

STATE OF VERMONT  
VERMONT SUPREME COURT  
\_\_\_\_\_ TERM, 2019

**Order Promulgating Amendments to Rule 26(b)(5)(A) of the Vermont Rules of Civil Procedure**

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

1. That Rule 26(b)(5)(A) 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.**

*(5) Trial Preparation: Experts.*

(A) Identification and Deposition of an Expert Who May Testify.

(i) A party may through interrogatories require any other party

- ~~to identify each person whom the other party expects to call as an expert witness at trial,~~ may use at trial to present expert testimony under Vermont Rules of Evidence 702, 703, or 705, whether or not the witness may also testify from personal knowledge as to any fact in issue in the case;
- ~~to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions as to which the expert is expected to testify;~~ and
- to provide a summary of the grounds for each opinion.

(ii) A party may depose any person who has been identified in an answer to an interrogatory posed pursuant to subparagraph (A)(i) as an expert whose opinions may be presented at trial.

(iii) A party may obtain by request for production or subpoena any final report of the opinions to be expressed by an expert who has been identified in an answer to an interrogatory posed pursuant to subparagraph (A)(i) as an expert whose opinions may be presented at trial, as well as the basis and reasons for the opinions and any exhibits that will be used to summarize or support them.

## Reporter's Notes—2019 Amendment

Rule 26(b)(5)(A)(i) is amended to adapt the language of F.R.C.P. 26(a)(2)(A) for the provision of the Vermont Rule identifying expert witnesses whose identity must be disclosed in response to an interrogatory. The amended rule applies to “each person” who may be used at trial to present expert testimony under Vermont Rules of Evidence 702, 703, and 705. To remove uncertainty regarding whether this requirement applies to witnesses whose testimony falls within those Evidence Rules but who were not specially retained to develop their opinions, the present amendment makes clear that Rule 26(b)(5) applies “whether or not the witness may also testify from personal knowledge as to any fact in issue in the case.”

The amended rule changes prior practice as exemplified by Hutchins v. Fletcher Allen Health Care, Inc., 172 Vt. 580, 582, 776 A.2d 376, 379 (2001) (mem.), where the Court interpreted an earlier version of V.R.C.P. 26(b)(5)(A)(i) to allow defendant’s expert witnesses who, as treating physicians, were also fact witnesses to be treated as ordinary witnesses not subject to those disclosure requirements. But see Stella v. Spaulding, 2013 VT 8, ¶ 17, 193 Vt. 226, 67 A.3d 247 (without objection, expert disclosure requirements applied to plaintiff’s nonparty primary care provider, despite dissent’s suggestion that Hutchins should apply).

This change is intended to further the purpose set forth in Rule 1 of the Vermont Rules of Civil Procedure “to secure the just, speedy, and inexpensive determination of every action.” Like other provisions of the Vermont Rules governing discovery of experts, the present amendment ensures fair notice to litigants of an expert’s testimony, enabling litigants to decide whether it is necessary to depose the expert and to otherwise prepare for the trial on scientific, technical, or other specialized issues. See, e.g. Stella, 2013 VT 8; Greene v. Bell, 171 Vt. 280, 283-84, 762 A.2d 865, 869 (2000). The goal of fairness and prevention of surprise requires disclosure of all expert opinion.

The term “expert” as used in Rule 26(b)(5)(A)(i) and throughout Rule 26(b)(5) refers to any witness who, as provided in Rule 702, is “qualified as an expert by knowledge, skill, experience, training, or education” and whose opinion or other testimony based on “scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” Rule 702 further provides that the testimony must be “based upon sufficient facts or data” and “the product of reliable principles

and methods,” and those principles and methods must be “applied . . . reliably to the facts of the case.”

Thanks to the liberality of Rule 702, witnesses with expertise in a wide variety of fields are now commonly used in civil and other litigation. Extension of the disclosure requirement to witnesses with expert qualifications who also have personal knowledge of factual matters in issue reflects the practical reality that such “fact” witnesses will invariably be called at trial. Thus, their expertise and the bases of their opinions should be routinely disclosed.

When the Vermont Rules of Civil Procedure were adopted in 1971, disclosure, as under the Federal Rules, was limited to witnesses whose opinions were formed “in anticipation of litigation or for trial.” As the Reporter’s Notes to V.R.C.P. 26 stated, “An expert whose knowledge or opinions are relevant because of his participation in the events giving rise to suit should be treated for discovery purposes as an ordinary witness.” This language was the basis of the decision in Hutchins, 172 Vt. at 582, 776 A.2d at 379.

The requirement that all opinion testimony under Rules of Evidence 702, 703 or 705 must be disclosed, regardless of whether it was formed in anticipation of litigation or trial was added to the Federal Rule in 1993. However, V.R.C.P. 26(b)(5) was amended only to delete the “anticipation of litigation” limitation and thus to require disclosure of each person whom the other party expects to call as an “expert witness” without qualification or clarification. Since neither the language relied on in Hutchins, nor the 1993 Federal Rule language is in the current Vermont rule, uncertainty and inconsistency in practice has resulted—for example, on the question of whether opinions of defendants or employees of defendants sued for professional negligence, or of plaintiffs’ treating physicians must be disclosed. See Stella, 2013 VT 8, ¶ 17.

The present amendment answers the question in the interest of clarity and fair notice by adopting the federal language to require that all witnesses with opinions under Rules of Evidence 702, 703, or 705 be disclosed. The amendment does not, however, adopt any of the heightened disclosure requirements of the federal rule. There is no automatic disclosure. No report is required. The amended rule continues to rely on expert witness disclosures, by counsel, in response to interrogatories. An interrogatory may ask for the subject matter of the expert’s testimony, the substance of the expert’s facts and opinions, and a summary of the grounds for each opinion.

Note that the nature, number, and timing of interrogatories permitted to be made under amended Rule 26(b)(5)(A)(i), or of other expert discovery under Rule 26(b)(5), may be established in a

scheduling order under Rule 16.2 entered after a discovery conference under Rule 26(f). The discovery conference may be held at any time after commencement of the action on the court's own motion or the motion of a party and may be combined with a pretrial conference under Rule 16.

Specifically, with respect to the testimony of treating physicians, production of treatment records will suffice if the response states that the treating physician's opinion testimony will be restricted to that set forth in her treatment records. If the opinion goes beyond that, however, the amended rule makes clear that the party who is answering discovery must disclose the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions of the expert and a summary of the grounds for each opinion.

2. That this rule, as amended, is prescribed and promulgated effective \_\_\_\_\_. 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 \_\_\_\_ day of \_\_\_\_\_, 2019.

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Paul L. Reiber, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice