October 1957

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https://doi.org/10.15779/Z38ZB6Z

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Discovery Today

David W. Louisell*

California's new discovery act repeals various sections of the Code of Civil Procedure pertaining to proceedings to perpetuate testimony, depositions taken within and without the state, and inspection of writings; amends section 1986 dealing with subpoenas; adds new sections substantially adopting, although with a few significant differences, the discovery and perpetuation mechanism of the Federal Rules of Civil Procedure; and substantially reenacts California law on taking depositions outside of the state. I have had several opportunities to discuss the new act with California lawyers. This article is an attempt to record those of my observations made during the discussions which, in the light of the questions asked by practitioners and judges, seem of most concern today.

There may be a tendency to think of the new act as more of an innovation than it actually is. California has long known a deposition practice liberal in its scope of permissible inquiry of both a party witness and other statutorily designated witnesses including one "who is the only one who can establish facts or a fact material to the issue." While in Ahern v. Superior Court the district court of appeal theorized that the deposition of a party was to be distinguished from that of a non-party witness in that the former was essentially discovery whereas depositions of witnesses are "to make certain that their testimony will be available at the trial," this the-

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1 Unless otherwise identified all California statutory references are to the California Code of Civil Procedure and will be referred to simply by the section number. The new act, Senate Bill No. 1093, Cal. Stat. 1957, c. 1904, effective January 1, 1958, effects the repeals and amendments mentioned in the text and adds new Article 3, comprising sections 2016 to 2035, to Chapter 3, Title 3, Part 4 of the Code of Civil Procedure. However, in the Standard California Codes, 1957, old Article 3 on Depositions, effective until January 1, 1958, is reprinted immediately after new Article 3. Old Article 3 contains certain section numbers identical with numbers of new Article 3. Throughout, when there is danger of confusion, the section referred to is identified as "new" or "old."

The author wishes to express his appreciation to three second-year law students in this law school for assistance in checking the status of authorities cited herein: Messrs. J. Wesley Fry, David E. Nelson, and John D. Taylor.

2 Referred to in text throughout as Federal Rules.

3 At Fourth Annual Summer Program for California Lawyers, offered by the Schools of Law of the University of California at Berkeley and Los Angeles, U.C.L.A. August 19-23, 1957; Continuing Education of the Bar, University Extension, University of California at Berkeley, October 25, 1957; Sacramento, November 6, 1957; Santa Clara, November 8, 1957.

4 Old § 2021.


6 Id. at 31, 245 P.2d at 571.
oretical distinction, if sound as such, was largely without significance in practice; once the right to take a non-party witness’ deposition was established, the permissible scope of inquiry seemed indistinguishable from that in the case of a party witness.\(^7\) Certainly old section 2021 on its face indicated no difference between a party and other witness as to scope of inquiry. Thus, with respect to depositions, the principal change effected by the new act is the extension of the availability of the existing liberal scope of inquiry from parties and other limited categories of witnesses to “any person.”\(^8\)

Similarly, since California has long known compellable inspection of writings under section 1000, the new act\(^9\) in adopting the federal measure for inspection\(^10\) is to be regarded as a liberalization of existing California practice rather than a revolutionary innovation. Likewise, the new act’s general acceptance of Federal Rule 35’s provisions for physical and mental examinations\(^11\) is largely confirmatory of existing California case law,\(^12\) whereas the previous statutory basis was nebulous.\(^13\)

Even the new act’s substantial adaptation to federal practice in respect of demands for admission of facts and genuineness of documents\(^14\) lies something of a California foundation in the long-standing provisions of sections 447 and 448\(^15\) for admission of the genuineness and due execution of certain written instruments not denied under oath. Actually, then, only the new act’s acceptance of the substance of Federal Rule 33 on interrogatories to adverse parties is a full-fledged innovation in California

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7 Carnation Co. v. Superior Court, 96 Cal. App. 2d 138, 140, 214 P.2d 552, 553 (1950); Comment, 44 CALIF. L. REV. 909, 913 (1956); cf. I.E.S. Corp. v. Superior Court, 44 Cal. 2d 559, 283 P.2d 700 (1955) (deposition of party); McClatchy Newspapers v. Superior Court, 26 Cal. 2d 386, 394, 159 P.2d 944, 949 (1945) (deposition of party); S.F. Gas and Elec. Co. v. Superior Court, 155 Cal. 30, 34, 39, 99 Pac. 359, 360, 362 (1908) (witness outside the state); Most v. Superior Court, 25 Cal. App. 2d 394, 77 P.2d 532 (1938) (deposition of party). But see Committee on Administration of Justice of the State Bar of California, Report, 31 CALIF. S.B.J. 204, 205 (1956); Pruitt, Depositions and Discovery, CALIFORNIA CIVIL PROCEDURE BEFORE TRIAL 675, 676, 683 (Univ. of Calif. Ext. 1957); Harkelroad, The Law of Discovery in the Courts of California, 4 So. CALIF. L. REV. 169, 184 (1931).

8 § 2016(a).

9 § 2031.

10 Fed. R. Civ. P. 34.

11 § 2032.

12 Johnston v. Southern Pac. Co., 150 Cal. 535, 89 Pac. 348 (1907); DeMeo, Physical Examination and Inspection of Physical Objects, MEDICO-LEGAL ASPECTS OF HEAD, NECK AND BACK INJURIES 461 (Univ. of Calif. Ext. 1955).

13 § 128(5); see also § 1871; Dodge v. San Diego Elec. Ry., 92 Cal. App. 2d 759, 769, 208 P.2d 37, 43 (1949).


15 § 447 provides: “When an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the answer denying the same be verified.” § 448 effectuates the same principle for a defendant whose defense is founded upon a written instrument. But see § 449; compare §§ 454, 1938.
practice, so far as techniques of discovery are concerned. Also, adoption of the federal sanctions\textsuperscript{16} which underpin the effectiveness of discovery produces significant changes; as the Bar Committee noted: "Methods of enforcing the rules relating to discovery are covered in our state practice only by the rules relating to contempt and by the shadowy concept of ‘inherent powers’ of the court. . . . The broad provisions of Federal Rule 37 have made available in the federal practice a much more effective and, we think fairer, means of enforcing the provisions relating to discovery. . . ."\textsuperscript{17}

The new code sections for the most part are written with the lucidity and precision which characterize their federal counterparts. It therefore seems unprofitable to paraphrase them; their own text is their best resumé. Rather, it will be my purposes to show (1) the anomalies and deficiencies of the previous California practice and the reasons for adoption of the new discovery mechanism, (2) the practical uses of the new act, with emphasis upon the breadth and scope of discovery now possible and the integration of the various devices into a unitary mechanism, and (3) the undergirding sanctions of discovery which make it effective and provide protection against its abuse. As the discussion occasions I shall attempt, especially as cautions for those familiar with federal practice, to point out the principal differences between the new act and the existing federal discovery rules.

Another problem that merits careful examination centers around the provision of new section 2016(b) that "all matters which are privileged against disclosure upon the trial under the laws of this State are privileged against disclosure through any discovery procedure. This article shall not be construed to change the law of this State with respect to the existence of any privilege, whether provided for by statute or judicial decision, nor shall it be construed to incorporate by reference any judicial decisions on privilege of any other jurisdiction." It seems to me that there is danger of confusion of the privileges of confidential communication codified in section 1881, especially the attorney-client privilege, with the problem of protection of the attorney’s "work product" now identified under the rubric of Hickman v. Taylor.\textsuperscript{18} However, this matter must be explored carefully and

\textsuperscript{16} FED. R. CIV. P. 37, substantially accepted by § 2034.
\textsuperscript{17} Committee on Administration of Justice of the State Bar of California. Report, 31 CALIF. S.B.J. 204, 206 (1956); see 2 Wyrin, SUMMARY OF CALIFORNIA LAW 1868 (6th ed. 1946).
\textsuperscript{18} 329 U.S. 495 (1947). In Pruitt, Depositions and Discovery, California Civil Procedure Before Trial 675, 683 (Univ. of Calif. Ext. 1957), it is stated: "[T]he limitations of the last two sentences of § 2016(b) quoted in the text] were designed first to preserve the attorney-client privilege as construed by the California Supreme Court in Holm v. Superior Court, 42 Cal. 2d 500, 267 P.2d 1025 (1954), and secondly to be a mandate to the California courts not to follow the decision of the United States Supreme Court in Hickman v. Taylor, 329 U.S. 495 (1947), where the court held that the work product of a lawyer was not within the scope of the attorney-client privilege and might therefore under some circumstances be the subject of
at length in the light of many California cases, and would be matter for independent treatment.

A few prefatory points may be noted. It is too late in the day for extensive discussion of the philosophy of discovery. However, I should like to repeat as still pertinent some observations made when Minnesota accepted the federal discovery rules in 1952:19

So much has been said of the underlying philosophy of the deposition-discovery rules—a law suit should be an intensive search for the truth, not a game to be determined in outcome by considerations of tactics and surprise—that little need be added here. The widespread acceptance of the rules by the bar attests to its acceptance of that philosophy, as well as acknowledgment that the rules comprise an efficient mechanism to help effectuate it. While fully accepting both of these premises, the author sees nothing in these rules at odds with the fundamentals of the common law method of adversary adjudication. There is nothing in these rules to suggest a retreat from the common law's hard-headed conception of litigation discovery." Clearly the new act makes explicit the preservation in discovery proceedings of confidentiality of privileged communications, including client-attorney communication, to the full extent such confidentiality exists by reason of the codification of the privileges in section 1881 or applicable decisions. I think, however, that only confusion will result from assimilating the problem of immunity from discovery for the attorney's work product, to the problem of confidential communication between client and attorney—a confusion perhaps already imbedded in some California cases. For example, quaere whether the justifying rationale, if any, for non-discoverability of defendant's photographs taken at the scene of an accident, as in Holm v. Superior Court, supra, and Carroll v. Superior Court, 42 Cal. 2d 874, 267 P.2d 1037 (1954); see also New York Cas. Co. v. Superior Court, 30 Cal. App. 2d 130, 85 P.2d 965 (1938) (confidential accident reports), is the immunity from discovery under usual circumstances of the work product of the attorney or those associated with him as co-workers; and whether the attempt to state the justification in terms of confidentiality of attorney-client communication only beclouds the issue. See United States v. Reynolds, 345 U.S. 1, 6 (1953). One wonders how a photograph of a public place, vehicle, or event can have the confidentiality required to be the subject of a privileged communication. See 8 Wigmore, Evidence §§ 2285, 2306-07, 2311, 2317-19 (3d ed. 1940); cf. City & County of San Francisco v. Superior Court, 37 Cal. 2d 227, 234-35, 238, 231 P.2d 26, 29-31 (1951). Converting what is essentially an "attorney's work product" problem into one of confidential communication has the further disadvantage of extending the area of applicability of the difficult to apply distinction used in California between documents prepared for the "dominant purpose" of transmittal to an attorney, and documents not so prepared. Compare Holm v. Superior Court, supra, with Union Oil Co. v. Superior Court, 151 A.C.A. 317, 311 P.2d 640 (1957). See Hickman v. Taylor, supra, at 508; Vilastor-Kent Theatre Corp. v. Brandt, 19 F.R.D. 522 (S.D.N.Y. 1956); cf. Minn. R. Civ. Proc. 26.02 which provides: "The production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor or agent in anticipation of litigation or in preparation for trial, or of any writing that reflects an attorney's mental impressions, conclusions, opinions or legal theories, or, except as provided in Rule 35, the conclusions of an expert, shall not be required." See discussion of this provision in Louisell, Discovery and Pre-trial Under the Minnesota Rules, 36 Minn. L. Rev. 633, 635-39 (1952). However, as noted in the text, this problem requires exhaustive study in the light of all California cases that impinge upon it. See also note 108 infra.

as adversary and competitive, and from its historic notion that a struggle—warfare, if you will—between vitally interested partisans, is most apt to expose the truth. . . . The rules simply develop discovery, which has its antecedents in English chancery practice, into an efficient technique for fact ascertaintment, to take its place in the common law's arsenal along with the advocate's other efficient weapons such as testimony in open court, cross-examination, impeachment, forensic skill, and mastery of legal principles. As stated by Mr. Justice Jackson in concurring in the decision of Hickman v. Taylor:

". . . [Counsel for plaintiff] bases his claim to [the conversations of defendants' counsel with witnesses] on the view that the Rules were to do away with the old situation where a law suit developed into 'a battle of wits between counsel.' But a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary."20

Second, we are here concerned only with discovery in civil cases. The interesting and important discovery developments in criminal law administration throughout the United States recently brought into focus by Jencks v. United States,21 and somewhat similar cases in California and elsewhere,22 are beyond our present ambit.

Third, we are primarily concerned with the new act as a discovery measure. The use of the fruits of discovery at the trial is an additional problem; the necessary circumstances for such use are now stated in section 2016(d), as in Federal Rule 26(d). It has been noted that the genius of the deposition-discovery mechanism lies largely in the clear-cut distinction between the right to take depositions and to get answers to interrogatories to an adverse party, on the one hand, and the right to use the depositions and answers, on the other. This distinction makes possible the utmost freedom in taking depositions and propounding interrogatories, because of the restrictions imposed on their use.23

20 329 U.S. at 516. For an argument that excessive discovery, by reducing the element of surprise, may promote successful perjury, see Hawkins, Discovery and Rule 34: What's so Wrong About Surprise? 39 A.B.A.J. 1075 (1953); compare Virtue, Sweet Are the Uses of Discovery: A Reply to Mr. Hawkins, 40 A.B.A.J. 303 (1954); Holtzoff, The Elimination of Surprise in Federal Practice, 7 Vand. L. Rev. 576 (1954). For an argument that we are reverting to "trial by deposition" as it existed in federal equity cases prior to 1912, see Dike, A Step Backward in the Federal Courts: Are We Returning to Trial by Deposition, 37 A.B.A.J. 17 (1951).


23 See 4 Moore, Federal Practice 1029 (2d ed. 1950); Pike & Willis, The New Federal Deposition-Discovery Procedure, 38 Colum. L. Rev. 1179, 1186–87 (1938). This article makes
Fourth, it is somewhat academic to consider discovery in isolation from pre-trial. They go together “like ham and eggs.” Often pre-trial may prove to be at least a partial fulfillment of discovery by offering the chance of bringing discovery measures to fruition: for example, when the pre-trial judge, as a result of depositions and other discovered data on file, effects an elimination of issues not genuinely controverted. Conversely, realistically viewed, pre-trial itself may be an additional discovery device, perhaps the ultimate one; the judge’s inquiries may lead to further admissions.\(^{24}\)

Fifth, the new act occasions no reason to doubt the continuing applicability of the well established decisional law permitting the use of the extraordinary remedies for review of discovery orders.\(^{25}\)

Perhaps lucidity and convenience of reference will be furthered by the following table setting forth, for each of the five discovery devices, the principal governing provision, Federal and California:

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no attempt to cover the sections of the new act governing depositions of witnesses out of California on commission. Generally, new §§ 2024–28 on such depositions are a reenactment of old §§ 2024–27 with minor changes and a provision, new § 2029, making applicable to the out-of-state practice the basic policies and mechanics now provided for in the in-state practice, except as otherwise expressly provided in new §§ 2024–28.


I

SOME ANOMALIES AND DEFICIENCIES OF THE OLD PRACTICE

A. Depositions and Perpetuation

True, the old California practice permitted a liberal scope of inquiry in the taking of the deposition of a witness after commencement of the action once the discoverer had established his right to take the deposition. To establish this right he had to show that the prospective witness was within at least one of the eight categories of old section 2021. The first category included a party or his agent or employee; the other seven included various kinds of non-party witnesses; there was no justifying rationale common to all the categories. While the eight categories taken together made possible the frequent use of depositions for discovery purposes, nevertheless there obviously were instances where a party in a California court, unlike one in federal court, was hamstrung in his discovery attempts after commencement of his action, because he could not show that the prospective witness was within any of the eight categories.

Strangely, however, before the commencement of an action the deposition of any witness could be taken by proceedings to perpetuate, without regard to the limitations of old section 2021. In fact it was by the perpetuation device that pre-trial discovery of the limits of an automobile insurance policy was made. The requirements for discovery by perpetuation proceedings were extremely simple; the perpetuator did not even have to allege the present impossibility of bringing his prospective lawsuit. Putting aside the problem of the justification or desirability of discovery of automobile insurance policy limits, it seems clear that the California practice was indeed anomalous in permitting such discovery before commencement of suit while precluding it after commencement.

26 To take a deposition under old § 2021, the discoverer had to establish by affidavit that his case was within that section; see old § 2030. An affidavit is no longer necessary to take a deposition, nor for issuance of a subpoena under § 1986 for appearance of the witness at the deposition, but it is still necessary for issuance of a subpoena duces tecum under § 1985. Compare FED. R. Civ. P. 45(d), which does not require an affidavit.

27 Old § 2021; Comment, 44 CAM. L. Rev. 909, 911-14 (1956).

28 Comment, 44 CAM. L. Rev. 909, 913-14 (1956).


30 See old §§ 2083-90; MacLeod v. Superior Court, 115 Cal. App. 2d 180, 251 P.2d 728 (1952). Note however the amendment of 1953, old § 2084.2, which authorized the judge who signed the order for perpetuation to impose reasonable conditions for protection of a party expectant or witness.

