

SANCTIONS FOR FAILURE TO MAKE DISCOVERY: THE FEDERAL RULES AND THE CALIFORNIA LAW

[This comment is one of a series being prepared by the law reviews of California at the request of the State Bar of California to supplement the study being conducted as to the feasibility and desirability of incorporating certain of the Federal Rules of Civil Procedure into California practice.]¹

This comment undertakes a comparison of federal sanctions for failure to make discovery, most of which are provided in Rule 37,² with California provisions which appear in diverse code sections and court decisions.

FEDERAL PRACTICE

Rule 37, Federal Rules of Civil Procedure, is designed to implement certain other rules which deal with various types of discovery.

Rule 30 provides for the taking of depositions of witnesses on oral examination. Rule 31 similarly provides for the taking of depositions by means of written interrogatories. Rule 33 provides for the service of written interrogatories on any adverse party.³ Rule 34 authorizes the court, on motion of any party and in a proper case, to order any other party to produce and permit inspection and copying of any document or paper or tangible thing that is not privileged. Rule 34 also gives the court power to order a party to permit entry on land or other property for the purpose of inspection.⁴ Rule 35 permits the court to order the physical or mental examination of a party when such condition is in controversy. Rule 36, pertaining to admission of facts and genuineness of documents, has no counterpart in California. Sanctions for failure to admit under Rule 36 have been discussed recently in this law review.⁵

Expenses of obtaining order compelling answer

Rule 37(a) provides that when a deponent refuses to answer any question propounded at the taking of the oral deposition (under Rule 30) or refuses to answer any interrogatory submitted (under Rule 31 or Rule 33), after reasonable notice to all parties, the party seeking discovery may apply to the court for an order compelling answer. If the court grants this motion and finds that the refusal to answer was without substantial justification,⁶ the court shall require the refusing party⁷ or witness, or the attorney

¹ See Comment, 42 CALIF. L. REV. 829 (1954) (production of documents, inspection and the subpoena *duces tecum*); Note, 42 CALIF. L. REV. 187 (1954) (physical or mental examinations, and admissions). Depositions and interrogatories will be discussed in a forthcoming issue of the California Law Review.

² Rule 37 is set forth in full in Appendix I.

³ This subject will be discussed in a forthcoming issue of the California Law Review.

⁴ See Comment, 42 CALIF. L. REV. 829 (1954).

⁵ See Note, 42 CALIF. L. REV. 187 (1954).

⁶ "These drastic provisions of the Rule should be invoked only when deliberate or flagrant attitude is demonstrated." *Grimmett v. Atchison, Topeka & Santa Fe Ry. Co.*, 11 F.R.D. 335, 336 (N.D. Ohio 1951).

⁷ *Banco Nacional de Credito v. Bank of America N.T. & S.A.*, 11 F.R.D. 497 (N.D. Calif. 1951).

or party advising refusal, or either of them, to pay to the examining party the amount of reasonable expenses and reasonable attorney's fees incurred in obtaining the order.

On the other hand, Rule 37(a) further provides that if the court denies the motion to compel answer, and it finds that said motion was made without substantial justification, the court shall require the examining party⁸ or the attorney advising the motion, or both, to pay the amount of reasonable expenses and reasonable attorney's fees incurred in opposing the motion.

The United States is expressly exempted from payment of expenses and attorney's fees by Rule 37(f).

Failure to obey an order made under Rule 37(a)—Contempt

After the order compelling the answer has been issued and a party or witness still refuses to answer a question asked under Rule 30, 31 or 33, the court may consider such refusal to be contempt of court under Rule 37(b)(1). With respect to a witness who is not a party, this is obviously the only sanction available, aside from possible payment of expenses under Rule 37(a).

Under federal practice, civil contempt may be dealt with by committing a person to prison until he performs the specified act if performance is within his power,⁹ but a person may not be imprisoned for a definite period as punishment for civil contempt.¹⁰ In addition, a compensatory fine may be imposed.¹¹ By the imposition of this fine the party seeking discovery is indirectly reimbursed for his expenses in obtaining the court order or subpoena.

Refusal to obey an order made under Rule 37(a), Rule 34 or Rule 35—other consequences

Under Rule 37(b)(2), a party refusing to answer (or a party whose officer or managing agent refuses to answer) is subject to a number of sanctions in addition to contempt. Since by the terms of the statute these sanctions may not be imposed on a party if the recusant witness is not a "party or officer or managing agent of a party,"¹² the courts' interpretation of this phrase is important.

The cases have discussed this problem in the context of Rule 37(d), which makes provision for the failure of a party or an officer or managing agent of a party to attend the taking of a deposition or to serve answers

⁸ United Mfg. & Service Co. v. Holwin Corp., 13 F.R.D. 510 (N.D. Ill. 1952).

⁹ Fenton v. Walling, 139 F.2d 608 (9th Cir. 1944), *cert. denied*, 321 U.S. 798 (1944).

¹⁰ Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911). *But cf.* United States v. Mine Workers, 330 U.S. 258, 304-305 (1947) (conditional fine used to compel compliance); Jencks v. Goforth, 57 N.M. 627, 261 P.2d 655 (1953) (conditional prison sentence for time certain used to compel compliance, court relying on United States v. Mine Workers, *supra*).

¹¹ Parker v. United States, 153 F.2d 66 (1st Cir. 1946).

¹² Gottlieb v. Isenman, 15 F.R.D. 88 (D. Mass. 1953).

to interrogatories submitted under Rule 33. The cases decided under Rule 37(d) on this point appear to be equally applicable to Rule 37(b)(2).

It has been held that the term "party or officer or managing agent of a party" does not include employees,¹³ nor does it ordinarily include directors of corporations.¹⁴ But where the duties of the directors are comparable to the duties of officers and managing agents of American corporations, they will be held to fall within the meaning of the term.¹⁵

Rule 37(b)(2) authorizes the court to make such orders "as are just," including a number of specifically enumerated sanctions. The "as are just" clause has been interpreted to authorize the court to make orders in addition to those specifically mentioned. Thus where a party's failure to comply with the court's order was due to neglect of his attorney, the court imposed the reasonable expenses and reasonable attorney's fees on the attorney.¹⁶ In another case the court penalized a party who failed to comply with an order made under Rule 34 by imposing attorney's fees of \$50 on the disobedient party.¹⁷ In a case where defendant had failed to comply with an order made under Rule 34, thereby depriving the plaintiff of certain evidence, the court reversed a verdict for the defendant and ordered a new trial.¹⁸

The first group of orders which Rule 37(b)(2) specifically authorizes the court to make pertains to conclusive presumptions against the refusing party.¹⁹ The court may order that the matters about which the questions were asked shall be taken to be in accordance with the claim of the other party, or that the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated fact shall be taken as established for the purposes of the action in accordance with the claim of the party obtaining the order.²⁰

The second type of sanction which the court may invoke relates to limiting the admissibility of evidence.²¹ The court may refuse to allow the disobedient party to support or oppose designated claims or defenses,²² or prohibit him from introducing in evidence designated documents or things or items of testimony,²³ or prohibit him from introducing evidence of physical or mental condition.

¹³ *Freeman v. Hotel Waldorf-Astoria Corporation*, 27 F. Supp. 303 (S.D.N.Y. 1939).

¹⁴ *Campbell v. General Motors Corp.*, 13 F.R.D. 331 (S.D.N.Y. 1952).

¹⁵ *Societe Internationale Pour Par. Ind., etc. v. Clark*, 8 F.R.D. 565 (D.D.C. 1948).

¹⁶ *Allen v. United States*, 16 Fed. Rules Serv. 507 (E.D. Pa. 1951).

¹⁷ *Bernat v. Pennsylvania R. Co.*, 14 F.R.D. 465 (E.D. Pa. 1953).

¹⁸ *Ernst v. Jewel Tea Co.*, 13 F.R.D. 234 (N.D. Ill. 1952).

¹⁹ Fed. R. Civ. P. 37(b)(2)(i).

²⁰ *Oregon-Washington R. & Nev. Co. v. Strauss & Co.*, 38 F. Supp. 229 (D. Ore. 1940).

²¹ Fed. R. Civ. P. 37(b)(2)(ii).

²² *Valenstein v. Bayonne Bolt Corporation*, 6 F.R.D. 363 (E.D.N.Y. 1946).

This provision is applicable to the United States. *O'Neill v. United States*, 79 F. Supp. 827 (E.D. Pa. 1948), *rev'd on other grounds, sub nom. Alltmont v. United States*, 177 F.2d 971 (3d Cir. 1950).

²³ *Bernat v. Pennsylvania R. Co.*, 14 F.R.D. 465 (E.D. Pa. 1953).

The third group of sanctions pertains to orders relating to the proceedings themselves.²⁴ The court may make an order striking pleadings,²⁵ or staying proceedings until the order is complied with,²⁶ or dismissing the action (with²⁷ or without prejudice²⁸), or rendering judgment by default against the disobedient party.

The United States Supreme Court in *Hovey v. Elliott*²⁹ held that it is a denial of due process of law for a court to strike an answer and enter a default judgment against a defendant as punishment for contempt. However, the later Supreme Court case of *Hammond Packing Co. v. Arkansas*³⁰ held that, in a similar situation, striking of the answer and rendering a default judgment was justified on the theory that failure to produce evidence created a presumption as to the bad faith and untruth of the answer.

One court held that after default the plaintiff will be required to make proof, but the defendant will be barred from offering proof in rebuttal.³¹ Professor Moore criticizes this holding, contending that no reason exists for treating defaults under Rule 37 differently from any other default judgment.³²

A 1941 decision of a United States Court of Appeals, *Duell v. Duell*,³³ indicates that before the court will grant a default judgment under Rule 37(b)(2)(iii) [or under Rule 37(d)] there must be a showing that defendant has failed to produce relevant evidence in his possession. If this is shown, the presumption as to bad faith and untruth arises, as recognized in *Hammond Packing Co. v. Arkansas*.³⁴ Under the provisions of Rule 55(e), Federal Rules of Civil Procedure, no default judgment may be awarded against the United States unless the claimant establishes his right to relief by satisfactory evidence. However, the United States may be barred from opposing certain claims asserted against it.³⁵

Finally, Rule 37(b)(2)(iv) provides that the court may order the arrest of any party or agent of a party for disobeying its orders, "except an order to submit to a physical or mental examination" made under Rule 35. The decisions indicate that a party may not be held in contempt for refusal

²⁴ FED. R. CIV. P. 37(b)(2)(iii). The court may give additional opportunity for compliance before resorting to its powers. See *Sher v. De Haven*, 199 F.2d 777 (D.C. Cir. 1952), *cert. denied*, 345 U.S. 936 (1953).

²⁵ *Pitman v. Florida Citrus Exchange*, 2 F.R.D. 25 (S.D.N.Y. 1941).

²⁶ *Cf. Zalutka v. Metropolitan Life Ins. Co.*, 108 F.2d 405 (7th Cir. 1939).

²⁷ *V. O. Machinimport v. Clark Equipment Co.*, 12 F.R.D. 191 (S.D.N.Y. 1951). This is applicable to the United States. *United States v. Cotton Valley Operators Committee*, 9 F.R.D. 719 (W.D. La. 1949), *aff'd per curiam by an equally divided court*, 339 U.S. 940 (1950).

²⁸ *Societe Internationale, etc. v. McGranery*, 111 F.Supp. 435 (D.D.C. 1953).

²⁹ 167 U.S. 409 (1897). *Accord*, *National Union v. Arnold*, 348 U.S. 37 (1954) (state court upheld in dismissing appeal as sanction for contempt).

³⁰ 212 U.S. 322 (1909).

³¹ *Dulin v. West*, 10 Fed. Rules Serv. 702 (W.D. Mo. 1946).

³² 4 MOORE'S FEDERAL PRACTICE 2809 (2d ed. 1950).

³³ 178 F.2d 683 (D.C. Cir. 1948).

³⁴ 212 U.S. 322 (1908), discussed in text at note 30 *supra*.

³⁵ *O'Neill v. United States*, 79 F.Supp. 827 (E.D. Pa. 1948), *rev'd on other grounds, sub nom. Alltmont v. United States*, 177 F.2d 971 (3d Cir. 1950).

to submit to a physical examination,³⁶ but a party may be held in contempt for refusal to obey an order made under Rule 34.³⁷

*Willful failure to attend deposition taking or serve answers to interrogatories*³⁸

The provisions of Rule 37(b)(2) pertain to a refusal of a party to answer in disobedience of an order issued under Rule 37(a) or a refusal of a party to obey an order made under Rule 34 or 35. A separate paragraph, Rule 37(d), provides for penalties in the event of a willful failure to attend deposition taking or to serve answers to interrogatories where the refusal is made by a party, or officer or managing agent of a party. The problem of determining who are parties or officers or managing agents of parties has been discussed previously.³⁹

While the court has authority to invoke Rule 37(d) without a supplementary order,⁴⁰ the courts ordinarily will not resort to use of Rule 37(d) without first giving the party another opportunity to comply.⁴¹

Under Rule 37(d) the court may (on motion and notice) strike out pleadings of the party who willfully fails to attend deposition taking or serve answers to interrogatories.⁴² One court has interpreted an order to strike a complaint as a dismissal without prejudice.⁴³ In addition to strik-

³⁶ *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941).

³⁷ *Fenton v. Walling*, 139 F.2d 608 (9th Cir. 1943), *cert. denied*, 321 U.S. 798 (1944). For a discussion of sanctions for contempt, see text at note 9 *supra*.

In addition to the above provisions, it should be noted that Rules 30, 31 and 33 provide that answers to oral and written interrogatories are to be given under oath. Willfully giving false answers to the questions propounded would be perjury. Professor Moore suggests that making false and evasive answers would be punishable as contempt of court if there were a clear showing of the facts of such evasion. 4 MOORE'S FEDERAL PRACTICE 2809 (2d ed. 1950).

³⁸ A type of written interrogatory not within the textual scope of this comment is the "letter rogatory." Rule 28(b) provides for the taking of depositions in foreign countries by the means of letters rogatory. Rule 37(e) provides that, for failure to respond to a letter rogatory, a subpoena may be issued as provided in 28 U.S.C. § 1783 (1952). Personal service of the subpoena is to be made by the United States consul, along with a tender to the witness of his necessary travel and attendance expenses. For failure to respond to the subpoena, 28 U.S.C. § 1784 (1952) provides for penalties: 1. Witness is ordered to show cause why he should not be punished for contempt. 2. Property of witness in United States may be levied on or seized and held to satisfy any judgment that may be rendered against the witness. 3. Copy of the levy or seizure must be forwarded to the consul with request for personal service, and publication of the order in a paper of general circulation once a week for six weeks in the district of the court making the order. 4. If found guilty, the witness may be punished by a fine of not over \$100,000 and if not paid otherwise, fine and costs of the proceedings are to be paid by sale of property levied or seized.

³⁹ See text following note 12 *supra*.

⁴⁰ The only exception involves the case of the involuntary plaintiff. As to him, it has been held that the notice provisions of Rule 37 are inadequate, and a subpoena will be required. *Diebold, Inc. v. Record Files*, 11 F.R.D. 543 (N.D. Ohio 1951).

⁴¹ *Dunn v. Pennsylvania R. Co.*, 96 F.Supp. 597 (N.D. Ohio 1951); *Maresco v. Lambert*, 2 F.R.D. 163 (E.D.N.Y. 1941); *Dann v. Compagnie Generale Trans-Atlantique Limited*, 29 F.Supp. 330 (E.D.N.Y. 1939).

⁴² *Spaeth v. Warner Bros. Pictures*, 1 F.R.D. 729 (S.D.N.Y. 1941).

⁴³ *Dictograph Products v. Kentworth Corporation*, 7 F.R.D. 543 (W.D. Ky. 1947).

ing the pleadings the court may dismiss the action with⁴⁴ or without⁴⁵ prejudice.

The court may also enter a default judgment against a party failing to attend deposition taking or a party failing to serve answers to interrogatories submitted under Rule 33.⁴⁶ The same limitations on the rendering of default judgments as were discussed with reference to Rule 37(b)(2)(iii) are applicable to Rule 37(d).⁴⁷

Failure to comply with subpoena compelling attendance

Rule 26(a) and Rule 45(a) provide a method of compelling attendance of witnesses, including witnesses who are parties, at a deposition taking. The procedure is to have a subpoena issued. On failure of a party or witness to comply with the subpoena, a motion may be made to have the disobedient party adjudged in contempt⁴⁸ in accordance with Rule 45(f).⁴⁹ However, the severe sanctions of Rule 37 would seem to be more efficient in compelling a disobedient party to obey.

Failure to obey subpoena duces tecum

Rule 34 pertains only to discovery and documents in the hands of parties. If it is desired to compel a witness to produce relevant material, Rule 26(a) and Rule 45(b) provide for the issuance of subpoenas *duces tecum*. Assuming that the subpoena was properly issued and served, refusal to comply would be punishable as contempt under Rule 45(f). While the subpoena *duces tecum* procedure is applicable to witnesses and parties alike, the order issued under Rule 34 coupled with the sanctions of Rule 37 presents a more effective means of compelling a party to make discovery.

Professor Moore believes that, in addition to punishment for contempt for failure to obey a subpoena *duces tecum*, the court would be authorized to issue an order under Rule 37(a) and enforce this order by means of Rule 37(b)(2). He also suggests that in a proper case the court could invoke Rule 37(d).⁵⁰ While this would place the sanctions for failure to make discovery as ordered by a subpoena *duces tecum* on a par with sanctions for failure to make discovery as ordered under Rule 34, there is no case support for this result.

⁴⁴ Loosley v. Stone, 15 F.R.D. 373 (S.D. Ill. 1954).

⁴⁵ Producers Releasing Corp. de Cuba v. PRC Pictures, 176 F.2d 93 (2d Cir. 1949).

When this case came up for a new trial, it was held that under the circumstances the dismissal without prejudice was equivalent to a dismissal for failure to prosecute, within the meaning of the applicable New York statute. The attempt to bring a new action was therefore held barred as not having been brought within the time originally provided. Producers Releasing Corp. de Cuba v. Pathe Industries, 10 F.R.D. 29 (S.D. N.Y. 1950). However, this ruling was reversed by the United States Court of Appeals on the ground that the dismissal in the original suit was not for neglect to prosecute within the meaning of the New York statute. Producers Releasing Corp. v. Pathe Industries, 184 F.2d 1021 (2d Cir. 1950).

⁴⁶ Michigan Window Cleaning Co. v. Martino, 173 F.2d 466 (6th Cir. 1949).

⁴⁷ See text at note 31 *supra*.

⁴⁸ Andrecht v. M. Livingston & Co., 5 Fed. Rules Serv. 774 (W.D. Ky. 1942).

⁴⁹ The sanctions for contempt have been referred to previously; see text at note 9 *supra*.

⁵⁰ 4 MOORE'S FEDERAL PRACTICE 2427 (2d ed. 1950).

A discussion of the appealability of the various orders made under the federal rules is beyond the scope of this paper.⁵¹

CALIFORNIA PRACTICE

While Federal Rules 26 and 37 and Rule 45, Federal Rules of Civil Procedure provide a homogeneous system relating to all types of discovery, California has a hit-or-miss hotchpot of statutes and case-law not readily generalized. In view of this, the sanctions for failure to make discovery in California are more understandable, if considered in the context of the particular discovery rule involved.

Refusal to answer or be sworn at deposition taking

Sections 2019 to 2038, California Code of Civil Procedure, provide for the taking of depositions of witnesses within and without the state. These rules are roughly analogous to Rules 30 and 31, Federal Rules of Civil Procedure. However, California has no provision similar to Rule 33, which provides that parties may serve other parties with written interrogatories.⁵²

In the event a witness refuses to be sworn or to answer a question at a deposition taking, Section 1991 of the Code of Civil Procedure requires the officer or commissioner taking the deposition to report this refusal to the court. After a hearing upon proper notice, the court may order the witness to be shown or answer. Disobedience of this order may be punished as contempt.

In lieu of reporting the refusal to answer or to be sworn as outlined above, the party seeking to obtain the deposition may request the officer taking the deposition to advise the witness that within from five to twenty days the refusal will be reported to the court by the officer or commissioner. At that time, or as soon thereafter as possible, the party may apply for an order directing the witness to obey. The witness is required to attend this session of court, and refusal to attend may be punished for contempt. After hearing the matter the court may without further notice order the witness to comply at a specified time and place. Thereafter, if the witness refuses to comply with such order, he may be punished for contempt.

If the refusal is committed in the court's presence, under Section 1211 of the Code of Civil Procedure the person may be punished summarily,⁵³ without the necessity of the notice and hearing procedure required by Section 1991.

Section 1219 of the Code of Civil Procedure provides that when the contempt consists of the omission to perform an act which is in the power of the person to perform, that person may be imprisoned until the act is performed. The act that is to be performed must be specified in the warrant of commitment.

⁵¹ See 4 *id.* § 26.37 (2d ed. 1950).

⁵² The California procedure with respect to depositions will be discussed in a forthcoming issue of the California Law Review.

⁵³ *Crocker v. Conrey*, 140 Cal. 213, 73 Pac. 1006 (1903).

