

**STATE OF VERMONT
VERMONT SUPREME COURT
JULY TERM, 2022**

Order Promulgating Amendment to Rule 26(e) 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(e) of the Vermont Rules of Civil Procedure be amended to read as follows (new matter underlined):

RULE 26. GENERAL PROVISIONS CONCERNING DISCOVERY

(e) **Supplementation of Responses.** A party who has responded to a request for discovery with a response ~~that was complete when made~~ is under a duty to supplement or correct the response in a timely manner to include information ~~thereafter acquired~~ with respect to the following matters if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing:

(1) Any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters; and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony.

(2) Any other prior response to an interrogatory, request for production, or request for admission.

(3) Any matter by order of any superior judge, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(4) For a witness who has been disclosed pursuant to Rule 26(b)(5)(A)(i) of this rule, the party's duty to supplement extends both to information included in the disclosure and to information given during the witness's deposition.

Reporter's Notes—2022 Amendment

Rule 26(e) is amended to conform more nearly to Federal Rule 26(e).

In the first sentence of V.R.C.P. 26(e), "that was complete when made" is deleted to fully eradicate the suggestion that supplementation is required only for information that is a departure from a formerly complete disclosure. Federal Rule 26(e)(1) was clarified in 1993 to eliminate this possible interpretation, by adding that there is a duty both to supplement and to correct. V.R.C.P. 26(e) was amended to reflect the federal rule change in 1996. However, the Federal Rule was further clarified in 2007 by deletion of the words "thereafter acquired" from the first sentence of the rule. This change eliminated any interpretation of the rule that the duty to

correct or supplement did not arise if information available to the disclosing party at the time of the initial disclosure rendered the initial disclosure incomplete or inaccurate. V.R.C.P. 26(e) as amended now follows Federal Rule 26(e) by also deleting “thereafter acquired.” See 8A Wright & Miller, Federal Practice and Procedure § 2049.1 (3d ed.).

In the first sentence of V.R.C.P. 26(e), “in a timely manner” is also added, consistent with F.R.C.P. 26(e)(1)(A), to address a matter on which the existing Vermont Rule was silent by incorporating a common-sense rule of reasonableness. This amendment to the V.R.C.P. 26(e) differs in one respect from F.R.C.P. 26(e). Amended V.R.C.P. 26(e) requires disclosure in a timely manner of all discovery for which there is a duty to supplement. F.R.C.P. 26(e)(2) carves out an exception for supplementation of expert disclosures and deposition testimony, requiring only that the supplementation occur no later than the deadline for mandatory pretrial disclosures, such as the disclosures of witnesses to be called at trial and documents to be used at trial. F.R.C.P. 26(a)(3)(B) requires that such pretrial disclosures be made no later than 30 days prior to commencement of trial. V.R.C.P. 26 does not contain the carve-out because Vermont’s discovery rules do not include a provision for pretrial disclosures. Moreover, experience in Vermont with civil trials reveals that the overwhelming majority of civil matters settle prior to trial, often during mediation. In order for the discovery process to fairly and accurately prepare parties for settlement discussions and mediation, timely supplementation of disclosures about and by expert witnesses is needed.

The present amendment also adds V.R.C.P. 26(e)(4) regarding supplementation of expert disclosures and expert depositions. The amended rule requires supplementation of disclosure of information provided about expert witnesses pursuant to Rule 26(b)(5)(A)(i) or by expert witnesses when deposed. This change brings the V.R.C.P. 26(e) into conformity with the federal rule change that was adopted in 1993.

2. That this amendment be prescribed and promulgated, effective on September 12, 2022. The Reporter’s Notes are advisory.

3. 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 11th day of July, 2022.



Signed by the Vermont Supreme Court

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

William D. Cohen, Associate Justice

Nancy J. Waples, Associate Justice