved to compel further response under rule 37(a). In addition, because the trial court entered sanctions without permitting the EEOC an opportunity to present its position the appellate court ordered the district court to withdraw its order.

Although the Supreme Court denied the writ of certiorari in this case, Justice Powell, joined by Justices Stewart and

100. 577 F.2d 43 (8th Cir. 1978), cert. denied, 439 U.S. 1081 (1979).
Rehnquist, filed a vigorous dissent in the disposition. The dissenter argued that the decision of the court of appeals was inconsistent with "principles vital to the proper functioning of the federal courts." 102

C. New Amendments to the Federal Plan

Unethical use of discovery procedures has been the focus of discussion and study by the Bench and Bar for some time. The Pound Conference, held in 1976 under the joint sponsorship of the Conference of Chief Justices, the Judicial Conference of the United States, and the American Bar Association, resulted in the formation of a task force to evaluate the issues and recommend solutions. 103

Chief Justice Burger also appointed an Advisory Committee on Civil Rules to conduct hearings on discovery abuse. 104 The Advisory Committee requested that the ABA Section of Litigation examine the issue. As a result, the Section of Litigation recommended proposed amendments to the Federal Rules. 105

The proposals developed by the ABA Section of Litigation were included in the ABA Discovery Abuse Report, supra note 15. For an evaluation of this report see United States Department of Justice, The Annual Report of the Attorney General of the United States 1977, at 13-15 (1978).
tion were passed along by the Chief Justice's Advisory Committee to the Committee on Rules of Practice and Procedure of the Judicial Conference. The Committee considered the proposals, and, after hearings, revised and adopted many of them. The Supreme Court then adopted the Committee's proposals as amendments to the Federal Rules of Civil Procedure.106

In its report, the Section of Litigation proposed an amendment to rule 26(b)(1) which would have limited the scope of discovery to "issues raised by the claims or defenses of any party."107 The Committee on Rules of Practice and Procedure, however, declined to adopt this recommendation, reasoning that the language was too general and would not prevent abuse. The Committee did delete the term "subject matter" from the rule with the expectation that this deletion would curtail expansive discovery.108 This deletion was not, however, incorporated into the 1979 proposals because the Committee decided that "abuse of discovery . . . is not so general as to require such basic changes in the rules that govern discovery in all cases."109 The new amendments adopted by the Supreme Court do not effectively limit the scope of discovery.

Rule 37, as currently written, is deficient because it does not by its terms explicitly apply to parties and attorneys who use excessive and unnecessary discovery procedures.110 If a party finds that discovery requests are burdensome or unnecessary, a protective order may be sought under rule 26(c). However, similar to rule 37(a)(4), rule 26(c) only permits ex-

106. See 1978 Proposed Amendments, supra note 25; 1979 Proposed Amendments, supra note 28; 1980 Amendments, supra note 29. See generally D. Segal, Survey of the Literature on Discovery from 1970 to the Present: Expressed Dissatisfactions and Proposed Reforms (1978); Cutner, supra note 2; Perlman, supra note 35; Schroeder & Frank, supra note 8; Werner, supra note 20, at 329-31.


109. 1979 Proposed Amendments, supra note 28, at 332. For a further explanation of why amendments to this rule were rejected see 1980 Amendments, supra note 29, app. A, at 541-42. See generally Perlman, supra note 35, at 59-64; Schroeder & Frank, supra note 8, at 478-83.

110. See generally Cohn, supra note 18; Erickson, supra note 103, at 289; McKinstry, supra note 13, at 799; Werner, supra note 20, at 329. But cf. Renfrew, supra note 9, at 268 (author argues that rule 37(a)(4) can be imposed on parties or attorneys who make unreasonable discovery demands as well as those who oppose reasonable demands).
expenses in bringing the motion; no other sanctions are authorized.

Rule 37 as amended does not expressly recognize the authority to impose discovery sanctions under 28 U.S.C. § 1927, nor does it expressly provide sanctions for parties who seek unnecessary discovery. Thus, not all improper discovery tactics are covered by the new rules.\textsuperscript{111} The Committee may have believed that its adoption of subdivision (f) to rule 26 would eliminate this "loophole."

The ABA Section of Litigation proposed an additional subdivision (e) to rule 37 which would have authorized a court to deal summarily with discovery abuses. Not only did the proposed amendment recognize that sanctions could be imposed under 28 U.S.C. § 1927, it would also have authorized "sanctions as may be just, including the payment of reasonable expenses and attorneys' fees, if any party or counsel . . . (ii) otherwise abuses the discovery process in seeking, making or resisting discovery."\textsuperscript{112} The 1978 Proposed Amendments included this language, but it was deleted from the 1979 proposals. The amendments adopted by the Supreme Court likewise do not include a subdivision (e) because the Committee found

\textsuperscript{111} The failure to enact amendment (e) to rule 37 is also important because it would have given the court authority to impose sanctions for failure to supplement interrogatories or for dumping documents, failures which are not presently covered by rule 37.

\textsuperscript{112} ABA Discovery Abuse Report, supra note 15, at 24. The Committee on Rules of Practice and Procedure has sought to alleviate this problem by amending rule 34 which provides for the production of documents. The amendment requires that "[a] party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request." 1980 Amendments, supra note 29, at 532. This amendment as adopted substantially conforms to the recommendation made by the Section of Litigation. Its purpose is to ensure that the documents have an internal logic, thereby making them easier to examine. See ABA Discovery Abuse Report, supra note 15, at 22.
the proposed language too broad.\textsuperscript{113}

Rule 26(f) provides for a discovery conference on motion by counsel for one of the parties. Before making the motion, the attorney must first make a reasonable effort to reach agreement with opposing counsel on the matters set forth in the motion. Each party has a duty under the rule to participate in good faith in framing a discovery plan. The court is then permitted to enter an order identifying the issues for discovery purposes, a plan and schedule for discovery, as well as any limitations on discovery. The rule also permits the discovery conference to be held in conjunction with the pretrial conference.\textsuperscript{114}

To ensure compliance with discovery conference orders, rule 37 has been amended so that rule 37(b)(2) sanctions are available for failure to obey discovery conference orders. A new subdivision (g) has also been added to rule 37. This amendment authorizes a court to impose expenses including attorney's fees upon a party or his attorney for failure to participate in good faith in the framing of a discovery plan.\textsuperscript{115}

The ABA Discovery Abuse Report also recommended that the number of interrogatories of right be limited to thirty, but this recommendation was not adopted by the Committee. The Committee felt this proposal would embroil the courts in endless disputes.\textsuperscript{116} On the recommendation of the Committee, the Supreme Court, however, did adopt an amendment to rule 33(c) that requires a party answering an interrogatory by specifying records to do so in sufficient detail to permit the interrogating party to locate and to identify the records in which the answer may be ascertained.\textsuperscript{117}

\textsuperscript{113} 1980 Amendments, supra note 29, app. A, at 544.
\textsuperscript{114} 1980 Amendments, supra note 29, at 526. See also ABA Discovery Abuse Report, supra note 15, at 4-7. The drafters also explained that the discovery conference is not to be routinely used. 1980 Amendments, supra note 29, at 527.
\textsuperscript{115} 1980 Amendments, supra note 29, at 532-33. Also, the current subdivision (e) of rule 37 was stricken since 28 U.S.C. § 1783 no longer refers to sanctions. Id. at 533. In addition, a proposed subdivision (f) of rule 37 which would have expressly permitted the court to notify the Attorney General of the United States that its officers or attorneys had failed to participate in good faith in discovery was deleted. The Committee found that courts already have this authority. Report of the Standing Committee on Rules of Practice and Procedure, 1980 Amendments, supra note 29, at 536-37; 1979 Proposed Amendments, supra note 28, at 347.
\textsuperscript{116} ABA Discovery Abuse Report, supra note 15, at 18; 1978 Proposed Amendments, supra note 25, at 648.
\textsuperscript{117} 1980 Amendments, supra note 29, at 531.
Although the new amendments establish the procedures for a discovery conference, an addition which may result in increased judicial oversight of the discovery process, the limited coverage of rule 37 still allows parties and attorneys to circumvent their discovery responsibilities. As Justice Powell stated in dissenting from the adoption of these amendments, "[t]he changes embodied in the amendments fall short of those needed to accomplish reforms in civil litigation that are long overdue."118

D. Alternative Methods of Curbing Discovery Abuse

An alternative means of curbing unnecessary discovery lies in the power of district courts to enact local rules under the authority of rule 83.119 Using this method, courts could enact rules designed to ameliorate problems not expressly encompassed by the Federal Rules.120

Another possible source of sanctions is the imposition of costs under 28 U.S.C. § 1927. This provision permits a court to impose costs against an attorney for multiplying proceedings that vexatiously increase costs. The statutory language is broad enough to embody attempts to increase costs by abusing discovery,121 but this provision has seen little use in the discovery arena. One reason for this minimal usage is that

118. Id. at 521 (Powell, J., dissenting) (Justices Stewart and Rehnquist joined Justice Powell's dissenting statement).

119. See generally Cohn, supra note 18; Renfrew, supra note 9, at 270; Comment, supra note 46, at 633-36. See also In re Sutter, 543 F.2d 1030 (2d Cir. 1976) (district courts may promulgate rules that impose sanctions for lawyers' conduct which falls short of contempt of court).

120. A potential hindrance to the application of rule 83 is the ruling by some courts that rule 37 is the exclusive authority for sanctions. See, e.g., Countryside Cas. Co. v. Orr, 523 F.2d 870, 872 n.3 (8th Cir. 1976). See generally Werner, supra note 20, at 324.

Rule 41(b) is a potential alternative source for sanctions. "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him." Fed. R. Civ. P. 41(b). But the Supreme Court in Societe Internationale held that where a party failed to comply with a discovery order dismissal could only be imposed under rule 37; the court of appeals could not utilize rule 41(b) to impose dismissal. 357 U.S. at 206-08. It can be argued, however, that this ruling simply makes rule 37 the sole source of sanctions if the discovery violation is expressly addressed in rule 37. Otherwise, sanctions authorized from other sources may be used. See Perlman, supra note 35, at 97-98.

121. See generally Renfrew, supra note 9, at 269; Werner, supra note 20, at 322-23; Comment, supra note 46, at 623-29.
courts have construed the statute to require notice and hearing before imposing costs, as well as a showing that the attorney willfully or recklessly increased costs.

A case recently decided by the Supreme Court also limits the potential availability of § 1927. In *Roadway Express, Inc. v. Piper* plaintiffs brought a civil rights class action alleging racial discrimination. Plaintiffs, however, failed to answer interrogatories, forcing the defendant to move for an order compelling answers. When plaintiffs failed to comply with the court order, defendant moved for dismissal under rule 37(b) and sought costs and attorney's fees. Basing its decision on civil rights statutes 42 U.S.C. §§ 1988, 2000e-5(k), and 28 U.S.C. § 1927, the trial court held that plaintiffs' attorneys were liable for all the costs and attorney's fees incurred by the defendant.

The court of appeals reversed this decision and the Supreme Court affirmed, holding that "costs" in 28 U.S.C. § 1927 are implicitly limited to costs enumerated in 28 U.S.C. § 1920, and that the availability of attorney's fees under the civil rights statutes cannot, therefore, be used to define "costs" under 28 U.S.C. § 1927.

The 1978 Proposed Amendments would have recognized the authority of a court to impose costs under 28 U.S.C. § 1927 in the discovery area, but the 1979 Proposed Amendments excluded these changes.

In exceptional cases, a court may use its inherent power to impose sanctions for abuse of the judicial process. In *Link v. Wabash Railroad*, the Supreme Court upheld the trial court's *sua sponte* dismissal of the plaintiff for failure to prosecute. The Court stated that inherent power is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."

A court's inherent powers were also at issue in the *Road-
way Express case. The Supreme Court noted that in narrowly defined circumstances federal courts do have inherent power to assess attorney's fees against counsel. The Court stated: "If a court may tax counsel fees against a party who has litigated in bad faith, it certainly may assess those expenses against counsel who wilfully abuse judicial processes." Before imposing these expenses a court must ascertain that the attorney acted in bad faith. In Roadway Express, the Court remanded the case so that the trial court could make a determination, after notice and hearing, of whether or not the attorneys involved had acted in bad faith.

III. COMPARATIVE ANALYSIS OF SANCTIONS UNDER THE CALIFORNIA CODE OF CIVIL PROCEDURE AND THE FEDERAL RULES

The primary authority for sanctions under the California Code of Civil Procedure is section 2034, which was originally based upon Federal Rule 37. When rule 37 was substantially revised in 1970, these revisions extinguished many of the discrepancies which had existed in the rule. Section 2034, although amended in recent years, still contains many of the "loopholes" which were eliminated from rule 37 by the 1970 amendments.

California discovery provisions have been interpreted to favor disclosure, making them even more liberal than the Federal Rules.

For the guidance of the trial courts the proper rule is declared to be not only one of liberal interpretation, but one that also recognizes that disclosure is a matter of right unless statutory or public policy considerations clearly prohibit it.

128. 447 U.S. at 752.
129. Id. at 756.
The scope of allowable discovery is also broad, based on the Federal Rules' "relevancy to the subject matter test." Any doubts about the relevance of information requested must be resolved in favor of discovery. However, trial courts do retain discretion in determining whether or not information is to be disclosed and whether or not sanctions are to be imposed for failure to comply with discovery requests.

In addition to section 2034, section 2019(b)(1) authorizes the court to protect a deponent from inquiry into specified areas. Section 2019(b)(1) authorizes the court to "make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression." The court has great latitude in applying sanctions under this provision. In Thoren v. Johnston and Washer the appellate court upheld the trial court's order barring testimony of an undisclosed witness because the party willfully failed to divulge the name of this witness as requested by interrogatories. The court cited section 2030(c), which incorporates section 2019(b)(1), as the authority for this order.

In A&M Records, Inc. v. Heilman the trial court issued

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A party seeking a protective order under Section 2019(b)(1) to prevent the taking of a deposition has the burden of establishing good cause for such an order. See, e.g., Hauk v. Superior Court, 61 Cal. 2d 295, 391 P.2d 825, 38 Cal. Rptr. 345 (1964); Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 364 P.2d 266, 15 Cal. Rptr. 90 (1961); State Dep't of Health Serv. v. Superior Court, 104 Cal. App. 3d 80, 163 Cal. Rptr. 414 (1980).

137. 20 Cal. App. 3d 270, 105 Cal. Rptr. 276 (1972). See also United Farm Workers of America, AFL-CIO v. Superior Court, 47 Cal. App. 3d 334, 120 Cal. Rptr. 904 (1975) (court held that trial court may impose sanctions for unduly frivolous or oppressive interrogatories, but it may not strike an entire interrogatory).

an order precluding the defendant from offering documents at trial which he had refused to produce in discovery. The order also precluded the defendant from testifying on matters which he had refused to answer at his deposition on the basis of the fifth amendment privilege against self-incrimination. The defendant argued that the court could not limit this testimony since he had not disobeyed any court orders, a prerequisite to applying sanctions under section 2034(b). The appellate court held that under section 2019(b)(1) a court has the power to make an order which protects the deposing party, as well as the party deposed, from oppression. Thus, the trial court was authorized to order the deponent not to waive his privilege against self-incrimination at trial since he had used it to block discovery.

A court may also impose expenses, including attorney's fees, in granting or refusing an order under section 2019(b)(1). In Flynn v. Superior Court, the court held that a party who sought a stay of deposition in good faith pending hearing on a motion to quash could not be assessed expenses because of failure to appear at the deposition. The party was, however, assessed costs and attorney's fees for forcing the real party in interest to seek a protective order when an earlier hearing date on the motion to quash would have absolved the need to seek the protective order.

Similar to federal case law, few California cases have found an inherent judicial power to apply sanctions for failure to make discovery. The court in Fairfield v. Superior Court upheld sanctions against a party for failure to obey the trial court's order for further responses under section 2030(a). Section 2030 does not expressly authorize sanctions for refusing to obey a court order, but the appellate court felt that every court has the power to compel obedience to its judgment. Thus the Fairfield court determined that section 2034(b)(2) sanctions could be applied for refusal to obey a section 2030(a) court order.

Other courts, however, have held that there is no inherent

2019(b)(1) may also be used by the court to order criminal misdemeanor immunity for witnesses testifying in a civil case. See Rysdale v. Superior Court, 81 Cal. App. 3d 280, 146 Cal. Rptr. 633 (1978).
authority to apply sanctions. In Bauguess v. Paine the California Supreme Court overturned sanctions imposed by the trial court on plaintiff's attorney. The trial court had ordered plaintiff's attorney to pay $700 in attorney's fees to the defendant after a mistrial was granted because of the attorney's actions. Noting that it is traditional for litigants to bear their own attorney's fees and that no statute authorizes fee awards following a mistrial, the California court held that this case was not analogous to the situation involved in Fairfield, and the award of attorney's fees exceeded the proper limits of the court's inherent powers.

Recent cases have followed the Bauguess decision. In Evarone v. Twentieth Century Hosts, Inc. the trial court struck a defendant's answer and entered a default judgment against him for counsel's failure to appear at a settlement conference and a hearing. The appellate court reversed, holding that neither the applicable statutes or rules of court grant a court jurisdictional authority to enter default without specific authorization.

In Fabricant v. Superior Court the trial court ordered the petitioner to pay $375 to three attorneys for abusing the subpoena power of the court. The petitioner, a defendant in a

141. E.g., Young v. Redman, 55 Cal. App. 3d 827, 128 Cal. Rptr. 86 (1976); Wisniewski v. Clary, 46 Cal. App. 3d 499, 120 Cal. Rptr. 176 (1975). Contra, Santandrea v. Siltec Corp., 56 Cal. App. 3d 525, 128 Cal. Rptr. 629 (1976) where the court ordered appellants to pay reasonable expenses including attorney's fees to the respondents for forcing them to contest the appellants' unauthorized motion. Although no explicit statutory authority existed for the imposition of this sanction, the court found that courts must be able to control the conduct of their business stating: "The exercise of the court's inherent power to provide for the orderly conduct of the court's business is a matter vested in the sound legal discretion of the court." Id. at 530, 128 Cal. Rptr. at 632.


143. Id. The court also expressly disapproved the decision in Santandrea v. Siltec Corp., 56 Cal. App. 3d 525, 128 Cal. Rptr. 629 (1976), which had approved the imposition of sanctions through the exercise of inherent powers. Id. at 639 n.8, 586 P.2d at 950 n.8, 150 Cal. Rptr. at 469 n.8. In expounding upon the Bauguess decision, the court in Yarnell & Assoc. v. Superior Court, 106 Cal. App. 3d 918, 165 Cal. Rptr. 421 (1980), found that the awarding of attorney's fees or sanctions, no matter how they are denominated, is invalid without express statutory authorization. The trial court had imposed a $250 sanction against the cross-defendant for filing a frivolous motion. But the appellate court reversed the sanction stating that these fees were improper under both the court's supervisory power and Code of Civil Procedure § 128.

144. 98 Cal. App. 3d 90, 159 Cal. Rptr. 294 (1979).

criminal case involving possession of a firearm by an ex-con- 
vict, had subpoenaed the attorneys to establish the communi- 
cation facilities available to private counsel. Petitioner wanted 
this evidence to support his argument that a telephone should 
be installed in his jail cell. The appellate court overturned this 
sanction holding that the awarding of the fees exceeded the 
proper limits of the trial court's power. In citing Bauguess the 
court concluded that inherent authority does not authorize fee 
awards to participants in litigation where there is a general 
legislative policy denying such awards, and where no statute 
or recognized exception is applicable.

A. Section 2034(a)

Section 2034(a) provides a vehicle to make discovery in a 
variety of situations. Under this subsection, a party may move 
the court to compel an answer or produce documents or books 
if the other side or a deponent refuses or fails to answer a 
question or produce documents or books at a deposition. A 
motion to compel may also be made if a party refuses or fails 
to answer an interrogatory under section 2030, and a party 
may request answers or further answers to requests for admis-
sions as permitted in section 2033. Additionally, a party may 
seek to compel compliance with a request for inspection under 
section 2031.

If the court finds that the failure, refusal, or objection to 
discovery was not substantially justified, or that an answer 
did not comply with section 2033, then the court may require 
that party to pay reasonable expenses. If the motion to com-
pel is denied, the court may impose expenses on the moving 
party. If a party fails to answer a request for admissions as 
ordered by the court, then such matters will be deemed ad-
mitted, subject only to relief as permitted by section 2033.

Prior to the 1974 and 1978 amendments to subsection (a), 
only "refusals" to abide by discovery requests were subject to 
the statute. Sanctions were not available unless the requesting

146. When a motion is made to compel an answer to an interrogatory the bur-
den is on the objector to demonstrate the validity of his objection. See Coy v. Supe-
rior Court, 58 Cal. 2d 210, 373 P.2d 457, 23 Cal. Rptr. 393 (1962).

147. See Union Mut. Life Ins. Co. v. Superior Court, 80 Cal. App. 3d 1, 145 Cal. 
Rptr. 316 (1978) (court held that expenses could not be imposed for refusal to answer 
interrogatories where novel questions were involved; thus, the refusing party was sub-
stantially justified in its noncompliance).
party could show willfulness on the part of the other party. By adding the term "fails", this provision has been brought into closer congruence with Federal Rule 37(a). In rule 37(a), "failure" has been interpreted to permit a party to seek sanctions for any noncompliance or negligence by the opposition in regard to discovery requests.\textsuperscript{148} The impact of the amendment in California is still unclear.\textsuperscript{149}

Under section 2034(a) as currently written, it is unclear whether an objection to an interrogatory requires the party seeking discovery to make a motion to compel further answers under section 2030(a), or a motion to compel under section 2034(a).\textsuperscript{150} Section 2030(a) provides for a motion to compel further response if the other side answers or objects to an interrogatory. A motion to compel under the amended section 2034(a) may only be sought if the party refuses or fails to answer an interrogatory. The court may require the party or attorney who refuses, fails, or objects, to pay expenses incurred in seeking a section 2034(a) motion, but there is no provision for expenses under section 2030(a).

If the terms "fails" or "refusal" include making objections, then a party need not seek a motion to compel further answers under section 2030(a). However, this interpretation loses its forcefulness when section 2034(a) is read in its totality. The term "objection" is explicitly used in this provision in relation to admissions, but not interrogatories. If the term "fails" includes objections, then the use of the term "objections" in the clause relating to admissions is mere surplusage since "fails" would accomplish the same purpose. Therefore, a motion for further answers under section 2030(a) may still be required if the other side objects to the interrogatories instead of filing answers.

The distinction is important because not only is there no provision for obtaining expenses under section 2030(a), neither is there an explicit provision for sanctions if the party

\textsuperscript{148} See text accompanying note 42 supra.

\textsuperscript{149} See California Continuing Education of the Bar, California Civil Discovery Practice § 3.2, at 93 (1975), where it states: "It is not clear how California courts will interpret the legislative decision to include both 'refusal' and 'failure' in CCP § 2034(a)."

\textsuperscript{150} Prior to the 1974 and 1978 amendments, an objection was not considered a "refusal"; thus section 2034(a) was not available. 14 H. Grossman & A. Van Alstyne, supra note 132, § 867, at 371.
does not comply with the order. In *Stein v. Hassen* plaintiff served interrogatories on defendant who in turn filed unresponsive answers. At the hearing on a motion to compel further answers, the court ordered the defendant to make additional answers and to pay plaintiff $150 in expenses, but denied plaintiff’s request for attorney’s fees. When defendant failed to comply with the order, plaintiff moved for a default judgment and additional expenses of $150 which were granted.

The appellate court found that defendant’s answers were indeed unresponsive and evasive, and that this constituted a willful refusal to comply with discovery orders. Thus, under section 2034(b)(2), the striking of defendant’s answer and counter-claim was justified.

However, the *Fairfield* court, in dicta, took the view that section 2030(a) does not allow the imposition of sanctions. Since the section does not provide for sanctions against the objecting party, the court concluded that the making of an objection is not equivalent to a “refusal” to answer an interrogatory regardless of how insubstantial the matter might appear to the court. The court did hold that once a court has issued an order under section 2030(a), it has inherent authority to impose sanctions if the order is not obeyed.

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151. See Cal. Civ. Proc. Code § 2030(a) (West Supp. 1981). In addition, the section 2030(a) motion for further response must be made upon notice within 30 days from the date of service of the answer or objections to the interrogatories unless the court on notice enlarges the time. A motion to compel answers to interrogatories under section 2034(a) on the other hand, has no statutory time limit if no answers have been filed. See California Continuing Education of the Bar, California Civil Discovery Practice § 3.19, at 102 (1975).


153. It should be noted, however, that although the decision validates the use of section 2034(b)(2) sanctions for failure to obey a court order under section 2030(a), it did not determine whether or not expenses imposed on the defendant in the initial section 2030(a) motion for further answers were valid. Id. at 300-02, 109 Cal. Rptr. at 325-26. But cf. Frey v. Superior Court, 237 Cal. App. 2d 201, 46 Cal. Rptr. 747 (1965), where the court upheld the imposition of attorney’s fees, finding that written objections to interrogatories were made without substantial justification. The court, however, based its action on section 2034(a), apparently classifying the written objection as a “refusal” under the statute as it was then written.


Recently, in *Deyo v. Kilbourne*, the court concluded that attorney's fees may be awarded under section 2030(a), citing *Frey v. Superior Court*. Noting that section 2034(a) was amended in 1974 to provide for attorney's fees for "failure" or "refusal" of a party to answer interrogatories, the court stated: "Clearly, a litigant who invokes a frivolous objection has not only failed to answer the question, but has set the stage for a wholly unnecessary judicial proceeding."

It is unclear whether or not attorney's fees may be awarded in making a motion to require further answers under section 2030(a), and whether or not an objection to an interrogatory constitutes a "refusal" or "failure" under section 2034(a). The California Rules of Court now recognize that a court may impose expenses, including attorney's fees, on a motion to compel answers or further answers to interrogatories or requests for admissions.

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156. 84 Cal. App. 3d 771, 789-91 & n.23, 149 Cal. Rptr. 499, 513-14 & n.23 (1978).
158. 84 Cal. App. 3d at 789 n.23, 149 Cal. Rptr. at 514 n.23.
159. One commentator has argued that section 2034 sanctions are available on section 2030(a) motions at least where the motion is caused by the interposing of objections. See Dobyns, *Sanctions and Interrogatories: Recent Developments*, 7 Orange County B.J. 7, 12 (1980).
160. A motion to compel answers or further answers to interrogatories or requests for admissions, or to protect the responding party shall include a declaration stating facts to show that prior to the filing thereof counsel for the moving party made a reasonable attempt to resolve the objections and disputed issues with opposing counsel but the attempt was unsuccessful. If the court finds that there was no good reason for the refusal or failure to resolve the matter, it may order any persons at fault to pay to the moving party the amount of reasonable expenses incurred in making the motion including reasonable attorney's fees. Id. Rule 257B.
Prior to the enactment of the 1974 amendment to section 2034(a), a party could move for an order requiring further answers to a request for admissions, or the matters could be deemed admitted if the other side "refused" to admit or deny the request for admissions. The 1974 amendment changed the language in this provision to include a "refusal" or a "failure" to deny or admit a request for admissions. This change brought section 2034(a) into conflict with section 2033(a), which at that time, deemed matters automatically admitted unless the party served either a sworn statement denying the matter or a written objection. The issue then arose as to whether a failure to comply with a request for admissions automatically deemed the matters admitted under section 2033(a), or whether the requesting party had to make a motion under section 2034(a) to have the matters admitted. In Zorro Investment Co. v. Great Pacific Securities Corp. the problem was resolved. The court held that a failure to comply with section 2033(a) was an automatic admission and that a party need not make a motion under section 2034(a) to get the matter admitted.

The 1978 amendment eliminated the statutory conflict. As currently written, section 2033 requires that the request for admissions be accompanied by a notice that the matters requested will be deemed admitted unless the answering party complies with the statute, e.g., files either a sworn denial, a statement why he cannot truthfully admit or deny, or a written objection. If the party fails to answer or object, the requesting party may serve notice on the other party that these matters have been deemed admitted. Any right to apply for

plaintiff failed to answer, the trial court denied the defendant's motion to compel answers to interrogatories on the basis that the defendant failed to comply with California Rules of Court 222.1 (i.e., the defendant failed to make a reasonable attempt to resolve objections and disputed issues with the plaintiff).

The court of appeals reversed, holding that California Rules of Court 222.1 does not come into effect if a party totally fails to respond to a request for interrogatories. The court supported its decision by reasoning that where a party does not answer or object to interrogatories, there is no dispute for the opposing party to resolve.

161. See Cohen v. Superior Court, 63 Cal. App. 3d 184, 133 Cal. Rptr. 575 (1976) (deeming matters admitted under section 2034(a) is too severe a penalty for failure to admit or deny when a party denied on the basis of information and belief).


163. Id. at 917, 138 Cal. Rptr. at 415.

relief under section 473 must then be made within thirty days.

Under section 2034(a), a party may seek an order requiring answers or further answers if the party receiving the request for admissions objects or does not comply with section 2033. If the responding party objects or the answer does not comply with section 2033, then the court may assess expenses against this party. Finally, if the court orders the party to furnish answers or further answers and the party does not obey this order, then the matters in the order will be deemed admitted subject to the restrictions on relief contained within section 2033.

Section 2034(a) is now more similar to its counterpart, rule 37(a), than it was before the 1974 and 1978 amendments. In spite of the similarities, there are still noticeable differences. Rule 37(a) encompasses all failures to make discovery, including objections. Although section 2034(a) now includes all failures to make discovery, it is unclear whether or not objections were intended to be included within this classification.\(^{165}\) Also, rule 37(a) requires the assessment of expenses against the failing party unless substantial justification can be shown. On the other hand, section 2034 leaves the matter of expenses to the discretion of the court. The final distinction between the two sections is that sanctions are available under rule 37 for all failures to comply with discovery, even an incomplete or evasive answer. Objecting to an interrogatory in California arguably forces the requesting party to move for a further response under section 2030(a), which does not provide for expenses.

B. Section 2034(b)

Under the provision of section 2034(b), a court may punish as contempt the refusal of any person to obey a subpoena or a court order under subsection (a). In addition, if a party refuses to obey an order to compel under subsection (a), or refuses to obey an order under section 2019, 2031, or 2032, the court has discretion to make such orders as: 1) establishing facts in favr of the party obtaining the order; 2) refusing to permit the disobedient party to oppose designated claims or prohibiting the introduction of evidence; 3) striking out plead-

\(^{165}\) See text accompanying notes 150-60 supra.
ings, or dismissing the action, or entering a default judgment; 4) requiring the payment of reasonable expenses; 5) directing the arrest of the disobeying party; and 6) imposing sanctions (1), (2), (3) as previously listed when a party fails to produce another for examination under section 2032(a).\footnote{166} This provision generates problems of interpretation since the term “refusal” is used by itself; the term “failure” is not used. It is not clear whether or not this language suggests a legislative intent that “refusal” require a showing of willfulness or bad faith. The legislative intent becomes even more opaque when subsection (d) is examined, since this provision specifically addresses “willfulness.”\footnote{167} This may mean that “willfulness” is not required unless it is specifically designated in the statute. Under the Supreme Court’s ruling in Societe Internationale a “refusal” encompasses any failure to comply with an order.\footnote{168} It is doubtful that “refusal” encompasses any failure to comply in California since subsection (a) was specifically amended to include the term “failure,” but subsection (b) was not similarly amended.\footnote{169} In Deyo v. Kilbourne,\footnote{170} the court stated that express findings of willfulness are required under subdivision (d), but they are not required under subdivision (b)(2).\footnote{171} The court did state that express findings should be made when the sanction of dismissal is imposed.

Subsection (b) gives discretion to the trial court to determine the appropriate sanction, but “the sanction imposed must be appropriate to the dereliction, must be authorized by the discovery statutes, and must not exceed that which is necessary to protect the interests of the party entitled to but denied discovery.”\footnote{172} California courts have traditionally been restrictive in applying sanctions because of the premise that sanctions should be used only for aiding discovery, not for

\begin{itemize}
  \item \footnote{166} CAL. CIV. PROC. CODE § 2034(b) (West Supp. 1981).
  \item \footnote{167} See H. Grossman & A. Van Alstyne, 14 CALIFORNIA PRACTICE § 876, at 387 (1972).
  \item \footnote{168} See text accompanying notes 39-42 supra.
  \item \footnote{169} See A&M Records, Inc. v. Heilman, 75 Cal. App. 3d 554, 565, 142 Cal. Rptr. 390, 397 (1977) (court stated that when a party disobeys a court order sanctions under section 2034(b)(2) may be imposed); Williams v. Travelers Ins. Co., 49 Cal. App. 3d 805, 123 Cal. Rptr. 83 (1975) (court upheld dismissal for failure to answer interrogatories although court interchanged the terms “refusal” and “failure”).
  \item \footnote{170} 84 Cal. App. 3d 771, 149 Cal. Rptr. 499 (1978).
  \item \footnote{171} Id. at 797, 149 Cal. Rptr. at 519 (dictum).
  \item \footnote{172} Richards v. Superior Court, 86 Cal. App. 3d 265, 269, 150 Cal. Rptr. 77, 79 (1978).
\end{itemize}
punishment. The California philosophy differs substantially from that propounded by the Supreme Court in National Hockey League, which allows sanctions for punishment as well as for deterrent purposes.

Contempt has rarely been used as a sanction, but one appellate court upheld the imposition of this sanction where a party consistently refused to answer questions at a deposition in spite of court orders to answer. Some courts have also sanctioned parties by precluding them from using evidence at trial. In In re Marriage of Stallcup, the husband failed to produce documents and answer questions as ordered by the court. This information was necessary for a certified public accountant to report on the community property involved in the divorce. The court ordered the husband several times to deliver these documents and to answer the questions, but neither the documents nor the answers were ever received. The appellate court upheld the sanction of precluding the husband from using any of these documents in evidence at trial, and found that there had been a willful refusal to comply with court orders. This finding was made even though the husband argued that the documents had been delivered to his attorney, and that the fault of the attorney should not be imputed to him.

Although California appellate courts are reluctant to sustain dismissal as a sanction, there does appear to be some use of this sanction by trial courts. In Housing Authority of Alameda v. Gomez the appellate court upheld the striking of defendant's answer and entering a default judgment for his refusal to comply with a court order to appear at a deposition. In discussing this sanction the court stated:

Although the ultimate sanction of default is a drastic penalty which should be sparingly used, the unsuccessful imposition of a lesser sanction is not an absolute prerequisite to the utilization of the ultimate sanction; and the test on appeal is whether the lower court abused its dis-

176. See text and accompanying notes 67-75 supra.
The trial court in *Stein v. Hassen* ordered the defendant to answer interrogatories and to pay plaintiff’s expenses under section 2034(a), but the defendant failed to pay the expenses or file responsive answers. In upholding the striking of defendant’s answer and imposing a default judgment, the appellate court stated:

As to the court’s finding of willfulness and lack of substantial justification for defendant’s failure to give adequate and sufficient answers, a reading of three sets filed by defendant reflects his evasiveness and lack of good faith, arrogant insolent attitude toward the judicial process, dilatory tactics and attempt to play “fast and loose” with the court.

But dismissal may be applied unjustly. In *Morgan v. Ransom* the appellate court found that dismissal for failure to obey the trial court’s order to answer interrogatories was punitive because there was no showing that the defendant had been prejudiced or that the interrogatory had a legitimate purpose. This was a unique situation; the plaintiff was in jail and filed the complaint pro se. The plaintiff did not learn of the interrogatories until after the order to compel had been made. He then filed handwritten answers and a motion to vacate when he learned of the court’s actions. The court clerk, however, refused to accept the answers since they were not properly filed, i.e., not typed on legal paper. In light of these circumstances, the court felt it would be unjust to impose dismissal.

Federal Rule 37(b) differs from its California analog by including all failures to comply with court orders requiring discovery. Willfulness is not required, as is arguably the case

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178. *Id.* at 371, 102 Cal. Rptr. at 659.
180. *Id.* at 302, 109 Cal. Rptr. at 327. See also *Kahn v. Kahn*, 68 Cal. App. 3d 372, 137 Cal. Rptr. 332 (1977) (court upheld dismissal holding that a dismissal ordered as a discovery sanction constitutes a judgment on the merits); *Williams v. Travelers Ins. Co.*, 49 Cal. App. 3d 805, 123 Cal. Rptr. 83 (1975) (plaintiff’s refusal to answer interrogatories that went to the heart of his claim justified dismissal).
181. 95 Cal. App. 3d 664, 157 Cal. Rptr. 212 (1979). See also *Duggan v. Moss*, 98 Cal. App. 3d 735, 159 Cal. Rptr. 425 (1979) (dismissal could not be imposed under section 2034(b)(2) since a prior order had not yet been disobeyed; a conditional order of dismissal, ordering dismissal unless the party complied with the order, exceeded the court’s jurisdiction).
under section 2034(b). Rule 37 no longer provides for the arrest of a person disobeying court orders as section 2034 does; it is now treated as a contempt of court. Section 2034(b) also permits the court to impose expenses, while rule 37(b) requires that expenses be imposed unless the failure was substantially justified.  

182 Also, rule 37(b) expressly includes all orders to provide or permit discovery, whereas section 2034(b) does not expressly include orders to file further answers to interrogatories under section 2030(a).  

C. Section 2034(c)

Under section 2034(c) if a party who is requested under section 2033 to admit the genuineness of documents or admit the truth of any matters of fact answers this request with a sworn denial, and the requesting party later proves the truth of the fact or genuineness of the documents, that party may be entitled to expenses in making the proof. An order including expenses should issue if: 1) there were no good reasons for the denial; and 2) the admissions sought were of substantial importance.

In Allen v. Pitchess  

184 the court upheld the imposition of expenses for denying a request for admission in regards to the authority of an agent. Appellants denied on the basis of lack of information or belief. The court stated that the respondent had proved that this denial was false, and that the fact was of substantial importance; therefore, the costs involved in proving this fact were correctly imposed under section 2034(c).

In contrast, in Smith v. Circle P Ranch Co.,  

185 the trial court granted plaintiff's motion for expenses in the proof of facts which the defendant wrongfully denied. However, the appellate court held that the sanctions under section 2034(c) were invalid since the defendant had answered that he was unable to truthfully admit or deny.  

186 Such an answer is not

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182. See Pember v. Superior Court, 66 Cal. 2d 601, 604, 427 P.2d 167, 169, 58 Cal. Rptr. 567, 569 (1967) (even if the court finds that there was no substantial justification for not complying with the order, the court is not required to award fees and expenses).
183. It should be noted, however, that section 2034(b) sanctions now apply to court orders under section 2019 because of the 1978 amendment.
186. Id. at 276-77, 150 Cal. Rptr. at 834-35. Sanctions are justified when a person denied for lack of information or belief, but has access to the information, be-
deemed a sworn denial under the statute; thus, the sanction can be circumvented by claiming an inability to admit or deny.\textsuperscript{187}

As explained previously, there is a significant "loophole" in the section 2034(c) sanction since it only applies to sworn denials; answers claiming an inability to admit or deny circumvent the sanction. Rule 37(c) on the other hand applies to all failures to admit, including an inability to admit or deny.\textsuperscript{188} Although a party may seek further answers to admissions under section 2034(a),\textsuperscript{189} there is little chance of getting the requested information admitted unless the requesting party can show that the opposition has the ability to give a definitive answer. Parties can effectively protect themselves by merely stating an inability to admit or deny. Although highly unethical, this form of "sandbagging" is not expressly covered by the statute.