A fine not exceeding \$500 or imprisonment not exceeding five days, or both, may be imposed under the provisions of Section 1218, Code of Civil Procedure, as punishment for contempt. Unlike federal practice, "in California the proceedings leading to punishment for failure to obey a decree (criminal contempt) and to imprisonment until the omitted act is performed (civil contempt) are exactly the same."⁵⁴

In addition to contempt, it is possible that if the witness refusing to be sworn or to answer is also a party-plaintiff, the court has power to enter an order staying proceedings until thirty days after compliance with the order.⁵⁵

There appears to be no way in which the party seeking and obtaining the order compelling the witness to be sworn or to answer can recover the costs of obtaining the order, as under Rule 37(a), Federal Rules of Civil Procedure.⁵⁶

Failure to attend deposition taking

To compel a witness to attend an examination where his deposition is to be taken, Section 1986, Code of Civil Procedure, provides for the issuance of a subpoena by the court.

Disobedience of such a subpoena under Section 1991 may be punished as contempt.⁵⁷ The same procedure is followed with respect to reporting disobedience of a subpoena as is followed in reporting refusal to be sworn or to answer.⁵⁸ There must be a hearing, after which the court may order the witness to obey the subpoena. Continued refusal to obey subjects the witness to punishment for contempt.⁵⁹

In addition to the punishments for contempt already outlined with reference to refusal to obey a court order, Section 1992, California Code of Civil Procedure, provides that "[a] witness disobeying a subpoena also forfeits to the party aggrieved the sum of one hundred dollars, and all damages which he may sustain by failure of the witness to attend, which forfeiture and damages may be recovered in a civil action." This provision has been construed to be in addition to the punishment for contempt authorized by Section 1991.⁶⁰ No supplementary hearing or order is necessary in order for the aggrieved party to bring his action under this section. All that need appear is that the witness has disobeyed the subpoena. Furthermore, this

⁵⁴ *City of Culver City v. Superior Court*, 38 Cal.2d 535, 541, 241 P.2d 258, 261 (1952).

⁵⁵ See *Union Trust Co. v. Superior Court*, 11 Cal.2d 449, 81 P.2d 150 (1938).

⁵⁶ See text at note 6 *supra*.

⁵⁷ *Burns v. Superior Court*, 140 Cal. 1, 73 Pac. 597 (1903).

⁵⁸ See text following note 52 *supra*.

⁵⁹ Cf. *Blache v. Superior Court*, 35 Cal.App.2d 740, 96 P.2d 970 (1939).

CAL. CODE CIV. PROC. § 1991 as it read before the 1907 amendment (Cal. Stats. 1907, c.391, p.731) provided that if a party-witness was in contempt for disobedience of a subpoena or refusal to answer or be sworn, his complaint could be stricken. The 1907 amendment removed this clause.

⁶⁰ *Church v. Payne*, 35 Cal.App.2d Supp. 752, 92 P.2d 406 (1939).

is a right which may be asserted by the aggrieved party without awaiting (and regardless of) the outcome of the trial.⁶¹ On its face it applies to witness and party-witness alike.

Section 1992 in effect allows the party seeking discovery to recover his costs in obtaining the subpoena, as well as any damages he can prove for failure of a witness to attend.

Aside from Section 1992 the prevailing party may recover from the losing party the costs incurred in the service of process.⁶² However, attorney's fees are not recoverable as costs except where expressly allowed by statute or by contract of the parties.⁶³ There is no statute authorizing the prevailing party so to recover.

In a case involving disobedience of a subpoena by a witness who is a party-plaintiff, an order staying the trial until thirty days after the plaintiff complies with the subpoena has been sustained.⁶⁴

Refusal to produce books, papers or documents as ordered under Section 1000

Section 1000, Code of Civil Procedure, is analogous to Rule 34, Federal Rules of Civil Procedure. However, Section 1000 is limited to the inspection and copying of accounts in books, documents and papers relating to the merits of the action. It also differs from Rule 34 in that Section 1000 has a self-contained list of sanctions authorized. As with Rule 34, Section 1000 is limited to parties.⁶⁵

The court may order either party to give to the other the books, documents or papers, assuming that all other procedural requirements have been fulfilled. On failure to comply, the court may exclude the documents from admission in evidence,⁶⁶ or instruct the jury that the documents are to be presumed as the other party alleges them to be,⁶⁷ or punish the refusing party for contempt.⁶⁸

The specific punishments imposed for contempt include fine and imprisonment, or both, and imprisonment until compliance with the order of the court.⁶⁹

The case of *Union Trust Co. v. Superior Court*,⁷⁰ to which reference

⁶¹ *Ibid.*

⁶² *Fay v. Fay*, 165 Cal. 469, 132 Pac. 1040 (1913).

⁶³ CAL. CODE CIV. PROC. § 1021; *Miller v. Kehoe*, 107 Cal. 340, 343, 40 Pac. 485, 486 (1895).

⁶⁴ *Union Trust Co. v. Superior Court*, 11 Cal.2d 449, 81 P.2d 150 (1938).

⁶⁵ This section has been discussed more completely in Comment, 42 CALIF. L. REV. 829 (1954).

⁶⁶ This has been construed to prevent the party refusing to make discovery from introducing documents in evidence. The provision is not applicable to the party seeking discovery. *Holm v. Superior Court*, 42 Cal.2d 500, 267 P.2d 1025 (1954).

⁶⁷ *Nevin v. Mercer Casualty Co.*, 12 Cal.App.2d 222, 55 P.2d 251 (1936). *But cf. Pinto v. Seely*, 22 Cal.App. 318, 135 Pac. 43 (1913).

⁶⁸ *Transbay Const. Co. v. Superior Court*, 12 Cal.App.2d 565, 55 P.2d 1237 (1936).

⁶⁹ See text at note 53 *supra*.

⁷⁰ 11 Cal.2d 449, 81 P.2d 150 (1938).

has already been made, upheld a trial court's order staying proceedings until thirty days after the plaintiff made discovery as ordered.⁷¹

California has no statutory counterpart to Rule 34(2), which authorizes the court to order a party to permit entry on land or other property for purposes of inspection. However, *Clark v. Tulare Lake Dredging Co.*⁷² held that the court, under Section 128(5), Code of Civil Procedure,⁷³ has inherent power to make an order allowing inspection of machinery prior to trial. There is no California case invoking sanctions for refusal to comply with an order of the court made thereunder. Disobedience would be punishable as contempt under Section 1209(5), California Code of Civil Procedure.⁷⁴

Refusal to obey subpoena duces tecum

The last sentence of Section 1000, relating to discovery of documents, reads as follows: "This section is not to be construed to prevent a party from compelling another to produce books, papers, or documents when he is examined as a witness." Section 1985, Code of Civil Procedure, provides that a witness may be required to bring with him any books, documents or other things under his control which he is bound by law to produce. The means by which this is required is the subpoena *duces tecum*. Disobedience of such a subpoena, after the court has issued its supplementary order as required by Section 1991, is contempt. The sanctions⁷⁵ imposed for failure to comply with a subpoena *duces tecum* should be identical with those for failure to obey an ordinary subpoena.⁷⁶

Refusal to submit to physical examination

California has no statutory provision permitting a court to order physical examination of a party. However, in *Johnston v. Southern Pacific Co.*⁷⁷ the court found that under Code of Civil Procedure Section 128(5)⁷⁸ it had inherent power to order a plaintiff to submit to physical examination by

⁷¹ The recent case of *Holm v. Superior Court*, 42 Cal.2d 500, 267 P.2d 1025 (1954), seemingly settled what had been a controversial question by holding that the remedy proper in reviewing an unjustified discovery order under CAL. CODE CIV. PROC. § 1000 is the writ of prohibition.

⁷² 14 Cal.App. 414, 112 Pac. 564 (1910).

⁷³ CAL. CODE CIV. PROC. § 128: "Every court shall have power: . . . 5. to control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any inanner connected with a judicial proceeding before it, in every matter appertaining thereto"

⁷⁴ CAL. CODE CIV. PROC. § 1209: "The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court: . . . 5. Disobedience of any lawful judgment, order, or process of the court"

⁷⁵ CAL. CODE CIV. PROC. § 1991; see text at note 53 and following note 59 *supra*.

⁷⁶ The most recent cases involving attempts to prevent unwarranted discovery by means of a subpoena *duces tecum* indicate that the proper procedure for the injured party is to refuse to comply, present the defense in contempt proceedings and, if found guilty, apply for certiorari or habeas corpus. See Comment, 41 CALIF. L. REV. 124, 132-133 (1953) and cases cited. It may be that in light of *Holm v. Superior Court*, 42 Cal.2d 500, 267 P.2d 1025 (1954), the writ of prohibition will be the proper remedy. See note 71 *supra*.

⁷⁷ 150 Cal. 535, 89 Pac. 348 (1907).

⁷⁸ See note 73 *supra*.

physicians of the adverse party. There appears to be no California case invoking sanctions for failure to comply. The party presumably could be punished for contempt under Code of Civil Procedure Section 1209(5)⁷⁹ as California has no provision such as Rule 37(b)(2)(iv) exempting a party from arrest for failure to submit to the physical examination.

Under the *Union Trust Co.*⁸⁰ decision, a court would seem to have authority to stay proceedings until compliance with the order.

The Uniform Act on Blood Tests to Determine Paternity, Sections 1980.1 to 1980.7, California Code of Civil Procedure, provides for specific sanctions. If a party refuses to submit to such tests, the court may resolve the question of paternity against such party or enforce its order if the rights of others are involved.⁸¹ This would seem to indicate that the full array of contempt sanctions could be brought to bear on the refusing party, most effective of which might be imprisonment until compliance with the order. There is no case on this point as yet.

PROPOSALS FOR MODERNIZING THE CALIFORNIA PROCEDURE

Compared with the comprehensive Federal Rules of Civil Procedure, California's discovery procedure is deficient in a great many respects.

In a proper case under Rule 37 a federal court may:

- (a) award reasonable costs and attorney's fees;
- (b) deal with disobedience of an order as contempt;
- (c) make such orders as are just;
- (d) indulge conclusive presumptions against the refusing party;
- (e) limit the admissibility of evidence;
- (f) make orders relating to the proceedings themselves (including striking pleadings, staying proceedings, dismissing the action or rendering judgment by default).

In California, sanctions for failure to make discovery are chiefly limited to:

- (a) contempt procedures;
- (b) the possibility of a stay of proceedings.

However, under Section 1000 of the Code of Civil Procedure, the court in some cases is authorized to indulge presumptions or exclude documents from evidence. These sanctions fall far short of those provided in Rule 37, Federal Rules of Civil Procedure.

To overcome some of these deficiencies, it has been recommended⁸² to

⁷⁹ See note 74 *supra*.

⁸⁰ See text at note 70 *supra*.

⁸¹ CAL. CODE CIV. PROC. § 1980.3: "In a civil action, in which paternity is a relevant fact, the court, upon its own initiative or upon suggestion made by or on behalf of any person whose blood is involved may, or upon motion of any party to the action made at a time so as not to delay the proceedings unduly, shall order the mother, child and alleged father to submit to blood tests. If any party refuses to submit to such tests, the court may resolve the question of paternity against such party or enforce its order if the rights of others and the interests of justice so require."

⁸² REPORT OF CONFERENCE COMMITTEE ON FEDERAL RULES, CONFERENCE OF STATE BAR DELEGATES (August 5, 1954).

the Board of Governors of the State Bar of California that the state bar adopt as one of its legislative program objectives the enactment of certain new sections, to be added to the Code of Civil Procedure.⁸³ Included in the proposed statutes are sections which will be substantially equivalent to Rule 33 (interrogatories to parties), Rule 34 (production of documents and inspection), Rule 35 (physical and mental examination) and Rule 36 (admission of facts and genuineness of documents). However, there was no recommendation for adoption of either Rule 30 or Rule 31 because it was concluded "that our California deposition procedure is adequate and that adoption by this state of the federal rules covering depositions is therefore unnecessary."⁸⁴

Since "[w]ithout adequate means of enforcement, the procedure of discovery would be ineffectual,"⁸⁵ it was further recommended that another code section patterned after Rule 37 be adopted. This proposed section differs from the federal rule in a number of respects. It is referred to as California Code of Civil Procedure Section.....⁸⁶

Under the proposed enactment, Section.....(a)(1) is essentially the same as Rule 37(a).⁸⁷ However, Section(a)(2), which has no counterpart in the federal rules, incorporates in essence the provisions of Section 1991, Code of Civil Procedure.⁸⁸ That is, if a party or other witness disobeys a subpoena, or refuses to sign an affidavit or deposition when required, or refuses to be sworn, the party seeking discovery may ask the court for an order directing the witness to comply. After a hearing the court may then order the witness to perform the omitted act.

Sections.....(b)(1) and.....(b)(2) provide for contempt and other consequences for refusal to obey the order of the court. These provisions are substantially the same as Rule 37(b)(1) and Rule 37(b)(2), Federal Rules of Civil Procedure.

The inclusion of Section.....(a)(2) marks a significant improvement⁸⁹ over the existing federal rules:

1. Under the federal rules, disobedience of a subpoena *duces tecum* is punishable only by contempt. Under the proposed California section, the full array of sanctions provided for by Rule 37(b)(2) may be invoked for disobedience of a subpoena or subpoena *duces tecum* if the proper formalities are met. It is to be noted that this clearly authorizes that which Professor Moore believed should be the case with reference to the subpoena *duces tecum* in federal practice,⁹⁰ where now the only sanction for failure to obey the subpoena is contempt.

⁸³ Text of the proposed statute is set forth in full in Appendix II.

⁸⁴ REPORT OF CONFERENCE COMMITTEE ON FEDERAL RULES, CONFERENCE OF STATE BAR DELEGATES 6 (August 5, 1954).

⁸⁵ *Id.* at 11.

⁸⁶ See Appendix II.

⁸⁷ See text at note 6 *supra*.

⁸⁸ See text following note 52 *supra*.

⁸⁹ The improvement is largely counteracted in that no change has been recommended for California's limited deposition procedure.

⁹⁰ See text at note 50 *supra*.

2. The sanctions for refusal to be sworn are clearly broader than similar sanctions under Rule 37(b)(2), which on its face authorizes only contempt for this recalcitrance. Under the proposed California statute, all the sanctions of Rule 37(b)(2) would apply as well. There seems to be no provision under the federal rules for refusal to sign, while under Section.....(a)(2), refusal to obey an order to sign subjects the party to Sections.....(b)(1) and(b)(2).

Another difference from the federal rules is found in the proposed California statute. Under Rule 37(b)(2) and Rule 37(d), sanctions are limited to parties or officers or managing agents of parties.⁹¹ Proposed Section(b)(2) includes not only parties or officers of corporations who are parties, but members, agents and employees of corporations who are parties, as well as agents or employees of municipal corporations or bodies politic which are parties to the action, and agents or employees of an individual who is a party to the action, and a person for whose immediate benefit the action or proceeding is prosecuted or defended.

The committee drafting the proposed statute stated: "(language revised to conform with subdivision (1) of Section 2021 C.C.P.)."⁹² This statement is not quite accurate. The proposed section has the additional category of "body politic," which is not found in Section 2021 of the Code of Civil Procedure.⁹³

The proposed Section.....(d) has an alternative method to that of Section.....(a)(2) for dealing with parties who willfully fail to attend deposition taking or fail to serve answers to interrogatories. Under the procedure outlined in Section.....(a)(2), the party seeking discovery must, after service of subpoena, obtain a supplementary order directing obedience before the sanctions of Sections.....(b)(1) and.....(b)(2) come into operation.

However, Section.....(d) is similar to Rule 37(d) in that on its face no supplementary order is necessary before the provisions of this section apply. The court is authorized to strike pleadings, dismiss the action, or enter a default judgment against the disobedient party.

Proposed Section.....(c) is in substance identical to Rule 37(c), providing for recovery of expenses incurred in proving the genuineness of a fact or document whose genuineness had been denied.⁹⁴

California has no procedural counterpart to Rule 28(b)⁹⁵ providing for

⁹¹ See text at notes 12 and 38 *supra*.

⁹² REPORT OF CONFERENCE COMMITTEE ON FEDERAL RULES, CONFERENCE OF STATE BAR DELEGATES 9 (August 5, 1954).

⁹³ CAL. CODE CIV. PROC. § 2021(1): "When the witness is a party to the action or proceeding or an officer, member, agent or employee of a corporation, or the agent or employee of a municipal corporation, which corporation or municipal corporation is a party to the action or proceeding, or an agent or employee of an individual who is a party to the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended"

⁹⁴ See text at note 5 *supra*.

⁹⁵ See note 38 *supra*. CAL. CODE CIV. PROC. § 2024 provides for the taking of depositions of persons outside the state or in a foreign country.

letters rogatory and hence has no need for a section similar to Rule 37(e).

Rule 37(f),⁹⁶ exempting the United States from expenses, has not been recommended for adoption so as to exempt the State of California from expenses; hence it would appear that under Sections 1028 and 1029, Code of Civil Procedure, expenses may be recovered from the state in a proper case.

It is believed that the proposed statute should include a provision similar to Rule 55(e), Federal Rules of Civil Procedure, such as the following:

Cal. Code Civ. Proc. §.....(e). No judgment by default shall be entered against the State of California or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

It is to be hoped that the legislature will give careful consideration to all the proposed discovery sections. "Discovery as afforded under the Federal Rules, and as exemplified by the proposed . . . Sections recommended in this report for adoption by California, represents one of the most important advances in modern procedure."⁹⁷

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⁹⁶ See text following note 8 *supra*.

⁹⁷ REPORT OF CONFERENCE COMMITTEE ON FEDERAL RULES, CONFERENCE OF STATE BAR DELEGATES 11 (August 5, 1954).

* Member, Second-Year Class.

APPENDIX I

Rule 37. Refusal to Make Discovery: Consequences.

(a) **REFUSAL TO ANSWER.** If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in the district where the deposition is taken for an order compelling an answer. Upon the refusal of a deponent to answer any interrogatory submitted under Rule 31 or upon the refusal of a party to answer any interrogatory submitted under Rule 33, the proponent of the question may on like notice make like application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

(b) **FAILURE TO COMPLY WITH ORDER.**

(1) **Contempt.** If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court.

(2) **Other Consequences.** If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

(c) **EXPENSES ON REFUSAL TO ADMIT.** If a party, after being served with a request under Rule 36 to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made.

(d) **FAILURE OF PARTY TO ATTEND OR SERVE ANSWERS.** If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any party thereof, or enter a judgment by default against that party.

(e) **FAILURE TO RESPOND TO LETTERS ROGATORY.** A subpoena may be issued as provided in Title 28, USC, § 1783, under the circumstances and conditions therein stated.

(f) EXPENSES AGAINST UNITED STATES. Expenses and attorney's fees are not to be imposed upon the United States under this rule.

[In order to make Rule 37 conform to a recommended change in Rule 35(a), providing for blood tests to determine blood relationship when such is in issue, Rule 37(b)(2) would be changed to make it clear that failure to comply with an order for a blood test, by either a party or his agent, or a person under his legal control or custody, allows the court to invoke all the sanctions of Rule 37(b)(2)(i), (ii) and (iii). ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE (May 1954).]

APPENDIX II

Cal. Code Civ. Proc. §. . . . Refusal to Make Discovery: Consequences.

(a) REFUSAL AND DISOBEDIENCE. (1) If a party or other deponent refuses to answer any question propounded upon examination, *during the taking of a deposition*, the deposition shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the *Superior Court of the County in which the deposition is taken* for an order compelling an answer. *Upon the refusal of a party to answer any interrogatory submitted under Section.....of this Code* [Rule 33 equivalent], the proponent of the question may on like notice make like application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or deponent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

(2) *If a party or other witness disobeys a subpoena, or refuses to subscribe to an affidavit or deposition when required, or refuses to be sworn, then the party adversely affected by such disobedience or refusal may, after reasonable notice to all persons affected thereby, make application to the court issuing the subpoena for an order directing the witness to respond to the subpoena, or to be sworn, or to subscribe to the deposition or affidavit. At the time specified in the notice the court shall hear the matter and may, without further notice, order the witness to perform the omitted act, and may in such order specify the time and place at which compliance shall be made or to which the taking of the deposition is continued.*

(b) FAILURE TO COMPLY WITH ORDER. (1) *Contempt. Thereafter, if the witness refuses to comply with any such order, he may be punished for contempt.*

(2) *Other consequences.* If any party or an officer, member, agent or employee of a corporation, or the agent or employee of a municipal corporation or body politic, which corporation or municipal corporation or body politic is a party to the action or proceeding, or an agent or employee of an individual who is a party to the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended [language revised to conform with subdiv. (1) of Section 2021 C.C.P.] refuses to obey an order under subdivision (a) of this section requiring him to answer designated questions, or an order made under *Section.....C.C.P.* [new C.C.P. equivalent of Rule 34] to produce any document or other thing for inspection, copying, or photographing, or to permit it to be done, or to permit entry upon land or other property, or an order made under *Section.....C.C.P.* [new C.C.P. equivalent of Rule 35] requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the

arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

(c) **EXPENSES ON REFUSAL TO ADMIT.** If a party, after being served with a request under *Section.....C.C.P.* [C.C.P. equivalent of Rule 36] to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made.

(d) **FAILURE OF PARTY TO ATTEND OR SERVE ANSWERS.** If a party *or other person mentioned under subdivision (b)(2) of this Section* wilfully fails to appear before the officer who is to take his deposition, after being served with the proper *subpoena*, or fails to serve answers to interrogatories submitted under *Section.....C.C.P.* [C.C.P. equivalent of Rule 33], after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of *such* party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

[Italicized portions represent changes or additions to Rule 37, Federal Rules of Civil Procedure.]