IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH JUDICIAL CIRCUIT

COURT OF APPEALS NO. 87-6486

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
Honorable Robert M. Takasugi, Judge

GENERAL LEON DEGRELLE,

Plaintiff-Appellant,

vs.

SIMON WIESENTHAL CENTER,

Defendant-Appellee.

BRIEF OF DEFENDANT-APPELLEE

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I. STATEMENT OF SUBJECT MATTER JURISDICTION AND TIMELINESS.

Defendant-Appellee the Simon Wiesenthal Center agrees with the statement of subject matter jurisdiction in Plaintiff-Appellant Degrelle's (hereinafter "Degrelle") brief. The Simon Wiesenthal Center believes that a notice of appeal was timely filed.

II. ISSUES PRESENTED.

1. Degrelle waived his right to appeal the District Court order dismissing this lawsuit by failing to object to the Magistrate's denial of his protective order and then failing to oppose the motion to dismiss.

2. The District Court did not abuse its discretion when it dismissed the lawsuit, after Degrelle failed to appear at his own properly noticed deposition on two occasions, and then failed to appear for his own court ordered deposition on a third occasion.

3. The Magistrate did not abuse his discretion when he denied the motion for protective order relating to Degrelle's deposition.

III. STATEMENT OF THE CASE.

A. PREFATORY STATEMENT.

This Court should dismiss Degrelle's appeal of the District Court's order of dismissal, because Degrelle waived his appeal by failing to oppose the motion to dismiss.

If this Court does not dismiss the appeal, the Court should affirm the District Court's order dismissing this lawsuit. The lawsuit was dismissed with prejudice after Degrelle failed to comply with a court order requiring him to attend his deposition. The order of the District Court requiring Degrelle to attend his deposition specifically warned Degrelle that the lawsuit would be dismissed if he did not appear for his deposition, unless he obtained a protective order. Nevertheless, Degrelle did not appear for the Court Ordered deposition and did not obtain a protective order. The District Court's order that Degrelle appear at his deposition followed Degrelle's failure to appear for his properly noticed deposition on two prior occasions.

B. STATEMENT OF FACTS.

The Plaintiff-Appellant, Leon Degrelle, was a General in the Waffen SS during World War II. (Brief For Appellant, Statement of the Case.) Degrelle proudly proclaims in his Complaint that "The said forces's Commander in Chief was Adolf Hitler, the democratically elected head of the German State." (Complaint, CR 1 p. 2 lines 16-17, Appellee's Excerpts of Record p. 2.) Degrelle was tried in absentia by a Belgian court after World War II, and sentenced to death. (Degrelle's Declaration In Support of Motion For Protective Order, CR 31, Appellee's Excerpts of Record p. 75.) 1/

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1. In this brief, Appellee's Excerpts of Record shall be designated as "AER," followed by the page number in Appellee's Excerpts of Record. Appellant did not submit Excerpts of Record. In this brief, portions of the record shall be referred to by the designation "CR," followed by the number that the document has on the District Court Docket sheet.

In July 1986, Degrelle filed a lawsuit in the U.S. District Court for the Central District of California against the Simon Wiesenthal Center. The Simon Wiesenthal Center is a charitable, non-profit organization headquartered in Los Angeles, which depends entirely on contributions for its existence. (Declaration of Sue Burden, CR 34 p. 12, AER (Appellee's Excerpts of Record) p. 76.)

Degrelle alleged that the Simon Wiesenthal Center had defamed him by referring to him as a criminal or war criminal, and had offered rewards for his "kidnapping." Degrelle asserted claims for RICO violations, assault, false imprisonment, invasion of privacy, defamation, and for a restraining order. Degrelle claimed $14,000,000.00 in damages. (Complaint, AER pp. 1-4; Amended Complaint, AER pp. 5-12.)

C. PROCEEDINGS IN THE DISTRICT COURT.

On August 15, 1986, the Simon Wiesenthal Center noticed Degrelle's deposition upon oral examination for September 29, 1986 in Los Angeles. (Notice of Deposition, CR 5,9, AER pp. 21-27.) Degrelle acknowledged receipt of the Notice of Deposition by sending (but apparently not filing) an Objection to Deposition. (Objection to Deposition, CR 9 Ex 3, AER p. 34.)

Degrelle failed to appear for his deposition on September 29, 1986. (Transcript of Deposition, CR 9 Ex. 2, AER pp. 28-33; Zipperstein declaration, CR 9 p. 8, AER pp. 50-51.)

On September 30, 1986, the Simon Wiesenthal Center re-noticed Degrelle's deposition for November 5, 1986, in Los Angeles. (Notice of Deposition, CR 7, 9, AER p. 41-48.) The

attorneys for the Simon Wiesenthal Center also sent Degrelle a letter explaining that his written objection to the deposition did not relieve him of his obligation to attend his deposition. The letter outlined the procedure that Degrelle had to follow to obtain a protective order or other relief. The Notice of Deposition and letter were sent to Degrelle by Federal Express. (Mausner letter to Degrelle, CR 9 Ex. 4, AER pp. 38-40; Zipperstein declaration, CR 9 pp. 8-9, AER pp. 50-51.)

On November 4, 1986, the Simon Wiesenthal Center received a mailgram from Degrelle stating that he would not appear for his November 5, 1986 deposition. (Mailgram, CR 9 Ex. 6, AER p. 49.)

Degrelle failed to appear for his deposition on November 5, 1986. (Zipperstein declaration, CR 9 p. 9, AER p. 51.)

The Simon Wiesenthal Center then moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 37(d), based on Degrelle's failure to appear for his deposition on two occasions. (CR 9.)

On January 13, 1987, the District Judge denied the Simon Wiesenthal Center's motion to dismiss, but ordered that Degrelle appear for deposition in Los Angeles upon sixty days notice by express mail. **The order issued by the District Judge provided that "Plaintiff is advised that if he fails to attend such deposition, this action shall be dismissed. The only way plaintiff can prevent said dismissal is obtain a protective order relieving him from appearing."** (Order Granting In Part and Denying In Part Defendant's Motion To Dismiss and Compelling Plaintiff's Appearance For Deposition, CR 13 p. 2, AER p. 53,

emphasis added.)

On January 15, 1987, the Simon Wiesenthal Center re-noticed Degrelle's deposition for April 2, 1987 in Los Angeles, serving the notice and a copy of the District Court's order by Federal Express. (Notice of Deposition, CR 14, AER pp. 55-67.)

On or about February 23, 1987, Degrelle filed a motion for a protective order, requesting that the taking of his deposition be deferred until ten days before trial or, in the alternative, requesting that his deposition be taken upon written interrogatories in Spain. (CR 19.)

On March 20, 1987, the Magistrate, sua sponte, issued an order requesting further briefing or declarations on certain issues from both parties. (Order Regarding Plaintiff's Motion For Protective Order, CR 20, AER pp. 70-74.) In particular, the Magistrate asked the parties to brief whether oral deposition is possible in Spain, ordered Degrelle to supply additional financial information and allowed Degrelle to supply additional medical information. The parties filed their additional briefs or declarations. (CR 31, 34)

On June 5, 1987, the Magistrate denied Degrelle's motion for a protective order, and ordered Degrelle to appear in Los Angeles for his deposition on August 17, 1987. (Order, CR 36, AER pp. 77-79.) The Simon Wiesenthal Center was ordered to send an airplane ticket to Degrelle for his travel to Los Angeles. Id. The Simon Wiesenthal Center did purchase and send an airplane ticket to Degrelle, as ordered. (Barksdale declaration, CR 37, AER pp. 80-87.)

The Magistrate's order stated that "plaintiff's failure to report for his deposition as ordered shall subject him to the sanctions provided in Rule 37(b), F.R.Civ.P., including but not limited to judgment by default against him." (June 5, 1987 Order, AER p. 79, emphasis added.)

On or about July 30, 1987, Degrelle moved for a rehearing on the denial of his motion for protective order. (Motion For Rehearing Re Protective Order, AER pp. 88-91.) On August 4, 1987, the Magistrate denied Degrelle's motion for rehearing. (Order, CR 41, AER pp. 92-94.)

Degrelle never filed any objections with the District Judge to the Magistrate's denial of his motion for protective order or the Magistrate's denial of his motion for rehearing.

Even though Degrelle had been ordered to appear at his deposition by both the District Judge and the Magistrate, and warned by both that failure to appear would result in dismissal, Degrelle failed to appear for his deposition on August 17, 1987. (Transcript of deposition, CR 42 Ex. 1, AER pp. 95-103; Zipperstein declaration, CR 42 p. 10, AER p. 104.)

On August 19, 1987, the Simon Wiesenthal Center filed a Motion For Entry of Default Judgment against Degrelle. (CR 42.) It is important to note that Degrelle did not file any opposition to the Motion For Entry of Default Judgment. (See CR 43, AER p. 105; CR 46; CR 110.)

On September 10, 1987, the District Judge issued an Order Dismissing the Action, with prejudice. The dismissal was entered on September 14, 1987. (CR 47, AER p. 106.) On or about October 13, 1987, Degrelle filed a Notice of Appeal. (CR

48, AER p. 107.)

IV. ARGUMENT.

A. DEGRELLE WAIVED HIS RIGHT TO APPEAL THE DISTRICT COURT ORDER DISMISSING THIS LAWSUIT BY FAILING TO OBJECT TO THE MAGISTRATE'S DENIAL OF HIS PROTECTIVE ORDER AND THEN FAILING TO OPPOSE THE MOTION TO DISMISS.

As discussed above, Degrelle never filed any objections with the District Judge to the Magistrate's denial of his motion for protective order or the Magistrate's denial of his motion for rehearing regarding the protective order. Furthermore, Degrelle did not file any opposition to the Simon Wiesenthal Center's motion to dismiss the lawsuit.

A party waives its right to appeal a dismissal or default judgment by failing to oppose the motion for dismissal or default judgment. Rudick v. Prineville Memorial Hospital, 319 F.2d 764, 769 (9th Cir. 1963) ("The motion to dismiss was made on Dr. Donley's behalf, and no objection was interposed. Appellant's counsel has thus waived his client's right to object on appeal."), citing Bucy v. Nevada Construction Co., 125 F.2d 213, 218 (9th Cir. 1942); Fowler v. Crown-Zellerbach Corp., 163 F.2d 773, 774 (9th Cir. 1947).

See also G-K Properties v. Redevelopment Agency of San Jose, 577 F.2d 645, 648 (9th Cir. 1978) (objection to dismissal of complaint for failure to comply with a discovery order may not be raised for the first time on appeal).

Therefore, by failing to oppose the motion to dismiss, Degrelle waived his right to appeal the dismissal.

Degrelle's failure to oppose the motion to dismiss in this case is exacerbated by his failure to file objections with the District Judge to the Magistrate's denial of his motion for protective order. By failing to object to the Magistrate's denial of the protective order, and then by failing to oppose the dismissal of the lawsuit in which the propriety of the denial of the protective order was relevant, Degrelle prevented review of the Magistrate's determination regarding the protective order by the District Judge and thereby waived his right to appeal it.

The situation in the instant case is not controlled by U.S. Dominator v. Factory Ship Robert E. Resoff, 768 F.2d 1099, 1102-1103 (9th Cir. 1985) and Britt v. Simi Valley Unified School District, 708 F.2d 452, 454 (9th Cir. 1983), which held that failure to file objections to a magistrate's order or recommendation does not constitute a waiver of the right to challenge that order or recommendation before the Court of Appeals. If Degrelle had opposed the motion to dismiss by raising the propriety of the denial of the protective order, the fact that he had not objected to the denial of the protective order would not prevent him from raising the issue on appeal, pursuant to U.S. Dominator and Britt.2/ However, since Degrelle

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2. It should be noted that in an earlier decision, the Ninth Circuit held that a party's failure to file objections to a magistrate's order or recommendation did constitute a waiver of that party's right to challenge the order before the Court of Appeals. McCall v. Andrus, 628 F.2d 1185, 1187 (9th Cir. 1980), cert. denied, 450 U.S. 996 (1981).

It should also be noted that a majority of the Circuits

(footnote continued)

did not raise the propriety of the denial of the protective order in an opposition to the motion to dismiss, he waived his right to appeal on the protective order and on the dismissal itself.

The rule is well established that a party may not raise issues on appeal that were not raised in the District Court. Greater Los Angeles Council On Deafness v. Zolin, 812 F.2d 1103, 1107 (9th Cir. 1987). Requiring that a party file opposition to a motion to dismiss in the district court or waive that party's right to appeal is supported by sound considerations of judicial economy. Absent such a rule, a party could raise before an appellate court any issue which could have been decided by the

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(footnote 2 continued)

have adopted a rule contrary to U.S. Dominator and Britt, holding that failure to object to the magistrate's order or recommendation results in a waiver of appeal to the Court of Appeals. Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980); Scott v. Schweiker, 702 F.2d 13 (1st Cir. 1983); John B. Hull, Inc. v. Waterbury Petroleum Products, Inc., 588 F.2d 24, 29-30 (2nd Cir. 1978), cert. denied, 440 U.S. 960; United Steelworkers of America v. New Jersey Zinc Co., 828 F.2d 1001, 1006-1008 (3rd Cir. 1987); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984), cert. denied, 467 U.S. 1208 (1984); United States v. Renfro, 620 F.2d 497, 500 (5th Cir. 1980), cert. denied, 449 U.S. 921 (1980); Central Progressive Bank v. Fireman's Fund Insurance Company, 658 F.2d 377, 382-383 (5th Cir. 1981); United States v. Walters, 638 F.2d 947, 949, 950 (6th Cir. 1981); Video Views, Inc. v. Studio 21, Ltd., 797 F.2d 538 (7th Cir. 1986); United States v. Haley, 541 F.2d 678 (8th Cir. 1974); Niehaus v. Kansas Bar Association, 793 F.2d 1159, 1164-1165 (10th Cir. 1986).

Contra, Lorin Corp. v. Goto & Co., 700 F.2d 1202, 1206 (8th Cir. 1983).

See also Thomas v. Arn, 474 U.S. 140, 155, 106 S.Ct. 466, 473, 88 L.Ed.2d 435 (1985) (Each court of appeals may promulgate its own rule.)

District Court, thereby resulting in an inefficient use of judicial resourses and a subversion of the rule that only those issues raised in the district court may be appealed.

This Court should therefore dismiss Degrelle's appeal, since Degrelle waived his right to appeal the District Court's dismissal of his lawsuit by failing to object to the magistrate's denial of his protective order and then failing to oppose the motion to dismiss.

B. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DISMISSED DEGRELLE'S ACTION AFTER DEGRELLE FAILED TO APPEAR AT HIS OWN DEPOSITION ON TWO OCCASIONS, AND THEN FAILED TO APPEAR FOR HIS OWN COURT ORDERED DEPOSITION ON A THIRD OCCASION.

1. Scope and Standard of Review.

This Court's review of the District Court's dismissal of Degrelle's lawsuit for failure to appear at his deposition and to comply with a discovery order is limited to a determination of whether the District Court abused its discretion. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642, 96 S.Ct. 2778, 2780, 49 L.Ed. 2d 747 (1976) ("The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing."); Hall v. Johnston, 758 F.2d 421, 424 (9th Cir. 1985) ("We review the district court's grant of default for abuse of discretion."); United Artists Corp. v. La Cage Aux Folles, Inc., 771 F.2d 1265, 1270 (9th Cir. 1985) ("We review a dismissal

even without first ordering the plaintiff to appear. Moore, Federal Practice, section 37.05, p. 37-117; Sigliano v. Mendoza, 642 F.2d 309, 310 (9th Cir. 1981) ("Dismissal is a proper sanction under Rule 37(d) for a serious or total failure to respond to discovery even without a prior order."); Charter House Insurance Brokers, Ltd. v. New Hampshire Insurance Co., 667 F.2d 600, 604 (7th Cir. 1981)(If a party does not appear for a properly noticed deposition, the court may impose sanctions directly, without first issuing an order to compel discovery.); Boykins v. Wainwright, 737 F.2d 1539 (11th Cir. 1984) (Dismissal is proper under Rule 37(d) for repeated failure of the plaintiff to appear for deposition).

Therefore, in the instant case, the District Court could have dismissed Degrelle's complaint after his failure to appear for his own deposition on two occasions. Rather than doing so, however, the District Court, in order to be overly fair to Degrelle, gave him another chance to appear for his deposition.

3. A District Court Has Authority to Dismiss A Lawsuit For Failure to Comply With A Discovery Order.

Federal Rule of Civil Procedure 37(b)(2)(C) provides that "[i]f a party fails to obey an order to provide or permit discovery," the court may make an order "dismissing the action or proceeding ... or rendering a judgment by default against the disobedient party." There is no question that a district court has authority to dismiss a lawsuit for failure of the plaintiff to comply with an order that he appear for his deposition.

In Hall v. Johnston, 758 F.2d 421, 424 (9th Cir. 1985), Hall

served a notice of deposition to depose defendant Johnston. When Johnston failed to appear, Hall filed a motion for default judgment pursuant to Federal Rule of Civil Procedure 37(d). The district court denied Hall's default motion upon the express condition that defendant Johnston comply with further deposition notices. Thereafter, Johnston failed to appear at a second duly-noticed deposition. Hall renewed his default motion against Johnston, and the district court granted the motion for default. 758 F.2d at 422. The Court of Appeals affirmed, stating:

> "The [district] judge was careful to explain the gravity of Johnston's failure to comply with the first deposition notice. Johnston was given another opportunity to comply. He failed to do so. The district court's grant of default against defendant Johnston is affirmed." 758 F.2d at 425.

See also Kabbe v. Rotan Mosle, Inc., 752 F.2d 1083, 1084 (5th Cir. 1985) (District court did not abuse its discretion in dismissing the action with prejudice for plaintiff's failure to appear for deposition, where the district court specifically cautioned plaintiff that failure to appear for deposition will result in the immediate dismissal of the case with prejudice.); Baker v. Limber, 647 F.2d 912, 918 (9th Cir. 1981) ("On two occasions appellant refused to answer any questions concerning the subject matter of the lawsuit against him or the counterclaims he raised against the trustees. No more serious refusal to comply with discovery is conceivable, and the imposition of harsh sanctions [striking counterclaim and

entering a default judgment] is well within the court's discretion."); Collins v. Wayland, 139 F.2d 677 (9th Cir. 1944), cert. denied, 322 U.S. 744 (1944) (Plaintiff failed to appear for his deposition, then failed to appear for his court ordered deposition. District court dismissed the lawsuit. Court of Appeals held that the appeal was frivolous.)

The United States Supreme Court and this Court have made clear that dismissal of the complaint for failure of the plaintiff to comply with discovery or a discovery order is not only an appropriate remedy, but a favored remedy. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642, 96 S.Ct. 2778, 2780, 49 L.Ed. 2d 747 (1976); G-K Properties v. Redevelopment Agency, 577 F.2d 645, 647 (9th Cir. 1978).

In National Hockey League, the Court of Appeals had reversed the district court's order of dismissal for failure of the plaintiff to timely answer written interrogatories. The Supreme Court reversed the Court of Appeals, making it clear that the abuse of discretion standard is to be strictly applied:

> "There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order. ...
>
> "But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize

those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." 427 U.S. at 642-643, 96 S.Ct. at 2780-2781.

In G-K Properties v. Redevelopment Agency, supra, 577 F.2d at 647, this Court stated the following:

> "We encourage such orders [of dismissal with prejudice for failure to comply with discovery orders]. Litigants who are willful in halting the discovery process act in opposition to the authority of the court and cause impermissible prejudice to their opponents. It is even more important to note, in this era of crowded dockets, that they also deprive other litigants of an opportunity to use the courts as a serious dispute-settlement mechanism."

See also Davis v. Fendler, 650 F.2d 1154, 1161 (9th Cir. 1981) ("Our review of the record convinces us that the district judge was well within his discretion in assessing the sanction of default judgment. We would be undermining the authority of our district judges to prevent further proliferation of discovery abuses if we were to hold otherwise.")

Applying the above standard to the instant case, it is clear that the District Court did not abuse its discretion in dismissing Degrelle's lawsuit. Degrelle failed to appear on two occasions for his properly noticed deposition. The District Court clearly could have dismissed the lawsuit at that point, without giving Degrelle a further chance to appear. Nevertheless, the District Court gave Degrelle another chance to

appear, ordering him to do so and warning him that another failure to appear would result in dismissal of the lawsuit unless he obtained a protective order. Degrelle sought a protective order, which was denied after extensive briefing. At that point, the Magistrate again warned Degrelle that if he did not appear for his deposition, a default judgment would be entered against him. In cases with very similar facts, this Court has held that an order of dismissal was not an abuse of discretion.

Degrelle disobeyed the District Judge's order of June 5, 1987, and the Magistrate's order of August 4, 1987, ordering him to appear for his deposition. Degrelle was given every opportunity to either appear for his deposition or convince the court that he should not be ordered to appear. Both the District Judge and the Magistrate warned Degrelle in their written orders that his failure to appear would result in the dismissal of his lawsuit. Clearly, in light of such warnings and Degrelle's failure to appear at two previously scheduled depositions, it was not an abuse of discretion to dismiss the lawsuit.

4. Degrelle's Failure To Appear At His Depositions Was Due to His Own Willfulness, Bad Faith, or Fault.

"With the 1970 amendments, the requirement of willfulness was deleted from Rule 37(d) and the Rule now provides that any failure to appear [for a deposition] ... is subject to any of the sanctions set forth in what is now subdivision (b)(2) of the Rule, leaving willfulness as a factor to be taken into

consideration in determining the severity of the sanction chosen by the court." Moore, Federal Practice, section 37.05, p. 37-123.

Nevertheless, this Court has held that "[a] dismissal sanction for failure to comply with Rule 37, Fed.R.Civ.P., is appropriate 'only where the failure to comply is due to willfulness, bad faith, or fault of the party.' [citation omitted] We have recognized that a dismissal or default judgment may be based on 'fault' alone." United Artists Corp. v. La Cage Aux Folles, Inc., 771 F.2d 1265, 1270 (9th Cir. 1985).

A plaintiff's repeated failures to comply with discovery requests or court orders is sufficient to establish the fault required to dismiss the lawsuit. Sigliano v. Mendoza, 642 F.2d 309, 310 (9th Cir. 1981) ("Sigliano's repeated failure to comply with the discovery request and the court's orders manifested the requisite fault and fully justified the sanction imposed.")

Failure to appear for a court ordered deposition, in and of itself, can be found to constitute the requisite willfulness, bad faith, or fault to warrant dismissal. In Founding Church of Scientology of Washington D.C. v. Webster, 802 F.2d 1448, 1458 (D.C. Cir. 1986) the defendants sought to depose the founder of Scientology, L. Ron Hubbard. Although Hubbard himself was not a plaintiff, the defendants sought to take his deposition as a managing agent of the plaintiff. The district court ordered Hubbard to appear for a deposition or the lawsuit would be dismissed. 802 F.2d at 1450. Upon Hubbard's failure to appear,

the district court dismissed the lawsuit. The Court of Appeals upheld the dismissal, stating:

> "Here, despite the protestations of Scientology that it could not contact Hubbard, the District Court took Hubbard's absence at the April deposition to 'supply the requisite 'element of willfulness or conscious disregard' for the discovery process which justifies the sanction of dismissal.' ... Since Scientology remained Hubbard's alter ego, notice to the organization could reasonably be construed as notice to him; in consequence, the Church itself, as the party for which Hubbard was, prima facie, the managing agent, could be sanctioned for his failure to appear when ample advance notice was given of the importance of the deposition and the consequence that would attach from failure to attend to it.
>
> "The District Court also had ample reason to interpret the failure of Hubbard to abide by its order as evidence of 'willfulness, bad faith or ... fault."

In United Artists Corp. v. La Cage Aux Folles, Inc., 771 F.2d 1265, 1270 (9th Cir. 1985) it was held that inability of the attorney to contact his client in order to complete discovery because the client was traveling constituted sufficient fault on the part of the client to uphold a dismissal for failure to comply with discovery requests.

In Lew v. Kona Hospital, 754 F.2d 1420, 1426 (9th Cir. 1985), the Court held that failure to attend a deposition could