31 New § 2017 replaces old §§ 2083-90 on perpetuation. It is substantially the same as FED. R. Civ. P. 27. See Comment, 44 CAM. L. Rev. 909, 925-29. Unlike the old sections, it requires that the petitioner allege that he “is presently unable to bring” his prospective action. Unlike FED. R. Civ. P. 27, new §§ 2017(a) and 2017(b) expressly authorize the court to order a peti-
Also, under the old deposition practice, there was no provision for the use of written interrogatories in the taking of depositions within California. But while admittedly the taking of depositions on written interrogatories for discovery purposes is a device used relatively infrequently under the Federal Rules, for the obvious reason that the purpose of genuine discovery is furthered by the advantages of on-the-spot cross-examination, nevertheless there can be occasions where this device may be welcome—for example, in the interests of economy. The new act's provision for it, in terms identical with the federal counterpart, is therefore an improvement over

\[\text{tiorer to pay reasonable fees and expenses to an attorney appointed by the court to represent an expected adverse party, or to furnish a copy of the deposition to an expected adverse party or to pay costs to him or to deponent. Cf. De Wagenknecht v. Stinnes, 243 F.2d 413 (D.C. Cir. 1957). Quaere, whether public liability insurance policy limits remain discoverable under the new act as under the old perpetuation proceedings. Superior Ins. Co. v. Superior Court, 37 Cal. 2d 749, 235 Pac.2d 833 (1951). But cf. New York Cas. Co. v. Superior Court, 30 Cal. App. 2d 130, 85 P.2d 965 (1938). Two positions are arguable: (1) discovery prior to procurement of the personal injury judgment remains permissible by perpetuation proceedings against the insurance company. Presumably it would be possible to allege truthfully in the petition for perpetuation the inability of petitioner to sue the company prior to procurement of the personal injury judgment. See Cal. Ins. Cons. § 11580; Corum v. Hartford Acc. & Indemnity Co., 67 Cal. App. 2d 891, 895, 155 P.2d 710, 712 (1945). But under § 2017(a)(3) a deposition for perpetuation is to be taken “in accordance with the provisions of this code relating to depositions taken after the commencement of actions” and the court may make the usual protective orders specified in §§ 2019(b) and 2019(d). See note 111 infra. Assuming this limits discoverability in perpetuation proceedings as with other discovery devices at least to testimony which appears "reasonably calculated to lead to the discovery of admissible evidence"; § 2016(b), perhaps the quoted hurdle is surmounted by the admissibility in the contemplated future suit against the insurance company of the amount of the policy. But note that § 2016(b) provides for examination “regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ." (Emphasis added.) (2) It is also arguable that discovery of insurance limits, formerly permissible only in perpetuation proceedings, is now possible in the personal injury action itself under §2016. Perhaps the California Supreme Court's answer ultimately will depend on whether it so believes in this discovery in principle as to be content with the decision in Superior Ins. Co. v. Superior Court, supra, allowing such discovery; if there is desire to escape that case, the escape hatch is available in the language of § 2016(b): “It is not ground for objection that the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.” (Emphasis added) Still, the identical language of Fed. R. Civ. P. 26(b) has not prevented some federal courts from allowing discovery of policy limits. Brackett v. Woodall Food Products, Inc., 12 F.R.D. 4 (E.D. Tenn. 1951); Orgel v. McCurdy, 8 F.R.D. 585 (S.D.N.Y. 1948). Contra, McClure v. Boeger, 105 F. Supp. 612 (E.D. Pa. 1952); cf. Colorado Milling & Elevator Co. v. American Cyanamid Co., 10 F.R.D. 611 (W.D. Mo. 1950). The state cases likewise are split: Maddox v. Grauman, 265 S.W.2d 939 (Ky. 1954), 41 A.L.R.2d 964 (1955) (allowing discovery); Jeppeson v. Swanson, 243 Minn. 547, 68 N.W.2d 649 (1955) (refusing it), discussed in 40 Minn. L. Rev. 183 (1956) and 34 Texas L. Rev. 129 (1955); cf. Peters v. Webb, 316 P.2d 170 (Okla. 1957); Bean v. Best, 80 N.W.2d 565 (S.D. 1957). See Note, 5 Stan. L. Rev. 322 (1953).

\[\text{Notes, Discovery: Boon or Burden, 36 Minn. L. Rev. 364, 380 (1952); Tactical Use and Abuse of Depositions Under the Federal Rules, 59 Yale L.J. 117, 121 (1949).}

\[\text{§ 2025, 2025½, as they can under new §§ 2024, 2025.}

\[\text{Notes, Discovery: Boon or Burden, 36 Minn. L. Rev. 364, 380 (1952); Tactical Use and Abuse of Depositions Under the Federal Rules, 59 Yale L.J. 117, 121 (1949).}

\[\text{§ 2020; Fed. R. Civ. P. 31.}

\[\text{Notes, Discovery: Boon or Burden, 36 Minn. L. Rev. 364, 380 (1952); Tactical Use and Abuse of Depositions Under the Federal Rules, 59 Yale L.J. 117, 121 (1949).}

\[\text{Notes, Discovery: Boon or Burden, 36 Minn. L. Rev. 364, 380 (1952); Tactical Use and Abuse of Depositions Under the Federal Rules, 59 Yale L.J. 117, 121 (1949).}
the old practice. Of course written interrogatories used in the taking of a deposition of any witness are never to be confused with written interrogatories to adverse parties, the propounding of which involves no use of the deposition mechanism whatsoever.

B. Interrogatories and Motions to Inspect: Adverse Parties

As already noted, the biggest gap in the old California practice was the absence of any device analogous to that of Federal Rule 33 providing for service of interrogatories on adverse parties to be answered by them under oath. The efficiency and economy of this device—involving no expense for the propounder other than the time for preparing the questions—doubtless explains the frequency of its use in federal practice, and there is no reason to predict that its counterpart under the new California act will be less appreciated. The new California provisions, with two exceptions to be discussed in detail later, fully accept Federal Rule 33's philosophy of liberal discoverability.

While the old California practice long knew the motion for inspection of writings under section 1000, its application was limited to designated writings "containing evidence relating to the merits of the action, or the defense therein." The measure or scope of discovery under this section has been equated by the California Supreme Court to that available under section 1985 governing issuance of subpoenas duces tecum, which requires a showing of the materiality of the matter or things demanded to "the issues involved in the case." The test of discoverability under both old section 1000 and section 1985, announced by the Supreme Court in McClatchy Newspapers v. Superior Court, was admissibility in evidence. In the same case the court permitted a broader scope of discovery in the taking of depositions; admissibility was not the test; it was enough if the matters inquired about pertained to potential issues in the case. Acceptance by the new law of Federal Rule 34's provisions not only extends discoverability to "objects or tangible things" as well as "writings" and permits entry on premises for inspecting, photographing, etc., but also permits a scope of discovery on motions to inspect as broad as that possible on the taking of depositions.

37 § 2030.
38 Note 58 infra and accompanying text; note 62 infra.
40 McClatchy Newspapers v. Superior Court, 26 Cal. 2d 386, 396, 159 P.2d 944, 951 (1945).
41 Id. at 395, 159 P.2d at 949.
42 § 2031.
43 See notes 82 and 99 infra.
C. Physical and Mental Examinations, and Demands for Admissions

Although California has long known compulsory physical examinations of personal injury plaintiffs as a matter of decisional law and practice, there was no express statutory provision nor uniform regulation of them comparable to that of Federal Rule 35. The new act basically codifies the decisional law into a regularized uniform practice, modeled on Federal Rule 35, but with certain important differences which may assume increasing significance vis-a-vis federal practice due to the restrictive interpretation of Federal Rule 35 in the Ninth Circuit.

Although, as noted in the introductory remarks, new section 2033 legitimately may be regarded as an extension of California's long-standing philosophy obviating the necessity of authentication of certain writings not controverted under oath, the new law effectuates that philosophy to the full extent of Federal Rule 36; now, the subject matter for admission potentially is "the genuineness of any relevant documents ... or ... the truth of any relevant matters of fact ... ."

II

THE PRACTICAL USES OF THE NEW ACT

Ready comprehension of the new act as a unitary discovery mechanism is advanced by consideration of possible use of the various discovery devices in an illustrative case. This method of discussion demonstrates (1) the breadth, inclusiveness and thoroughness of the new discovery procedure, (2) the close integration of the various devices into a unitary mechanism, and (3) potential overlapping of the various devices, sometimes inviting or necessitating choice among them.

Let us assume that plaintiff, while driving alone on a country road at night, encounters a car speeding from the opposite direction. It suddenly swerves over the center line and collides with plaintiff's car, knocking it into the ditch and rendering plaintiff unconscious. It then flees the scene. Other than the facts stated, all that plaintiff's attorney can ascertain from his interviews with plaintiff, a Good Samaritan who eventually extricated plaintiff from his demolished car and took him to a hospital, a not overly cooperative sheriff, and police officials, is the name of the registered owner of the offending car—its registration card apparently having been dislodged by the collision and dropped near the scene. Plaintiff commences

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44 Note 12 supra.
45 See note 13 supra.
46 § 2032.
47 See note 104 infra.
48 §§ 447, 448; see note 15 supra in which § 447 is quoted.
49 § 2033(a).
suit against the registered owner, hereinafter called Owner, in an appropriate superior court. How can the new act help plaintiff?

Waiting at least eleven days after service of summons on Owner so as to avoid the necessity of a court order, plaintiff serves a written interrogatory on Owner under new section 2030 asking him for the name and address of the person driving his automobile on the occasion involved. Of course, instead of serving such an interrogatory, plaintiff, by waiting until the twenty-first day after service of summons, might have served notice of taking Owner's deposition under new section 2016. But notice the relative ease, convenience and economy of merely serving an interrogatory on Owner as an adverse party; unlike a deposition, it involves no expense except that entailed in the time for dictating the interrogatory; it involves none of the details of the deposition mechanism such as arranging for the stenographer and fixing the time and place for taking the deposition. Owner's answer to the interrogatory, like testimony given at a deposition, must be under oath. And, if the answer to the interrogatory should prove unsatisfactory to plaintiff, the fact that an interrogatory was first propounded is no barrier whatsoever to a later taking by plaintiff of Owner's deposition. However, California has one arbitrary limitation unknown to federal practice: only one set of interrogatories to the same adverse party.

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60 See CAL. VEH. CODE § 402. As to commencement of action and the "John Doe" practice, see §§ 405, 406, 474, 581a; 1 WITKIN, CALIFORNIA PROCEDURE 812 (6th ed. 1954); 2 id. 1210–16, 1700.

61 "Interrogatories may be served upon any adverse party at any time after service of the summons or the appearance of such adverse party and without leave of court, except that, if service of interrogatories is made by the plaintiff within 10 days after such service of summons or appearance, leave of court granted with or without notice must first be obtained." § 2030(a).

62 There is a similar provision for service of notice of taking a deposition, except that the period is 20 days. § 2016(a). FED. R. CIV. P. 33 and 26(a) effectuate the same philosophy—a defendant should be given time to retain his attorney and prepare—except that the respective periods of 10 and 20 days run from commencement of the action, rather than service or appearance.

63 Requirements of service under the new act are satisfied by serving a party or his attorney in the manner provided in Ch. 5, Title 14, Part 2 of the Code of Civil Procedure, beginning with § 1010. See §§ 2019(a), 2020(c), 2030(d), 2031(b), 2032(c), 2033(c).

64 For forms for use in submitting interrogatories to adverse parties, see Pruitt, Depositions and Discovery, CALIFORNIA CIVIL PROCEDURE BEFORE TRIAL 675, 707 (Univ. of Calif. Ext. 1957); 3 BENDER, FEDERAL PRACTICE FORMS 24–41 (1956). Precise formulation of interrogatories not only may reasonably be expected by the court, but often proves most rewarding to the propounder.

65 See note 51 supra.

66 Interrogatories to adverse parties under § 2030 are not to be confused with the permissible use of written interrogatories in taking the deposition of a witness under § 2020. The same caution applies to the distinction between FED. R. CIV. P. 33 and 31.

67 "Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered . . . ." § 2030(b); accord, FED. R. CIV. P. 33.
party may be served except with leave of court. Therefore plaintiff will want to be careful to include in his first set, because it may be his last, all interrogatories that he wants to propound to Owner. The scope of inquiry is just as broad as it would be on the taking of Owner’s deposition—a scope as pervasive, it is believed, as that which prevails in any Anglo-American jurisdiction. And Owner’s sworn answers to the interrogatories “. . . may be used to the same extent . . . as the deposition of a party.”

This is an appropriate place to note another important difference between section 2030 and Federal Rule 33 on interrogatories to adverse parties, a difference which perhaps will appear more frequently in commercial than in tort litigation. Section 2030(c), unlike Federal Rule 33, provides that where the answer to any interrogatory may be derived from the business records or abstract thereof of the addressee, it shall be a sufficient answer for the addressee to specify such records and afford to the propounder reasonable opportunity to examine and copy them. This provision, without undermining the liberal scope of interrogatory discovery, places the burden of discovery on its potential benefitee, and may do much to resolve an impasse which developed in federal practice.

Let us suppose that Owner answers by stating that on the occasion involved John Driver, a California resident, was driving Owner’s car. More than twenty days now having passed since the service of summons on Owner, plaintiff promptly serves on Owner, with no need of prior court permission, notice of taking the deposition of Driver at the office of plaintiff’s attorney at a specified date and hour. Section 2019(a) requires at

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68 § 2030(a); cf. Fed. R. Civ. P. 33.
69 § 2030(b); accord, Fed. R. Civ. P. 33.
60 See note 72 infra.
61 § 2030(b); accord, Fed. R. Civ. P. 33.
62 “Where the answer to any interrogatory may be derived or ascertained from the business records of the party to whom such interrogatory is addressed or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, it shall be a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party by whom the interrogatory was proposed reasonable opportunity to examine, audit or inspect such records and to make copies thereof or compilations, abstracts or summaries therefrom.”
63 See 4 Moore, Federal Practice § 33.08[2] (2d ed. 1959); 2 Barron & Holtzoff, Federal Practice and Procedure § 771 (Rules ed. 1959); Speck, The Use of Discovery in United States District Courts, 60 Yale L.J. 1132, 1142–44 (1952). Of course an addressee’s reliance on § 2030(c) may involve for him a difficult problem of segregating documents which he is willing to have the propounder see, from those which he is unwilling to have the propounder see and which are irrelevant or otherwise non-discoverable.
64 See note 51 supra.
65 For a form of notice, see Pruitt, Depositions and Discovery, in California Civil Procedure Before Trial 675-700 (Univ. of Calif. Ext. 1957). For forms for use in deposition practice generally, see 2 Bender, Federal Practice Forms 697–801 (1956); 3 id. 1–22.
66 “The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs.” § 2019(a). Fed. R. Civ. P. 30(a) has the same provision.
least 10 days notice, unlike Federal Rule 30(a) which requires only "reasonable notice". Plaintiff, under sanction of potential assessment of costs against him for failure to procure the presence of Driver for the deposition, is careful to subpoena Driver to appear for the taking of the deposition, because Driver at this stage is only a prospective witness and not a party; if Driver were a party the service of a subpoena would not be required to compel his attendance; service of proper notice on him would suffice. Plaintiff in his notice does not, because he need not, indicate whether the deposition is taken for discovery purposes, or for use at the trial, or for both.

By reason of the scope of inquiry expressly provided by section 2016(b) plaintiff's attorney really has carte blanche, as he would have in federal practice, to make broad and penetrating inquiry into all matters possibly relevant—inquiry certainly at least as broad as that permitted under the old California practice with respect to a deponent who was a party. In the words of section 2016(b):

Unless otherwise ordered by the court as provided by subdivision (b) or (d) of Section 2019 of this code, the deponent may be examined regarding

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67 "Such notice must be at least 10 days, adding also one day for every 100 miles of the distance of the place of examination from the residence of the person to whom the notice is given. . . ." § 2019(a). While Fed. R. Civ. P. 30(a) requires only "reasonable notice," it, like § 2019(a), authorizes the court, on motion of any party on whom the notice is served, to enlarge or shorten the time for cause. For increase of time resulting from service by mail, see §1013; compare Fed. R. Civ. P. 6(e).

68 § 2019(g)(2); Fed. R. Civ. P. 30(g)(2) is the same. Of course it is not obligatory on a party to subpoena a desired witness; a party confident the witness will voluntarily come may decide to run the risk of incurring the mentioned costs.

69 §§ 1986, 1989. Respecting the territorial limitations on the reach of the subpoena, and the proper court to issue it, see Wemyss v. Superior Court, 38 Cal. 2d 616, 241 P.2d 525 (1952); Comment, 44 Calif. L. Rev. 909, 917–18 (1956). Note that by reason of the 1957 amendments, § 1986 no longer requires an affidavit for issuance of a subpoena ad testificandum (as distinguished from a subpoena duces tecum under § 1985); and that § 1989 now extends the reach of an out-of-county subpoena to 150 miles from the witness' place of residence "to the place of trial." Compare Fed. R. Civ. P. 45(d)(2).

70 § 2019(a) (1) is explicit on this; the same result is reached in federal practice. 4 Moore, Federal Practice § 26.10 (2d ed. 1930). In federal practice it is arguable that, in respect of adverse parties, a subpoena duces tecum is unnecessary to compel production of documents or things, if they are designated in the notice of deposition. See 4 id. §§ 26.10, 34.02.

71 §§ 2016(a), 2019(a); accord, Fed. R. Civ. P. 26(a), 30(a).

72 An excellent treatment of the scope and breadth of discovery appears in 4 Moore, Federal Practice §§ 26.15–25 (2d ed. 1950). Note the abandonment of the hampering restrictions found in the old rules that a party can inquire only into those facts that are material to his own cause and cannot pry into his opponent's case, Downie v. Nettleton, 61 Conn. 593, 24 Atl. 977 (1892); see opinion of Carter, J., dissenting in Hohn v. Superior Court, 42 Cal. App. 2d 500, 512, 267 P.2d 1025, 1032 (1954); or that discovery is allowable only in aid of the party with the burden of proof. See 4 Moore, Federal Practice, § 2606 (2d ed. 1950).

73 See, e.g., McClatchy Newspapers v. Superior Court, 26 Cal. 2d 386, 395, 159 P.2d 944, 949 (1945).
DISCOVERY TODAY

any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party, or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.

Plaintiff's attorney of course realizes that by taking Driver's deposition plaintiff has not made Driver his own witness for any purpose. If during the course of the deposition plaintiff becomes abusive of the witness, or insists upon answers to confidential matters, adequate protective measures are available. After the deposition is completed, plaintiff names Driver as an additional defendant.

Let us assume that by astute interrogation of Driver, plaintiff among other facts had compelled the admission that on the night involved Driver's car had two other occupants, Rider and Passenger, both California residents. Plaintiff serves notice on Owner and Driver that plaintiff at a specified date, hour, and place will take Rider's deposition, and subpoenas Rider accordingly. At the taking of this deposition Rider testifies that prior to the collision Passenger told Rider that Driver had said that Driver intended to make delivery that night to a country store of some cartons of cigarettes on behalf of Driver's employer, a cigarette company. This testimony is proper discovery even though at a trial it would be objectionable as hearsay; "it is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."

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76 §§ 2019(d), 2034(a); Fed. R. Civ. P. 30(d) and 37(a) are substantially the same. See notes 120-21 infra and accompanying text.

77 The new act is explicit on most of the mechanical details, as are the Federal Rules: e.g., the functions to be performed by the officer taking the deposition, such as administration of the oath, stenographic recording, noting of objections, supervision of signing and changes, certification and filing. See §§ 2019(c), 2019(e), 2019(f); compare Fed. R. Civ. P. 30(c), 30(e), 30(f). The party taking the deposition is required to give prompt notice of its filing to all other parties; § 2019(f) (3); Fed. R. Civ. P. 30(f) (3). There are also explicit provisions governing waiver of irregularities; § 2021; Fed. R. Civ. P. 32. While the new act, like the Federal Rules, does much to conduce to minimization of those irregularities which are usually only technical in nature, it of course remains true under § 2021(c) (1), as under Fed. R. Civ. P. 32(c) (1), that "objections to the competency of a witness or to the competency, relevancy or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time." § 2019(a) (2), like Fed. R. Civ. P. 29, provides: "If the parties so stipulate in writing, depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions."

77 § 2016(b); Fed. R. Civ. P. 26(b).
To make further discovery concerning the mentioned conversation between Rider and Passenger, plaintiff decides to take Passenger's deposition. Normally, this deposition too would be taken orally, so that plaintiff would have the advantage of on-the-spot examination of Passenger. However, for some reason of policy, tactics, or economy, plaintiff takes this deposition on written interrogatories, and such interrogatories and the cross-interrogatories are served, and then submitted to the officer designated in the notice of deposition, all as provided by section 2030. The designated officer takes the testimony of Passenger, who was properly subpoenaed, and prepares, certifies and files the deposition substantially as with a deposition orally taken. Such a deposition of a witness, taken on written interrogatories, is not to be confused with interrogatories to adverse parties which, as noted, do not involve use of the deposition machinery at all.

Plaintiff now decides that he has discovered enough to justify naming the cigarette company, which does business in California, as an additional defendant. After doing so plaintiff serves notice on Owner, Driver and the company, that he will take a second deposition of Driver. The number of depositions of any party or witness is not arbitrarily limited, and a second or even additional depositions may be taken, subject only to the right of an adverse party or the deponent to obtain a protective order against annoyance, embarrassment or oppression. At this deposition plaintiff discovers from Driver that the company probably is in possession of a set of written regulations governing the working conditions, use of non-company automobiles, and hours of employment of its employees.

Plaintiff now considers it important to see the company's regulations. How should he proceed? At least on the face of the new act, there would seem to be three possibilities: (1) to submit to the company an interrogatory under section 2030 inquiring as to whether it is in possession of such regulations and, if so, requesting it to attach a copy thereof to its answer; (2) to take the deposition of an appropriate company agent under section 2016 and in connection therewith to obtain by subpoena duces tecum under section 1985, the company regulations; (3) to make a motion under section 2031 for an order for inspection and copying of the regulations. All of these alternatives have been successfully used at various times in federal

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78 See note 33 supra and accompanying text.
80 §§ 2020, 2019(c), 2019(e), 2019(f); compare Fed. R. Civ. P. 31, 30(c), 30(e), 30(f). Quaere, whether the reference in § 2020(b) to "§ 2019(d)" is a clerical error and should be "§ 2019(e)."
82 2019(b); Fed. R. Civ. P. 30(b). Compare the provision of § 2030(a) limiting a party to one set of interrogatories to the same adverse party, except with leave of court. A similar provision was removed from Fed. R. Civ. P. 33 by the amendment of 1946. 4 Moore, Federal Practice 2254 (2d ed. 1950).
practice. The interrogatory and deposition-subpoena duces tecum methods normally involve no authorizing court order; the motion to inspect seeks such an authorizing order which presupposes a showing of good cause. Recent federal cases point out in substance that the first two methods may, realistically viewed, be essentially subterfuges to achieve without a showing of good cause what should be achieved only by such a showing made on motion. In California, section 1985, not amended by the new act, continues to require that all applications for subpoenas duces tecum "shall be accompanied by an affidavit specifying the exact matters or things desired to be produced, and setting forth in full detail the materiality thereof to the issues involved in the case . . . ." This contrasts with the federal practice under which all subpoenas, including those duces tecum, are issued on application. Thus under the new California practice there may be less reason than in federal practice to condemn plaintiff's effort to discover the company regulations by the deposition-subpoena duces tecum technique rather than by a motion for inspection. But seemingly use of the interrogatory method as a substitute for a motion when offensive in federal practice is equally so under the new California act. In any event, use of the wrong technique does not necessarily foredoom the effort; it may prove a successful although improper road to the right goal. For example, an interrogatory requesting that a copy of the sought document be attached to the answer, if an improper interrogatory, may on objection thereto by the addressee

83 FED. R. Civ. P. 26(a), 33, 34, 45(d) (1). See Alfred Pearson & Co. v. Hayes, 9 F.R.D. 210 (S.D.N.Y. 1949); 4 MOORE, FEDERAL PRACTICE §§ 33.22, 34.02 (2d ed. 1950); 2 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 1002 (Rules ed.); WRIGHT, MINNESOTA RULES 206 (1954); PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS, REPORT 39–40 (Advisory Committee on Rules for Civil Procedure, Oct. 1955). The Advisory Committee proposed the amendment of FED. R. Civ. P. 34 expressly to permit discovery of documents on interrogatories under rule 33 or subpoena under rule 45(d) if the documents "are subject to discovery without a showing of necessity or justification." Id. at 38; cf. Hickman v. Taylor, 329 U.S. 495 (1947). However, this proposal is dead, or at least dormant for the time, because of the discharge of the Advisory Committee by the Supreme Court without action on the suggestion. 352 U.S. 803 (1956). California cases under old § 1000 allowing discovery of a party's own statement are Dowell v. Superior Court, 47 Cal. 2d 483, 304 P.2d 1009 (1956); Holm v. Superior Court, 42 Cal. 2d 500, 267 P.2d 1025 (1954).

84 Jack Loeks Enterprises v. W. S. Butterfield Theatres, 20 F.R.D. 303 (E.D. Mich. 1957); cf. Local 174 v. United States, 240 F.2d 387 (9th Cir. 1956). Of course this criticism is not applicable where the subpoenaed person is only a witness and not a party; he then is not subject to a motion to inspect and the documents can only be reached by subpoena duces tecum. Shephard v. Castle, 20 F.R.D. 184 (Mo. 1957). See note 83 supra.

85 FED. R. Civ. P. 45(d) (1) authorizes issuance on "proof of service of a notice to take a deposition . . . ." But cf. Rule 8(b), U.S. District Court, N.D. Cal. (deposition subpoenas may issue upon filing of notice to take deposition, and before service thereof). Of course the court has power, on motion, to quash or modify a subpoena duces tecum. FED. R. Civ. P. 30(a), 45(b), 45(d). By reason of the 1957 amendment California subpoenas, except those duces tecum, are now issuable as of course under § 1986; subpoenas duces tecum continue to require an affidavit under § 1985.
evoke from the propounder a showing of "good cause" that would formally justify a motion for inspection; if so, normally there would be no reason for the court to stand on the formality of such a motion. 86

Let us suppose plaintiff on motion secures a court order for inspection of the company regulations. Thereafter, plaintiff serves notice on all defendants that he will take the deposition of an appropriate company agent, and at this deposition testimony is adduced that correspondence has passed between company officials pertaining to the company regulations already inspected by plaintiff. Plaintiff thereupon moves for an inspection of this correspondence under section 2031. The company, raising no question of privilege, nevertheless opposes the motion on the grounds that such correspondence cannot possibly constitute admissible evidence. Is the correspondence discoverable?

Old section 1000 provided in relevant part: 87

Any court in which an action is pending, or a judge thereof may, upon notice, order either party to give to the other, within a specified time, an inspection and copy or permission to take a copy, of entries of accounts in any book, or of any document or paper in his possession, or under his control, containing evidence relating to the merits of the action, or the defense therein.

This section was construed to limit discoverability of writings to those containing admissible evidence. In McClatchy Newspapers v. Superior Court, 88 the supreme court said in respect of defendant's showing in support of its motion for an order of inspection of plaintiff's papers:

The right to have an inspection of papers and documents in the hands of a party to the action or a third person is governed by different rules from those applying to depositions. A party or witness has a constitutional right to be free from unreasonable searches and seizures, and it is therefore incumbent upon the one seeking an inspection to show clearly that he has a right thereto and that the constitutional guaranties will not be infringed. Hence, the affidavit in support of the demand for inspection must identify the desired books, papers and documents and it must clearly show that they contain competent and admissible evidence which is material to the issues to be tried. The affiant cannot rely merely upon the legal conclusion, stated in general terms, that the desired documentary evidence is relevant and material.

If it be assumed that the correspondence in our hypothetical case contains no admissible evidence, quite clearly such correspondence would not have been discoverable under old section 1000. But the measure of discov-

87 Emphasis added.
erability on motion to inspect under new section 2031(a) is just as broad as on the taking of a deposition under new section 2016(b) or on submission of interrogatories under new section 2030(b). It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence. Thus, pretermitting all possible questions of privilege that might arise if, for example, the company claimed that the correspondence was written for the dominant purpose of communicating with counsel, it seems clear that the correspondence would be discoverable under new section 2031(a). The new act therefore effects an important liberalization respecting discoverability of writings; and it extends the new liberal scope of inquiry to “photographs, objects or tangible things” in accord with the Federal Rule. Also in accord therewith is section 2031(a)’s provision for an order permitting a party to enter upon another party’s property for inspection and other discovery purposes.

Suppose plaintiff, instead of moving to inspect the company correspondence under new section 2031, seeks discovery thereof by taking the deposition of a company agent and in connection therewith serves a subpoena

80 See notes 18 supra, 108 infra.
82 § 2031(a).
83 Fed. R. Civ. P. 34.
84 Despite the liberality of discovery under Fed. R. Civ. P. 34, there are limits; a recent case, Fisher v. United States Fidelity & Guaranty Co., 246 F.2d 344 (7th Cir. 1957) provides an interesting illustration. In a suit on an insurance policy following theft of plaintiff’s car and its return to him in a damaged condition, defendant obtained an order under rule 34 for an inspection of the car. Defendant took the position “that the word ‘inspection’ in rule 34 includes the right to attach a carburetor and a generator to the motor of the car and to move it back and forth and determine the condition of the moving parts thereof . . . .” Id. at 348. In rejecting this theory, the court said: “If we are to read into the word ‘inspect’ the right to test the object produced for inspection, we would have to say that in the case of a substance produced for inspection, a chemical analysis could be made which might require the consumption of a part of the substance itself. Many instances of analysis, examination and physical operation of an object produced under rule 34 suggest themselves if an inspection is to be broadened to include a test. We have no right to extend the rule to include tests, because we have no legislative authority. If those possessing the rule making power believe that the rule should be extended to cover such situations, they may amend the rule to accomplish that purpose.” (Id. at 348-49). Also noteworthy is the preclusion in some federal courts of discovery of the opinion of certain experts, e.g., United States v. Certain Parsels of Land, 15 F.R.D. 224 (S.D. Cal. 1954); compare 4 Moore, Federal Practice 1158 (2d ed. 1950).
85 As to parties’ agents, note the difference between the new California act and the federal rules regarding the use of depositions of a party for trial or hearing purposes. Fed. R. Civ. P. 26(d) (2) provides: “The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership, or association which is a party may be used by an adverse party for any purpose. (This language respecting vicarious actors is the same as that in Fed. R. Civ. P. 43(b) governing
duces tecum under section 1985. By making this attempt plaintiff may bring into focus something of a dilemma occasioned by the facts that (1) issuance of a subpoena duces tecum under section 1985 requires "an affidavit specifying the exact matters or things required to be produced, and setting forth in full detail the materiality thereof to the issues involved in the case ... ";96 (2) this requirement has been equated by the supreme court with the aforesaid requirement of old section 1000; both have been deemed to make discoverable only writings containing admissible evidence;97 (3) section 1985 has not been changed by the new act; and (4) for motions to inspect—and for interrogatories to adverse parties—there is now the same liberal scope of discovery as for depositions, nonadmissibility no longer precluding discovery.98 It is technically arguable, because section 1985 has not been changed, that the old limitation continues whereby discovery of writings by subpoena duces tecum was limited to those containing admissible evidence. But such a result would produce not only an unfortunate difference between scope of discoverability by subpoena duces tecum on the one hand, and by depositions, interrogatories to adverse parties, and motions to inspect on the other, but also would produce the anomaly of coexistence for the same deposition of (a) the liberal measure of discovery now explicitly stated by new section 2016(b) as to questions asked of the witness, with (b) the restriction of subpoenas duces tecum to items containing admissible evidence. Probably, therefore, this limitation of subpoena duces tecum discovery, perhaps natural under a philosophy which regarded all writings as such in a category different from oral testimony which was liberally procurable by deposition,99 will not survive the adverse examination.) In the enforcement provisions of Fed. R. Civ. P. 37(b)(2) and 37(d) the language respecting vicarious actors is reduced to "officer or managing agent of a party." For the consequence of this narrow language in the enforcement provisions, see Park & Tilford Distillers Corp. v. Distillers Co., 19 F.R.D. 169 (S.D.N.Y. 1956).

Compare the much broader counterpart sections of the new California act. Section 2016 (d)(2) provides: "The deposition of a party to the record of any civil action or proceeding or of a person for whose immediate benefit said action or proceeding is prosecuted or defended, or of anyone who at the time of taking the deposition was an officer, director, superintendent, member, employee, or managing agent of any such party or person may be used by an adverse party for any purpose." See Golden State Co. v. Superior Court, 25 Cal. App. 2d 176, 76 P.2d 728 (1938). The language of § 2034(b)(2) with respect to vicarious actors is the same as that quoted. (Note that such language is identical with that appearing in § 2055 governing adverse examination.) However, in § 2034(d), the language respecting vicarious actors is reduced to "officer, director or managing agent."

96 Emphasis added.


98 §§ 2031(a), 2030(b), 2016(b), 1985.

99 Some difficulty may be occasioned by the California tendency to assimilate the restrictions on discovery under old § 1000 (as under § 1985 on subpoenas duces tecum) to constitutional protection. "A party or witness has a constitutional right to be free from unreasonable searches and seizures, and it is therefore incumbent on the one seeking an inspection to show
new act's provision of a uniform measure of discovery applicable alike to all devices and regardless of whether or not the data sought be in writing.

Let us assume that by one technique or another, plaintiff examines the company correspondence. He now feels that he is in a position to make demands for admission on the company. He therefore serves\textsuperscript{100} on the company pursuant to new section 2033 a demand that it admit (1) the genuineness of one of the letters purportedly written by a company executive, which plaintiff discovered as a part of the mentioned correspondence, and (2) the truth of the fact that on the occasion involved, Driver was making a delivery for the company. Section 2033, like its counterpart Federal Rule 36, contains closely knit provisions calculated to compel admissions as to all things that cannot reasonably be controverted. Thus, if the company takes no action on the request "each of the matters of which an admission is requested shall be deemed admitted..."\textsuperscript{101} The initiative under section 2033 is on the served party to deny, or state why he cannot truthfully admit or deny, or object if the requests for admission are improper. While on scope of discovery section 2033 contains no cross reference to section 2016(b)—and therefore, unlike sections 2030(b) on interrogatories and 2031(a) on inspection motions, does not automatically assimilate the liberal discovery scope for depositions—it does contain only the same basic restriction, that the documents or facts must be relevant and not privileged. As we shall see in considering enforceability of discovery, this section is undergirded with a significant sanction—threatened imposition of costs for unreasonable failure to admit.\textsuperscript{102}

\textsuperscript{100} As to the timing of requests for admission, once again we have a limitation on plaintiff not applicable to defendant; see note 51 supra. Thus "If a plaintiff desires to serve a request within 10 days after such service of summons or appearance, leave of court, granted with or without notice, must be obtained." § 2033(a); compare Fed. R. Civ. P. 36(a).

\textsuperscript{101} § 2033(a); compare Fed. R. Civ. P. 36(a).

\textsuperscript{102} § 2034(c); compare Fed. R. Civ. P. 37(c). This matter is discussed further under subheading III(A) infra dealing with sanctions which make discovery effective.
Demands for admission seem to be one of the most neglected of the discovery devices in federal practice. They can be significant tools in helping to avoid unnecessary expense and labor.

While we have been considering discovery by plaintiff, it is obvious that the shoe might well have been on the other foot; defendant might have been doing many of the same things in an attempt to establish plaintiff's contributory negligence. As the United States Supreme Court said in *Hickman v. Taylor*:

But framing the problem in terms of assisting individual plaintiffs in their suits against corporate defendants is unsatisfactory. Discovery concededly may work to the disadvantage as well as to the advantage of individual plaintiffs. Discovery, in other words, is not a one-way proposition. It is available in all types of cases at the behest of any party, individual or corporate, plaintiff or defendant. The problem thus far transcends the situation confronting this petitioner. And we must view that problem in light of the limitless situations where the particular kind of discovery sought by petitioner might be used.

One discovery device especially significant for the defendant is section 2032, governing physical or mental or blood examinations. California practitioners accustomed to use of its counterpart, Federal Rule 35, should carefully note the differences between the two which may result in a substan-

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104 The differences result from acceptance in § 2032 of the proposed amendments to Fed. R. Civ. P. 35 not acted upon by the United States Supreme Court prior to its discharge of the Advisory Committee. See Proposed Amendments to the Rules of Civil Procedure for the United States District Courts, Report 41–42 (Advisory Committee on Rules for Civil Procedure, Oct. 1955); 352 U.S. 803 (1956) (discharge of committee). Note that: (1) § 2032(a), unlike rule 35(a), expressly includes “blood examination.” However, even without such express provision, Beach v. Beach, 114 F.2d 479 (D.C. Cir. 1940) upheld the right to require a blood test in an action in which blood relationship is in controversy. (2) While, with respect to persons subject to orders for examination, rule 35(a) provides simply that “in an action in which the mental or physical condition of a party is in controversy, the court... may order him to submit to... examination...,” § 2032(a) states that “in an action in which the mental or physical condition or the blood relationship of a party, or of an agent or a person in the custody or under the legal control of a party, is in controversy, the court... may order the party to submit to... examination... or to produce for such examination his agent or the person in his custody or legal control.” In explaining its reasons for urging that rule 35(a) be amended to provide as § 2032 provides, the United States Supreme Court Advisory Committee said: “The authorization for examination of a person in the custody or under the legal control of a party will allow, for example, a physical examination of a minor where his parent or guardian sues to recover for injuries to the minor, or a blood examination of an infant in a paternity action. And the authorization for examination of an agent will cure such a case as *Kell v. Denver Tramway Corp.*, Civ. No. A-81314, Div. 4, Denver County, 1953, decided under the Colorado equivalent to F.R. 35(a), where plaintiff was denied an examination of the vision of defendant's bus driver, though the driver was claimed to be color blind.” Proposed Amendments to the Rules of Civil Procedure for the United States District Courts, Report 42 (Advisory Committee on Rules for Civil Procedure, Oct. 1955). Compare Dulles v. Quan Yoke Fong, 237 F.2d 496 (9th Cir. 1956) (only parties compellable under rule 35 to submit to blood ex-
tially broader applicability of section 2032 discovery, particularly when compared with the interpretation and application of rule 35 in the Ninth Circuit. While the right of a defendant to have a physical examination of a personal injury plaintiff is so well established by decisional law in California that new section 2032 would appear to be primarily codification, perhaps its combination in one succinct section of provisions authorizing examinations, with waiver provisions, will promote uniformity of practice in California. Presumably, most plaintiffs will normally submit voluntarily to an examination under the new practice as under the old, knowing that establishment of "good cause" for an examination is comparatively easy for the defendant. Under new section 2032(b)(1), when the plaintiff submits to an examination by defendant's physician, the plaintiff on demand may obtain a copy of such physician's detailed written report together with like reports of all earlier examinations of the same condition. But after he gets such reports, the plaintiff on request must turn over to the defendant a like report of any examination, previously or thereafter made, of the same condition. Further, under section 2032(b)(2) plaintiff, by obtaining the report of the defendant's physician, or by taking the deposition of the defendant's physician, waives any privilege he may have in the present or any other action involving the same controversy regarding the examination.

(2) Under both § 2032(b)(1) and Fed. R. Civ. P. 35(b)(1), the person who submits to an examination is entitled to a copy of defendant's physician's report; but only under the former is such a person expressly entitled to "like reports of all earlier examinations of the same condition." (4) Presumably the phraseology of § 2032 is broad enough to preclude limitation of examinations to personal injury actions; compare Wadlow v. Humbred, 27 F. Supp. 210 (W.D. Mo. 1939); and is broad enough to permit procurement by the injured person of defendant's physician's reports even though the injured person submitted voluntarily to the examination, i.e., without court order. See Proposed Amendments to the Rules of Civil Procedure for the United States District Courts, Report 43 (Advisory Committee on Rules for Civil Procedure, Oct. 1955); Moore, Federal Rules and Official Forms 194 (1956).

(5) Because of the language of § 2032(a) quoted in (2) § 2034(b)(2) on enforcement has a subsection not in rule 37(b)(2). It provides that where a party has failed to comply with an order under § 2032(a) quoted in (2) § 2034(b)(2) on enforcement has a subsection not in rule 37(b)(2). It provides that where a party has failed to comply with an order under § 2032(a) to produce another for examination, such party is subject to the same sanctions as though he violated an order to submit himself for examination "unless the party failing to comply shows that he is unable to produce such [other] person for examination." § 2034(b)(2)(v).

105 Dulles v. Quan Yoke Fong, 237 F.2d 496 (9th Cir. 1956).
106 See authorities collected in notes 12 and 13 supra.
107 § 2032(a) provides in part: "The order [for examination] may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made." In federal practice a showing usually considered sufficient is made by defendant's affidavit that he has good reason to believe that plaintiff's injuries are not as extensive as plaintiff claims. See 4 Moore, Federal Practice § 35.04 (2d ed. 1950); cf. Teche Lines v. Boyette, 111 F.2d 579, 581-82 (5th Cir. 1940). Doubtless under § 2032 the California courts, like the federal courts, will be careful to protect the rights of the person to be examined and will refrain from ordering unduly painful or dangerous examinations. See 4 Moore, Federal Practice § 35.04 (2d ed. 1950).
timony of every other physician who has examined or may thereafter examine plaintiff in regard to the same condition. But since, under section 1881(4), the personal injury plaintiff normally waives his physician-patient privilege in California merely by bringing his action, new section 2032 (b)(2) would seem to be in substantial part duplicative of existing law. 108

III

THE SANCTIONS OF DISCOVERY

Two types of potent sanctions undergird the new act: (A) those which make discovery effective, and (B) those which protect against abuse. 109

A. Sanctions Which Make Discovery Effective

As already noted, one of the main achievements of the new act is the acceptance of the broad, cogent and closely coordinated enforcement provisions of Federal Rule 37 in the place of methods limited to “rules relating to contempt and by the shadowy concept of the ‘inherent power’ of the court.” 110

Because compulsory production of documents and things under section 2031 and compulsory examinations by physicians under section 2032 are had pursuant to court order, violation of the original discovery order itself renders the violator subject to the provisions, hereinafter mentioned, of section 2034(b)(2). But when a party or other witness refuses to answer a question at a deposition on oral examination, or a witness refuses to answer an interrogatory submitted in the taking of a deposition by written inter-

108 Difficulties may be encountered in meshing together the waiver provisions of § 2032 (b)(2) with existing California holdings on confidential communication. By doing either of the specified acts (i.e., obtaining the report of defendant’s physician’s examination, or by taking the deposition of such physician) plaintiff waives “any privilege” he may have “regarding the testimony of every other person who has examined or may thereafter examine him in respect to the same condition.” Should the quoted language be limited so as to effect a waiver only of a patient’s privilege respecting treating physicians? If so, is it not merely duplicative of § 1881(4)? Or should “any privilege” be taken literally so as to include that respecting a physician employed as an expert solely to examine plaintiff, within the attorney-client privilege rule of City & County of San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26 (1951)? Cf. Wilson v. Superior Court, 148 Cal. App. 2d 433, 307 P.2d 37 (1957). If so, would the result conflict with § 2016(b)’s provision: “All matters which are privileged against disclosure upon the trial under the law of this state are privileged against disclosure through any discovery procedure. This article shall not be construed to change the law of this state with respect to the existence of any privilege, whether provided for by statute or judicial decision, nor shall it be construed to incorporate by reference any judicial decisions on privilege of any other jurisdiction.”? Is the problem so bothersome as to induce plaintiffs’ attorneys, at least until the matter is clarified, to refrain from demanding defendant’s physician’s report or taking his deposition? See note 18 supra.

109 Perhaps this sharp dichotomy is somewhat inaccurate in that some sanctions, e.g., those under § 2034(a), look both ways.

110 See note 17 supra, and accompanying text.
rogatories, or a party refuses to answer an interrogatory submitted by an adverse party under section 2030, such refusal is not originally a violation of a court order. Thus, if the proponent of the question wishes to force the issue so as to render the person refusing fully liable to the sanctions of section 2034(b), he must first obtain a court order compelling answer. This may be done under section 2034(a) which, however, expressly reserves to the proponent the alternative right of relief under section 1991, not amended by the new act. Then if the person refusing to answer, whether a party or other witness, persists in his refusal, it may be treated as a contempt of court under section 2034(b)(1) or section 1991. Such refusal, as well as violation of an order to produce under section 2031 or submit to an examination under section 2032, subjects the party violator to "such orders in regard to the refusal as are just" under section 2034(b)(2), ranging in degree from drawing an unfavorable conclusion against the disobedient party in the matters which his disobedience involves, to rendering judgment by default against the disobedient party or even issuance of an order directing his arrest, except that arrest is not permissible for violation of an order for examination by a physician.111

Even in the absence of a court order compelling discovery, certain failures to respond to discovery attempts will invoke significant penalties if the failures are wilful. Thus, under section 2034(d) if a party wilfully fails to appear before the officer who is to take his deposition after being served with proper notice, or fails to submit answers to interrogatories under section 2030, 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 part thereof, or enter a judgment by default against that party."112

111 The following are the specific authorizations of § 2034(b)(2), other than subpart (v), as to which see note 104 supra. "(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 or blood condition of the person sought to be examined, 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 the physical or mental or blood condition of the person sought to be examined; (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 or blood examination . . . ."

The limitation in 2034(b)(2)(iv) precluding arrest for violation of an order compelling a physical, mental, or blood examination rests, of course, in the historic Anglo-American tradition of "inviolability of the person." See FED. R. CIV. P. 37(b)(2)(iv); Sibbach v. Wilson & Co., 312 U.S. 1, 17 (1941).

112 See also § 1991, applicable as an alternative to the new act's provisions by reason of §§ 2034(a) and 2034(b).
The new act also expressly provides for significant financial sanctions conducive to the suppression of frivolous claims and objections, and to efficiency in discovery. Specifically, section 2034(a) promotes careful formulation of judgment as to whether or not a question propounded is a proper one which should be answered. Thus, if a party or witness refuses to answer a question which the court, on motion, determines should have been answered, and the court finds that the refusal was without substantial justification, the court may require the refusing party or witness and the party or attorney advising the refusal or both of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney’s fees. Contrariwise, if the motion to compel an answer is denied and the court finds that the motion was made without substantial justification, the financial burden may fall upon the examining party or the attorney advising the motion or both of them.\footnote{Note that rule 34(a) uses the mandatory word “shall” in respect to orders for payment of reasonable expenses.}

There is thus placed directly on attorneys a somewhat unique sanction to refrain from the frivolous, to weigh carefully considerations of relevancy and privilege, and to advise in accordance with their best judgment.

Similarly section 2034(c) provides that if a party, after being served with a request for admission under section 2034, serves a sworn denial thereof, and if the party requesting the admission thereafter proves the matter as to which the request was made, the court on application of the latter party shall order the offending party to pay the reasonable expenses incurred in making 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.

In addition to the financial sanctions expressly imposed by the new act, other provisions of California law, realistically viewed, may be considered as sanctions conducive to reasonable, and inhibitory of unreasonable, discovery. The likelihood, or lack thereof, of eventual recovery of the costs of discovery, by taxation of them against the losing party, can be a factor in a party’s decision to use or not to use discovery. It costs little more than counsel’s time to propound interrogatories under section 2030, to move for the production of documents and things under section 2031, or to make requests for admissions under section 2033. The taking of a deposition on written interrogatories under section 2020 may be less expensive than an oral deposition. The latter device may involve not only expenditure of much time of counsel, but also substantial out-of-pocket disbursements. It seems well established in California that allowability of deposition costs is ordinarily a matter for the trial court’s discretion, even though the deposition
is not used at the trial. In *Moss v. Underwriters' Report*114 the California Supreme Court, in approving taxation as costs of amounts paid by the plaintiff in taking depositions which were not used in evidence, said:

... The plaintiff made a full showing concerning the necessity for these depositions and the fact that plaintiff did not offer them as evidence upon the trial does not necessarily indicate that he could have safely proceeded to trial without them. The necessity for such expenditures is always a question for the trial judge ... and the appellant has made no showing of any abuse of discretion in the determination of this question.

In the *Moss* case the court disallowed the amount plaintiff had paid for a copy of his deposition taken by the defendant, but the legislature has set aside this latter holding.116

The established power of California trial courts to determine whether "the taking of [depositions] was unnecessary"116—from which ensues the important consequence of taxability *vel non*—will probably be of increasing significance under the new act. Deliberate, careful and patient trial court appraisal “as to the entirety of the case”117 to determine the propriety of taking depositions accordingly will become increasingly vital to just decisions on taxation of costs, and therefore to sound deposition practice.

Clearly the new act's enforcement provisions are adequate for fulfillment of the purposes of discovery. Perhaps it is appropriate to caution that, especially until the Bar has assimilated the new features of the act—a process that can be burdensome to practitioners schooled in a different tradition—the trial bench should apply the sanctions firmly but reasonably and understandingly. The utility, workability and success of discovery will ultimately not be as much a function of threats and sanctions as of its acceptance in reasonable fashion by the trial Bar. What was said when another state adopted the federal discovery rules remains pertinent:118

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115 § 1032a now provides: "Any person allowed his costs under the provisions of this chapter shall, in addition to other costs, be entitled to the reasonable cost of taking and transcribing depositions, together with the reasonable cost of one copy of each such deposition, unless it shall appear to the court that the taking of such deposition was unnecessary, and in addition the reasonable cost of one copy of all depositions taken by the party or parties against whom such costs are allowed." As to the federal rule on taxation of deposition costs, see 4 MOORE, FEDERAL PRACTICE § 26.36 (2d ed. 1950).

116 § 1032a; quoted in note 115 *supra*; see note 114 *supra* and corresponding text.


118 Louisell, Discovery and Pre-trial Under the Minnesota Rules, 36 MINN. L. REV. 653, 646 (1952). "As a matter of administration, examinations should be arranged between the parties on a professional basis, and resort to the court by motion or objection should be had only when a serious question is raised as to the good faith, legitimate purpose or reasonable scope of the examination." Marie Dorros, Inc. v. Dorros Bros., 274 App. Div. 11, 14, 80 N.Y.S.2d 25, 27 (1st Dep't 1948). For a recent illustration of too severe a sanction in enforcing discovery, *viz.*, dismissal because of plaintiff’s failure to appear for a physical examination and further depo-
Implicit in the discovery rules is acknowledgement that they will be administered by a learned profession of judgment and integrity, which can be depended upon for a high degree of self discipline and self-policing. This acknowledgement is not based upon delusive suppositions that advocates in an adversary system will freely abandon positions of strength out of considerations of sentiment or good fellowship, but rather that judgment, experience and mutual respect among fellow practitioners will normally dictate limitations of common sense substantially equivalent to those that would be imposed by a court.

B. Sanctions Which Protect Against Abuse of Discovery

Section 2019(b) specifically sets forth the protective orders which a court may issue upon motion seasonably made by any party or the prospective witness, after notice is served for taking the oral deposition of the witness. The range of these orders is from an order fixing the place of taking the deposition, to one prohibiting altogether the taking. The enumerated orders doubtless are sufficiently inclusive to take care of most contingencies requiring protection which are apt to occur. Nevertheless this section, substantially like its federal counterpart, goes on to provide generally that the court “may make any other order which justice requires to protect the party or witnesses from annoyance, embarrassment or oppression.” Section 2019(b) is applicable before commencement of taking the deposition; the same protection, with an order for termination substituted as a possibility for an order that the deposition not be taken, is available after commencement under section 2019(d). The norm for protective orders established by section 2019 is equally applicable to interrogatories to adverse parties and discovery of documents and things by reason of cross references in sections 2030(b) and 2031(a) to section 2019(b).

119 Its counterpart is Fed. R. Civ. P. 30(b).

120 § 2019(b) provides: “After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than stated in the notice, or that it shall not be taken except by allowing written interrogatories by one or more parties, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.” See also §§ 2065, 2066.

121 The counterpart is Fed. R. Civ. P. 30(d).

122 And by cross reference in Fed. R. Civ. P. 33 and 34 to 30(b).
reason of section 2020(d), applicable to depositions upon written interrogatories, along with the possible additional orders that "the deposition shall not be taken before the officer designated in the notice or that it shall not be taken except by allowing oral examination by one or more parties."

Section 2032 providing for compulsory examinations by physicians contains no similar cross reference to section 2019(b), but it does require initially a court order "made only on motion for good cause shown and upon notice to the person to be examined and to all parties" which "shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made." Also section 2033, providing for requests for admissions, contains no cross reference to section 2019(b), but it does contain its own protective provision by authorizing written objections by the addressee of the requests, on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or part.

In addition, significant protective sanctions appear in section 2019(g). They provide that if the party giving the notice of the taking of a deposition fails to attend and proceed therewith, or by neglecting to subpoena a non-party witness fails to procure his attendance, and if another party attends, thus incurring waste of time and expense, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

Thus the courts have ample power to protect at least against most potential abuses of the discovery rules. In federal practice the principal abuses seem to have occurred chiefly in the so-called "big cases"—mostly antitrust and patent cases. As noted, the wise and careful use by trial courts of their discretion in allowing or disallowing as taxable costs the expenses of taking depositions can be a realistic and significant protective measure.

123 Accord, FED. R. CIV. P. 31(d).
124 Accord, FED. R. CIV. P. 35(a).
125 Accord, FED. R. CIV. P. 36(a).
126 Accord, FED. R. CIV. P. 36(g) is its counterpart. Note the financial sanctions considered in notes 113–15 supra and accompanying text which can also properly be considered as protective against unreasonable discovery.
128 Notes 114–17 supra and accompanying text.
ure. In view of the wide discretion vested in trial judges to protect against abuse, as well as to enforce discovery, the significance of an able trial bench to sound and just judicial administration is further emphasized.

CONCLUSION

California has now joined the lengthening ranks of states substantially adopting federal discovery practice. From the viewpoint of liberal discovery as an ideal, appreciation is assuredly due the sponsors of the new act and the legislature for setting aside deficiencies and limitations which characterized the old practice and replacing them with an integrated system which has generally been regarded as successful. Although in the wake of the new act undoubtedly there will be uncertainties to be resolved and problems to be threshed out—perhaps principally the matter of delineating within the framework of the new act the operative scope of extant privileges of nondisclosure, including the attorney-client confidential communication privilege—the road to liberal discovery in California courts is now for all practical purposes at least as clear as it is in federal courts.

But of course it would be naive to hail the new act as the panacea of litigation. All it does—all any procedural reform can do—is provide tools which, like all tools, depend ultimately for their value on the skill of the craftsmen who wield them. Success of the new discovery tools is largely dependent on the high craftsmanship of the trial bench; a craftsmanship which therefore becomes even more important to successful judicial administration than it was before the new act.