D. Section 2034(d)

Under section 2034(d), if a party or person willfully fails to appear at a deposition or willfully fails to serve answers to interrogatories, the court on notice and motion may strike their pleadings, dismiss the action, enter a judgment by default, or impose other lesser penalties as it may deem just. The court may also order the willfully failing party or his attorney to pay the moving party's expenses, including attorney's fees, in making the motion.\textsuperscript{190} This provision has been construed to mean that willfulness need not be proven by the moving party. Instead, the burden of proving non-willfulness is on the noncomplying party.\textsuperscript{191}

\textsuperscript{187} In addition, a court does not have to impose the section 2034(c) sanction—it has discretion. See, e.g., City of Los Angeles v. Waller, 90 Cal. App. 3d 766, 154 Cal. Rptr. 12 (1979) (court upheld dismissal of 2034(c) motion stating that it was far from clear that the plaintiff was deliberately dishonest in filing the denial and that the trial court had discretion whether to deny or approve the motion). If a party unnecessarily seeks admissions, his opponent may bring a suit for abuse of process. See Twyford v. Twyford, 63 Cal. App. 3d 916, 134 Cal. Rptr. 145 (1976).

\textsuperscript{188} Advisory Committee's Statement, supra note 41, at 541; note 130 supra, at 373.

\textsuperscript{189} See text accompanying notes 146-47 supra.

\textsuperscript{190} See CAL. CIV. PROC. CODE § 2034(d) (West Supp. 1981).

\textsuperscript{191} Cornwall v. Santa Monica Dairy Co., 66 Cal. App. 3d 250, 135 Cal. Rptr. 761 (1977) (appellate court found that plaintiff exhibited willful conduct in failing to keep his attorney apprised of his whereabouts so that interrogatories could be mailed.
Some courts have dismissed actions for failure of a party to appear at a noticed deposition. Others have first imposed lesser sanctions, including monetary expenses, before imposing dismissal or default for a continued noncompliance.

In Thoren v. Johnston and Washer the court held that a willfully false answer to an interrogatory must be treated as no answer at all. Thus, where the falsity lay in the deliberate omission of a witness’s name, the trial court properly barred any testimony by that witness under section 2034(d).

A court cannot impose monetary sanctions under section 2034(d) if failure to appear at the deposition was not willful. In Flynn v. Superior Court, plaintiff failed to appear at a deposition because he had presented a motion to quash the deposition. The court had instituted a stay until the hearing, but the other party, believing the stay to be invalid, held deposition proceedings anyway. The court found that the plaintiff did not willfully fail to appear at the deposition; thus monetary sanctions were inappropriate.

Sanctions applied without notice may also violate due process. In a recent case, Blumenthal v. Superior Court, the appellate court annulled the sanctions that the trial court had imposed against defendant’s attorney. When defendant failed to appear for a deposition, plaintiffs moved for sanctions under section 2034(d). The trial court entered a default judgment against the defendant, but it also ordered the defendant’s attorney to pay $1,000 to plaintiffs and their counsel. The appellate court annulled this sanction because the moving papers did not mention the attorney, and thus he had no notice sanctions which could be levied against him personally.

193. See, e.g., Flood v. Simpson, 45 Cal. App. 3d 644, 119 Cal. Rptr. 675 (1975) (court upheld entering of default judgment for continued failure to appear at deposition after monetary sanctions had been imposed and order by the court to appear had been made).
195. Id. at 274-76, 105 Cal. Rptr. at 278-79. But cf. Rangel v. Graybar Elec. Co., 70 Cal. App. 3d 943, 139 Cal. Rptr. 191 (1977) (the trial court had barred the testimony of plaintiff’s expert witness, but the appellate court found an abuse of discretion since there was a lack of substantial evidence indicating willful concealment of the identity of the intended witness).
To do otherwise the court held would be a denial of due process.

Even though a trial court has discretion to impose sanctions, it cannot apply them indiscriminately. In Richards v. Superior Court
draft parties in interest objected to interrogatories which sought financial information. The trial court overruled the objections, but did issue a protective order to shelter the confidentiality of the information. One of the parties initially failed to comply with the request, and when the party did comply, the court felt the information was insufficient. As a result of these actions, the court lifted the protective orders as to all parties, not just the non-complying party. The appellate court held this was an abuse of discretion since it "held four of the petitioners hostage to force compliance by the fifth . . . ." 199

The major difference between subdivision (d) and the Federal Rules is that rule 37(d) applies to any failure to attend a deposition or answer interrogatories; no finding of willfulness is required. Also, rule 37(d) states that the court shall award expenses for failure to appear at a deposition or answer an interrogatory. Section 2034(d) on the other hand, states that a court may impose costs, but it is not mandatory. The Federal Rules state that a failure to act cannot be excused on the ground that discovery is objectionable unless the party has applied for a protective order. California cases have adopted this same concept. 200

IV. CONCLUSION

California discovery sanctions have unfortunately not kept pace with the changes made in federal discovery sanctions. Abusive discovery procedures which have been eliminated in rule 37 still exist under section 2034. The language in section 2034(a) pertaining to objections to interrogatories must be clarified so that parties will know whether a motion for further answers under section 2030(a), or a motion to compel under section 2034(a), is required when an objection is made. The confusing language in subsection (b) needs to be

199. Id. at 270, 150 Cal. Rptr. at 79.
rewritten to include all failures to obey court orders, not just refusals. Subsection (c) needs modification to prevent parties from circumventing sanctions by claiming an inability to admit or deny. The requirement of "willfulness" under section 2034(d) should be eliminated since it does not encompass all failures to make discovery.

Monetary sanctions should be applied more frequently. In furtherance of this policy, monetary sanctions should be imposed upon all parties who refuse to comply with discovery as required in rule 37. The provisions in section 2034 which leave this decision to the discretion of the court should be amended. If applied in conjunction with other sanctions, monetary awards could become a more effective tool in preventing misuse of discovery.

The policy in California that sanctions are to be used only for remedial purposes needs to be reformed. California courts must give greater recognition to the role that sanctions can play in deterring parties and attorneys from misusing discovery.

All courts need to recognize their responsibility in preventing discovery abuse. Strict sanctions need to be employed in some cases in order to deter parties from engaging in improper discovery tactics. Appellate courts must exercise more restraint in reversing trial courts. The recent amendments to section 2034 have brought California discovery sanctions into closer congruence with federal sanctions, but more changes need to be made if discovery is to be eliminated as a tool for exploitation.