

**STATE OF VERMONT  
VERMONT SUPREME COURT  
MAY TERM, 2009**

**Order Promulgating Amendment to the Vermont Rules of Civil**

Pursuant to Chapter II, Section 37, of the Vermont Constitution and 12 V.S.A. § 1, it is hereby ordered:

1. That Rule 16.2 of the Vermont Rules of Civil Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

**RULE 16.2. SCHEDULING ORDERS**

After a pretrial or discovery conference or after a hearing called for that purpose, the court may enter or amend a scheduling order which may ~~provide~~:

(i) ~~A set a~~ set a date or dates by which all pretrial motions, except those based on circumstances that arise after the cut-off date or a motion to dismiss for lack of subject matter jurisdiction, must be filed;

(ii) ~~A set a~~ set a date by which third parties may be brought into the action pursuant to V.R.C.P. 14;

(iii) provide for discovery of electronically stored information;

(iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation materials after production;

(v) ~~A set a~~ set a date at which the case will be tried, or a date after which the case will be considered ready for trial so that it will appear on a trial list and thereafter be governed by V.R.C.P. 40(a).

Except as herein provided, a scheduling order controls the subsequent course of the action and takes precedence over any rule with respect to the time for taking any action or the scheduling of actions for trial. A case subject to a scheduling order may be continued only on motion and a showing of good cause. The date of a conference or action of a party as ordered by the court may be extended only on motion and a showing of good cause.

The terms of a scheduling order shall be determined with reasonable accommodation to litigants and their counsel and shall be modified where necessary to prevent manifest injustice. When a party fails to obey a scheduling order, the court may impose the sanctions provided in Rule 37(b)(2)(B) or (C) or, if the failure is to appear for trial as directed, dismiss the action or enter a default.

**Reporter's Notes—2009 Amendment**

V.R.C.P. 16.2 is amended as part of a series of amendments conforming the Vermont Rules of Civil Procedure to 2006 amendments of the Federal Rules of Civil Procedure that made specific provision for discovery of electronically stored information. See Reporter's Notes

to simultaneous amendment of V.R.C.P. 26. The present amendment is adapted from a 2006 amendment adding F.R.C.P. 16(b)(5), (6), to the permissible contents of a pre-trial scheduling order “to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation if such discovery is expected to occur” and to include “any agreements that the parties reach to facilitate discovery of by minimizing the risk of waiver of privilege or work product protection.” Advisory Committee’s Note to 2006 Amendment of F.R.C.P. 16(b).

2. That Rules 26(b) and (f) of the Vermont Rules of Civil Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

## **RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY**

\* \* \* \* \*

(b) **Discovery Scope and Limits.** Unless otherwise limited by order of a superior judge in accordance with these rules, the scope of discovery is as follows:

(1) *In General; Limitations.* Parties may obtain discovery regarding 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 party seeking discovery 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 any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of this paragraph. The court may specify conditions for the discovery.

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by a Superior Judge if it is determined that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issue at stake in the litigation. The Superior Judge may act upon the

Superior Judge's own initiative after reasonable notice or pursuant to a motion under subdivision (c).

\* \* \* \* \*

(5) Claims of Privilege or Protection of Trial-Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial-preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) Information Produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial preparation-material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

\* \* \* \* \*

(f) **Discovery Conference.** At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. . . .

\* \* \* \* \*

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, including any issues about preserving discoverable information, any issues about discovery of electronically stored information including the form or forms in which it should be produced, and any issues about claims of privilege or protection as trial-preparation materials; establishing a plan and schedule for discovery; setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

\* \* \* \* \*

V.R.C.P. 26(b) and (f) are amended as part of a series of amendments conforming the Vermont Rules of Civil Procedure to 2006 amendments of the Federal Rules of Civil Procedure that made specific provision for discovery of electronically stored information. See Reporter's Notes to simultaneous amendments of V.R.C.P. 16.2, 33, 34, 37, 45. The term "electronically stored information" has the same broad meaning in all of these amendments that is given it in the amendment of V.R.C.P. 34(a).

These amendments for the most part codify the practice that has developed under existing standards. See American Bar Association Section of Litigation, *Civil Discovery Standards* 57-76 (Revised, August 2004), <http://www.abanet.org/litigation/discoverystandards/>; Conference of Chief Justices, *Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information* (August 2006), <http://www.ncsconline.org/images/EDiscCCJGuidelinesFinal.pdf>; Uniform Rules Relating to the Discovery of Electronically Stored Information ( August 2007), 14 *Uniform Laws Annotated* Supp. 10 (2008), [http://www.law.upenn.edu/bll/archives/ulc/udoera/2007\\_final.htm](http://www.law.upenn.edu/bll/archives/ulc/udoera/2007_final.htm). Although the *Standards*, *Guidelines*, and Uniform Rules reflect that existing practice, it is preferable to spell out in the Vermont Rules specific provisions concerning discovery of electronically stored information, rather than await case-by-case development. Adoption of the Federal Rules amendments, so far as consistent with existing Vermont provisions, will retain the basic uniformity between state and federal practice that is a continuing goal of the Vermont Rules. (Note that, effective December 1, 2007, the Federal Rules were completely "restyled" in a comprehensive set of amendments that diminish uniformity of form and language until Vermont can follow suit. Uniformity of practice will continue, however, because the "restyling" was intended to make no substantive change in the operation of the Federal Rules.)

The need for accessible and understandable procedural rules, as described in the Introduction to the Conference of Chief Justices, *Guidelines*, *supra*, at v-vii, reflects the fact that

Most documents today are in digital form. "Electronic (or digital) documents" refers to any information created, stored, or best utilized with computer technology of any sort, including business applications, such as word processing, databases, and spreadsheets; Internet applications, such as e-mail and the World Wide Web;

devices attached to or peripheral to computers, such as printers, fax machines, pagers; web-enabled portable devices and cell phones; and media used to store computer data, such as disks, tapes, removable drives, CDs, and the like.

There are significant differences, however, between conventional documents and electronic documents—differences in degree, kind, and costs. . . . The volume, number of locations, and data volatility of electronic documents are significantly greater than those of conventional documents. . . . [D]igital transactions (creation of an electronic airline ticket, for example) often create no permanent document in electronic or any other form. . . . In addition, unlike conventional documents, electronic documents contain non-traditional types of data including metadata, system data, and “deleted” data.

Cost differences are often thought to include differences in the allocation of costs [from the requesting to the responding party] as well as the amount of costs [through significant expense for technology experts]. On the other hand, . . . [w]hen properly managed, electronic discovery allows a party to organize, identify, index, and even authenticate documents in a fraction of the time and at a fraction of the cost of paper discovery while virtually eliminating costs of copying and transport.

Until recently, electronic discovery disputes have not been a standard feature of state court litigation in most jurisdictions. However, because of the near universal reliance on electronic records both by businesses and individuals, the frequency with which electronic discovery-related questions arise in state courts is increasing rapidly, in all manner of cases. Uncertainty about how to address the differences between electronic and traditional discovery under current discovery rules and standards “exacerbates the problems. Case law is emerging, but it is not consistent and discovery disputes are rarely the subject of appellate review” [quoting Committee on Rules of Practice and Procedures of the Judicial Conference of the United States, *Report of the Civil Rules Advisory Committee*, p.3 (Washington, DC: August 3, 2004)].

In summary, the present amendments address the principal concerns reflected in the *Standards, Guidelines*, and Uniform Rule:

- V.R.C.P. 16.2 is amended to establish a process for the parties and court to address early issues pertaining to the disclosure and discovery of electronically stored information and of trial-preparation material.
- V.R.C.P. 26 is amended to provide standards for motions to compel or for a protective order when electronically stored information is “not reasonably accessible,” to provide a “claw-back” procedure for claims of privilege and protection of trial-preparation materials, and to provide for consideration in the discovery conference order of issues relating to the disclosure and discovery of electronically stored information.
- V.R.C.P. 33(c) is amended to provide expressly that an answer to an interrogatory involving review of business records should involve a search of electronically stored information.
- V.R.C.P. 34 is amended to provide a procedure for addressing objections to production of electronically stored information.
- V.R.C.P. 37(f) is added to create a “safe harbor” that protects a party from sanctions for failing to provide electronically stored information lost because of the routine operation of the party’s computer system.
- V.R.C.P. 45 is amended to conform the procedure and standards for subpoenas of electronically stored information to the other amendments regarding discovery of electronically stored information.

The amendment to V.R.C.P. 26(b)(1), adopts virtually verbatim the 2006 amendment adding F.R.C.P. 26(b)(2)(B). The new rule allows the party from whom discovery of electronically stored information is sought to decline to comply with a request on the ground that the information is not reasonably accessible without undue burden or cost. The objecting party bears the burden of establishing that ground on a motion to compel or for a protective order. Even if the ground is established, the court may order discovery for good cause and with appropriate conditions. Accessibility depends on the nature of the information and the system in which it is stored. Whether burden and cost are undue depends on the circumstances of the case, including the availability of the information from other sources, its importance to the issues, and the parties’ resources. These factors would be

addressed in determining whether good cause exists for the requested discovery. The claim that accessibility is not reasonable does not relieve the responding party from existing duties to preserve evidence. See, generally, Advisory Committee's Note to 2006 Amendment of F.R.C.P. 26(b)(2)(B).

V.R.C.P. 26(b) is also amended by the addition of a new paragraph (5) concerning claims of privilege and protection of trial-preparation materials, now of particular importance in view of the potential scope of discovery of electronically stored information. New subparagraph (A), originally adopted as F.R.C.P. 26(b)(5) by a 1993 amendment, was not adopted for the Vermont rule at that time. It requires an express and detailed claim to give notice to the other party when discovery is withheld on those grounds. See Advisory Committee's Note to 1993 Amendment of F.R.C.P. 26(b).

New V.R.C.P. 26(b)(5)(B) contains the language of F.R.C.P. 26(b)(5)(B), added by the 2006 federal amendments. It recognizes that "the risk of waiver, and the time and effort to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed." Advisory Committee's Note to 2006 Amendment of F.R.C.P. 26(b)(5). Thus, the new provision establishes a procedure for a privilege or protection claim to be made after production. Whether the production operates as a waiver is left for case-by-case determination on the basis of developing case law. The producing party must give notice to the receiving party that will enable that party to decide whether to challenge the claim and whether to return, sequester, or destroy the information. The receiving party must also take steps to retrieve any information that it disclosed to others before receiving notice. The producing party must preserve the information pending a ruling on the motion. See Advisory Committee's Note, *supra*.

V.R.C.P. 26(f) is amended to specify that the issues to be addressed in the court's order following a discovery conference include issues relating to the matters covered in amended Rules 26(b)(1) and (5)—discovery of electronically stored information, including the form or forms in which it should be produced under amended Rule 34(b), and privilege and protection claims. The language of the amendment is taken from the 2006 amendment of F.R.C.P. 26(f), describing the issues that are to be discussed in a discovery conference and included in the resulting discovery plan. For further discussion of the scope of the language, see

Advisory Committee's Note to 2006 Amendment of F.R.C.P.  
26(f).

3. That Rule 33(c) of the Vermont Rules of Civil Procedure be amended to read as follows (new matter underlined):

### **RULE 33. INTERROGATORIES TO PARTIES**

(c) **Option To Produce Business Records.** Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is 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 serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

#### **Reporter's Notes—2009 Amendment**

V.R.C.P. 33(c) is amended as part of a series of amendments conforming the Vermont Rules of Civil Procedure to 2006 amendments of the Federal Rules of Civil Procedure that made specific provision for discovery of electronically stored information. See Reporter's Notes to simultaneous amendment of V.R.C.P. 26. The present amendment is identical to the 2006 amendment of F.R.C.P. 33(d), essentially applying the procedure already in effect for business records to such records that are electronically stored. See Advisory Committee's Note to that amendment.

4. That Rule 34 of the Vermont Rules of Civil Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

### **RULE 34. PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES**

(a) **Scope.** Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, ~~and copy, test, or sample~~ any designated documents or electronically stored information— (including writings, drawings, graphs, charts, photographs, sound recordings, images ~~phone records~~, and other data or data compilations stored in any medium from which information

can be obtained, ~~—translated, if necessary, by the respondent through detection devices~~ into reasonably usable form), or to inspect and copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) **Procedure.** The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

The party upon whom a request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. Any Superior Judge may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, in which event stating the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The request being addressed shall be reproduced before the response. If objection is made to the requested form or forms for producing electronically stored information—or if no form was specified in the request—the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Unless the parties otherwise agree, or the court otherwise orders:

(i) ~~A~~ a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;

(ii) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

(iii) a party need not produce the same electronically stored information in more than one form.

**Reporter's Notes—2009 Amendment**

V.R.C.P. 34 is amended as part of a series of amendments conforming the Vermont Rules of Civil Procedure to 2006 amendments of the Federal Rules of Civil Procedure that made specific provision for discovery of electronically stored information. See Reporter’s Notes to simultaneous amendment of V.R.C.P. 26. The present amendment is identical to the 2006 amendments of F.R.C.P. 34.

The amendment of V.R.C.P. 34(a) is intended “to confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents” and to make clear that a request for “documents” that does not differentiate paper documents and electronically stored information should be understood as including the latter. The scope of the term is meant to be expansive, including “any medium”—even those that may be developed in the future. The amendment also makes clear that paper or electronic documents may be tested or sampled, subject to protections available under V.R.C.P. 26(b)(1) and (c), and that tangible things to be produced must be “designated.” See Advisory Committee’s Note to 2006 Amendment of F.R.C.P. 34(a).

Amended V.R.C.P. 34(b) subjects electronically stored information to requirements comparable to those for all documents that they be produced as kept in the usual course of business or “in a reasonably usable form.” The purpose is “to protect against deliberate or inadvertent production in ways that raise unnecessary obstacles for the requesting party.” Advisory Committee’s Note to 2006 Amendment of F.R.C.P. 34(b). Although the requesting party may specify a form or forms for the production of electronically stored information to facilitate discovery, that party need not do so. If no specific form is requested, or the responding party objects to the requested form, that party must state the form it intends to use in order to permit the parties to resolve disputes about the form before production begins. See, generally, Advisory Committee’s Note, *supra*.

5. That Rule 37(f) of the Vermont Rules of Civil Procedure be added to read as follows:

**RULE 37. FAILURE TO MAKE DISCOVERY: SANCTIONS**

\* \* \* \* \*

(f) **Failure to Provide Electronically Stored Information.** Absent exceptional circumstances, a court may 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.

### **Reporter's Notes—2009 Amendment**

V.R.C.P. 37(f) is added as part of a series of amendments conforming the Vermont Rules of Civil Procedure to 2006 amendments of the Federal Rules of Civil Procedure that made specific provision for discovery of electronically stored information. See Reporter's Notes to simultaneous amendment of V.R.C.P. 26. The present amendment is identical to F.R.C.P. 37(f) added by the 2006 federal amendments. The rule reflects "a distinctive feature of computer operations, the routine alteration and deletion of information that attends ordinary use." Advisory Committee's Note to 2006 Amendment Adding F.R.C.P. 37(f). Note that the rule applies only to "routine" operation—the result of the basic design of the system to serve its intended purposes. The rule also requires "good faith" operation, precluding the knowing continuation of an operation that results in destruction of information that a party was obligated to preserve. See, generally, Advisory Committee's Note, *supra*.

6. That Rule 45 of the Vermont Rules of Civil Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

### **RULE 45. SUBPOENA**

#### **(a) Form; Issuance.**

- (1) Every subpoena shall
  - (A) state the name of the court from which it is issued; and
  - (B) state the title of the action, the name of the court in which it is pending, and its civil action number; and
  - (C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection, ~~and copying, testing, or sampling~~ of designated books, documents, electronically stored information, or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and
  - (D) set forth the text of subdivisions (c) and (d) of this rule.

A command to produce evidence or to permit inspection, copying, testing, or sampling may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

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#### **(c) Protection of Persons Subject to Subpoenas.**

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(2)(A) A person commanded to produce and permit inspection, ~~and copying, testing, or sampling~~ of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection, ~~and copying, testing, or sampling~~ may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to ~~inspection or copying of producing~~ any or all of the designated materials or inspection of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to the requested production or to inspect, and copy, test, or sample the materials or inspect the premises except pursuant to an order of the court for which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel ~~production~~ shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection, ~~and copying, testing, or sampling~~ commanded.

\* \* \* \* \*

**(d) Duties in Responding to Subpoena.**

(1)(A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(1). The court may specify conditions for the discovery.

(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be

made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

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### **Reporter's Notes—2009 Amendment**

V.R.C.P. 45 is amended as part of a series of amendments conforming the Vermont Rules of Civil Procedure to 2006 amendments of the Federal Rules of Civil Procedure that made specific provision for discovery of electronically stored information. See Reporter's Notes to simultaneous amendment of V.R.C.P. 26. The present amendments are virtually identical to the 2006 amendments of F.R.C.P. 45. The purpose of the amendments is to conform the procedure governing subpoenas involving electronically stored information to that provided for various forms of discovery by the amendments to V.R.C.P. 26, 33, and 34.

The amendments of V.R.C.P. 45(a)(1) make clear, as does amended V.R.C.P. 34(a), that a subpoena may be sought for testing and sampling and that electronically stored information, which is defined in V.R.C.P. 34(a), may be sought by subpoena as well as through discovery. Similar to the provisions of amended V.R.C.P. 34(b), the subpoena can designate the form or forms for production of the information. Amended V.R.C.P. 45(c) and (d) track appropriate provisions of amended V.R.C.P. 34(b) concerning obligations of the parties and objections to production or nonproduction. V.R.C.P. 45(d)(2)(B), like amended V.R.C.P. 26(b)(5), provides a procedure for asserting privilege or trial-preparation materials protection after production. See Reporter's Notes to simultaneous amendments of those rules.

7. That Rule 50(b) of the Vermont Rules of Civil Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

**RULE 50. JUDGMENT AS A MATTER OF LAW IN ACTIONS  
TRIED BY A JURY; ALTERNATIVE MOTIONS FOR NEW TRIAL;**

## CONDITIONAL RULINGS

\* \* \* \* \*

(b) **Renewal of Motion for Judgment after Trial; Alternative Motion for New Trial.** Whenever a motion for judgment as a matter of law made ~~at the close of all the evidence under subdivision (a) is denied or for any reason~~ is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by filing not later than 10 days after entry of judgment or, if the motion addresses a jury issue not decided by a verdict, no later than 10 days after the jury was discharged. Renewal of the motion is necessary to appeal from a denial of or a failure to grant a motion for judgment as a matter of law. A motion for a new trial under Rule 59 may be joined with renewal of the motion, or a new trial may be requested in the alternative. If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law. If no verdict was returned the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.

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### Reporter's Notes—2009 Amendment

V.R.C.P. 50(b) is amended to conform the Vermont rule to a 2006 amendment of F.R.C.P. 50(b).

V.R.C.P. 50 was revised in its entirety in 1995 to incorporate the substance of 1991 and 1993 amendments of F.R.C.P. 50. See Reporter's Notes to 1995 Amendment of V.R.C.P. 50. Under V.R.C.P. 50(a) as amended in 1995, a motion for judgment as a matter of law can be made at any time before submission of the case to the jury, so long as the opposing party, as a party, has been fully heard on an issue. Both V.R.C.P. and F.R.C.P. 50(b) relating to renewal of the motion after trial, however, continued to require that the prior motion have been made at the close of all the evidence.

The present amendment to V.R.C.P. 50(b) adopts a 2006 amendment of F.R.C.P. 50(b) that deleted this reference so that the rule requires only a prior motion made under V.R.C.P. 50(a), rather than a motion made at the close of all the evidence. Because the post-judgment motion is merely a renewal of the pre-verdict motion, it can be granted only on grounds advanced in the prior motion. The amendment "responds to many decisions that have begun to move away from requiring" that the pre-verdict motion have been made literally at the close of all the evidence, a

requirement that lawyers continually overlook. The amendment is intended to establish a functional practice that is more consistent and predictable than that under the prior rule. The amendment is not intended to discourage judges from expressly inviting motions at the close of all the evidence. The amendment also makes clear that a post-judgment motion addressing an issue not decided by verdict must be made within ten days after the jury is discharged. See Advisory Committee's Note to 2006 Amendment of F.R.C.P. 50(b).

8. That these rules, as adopted or amended, are prescribed and promulgated to become effective on July 6, 2009. The Reporter's Notes are advisory.

9. That the Chief Justice is authorized to report these amendments to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this 7<sup>th</sup> day of May, 2009.

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice