STATE OF VERMONT
VERMONT SUPREME COURT
OCTOBER TERM, 2020

Order Promulgating Amendments to Rules 26(c) and 34(b) of the Vermont Rules of Civil Procedure

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

1. That Rule 26(c) of the Vermont Rules of Civil Procedure be amended to read as follows (new matter underlined):

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

(c) **Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, any Superior Judge may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place or the allocation of expenses <u>for the discovery or disclosure</u>; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the judge; (6) that a deposition after being sealed be opened only by order of the judge; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the judge.

If the motion for a protective order is denied in whole or in part, the judge may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

Reporter's Notes—2020 Amendment

Rule 26(c)(2) is amended by the addition of the phrase, "for the discovery or disclosure," for uniformity with the language of Federal Rule of Civil Procedure 26(c)(1)(B). Although, unlike the Federal Rule, disclosure is not mandatory under V.R.C.P. 26, the term is included because a scheduling order could require a disclosure.

2. That Rule 34(b) of the Vermont Rules of Civil Procedure be amended to read as follows (new matter underlined):

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

(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 42 days after service of the summons and complaint upon that defendant. Any Superior Judge may allow a shorter or longer time. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons. <u>The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection, provided that, on a showing by the requesting party of a reasonable need, any Superior Judge may order inspection.</u> An objection must state whether any responsive materials are being withheld on the basis of that objection. If objection is made to part of an item or category, the objection must specify the part and permit inspection of the rest. 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:

(1) 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;

(2) 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

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

Reporter's Notes—2020 Amendment

Rule 34(b) is amended to add language from Federal Rule of Civil Procedure 34(b)(2)(B) permitting the production of copies of requested material, rather than their inspection. The language was added to the Federal Rule in 2015 "to reflect the common practice." See Federal Advisory Committee's Notes to 2015 Amendment. The present amendment, however, departs from the Federal Rule by providing that the requesting party may obtain inspection of the originals on a showing of "a reasonable need"—for example, a legibility issue not resolvable in a copy.

3. That these amendments be prescribed and promulgated, effective on December 7, 2020. The Reporter's Notes are advisory.

4. 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 6th day of October, 2020.

Signed by the Vermont Supreme Court

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice