PROPOSED CHANGES TO RULE 33 INTERROGATORIES AND RULE 37 SANCTIONS

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Interrogatories under Rule 33 of the *Federal Rules of Civil Procedure* are the least expensive and most convenient of the discovery devices.[1] And rule 37, providing various sanctions for refusal to make discovery, has generally proven a workable device for imposing equitably appropriate penalties on those who would hinder the discovery process. There are, however, continuing problems with both rules, particularly in the manner in which rule 37 interacts with rule 33. In response, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has proposed some changes intended to eliminate these problems in its 1969 draft of proposed amendments to the discovery rules.[2]

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[1] 2A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 774, at 369 (Wright ed. 1961); Note, *Proposed 1967 Amendments to the Federal Discovery Rules*, 68 COLUM. L. REV. 271, 287 (1968); *see* 71 HARV. L. REV. 734, 736 (1958).

[2] *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, FINAL DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS RELATING TO DEPOSITION AND DISCOVERY (1969) [hereinafter cited as 1969 FINAL DRAFT]. The pertinent parts of rules 33(a) and (b) and 37(a), (b), and (d) applicable to interrogatories are set out with the proposed amendments in italics and the language to be deleted crossed out. Note that rule 37(a) has been entirely rewritten and that the original version is not set out below.

Rule 33. Interrogatories to Parties.

(a) Availability; Procedures for Use. Any party may serve upon any adverse *other* party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association *or governmental agency*, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, *without leave of court*, be served *upon the plaintiff* after commencement of the action *and upon any other party with or after service of the summons and complaint upon that party.* ~~and without leave of court, except that, if service is made by the plaintiff within 10 days after such commencement, leave of court granted with or without notice must first be obtained. The interrogatories~~

Each interrogatory shall be answered separately and fully in writing under oath., *unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer.* The answers ~~shall~~ *are to* be signed by the person making them;, and *the objections signed by the attorney making them.* ~~the~~ *The* party upon whom the interrogatories have been served shall serve a copy of the answers, *and objections if any,* ~~on the party submitting the interrogatories within 15 days after the service of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time.~~ *within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time.* ~~Within 10 days after~~

These changes, along with other proposed changes in federal dis-

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service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined. *The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.*

(b) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the same extent *permitted by the rules of evidence.* as provided in Rule 26(d) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but the court, on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of Rule 30(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

. . . .

Rule 37. Refusal *Failure* to Make Discovery: Consequences *Sanctions*

(a) Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) Appropriate Court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. . . .

(2) Motion. If . . . a party fails to answer an interrogatory submitted under Rule 33 . . . the discovering party may move for an order compelling an answer

. . . .

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) Evasive or Incomplete Answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) Award of Expenses of Motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply With Order.

. . . .

(2) Other Consequences *Sanctions by Court in Which Action is Pending.* If any *a* party . . . refuses *fails* to obey an order *to provide or permit discovery, including an order* made under subdivision (a) of this rule requiring him to answer designated questions . . . the court *in which the action is pending* may make such orders in regard to the refusal *failure* as are just, and among others the following:

(i) *(A)* 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, *order was made* or any other designated

covery procedure, are now under consideration by the Arizona State Bar Committee on Rules of Civil Practice and Procedure. Since almost all prior federal amendments have been promptly adopted in Arizona,[3] this article will examine the problems under the current rules 33 and 37 and point out how the proposed amendments would resolve them.

THE RULE 33 AMENDMENT

Despite the general usefulness of the rule 33 interrogatory, it is the source of more objections and motions than any other discovery device.[4]

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

(iii) *(C)* 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) *(D)* 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~~ *treating as a contempt of court the failure to obey* any ~~of such~~ orders except an order to submit to a physical or mental examination.*;*

(E) . . . .

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

. . . .

(d) Failure of Party To Attend *At Own Deposition* or Serve Answers *to Interrogatories or Respond to Request for Inspection.* If a party . . . ~~wilfully~~ fails . . . *(2)* to serve answers *or objections* to interrogatories submitted under Rule 33, after proper service of ~~such~~ *the* interrogatories . . . the court *in which the action is pending* 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 part thereof, or enter a judgment by default against that party~~, *make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.*

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

[3] *See* Frank, *Arizona and the Federal Rules*, 41 F.R.D. 79 (1967).

The procedure for adoption in the federal system is set forth in 28 U.S.C. §§ 2071, 2072 (1964). Section 2072 provides in part:

> Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

[4] *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS RELATING TO DEPOSITION AND DISCOVERY 61-62 (1967) [hereinafter cited as 1967 PRELIMINARY DRAFT] [also printed in 43 F.R.D. 211 (1968)]:

> The Columbia Survey [unpublished field survey of federal pretrial discovery on file with the *Columbia Law Review*] shows that, although half of the litigants resorted to deposition and about one-third used interroga-

One reason for this lies in the time allowed for serving answers to interrogatories, 15 days, and objections, 10 days. When a party is served with interrogatories, he is presented the task of studying the questions and preparing appropriate answers in a time period which is often too short. Even more restrictive is the time allowed to uncover defects to which objections should be made, and since failure to serve objections within 10 days is a waiver of the right to object,[5] the party cannot subsequently object if he discovers the defect at a later time. Given the heavy workload of most attorneys, these alloted periods simply do not leave sufficient time to do an effective job preparing either answers or objections.

The second reason for the excessive number of objections and motions arises from the objection procedure provided in rule 33. Presently, when serving objections to interrogatories, a party must also serve a notice of hearing on the objections. This results in automatic court intervention and the duty to answer the interrogatories is deferred until the court passes on the objections.[6] Thus a party without time to prepare answers may merely draw up objections and is not obligated to answer until the court rules on them. One unfortunate result of this procedure, aside from the delay and expense to the parties, is that the court's time is taken up doing what the parties themselves could and should accomplish through out-of-court consultation and accommodation.

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, in its 1967 preliminary draft of proposed amendments to the discovery rules,[7] has attempted to eliminate the source of objections by amending rule 33 to allow 30 days from the serving of the interrogatories for answers *and* objections. The 1969 draft proposes a further extension of time by adding, "except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant." Presumably this doubling or tripling of time in which to prepare answers will eliminate the need to use objections as a delaying tactic.[8]

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tories, about 65 percent of the objections were made with respect to interrogatories and 26 percent related to depositions. See also Speck, *The Use of Discovery in United States District Courts*, 60 Yale L.J. 1132, 1144, 1151 (1951); Note, 36 Minn. L. Rev. 364, 379 (1952).

[5] Cephas v. Busch, 47 F.R.D. 371 (E.D. Pa. 1969).

[6] 1967 PRELIMINARY DRAFT, *supra* note 4, at 62; Speck, *The Use of Discovery in United States District Courts*, 60 YALE L.J. 1132, 1144 (1951). Rule 33 also allows a party to gain an extension of time in which to answer by applying to the court and showing good cause. However, this method has not generally been used.

[7] *See* note 4 *supra.*

[8] It might also be noted here that another proposed amendment to rule 33 would correct the mistake of seemingly permitting service of interrogatories on the defendant before he has been served with a summons and complaint so as to become subject to the jurisdiction of the court under rule 4. The second sentence of the present rule 33 is:

> Interrogatories may be served after *commencement of the action* and without leave of court, except that, if service is made by the plaintiff within 10 days *after such commencement*, leave of court granted with or without notice must first be obtained. (emphasis added).

However, to insure against a recurrence of this practice, the Committee also would remove from the objecting party the right to initiate court intervention with its resultant delay. Under the proposed objection procedure, rather than the objector serving a notice of hearing with its automatic court intervention, the interrogator would have a choice whether to involve the court in the dispute. This is done by allowing the interrogator, when presented with objections, to move under rule 37(a) for an order compelling answers and in the course of the hearing on this motion the court would pass on the objections.[9] However, the interrogator would not invite court intervention as a matter of course since rule 37(a) imposes monetary sanctions on those who invoke that rule without substantial justification.[10] And the party interrogated would also be deterred from making frivolous objections since the same sanctions could be applied to him for doing so. The salutary side effect of these amendments would be to encourage parties to seek out-of-court resolution of their differences, if any, and free the courts for more important matters.[11]

Since rule 3 provides that the action is commenced by filing the complaint, the present wording of rule 33 would allow service of interrogatories before service of the summons and complaint. The proposed amendment corrects this problem by expressly providing that

> [i]nterrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and *upon any other party with or after service of the summons and complaint upon that party.* (emphasis added).

In spite of the present language in rule 33, Hilton v. W.T. Grant Co., 212 F. Supp. 126, 130 (W.D. Pa. 1962), held that a nonresident corporation, which moved to dismiss the complaint on the ground that the claim did not arise out of an act of defendant in Pennsylvania, where defendant was purportedly served by service on the Secretary of the Commonwealth, was relieved of answering interrogatories pending disposition of the motion to dismiss. Apparently the interrogatories went to the merits and not to the jurisdictional fact. The court said "the burdens incident to the status of a defendant ought not to be augmented until it is certain that the party involved really is properly a defendant." *Id. Cf.* Urquhart v. American-La France Foamite Corp., 144 F.2d 542, 544 (D.C. Cir.), *cert. denied*, 323 U.S. 783 (1944), which reversed the lower court for its failure to permit plaintiffs to take depositions to disprove defendant's affidavits attacking jurisdiction. Interrogatories under rule 33 may be used for that purpose. 4 J. MOORE, FEDERAL PRACTICE ¶ 33.16, at 2341 (2d ed. 1966). Arizona solved the problem by substituting "within ten days after *service of process* upon the party served with the interrogatories." ARIZ. R. CIV. P. 33 (emphasis added).

[9] The last sentence of the proposed amendment to rule 33(a) would read: "The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory."

[10] *See* discussion of rule 37(a) and its proposed amendments at notes 13 and 14 *infra*, and accompanying text.

[11] Furthermore, the court by local rule may impose a requirement of consultation before a court hearing is allowed. *See* 1967 PRELIMINARY DRAFT, *supra* note 4, at 64: "The proposed changes are similar in approach to those adopted by California in 1961. See Calif.Code Civ.Proc. § 2030(a). The experience of the Los Angeles Superior Court is informally reported as showing that the California amendment resulted in a significant reduction in court motions concerning interrogatories."

Allowing court intervention to be sought through rule 37(a) also would remove the inequity resulting from the failure of rule 37 to provide immediate consequences for a failure to answer after the court has overruled objections to interrogatories without expressly directing that they be answered. Presumably, after the court overrules the objections, the party still has 15 days in which to answer. If, at the end of this period he still has not answered, then the interrogator in order to exert the

INTERROGATORIES AND RULE 37 AMENDMENTS

Rule 37(a)

Rule 37(a) provides a method of compelling a party, by means of court order, to answer interrogatories when he has refused to do so. If the court finds the refusal was without substantial justification it must award expenses, including attorney's fees, to the moving party. Conversely, if the movant sought the court's aid without such justification, the court must penalize him.

It has been found, however, that only in a few cases has a court applied the sanctions of 37(a).[12] Thus, the Committee has strengthened this provision by stating that the award of expenses shall be made "*unless* the court finds that . . . [the defeated party] was substantially justified or that other circumstances make an award of expenses unjust."[13] The effect of this amendment will be that expenses usually will be awarded absent an affirmative finding that the losing party acted justifiably in raising the point in court.[14] It should be noted here that like provisions will be added to 37(b) and (d) under the proposed amendments, although courts have sometimes ordered payment of expenses under those subdivisions even without express authorization.[15]

Another amendment to 37(a) is designed to correct the failure of the present rule expressly to cover the situation where there is an evasive or incomplete answer to an interrogatory.[16] The 1969 draft would pro-

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pressure of threatened sanctions must first move under 37(a) for an order compelling answers. (Unless, of course, he can show the party "wilfully" failed to answer and invoke 37(d) which does not require an antecedent order.) The interrogated party then has the option of complying with the order and avoiding 37(b) sanctions and in the process has gained a substantial amount of delay. *See* Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480, 492-93 (1958).

Under the proposed rule 33 procedure this situation would not arise because when a party moves under 37(a) in response to the objections, the rule requires the court to issue an order compelling an answer if the motion is meritorious. Thus 37(b) sanctions would immediately come into play if the order is not complied with.

[12] 1967 PRELIMINARY DRAFT, *supra* note 4, at 93:

> Only a handful of reported cases include an award of expenses, and the Columbia Survey found that in only one instance out of about 50 motions decided under Rule 37(a) did the court award expenses. It appears that the courts do not utilize the most important available sanction to deter abusive resort to the judiciary.

[13] *Id.* at 86 (emphasis added).

[14] *Id.* at 93:

> The proposed change provides in effect that expenses should ordinarily be awarded unless the court finds that the losing party acted justifiably in carrying his point to court. At the same time, a necessary flexibility is maintained, since the court retains the power to find that other circumstances make an award of expenses unjust—as where the prevailing party also acted unjustifiably. The amendment does not significantly narrow the discretion of the court, but rather presses the court to address itself to abusive practices.

[15] *Id.* at 94; 4 J. MOORE, FEDERAL PRACTICE ¶ 37.03 [3-1], at 2844, ¶ 37.04, at 2871 n.7 (2d ed. 1968).

[16] *See* Southard v. Pennsylvania R.R., 24 F.R.D. 456, 457 & n.3 (E.D. Pa. 1959) (dictum). *Cf.* Cozier v. American Airlines, Inc., 25 F.R.D. 268, 269 (S.D.N.Y.

vide: "For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer." Since existing case law holds that courts have the power to compel adequate answers,[17] this change merely recognizes the power and incorporates it into the rule.

Rule 37(b)

Subdivision (b) of rule 37 encompasses a wide array of sanctions which a court may impose if it determines that a party has failed to comply with an order to answer issued under 37(a). Like 37(a), which is applicable only if a party has "refused" to answer, 37(b) is available only where the party has "refused" to obey.

The use of refuse in these subdivisions caused trouble for some courts who interpreted it as requiring some degree of wilfulness.[18] However, in discussing the meaning of refusal in the context of 37(b) the United States Supreme Court said:

> Petitioner has urged that the word 'refuses' implies willfulness and that it simply *failed* and did not *refuse* to obey since it was not in willful disobedience. But this argument turns on too fine a literalism . . . . For purposes of subdivision (b)(2) of Rule 37, we think that a party 'refuses to obey' simply by failing to comply with an order.[19]

The Committee would substitute "fails" and "failure" for "refuses" and "refusal" throughout rule 37. In view of the Supreme Court's pronouncement on the subject, the effect of the change on 37(a) and (b) would be to bring their wording into conformity with the Court's interpretation and at the same time remove any lingering doubt as to when the rule could be used.

Rule 37(d)

This subdivision is specifically intended to apply to parties who "wilfully fail" to serve answers to interrogatories. As presently written it provides an exclusive list of rather severe sanctions including striking all or part of a pleading, a default judgment, and dismissal. Since rule 41(b), concerning involuntary dismissals, provides that

> [u]nless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule . . . operates as an adjudication upon the merits,

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1960) (purported answers to the effect that whether acts of owner and manufacturer of airplane, weather conditions, or acts of God caused the accident were questions of fact for court and jury were held to be not answers but refusals to answer and since there was no objection to the questions the party would be required to disclose its knowledge regardless of the source).

17 Cozier v. American Airlines, Inc., 25 F.R.D. 268 (S.D.N.Y. 1960); 1967 PRELIMINARY DRAFT, *supra* note 4, at 92.

18 4 J. MOORE, FEDERAL PRACTICE ¶ 37.03 [1], at 2837-38 (2d ed. 1968).

19 Societe Internationale v. Rogers, 357 U.S. 197, 207-08 (1958).

a dismissal under 37(d), unless otherwise specified, imposes a severe result upon one who fails wilfully to answer an interrogatory.[20]

As a method of inducing discovery from a recalcitrant party the rule's advantage to the interrogator is that he does not have to give that party additional time by first seeking a court order through 37(a),[21] as would be necessary prior to threatening 37(b) sanctions.[22] The disadvantage, however, is that the interrogator must prove the element of wilfulness which, although not necessarily requiring a showing of a wrongful intention, does import "[a] conscious or intentional failure to act, as distinguished from an accidental or involuntary non-compliance . . . ."[23] This contrasts with the mere noncompliance type of "refusal" required to invoke 37(a).

Another disadvantage of the current rule 37(d) is that because of the harshness of the penalties, "the courts have interpreted it as permitting softer sanctions than those which it sets forth,"[24] thus reducing its coercive value to the interrogator after he has gone to the effort to prove wilfulness. There are cases in which dismissal has been refused and additional time has been granted, often with assessment of expenses, where there was some justifiable reason for the failure to comply with rule 33.[25] Default judgments, also allowed by rule 37(b), have been denied for the same reason.[26]

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[20] Stebbins v. State Farm Mut. Auto. Ins. Co., 413 F.2d 1100, 1102 (D.C. Cir. 1969); Nasser v. Isthmian Lines, 331 F.2d 124, 127, 129 (2d Cir. 1964) (such effect cannot be avoided on ground it was caused by dereliction of counsel); Hubbard v. Baltimore & O.R.R., 249 F.2d 885 (6th Cir. 1957); 4 J. MOORE, FEDERAL PRACTICE ¶ 37.03 [3-4], at 2856 (2d ed. 1968).

[21] Robinson v. Transamerica Ins. Co., 368 F.2d 37, 39 (10th Cir. 1966) (dictum); Hendricks v. Alcoa S.S. Co., 32 F.R.D. 169 (E.D. Pa. 1962); 2A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 851, at 526 (Wright ed. 1961); 4 J. MOORE, FEDERAL PRACTICE ¶ 37.02 [2], at 2818 (2d ed. 1968).

[22] *See* Wembley, Inc. v. Diplomat Tie Co., 216 F. Supp. 565, 573 (D. Md. 1963):

> There are four grounds for denying defendant's motion to strike. The first is that Rule 37(b)(2)(ii) comes into operation only when a party has refused to obey *an order of the court* compelling an answer to the interrogatories. Maurer-Neuer, Inc. v. United Packinghouse Workers of America, D.C.D. Kan. 1960, 26 F.R.D. 139, 140; Southard v. Pennsylvania Railroad Company, D.C.E.D. Pa. 1959, 24 F.R.D. 456, 457; 2A. Barron & Holtzoff, Federal Practice and Procedure, § 851, page 526.

[23] United States *ex rel.* Weston & Brooker Co. v. Continental Cas. Co., 303 F.2d 91, 93 (4th Cir. 1962); *accord*, Brookdale Mill, Inc. v. Rowley, 218 F.2d 728, 729 (6th Cir. 1954).

[24] 1967 PRELIMINARY DRAFT, *supra* note 4, at 96, *citing* Gill v. Stolow, 240 F.2d 669 (2d Cir. 1957); Saltzman v. Birrell, 156 F. Supp. 538 (S.D.N.Y. 1957); 2A W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 855, at 554-57 (Wright ed. 1961).

[25] Robinson v. Transamerica Ins. Co., 368 F.2d 37 (10th Cir. 1966); United States v. One 1964 Cadillac Coupe DeVille, 41 F.R.D. 352 (S.D.N.Y. 1966); Maurer-Neuer, Inc. v. United Packinghouse Workers of America, 26 F.R.D. 139 (D. Kan. 1960) (plaintiff preoccupied with another aspect of the case); Dunn v. Pennsylvania R.R., 96 F. Supp. 597 (N.D. Ohio 1951) (case removed to federal court and plaintiff's failure to answer interrogatories was possibly caused by lack of knowledge of federal rules; no dismissal but plaintiff ordered to answer within 10 days); and cases cited in 4 J. MOORE, FEDERAL PRACTICE ¶ 37.04, at 2877 n.21 (2d ed. 1968).

[26] United States v. An Article Labeled "Firmatron by Norruth," 324 F.2d 497 (2d Cir. 1963); Lodge 743, Int'l Ass'n of Machinists v. United Aircraft Corp.,

In order to remove these obstacles to effective utilization, the Committee proposes to amend 37(d) in two respects. The first would eliminate the requirement that the failure to serve an answer be wilful and would lessen the burden of proof on the interrogator when he seeks to invoke the rule's sanctions. This, of course, raises a question concerning the severity of the sanctions in view of the somewhat less culpable conduct which would be penalized. Recognizing this problem the Committee, secondly, would supplement the present sanctions with one allowing "such orders in regard to the failure as are just, and among others it [the court] may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule." The end result is to permit a court to impose any of the wide range of sanctions now available under rule 37(b); however, lest the extreme recalcitrants take hope, wilfulness would continue to be a factor in determining the severity of the sanction to be applied.[27]

CONSIDERATIONS IN APPLYING RULE 37 SANCTIONS

Once it is determined that a particular situation is an appropriate one in which to impose sanctions, it then becomes necessary for the court to decide on a specific penalty. In this regard it will be helpful to review the factors involved in such a decision, particularly as they apply to interrogatories.

In a series of cases beginning in 1897, the United States Supreme Court has attempted to delineate the permissible applications of sanctions. In *Hovey v. Elliott*,[28] the Court held that it is a denial of due process to strike a party's answer and enter a default judgment against him merely to punish him for contempt, and not as a means of compelling the production of evidence. Subsequently, however, in *Hammond Packing Co. v. Arkansas*,[29] the Court upheld the power of a state court to strike an answer and enter a default judgment against a party for his failure to secure attendance of witnesses and to produce documents. *Hovey* was distinguished thusly: in *Hovey* the dismissal was ordered merely as punishment but in *Hammond Packing* "the preservation of due process was

220 F. Supp. 19, 21 (D. Conn. 1963), *aff'd*, 337 F.2d 5 (2d Cir. 1964), *cert. denied*, 380 U.S. 908 (1965) (order did not detail extent of analysis required of employer in answering interrogatories, and production of 120,000 copies of personnnel records perhaps consumed the time allowed); Stom v. Pennsylvania R.R., 15 F.R.D. 284 (E.D. Pa. 1953) (defendant erroneously contended it was under no duty to furnish a particular witness' version of an event where the witness' version conflicted with other information known by defendant); and cases cited in 4 J. MOORE, FEDERAL PRACTICE ¶ 37.04, at 2877-78 n.21 (2d ed. 1968).

27 4 J. MOORE, FEDERAL PRACTICE ¶ 37.04, at 2870 (2d ed. 1968); 1967 PRELIMINARY DRAFT, *supra* note 4, at 96:

> 'Wilfullness' continues to play a role, along with various other factors, in the choice of sanctions. Thus, the scheme conforms to Rule 37(b) as construed by the Supreme Court in *Societe Internationale etc., v. Rogers*, 357 U.S. 197, 208 . . . (1958).

28 167 U.S. 409, 444 (1897).

29 212 U.S. 322, 353-54 (1909).

secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense."[30] The Court also noted that any reasonable showing of inability to comply with the order to produce the evidence in the latter case would have satisfied the requirements of the order.[31]

This problem of how far a court should go in applying sanctions was reexamined in *Societe Internationale v. Rogers*,[32] an action by a Swiss corporation against the Alien Property Custodian to recover shares of stock in an American corporation seized during the war on the ground that they were owned by a German company. Plaintiff opposed a motion under rule 34 requiring production of certain records on the ground that Swiss law made such production illegal and subjected those responsible for disclosure to criminal penalties. The trial court ordered production, the records were not produced, and the court granted defendant's motion to dismiss, holding that the records were important to the defense and Swiss law was not sufficient reason for refusal to comply with the order to produce.[33] The court of appeals affirmed.[34] The Supreme Court reversed, however, on grounds that the plaintiff was unable to comply with the order and the defendant had other evidence sufficient for its defense.[35] It has been said of the *Rogers* case:

> [T]he *Rogers* court laid particular emphasis upon the level of contumacy as a determinant of the harshness of the sanction. It stated unequivocally that no willfulness is necessary to bring Rule 37(b) into play. But it added that willfulness is a necessary ingredient in a decision to dismiss the case for failure to produce. The most that can be said about the decision is that Rule 37(b) is designed to empower the court to compel production of evidence by the imposition of reasonable sanctions, but that the court should not go beyond the necessities of the situation to foreclose the merits of controversies as punishment for general misbehavior.[36]

This interpretation of the *Rogers* case appears to be expressed in rule 37 (b)(2), which provides for consequences of varying severity to meet the particular situations, including the catch-all, "the court may make such orders in regard to the refusal as are just." It would seem, then, that the appropriate guideline in applying rule 37 is to fashion sanctions appropriate to the degree of contumacy.[37]

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30 *Id.* at 351.
31 *Id.* at 347.
32 357 U.S. 197 (1958).
33 Societe Internationale v. McGranery, 111 F. Supp. 435 (D.D.C. 1953).
34 Societe Internationale v. Brownell, 243 F.2d 254 (D.C. Cir. 1957).
35 Societe Internationale v. Rogers, 357 U.S. 197, 212 (1958).
36 4 J. MOORE, FEDERAL PRACTICE ¶ 37.03 [1], at 2842 (2d ed. 1968).
37 *See id.* at ¶ 37.03 [3-1] to [3-4], at 2844-59; Robinson v. Transamerica Ins. Co., 368 F.2d 37, 39 (10th Cir. 1966), where the court, reversing an order of dismissal, said:

> It [rule 37] affords a broad choice of remedies and penalties for failure

When a sanction is necessary in regard to interrogatories, a court may exercise its ingenuity in fashioning an appropriate order. Thus, for example, if there is inexcusable failure to answer plaintiff's interrogatories relating to defendant's counterclaim, plaintiff's motion for judgment by default on his complaint will be denied but the counterclaim will be dismissed with prejudice.[38] In a negligence action, if plaintiff's answer to an interrogatory specifies the acts of negligence relied on, plaintiff should not be allowed to prove other grounds of negligence.[39] In a copyright infringement action, the court, because of the unresponsiveness of plaintiff's answer to an interrogatory calling for a list of titles to musical compositions in which it had certain rights, would have excluded plaintiff's proof that it had rights to the titles if it had failed to file an amended and responsive answer to the interrogatory.[40] Frequently, additional time to answer is allowed if there is adequate reason, in order to avoid dismissal or default,[41] and courts have refused to strike pleadings or enter dismissals or defaults under rule 37(d) when answers to interrogatories were incomplete or improperly attempted to raise objections.[42] A party disobeying an order under rule 37(b) by declining to answer interrogatories may be precluded from offering testimony at the trial or from cross-examining witnesses.[43] However, delay in answering after the time allowed is not a refusal to answer in violation of rule 37(b),[44] but delay along with other circumstances, such as inconsistency between the answers to in-

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to comply. . . . The administration of the rules lies necessarily within the province of the trial court with power to fashion such orders as may be deemed proper to vouchsafe full discovery for the just, speedy and inexpensive determination of the lawsuit. . . . But, the sanctions provided in the rule are not absolute; they are couched in terms of 'may', not 'shall'; they contemplate the exercise of judicial discretion which is, of course, always subject to review for abuse. . . .

. . . .

. . . The plaintiff was derelict, but he was contrite. The trial court was obviously impatient, perhaps even injudicious. After all, the purpose of the discovery rules is to produce evidence for the speedy determination of the trial. The office of 37(d) is to secure compliance with the discovery rules, not to punish erring parties. We think the spirit and purpose of the rule would have been best served and the expense of this appeal avoided if appellant had been allowed to answer instanter, as apparently he was prepared to do.

See also Annot., 2 A.L.R. FED. 811, 819-27 (1969).

[38] Harlem Book Co. v. Hurtt, 31 F.R.D. 177 (E.D. Mo.), *appeal dismissed*, 308 F.2d 949 (8th Cir. 1962).

[39] This contention was made in Hall v. Delvat, 95 Ariz. 286, 289, 389 P.2d 692, 695 (1964), but the court decided the case on the basis that the complaint specified the grounds of negligence and held that plaintiff's proof must be confined to the alleged grounds. *Id.* at 290, 389 P.2d at 695.

[40] Life Music, Inc. v. Broadcast Music, Inc., 41 F.R.D. 16, 27 (S.D.N.Y. 1966).

[41] Terry Carpenter, Ltd. v. Ideal Cement Co., 117 F. Supp. 441, 448-49 (D. Neb. 1954); Byers Theaters, Inc. v. Murphy, 1 F.R.D. 286, 290 (W.D. Va. 1940).

[42] Cardox Corp. v. Olin Mathieson Chem. Corp., 23 F.R.D. 27, 29 (S.D. Ill. 1958); Maddox v. Wright, 11 F.R.D. 170-71 (D.D.C. 1951).

[43] Michigan Window Cleaning Co. v. Martino, 173 F.2d 466 (6th Cir. 1949); Fisher v. Underwriters at Lloyd's London, 115 F.2d 641, 646 (7th Cir. 1940) (dictum).

[44] Kearns v. Seven-Up Co., 30 F.R.D. 333, 334 (E.D. Pa. 1962).

terrogatories and the pleadings, may justify sanctions.[45]

SANCTIONS NOT PROVIDED IN RULE 37

Situations arise in which a party answers an interrogatory, but at the trial attempts to give testimony contrary to his answer or produces witnesses other than those named in his answer to the interrogatory. Suppose the interrogatory inquiring about a fact is answered, "I do not know," yet at the trial the answering party attempts to testify about the fact. The most effective sanction is for the trial court to exercise its discretionary power by sustaining an objection to testimony concerning the fact. Thus, in *Schwartz v. Schwerin*,[46] the plaintiff, an attorney suing a former client to recover a fee for legal services, evasively answered an interrogatory inquiring about the amount of time spent. At the trial, the court did not allow him to testify about the amount of time he had spent in rendering the services. The Supreme Court of Arizona approved that ruling:

> The trial court, by its ruling, merely required plaintiff to stand on the answers previously given. It is fundamental that interrogatories are a 'discovery process' and the inquiring party is entitled to be made aware of certain facts known only to the opposing party, so that he may be better able to prepare for trial. At best the ruling attacked raised a matter of discretion with the trial court, and upon this record we perceive no abuse of discretion or error in its ruling.[47]

A like result was reached by the First Circuit in *Stevens v. Consolidated Mutual Insurance Co.*,[48] which held it proper to refuse to permit a witness to give testimony based on blueprints, since the witness, in answer to interrogatories filed less than a week before the trial, had denied the existence of any blueprints, diagrams or drawings of the area where plaintiff fell.

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[45] United States *ex rel.* Weston & Brooker Co. v. Continental Cas. Co., 303 F.2d 91, 92-93 (4th Cir. 1962). The court there said,

> We would have some hesitancy in supporting the judgment below in view of the fact that the interrogatories in question were in fact answered prior to judgment but for the fact that the record offers other support for the court's conclusion that defendant was but delaying the inevitable by its procrastination. The inconsistency between defendant's formal unsworn Answer and the sworn answers to interrogatories admitting its liability for almost half the amount sued for raises a permissible inference that the defendant was not energetically seeking to throw light on the facts at issue. *Id.* at 93.

[46] 85 Ariz. 242, 336 P.2d 144 (1959).

[47] *Id.* at 247, 336 P.2d at 147. If the fact inquired about concerns an external fact, such as whether a third person has any claim to part of the property involved, an answer to the effect that the party does not know or does not remember may be treated as a refusal to answer. Life Music, Inc. v. Broadcast Music, Inc., 41 F.R.D. 16, 24-25 (S.D.N.Y. 1966) (music publishing corporation had knowledge, through its president, that there was an outstanding claim to public performance rights in some of the compositions referred to in defendants' interrogatory, but did not give that information; *held* a wilful refusal to comply with an order to answer an interrogatory).

[48] 352 F.2d 41 (1st Cir. 1965).

It also has been held that plaintiff's cross-examination of defendant's witness based on a prior written statement to plaintiff may be precluded because plaintiff had answered an interrogatory that he had no statements from any person involved in the action.[49] A similar problem arises when an interrogatory asks for the name of witnesses and the answer omits the names of some persons who are later called to testify. Since there has been no refusal to answer, a motion to compel an answer under rule 37(a) cannot be made, even if the questioning party knows the other is concealing witnesses. There are many cases holding it proper in this case not to allow the testimony of the witnesses whose names were omitted,[50] although a continuance at the cost of the transgressing party might be ordered in the case of an important witness.

CONTINUING DUTY TO UPDATE ANSWERS

The present rules leave unanswered the question of whether there is a continuing duty to disclose information discovered after answers to interrogatories have been served. There are four lines of authority: (1) there is such a continuing duty,[51] (2) there is such a duty if the interrogatories contain a demand for disclosure of information later discovered,[52] (3) there is no such continuing duty,[53] and (4) there is no duty to supplement an answer which was complete when made unless otherwise ordered by the court or agreement of the parties except that there is a duty seasonably to supplement an answer to any question requesting the identity and location of persons having knowledge of discoverable matters, or the identity of expert witnesses and the subject matter of their testimony.[54] Courts on motion have required the reexamination of answers to interrogatories and the curing of any deficiencies which have arisen by reason of lapse of time or receipt of additional information.[55]

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[49] Frankel v. Stake, 33 F.R.D. 1, 2 (E.D. Pa. 1963).

[50] Thompson v. Calmar S.S. Corp., 331 F.2d 657, 662 (3d Cir.), *cert. denied*, 379 U.S. 913 (1964); Taggart v. Vermont Transp. Co., 32 F.R.D. 587, 590 (E.D. Pa. 1963), *aff'd*, 325 F.2d 1022 (3d Cir. 1964); Newsum v. Pennsylvania R.R., 97 F. Supp. 500, 502 (S.D.N.Y. 1951) (alternative holding); Carver v. Salt River Valley Water Users' Ass'n, 104 Ariz. 513, 515-16, 456 P.2d 371, 373-74 (1969) (citing federal and state court cases); Annot., 27 A.L.R.2d 737 (1953). *But see* Wray M. Scott Co. v. Daigle, 309 F.2d 105, 110 (8th Cir. 1962); Wroblewski v. Exchange Ins. Ass'n, 273 F.2d 158, 162 (7th Cir. 1959).

[51] Gebhard v. Niedzwiecki, 265 Minn. 471, 476 n.5, 478-79, 122 N.W.2d 110, 114 & n.5, 115 (1963), citing federal cases, held that there is such continuing duty and that the sanction for wilful violation of the duty is to sustain an objection to the evidence. But the court also said, "where there is an honest mistake and the harm can be undone, it may frequently occur that a continuance or some other remedy would be adequate." *Id.* at 479, 122 N.W.2d at 115.

[52] *See* Annot., 88 A.L.R.2d 657, 665-66 (1963).

[53] Gorsha v. Commercial Transp. Corp., 38 F.R.D. 188, 189-90 (E.D. La. 1965) (by implication) (stating that the interrogating party knows which requests are subject to change by lapse of time and that he can serve another set of interrogatories). The problem is discussed in 4 J. MOORE, FEDERAL PRACTICE ¶ 33.25 [4], at 2400 (2d ed. 1966).

[54] Diversified Prods. Corp. v. Sports Center Co., 42 F.R.D. 3, 5 (D. Md. 1967).

[55] Chisholm v. Board of Pub. Educ., 33 F.R.D. 313, 314 (E.D. Pa. 1963).

The continuing duty problem is sometimes solved by local rule.[56] In Arizona the problem is partially solved by the rule requiring each attorney to serve and file with the court "at least five days prior to the date of the pretrial conference, a memorandum containing . . . (5) A statement that all answers or supplemental answers to interrogatories under Rule 33 of the Rules of Civil Procedure reflect facts known to the date of the memorandum."[57]

To resolve this problem at the federal level, the Committee, in its 1969 draft, proposes the following revision of rule 26:

> (e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:
>
> (1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.
>
> (2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.
>
> (3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

CONCLUSION

With a few exceptions, the pre-trial discovery procedure provided in the federal rules has proven an effective device to promote expeditious litigation and early settlement of claims. However, on some occasions the rule 33 interrogatory and, to a lesser extent, the rule 37 sanctioning procedure have become such exceptions. The proposed changes in both of these rules are designed to eliminate the various problems associated with them and, in view of the added value this would give to the interrogatory procedure, it is probable that the amendments will be adopted in the near future.

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[56] *E.g.*, in the Eastern District of Pennsylvania, Local Rule 20(f) provides: "Upon discovery by any party of information which renders that party's prior answers to interrogatories substantially inaccurate, incomplete, or untrue, such party shall file appropriate supplemental answers with reasonable promptness." Taggart v. Vermont Transp. Co., 32 F.R.D. 587, 589 n.2 (E.D. Pa. 1963), *aff'd*, 325 F.2d 1022 (3d Cir. 1964).

[57] ARIZ. SUPER. CT. R. 6(a); 17 ARIZ. REV. STAT. ANN. (Supp. 1969-70). If a stipulation is used instead of a pretrial conference, rule 6(f)(4) requires the stipulation to contain the same statement as rule 6(a)(5).