RULE 37. FAILURE TO MAKE DISCOVERY: SANCTIONS

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

(1) *Appropriate Court.* A motion for an order to a party or a deponent shall be made under Rule 26(g). On matters relating to a deposition being taken outside the state, the court may order that an application for an order to the deponent be made to any court having general civil jurisdiction in the place where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for production or inspection submitted under Rule 30(b)(5) or 34, fails to respond that inspection will be permitted as requested or fails to produce or to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling production or inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

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

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

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

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

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

(b) Failure to Comply With Order.

(1) *Sanctions by Court in Place Where Deposition Is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the place in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action Is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Rule 26(g), Rule 35 or subdivision (a) of this rule, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made 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;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

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

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 26(g) or Rule 35(a) requiring that party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that that party is unable to produce such person for examination.

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

(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take a deposition, after being served with a proper notice, or to comply with a properly served request for production under Rule 30(b)(5), without having made an objection thereto, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for production or inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require

the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

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

(e) Electronically Stored Information. Absent exceptional circumstances, the court shall not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.

Advisory Committee Note
July 2008

Rule 37(e) is adopted to address the discovery of electronically stored information. Corresponding amendments have also been made to Rules 16, 26, 33, and 34. The amendment to Rule 37 (e) is intended to protect parties who may have lost electronically stored information "as a result of the routine, good-faith operation of an electronic information system." The amendment is identical to the 2006 amendment to F.R.Civ.P. 37 (e), whose Advisory Committee's Notes and case law should be consulted for guidance.

The amendment to Rule 37(e) is in effort to balance two interests. First, a party should not be sanctioned or subject to a claim of spoliation of evidence if electronically stored information is lost or altered as a result of the good-faith operation of the party's electronic information system. The amendment recognizes that electronic information is dynamic, subject to routine alteration or deletion, and may not always be available in the same form as when the events giving rise to the case took place. Second, the rule also recognizes that the dynamic nature of electronically stored information is not a license to create or maintain an environment in which relevant evidence is rendered unavailable. The rule seeks to balance these interests by requiring that the protection of the rule extends only to the operation of an electronic information system that is both "routine" and "good faith."

Obviously, the requirement that the operation of the information system be "routine" requires that the operation be in the ordinary course of business. At the

same time, “good faith” may require an intervention to ensure that information is not lost. As the federal Advisory Committee Note makes clear, "[G]ood faith in the routine operation of an information system may involve a party’s intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. . . . The good faith requirement of Rule 37 (e) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations while allowing that operation to continue in order to destroy specific stored information that it is required to preserve." One of the sources of such a requirement may be a "litigation hold" order or agreement that might be created in the discovery conference process under Rule 16 (a). A party receiving a litigation hold request before or during suit would be well advised to take reasonable steps to protect the information pending a ruling from the court.

Although the amendment to Rule 37 (e) provides that a party will not be sanctioned under the circumstances the rule contemplates, if a party is found to have rendered electronically stored information unavailable by means not the result of the "routine, good faith operation in an electronic information system," the court has broad powers to make appropriate orders and to sanction the offending party.

Advisory Committee’s Notes
May 1, 1999

An amendment is made to Rule 37(a)(1) to require that motions compelling discovery be made under Rule 26(g) in order to implement the new informal discovery resolution process prescribed by that rule. Similar references to Rule 26(g) have been inserted in subdivisions (b)(2) and (b)(2)(E).

An amendment with no substantive effect was also made to subdivision (b)(2) by moving the reference to Rule 35 from a location following the phrase “subdivision (a) of this rule” to the location preceding it.

Advisory Committee's Note
October 1, 1970

Rule 37 provides generally for the sanctions available against parties or persons who unjustifiably resist discovery. The existing rule uses both the term "failure" to afford discovery and the term "refusal" to do so. The term "failure" is used consistently throughout the amended rule in order to avoid any implication that the different term "refusal" imports wilfulness.

Rule 37(a)(1) preserves the provision of the existing Maine Rule 37(a) permitting application "to any court having general civil jurisdiction in the place where the deposition is taken for an order compelling an answer." As was stated in the Reporter's Note to the original rule (*see* 1 Field, McKusick and Wroth at 542) a Maine rule cannot direct an out-of-state court what to do, nor can a Maine court control the conduct of a nonparty witness beyond its jurisdiction. However, it is believed that the inclusion of this reference will make it more likely that the out-of-state court will take appropriate action against a recalcitrant deponent as a matter of comity. *See* Field, McKusick and Wroth § 28.2 for discussion of enforcement against a recalcitrant deponent outside the state. As against a party or an in-state deponent, the application for an order will properly be made to a Justice of the Superior Court, that is, to the court in which the action is pending, except when the action is pending before a single justice of the Supreme Judicial Court, in which event application should be made to that justice.

Rule 37(a)(4) reverses the statement of the circumstances under which an award of expenses will be made on a motion for an order compelling discovery. The existing rule provides for an award of expenses only if the losing party or person is found to have acted without substantial justification. As amended the rule states that the court shall award expenses, including reasonable attorneys fees, to the prevailing party or persons unless the losing party's action is found to have been substantially justified. Thus, although the test of "substantial justification" is preserved, the reversal in the language provides in effect that expenses should ordinarily be awarded unless the court finds that the losing party acted justifiably in carrying this point to court.

Rule 37(b) spells out the sanctions that are available in the event of a failure by a party or other person to comply with an order for discovery. Subdivision (b)(1) applies in a case where an out-of-state court has entered an order that a non-party deponent within its jurisdiction be sworn or answer a question propounded or submitted under Rules 30 or 31. Again this rule hopefully will encourage the out-of-state court to exercise its contempt powers in aid of the Maine deposition as a matter of comity. Under Rule 37(b)(2) the court in which the action is pending has a much wider choice of sanction.

Rule 37(c) spells out the expenses, including reasonable attorneys fees, allowable in the event of failure without good reason to admit a matter as requested under Rule 36. Rule 37(d) is expanded to cover requests for inspection under Rules 30(b)(5) and 34, as well as depositions and interrogatories which were

previously covered. Both in Rule 37(d) and also in Rule 37(a)(2) deviations from the similarly numbered federal rules occur by the separate reference to requests for inspection under Rule 30(b)(5). The separate references are necessary in Maine because Maine Rule 30(b)(5) spells out an independent procedure for production in connection with depositions of parties whereas F.R. 30(b)(5) merely refers to the procedure of Rule 34. The advantages of the Maine treatment of the problem are discussed in the Advisory Committee's Note to Rule 30.

The second paragraph of subdivision (d) is added to make clear that a party may not remain completely silent even when he regards a notice to take his deposition or a set of interrogatories or requests for inspection to be improper and objectionable. If he elects not to appear or not to respond, he must apply for a protective order.

Reporter's Notes
December 1, 1959

This rule is substantially the same as Federal Rule 37, but with omission of parts inapplicable to state practice. It furnishes the sanctions necessary to make the preceding rules work. Court surveillance of discovery procedure may be worked in two ways: (1) by application for a protective order under Rule 30(b) or 30(d) on appropriate objection from the party against whom discovery is sought; and (2) by application for a Rule 37 sanction by the party seeking discovery.

Rule 37(a) covers the case where a party or a deponent refuses to answer a question on oral examination. Of course the officer before whom the deposition is taken has no power to punish for contempt, nor does he have power to make rulings on evidence. The proponent of the question has his choice between completing his examination on other matters or adjourning the deposition and applying to the court for an order compelling an answer. An unreasonable refusal may be penalized by imposing the costs of obtaining the order, including counsel fees, not only upon the recalcitrant party but upon the attorney advising the refusal. Similarly, costs may be imposed for the unreasonable resort to the court for an order which is denied.

The reference in Rule 37(a) to an application for an order to any court having general civil jurisdiction in the place where the deposition is taken deals with the situation where a deposition is taken outside the state for use in a Maine action. Of course, a Maine rule cannot direct an out-of-state court what to do, nor can a Maine court control the conduct of a non-party witness beyond its

jurisdiction. It is believed that the inclusion of this reference will make it more likely that the out-of-state court would take appropriate action against a recalcitrant deponent as a matter of comity.

The same procedure is available for refusal to answer a question on written deposition under Rule 31 or on Rule 33 interrogatories to a party although as to the latter there would be little or no occasion to apply to an out-of-state court for aid, since the sanctions against the party under Rule 37(b) would be sufficient.

Rule 37(b) lists the sanctions. As to non-party witnesses punishment for contempt is the sole sanction. As to parties, the sanctions vary up to and including dismissal of the case or default. The court will select the one thought most adaptable to the particular situation. It is expressly provided that a party refusing to submit to a physical examination may not be punished for contempt, but his case may be dismissed.