PROPOSED

STATE OF VERMONT
VERMONT SUPREME COURT
_____TERM, 2017

Order Promulgating Amendment of Rule 26(b) 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) of the Vermont Rules of Civil Procedure be amended to read as follows (deleted matter struck though; 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.*

(A) 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.

(B) 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.

(C) 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).

(2) *Insurance Agreements.* A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) *Trial Preparation: Materials.*

(A) Showing Required. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the judge shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

(B) Previous Statements. A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (~~A~~ i) a written statement signed or otherwise adopted or approved by the person making it, or (~~B~~ ii) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) *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,~~ disclose the identity of any witness it may use at trial to present expert testimony under Vermont Rules of Evidence 702, 703, or 705 ~~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 a summary of the grounds for each opinion~~ and to comply with subparagraphs (ii) or (iii) as appropriate.

(ii) Unless otherwise stipulated or ordered by the court, if the expert witness is one

- who will not testify from personal knowledge as to any fact in issue in the case, and
- who is retained or specially employed to provide expert testimony in the case, or
- whose duties as an employee of the party involve giving expert testimony,

this disclosure must be accompanied by a written report prepared and signed by the witness. The report must contain

- a complete statement of all opinions the witness will express and the basis and reasons for those opinions;
- the facts or data considered by the witness in forming the opinions;
- any exhibits that will be used to summarize or support the opinions;
- the witness's qualifications, including a list of all publications authored in the previous 10 years;
- a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- a statement of any compensation to be paid for any study and testimony in the case.

(iii) Unless otherwise stipulated or ordered by the court, if the witness is any other expert identified pursuant to subparagraph (i), the disclosure must state the subject matter on which the expert is expected to testify, and the substance of the facts and opinions as to which the expert is expected to testify, and contain a summary of the grounds for each opinion.

(iv) The parties must make these disclosures at times and in a sequence provided by stipulation or order of the court. In the absence of a stipulation or court order, the disclosures must be made at least 90 days before the date set for trial or for the case to be ready for trial; or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter offered by another party, within 30 days after the other party's disclosure under (A)(ii) or (A)(iii).

(~~ii~~ v) 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. If a report from the expert is required by subparagraph (A)(ii), the report must be produced in advance of the deposition.

(~~iii~~ vi) A party may obtain by request for production or subpoena any ~~final~~ written 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~~ has been disclosed pursuant to subparagraph (A)(iii), as well as any exhibits that will be used to summarize or support the expert's opinions.

(B) Trial-Preparation Protection for Draft Disclosures and Certain Reports. Rule 26(b)(3) protects drafts of any disclosure of an expert that is required or prepared under subparagraph (A)~~(i)~~ and drafts of any report prepared by such an expert, regardless of the form in which the draft is recorded.

(C) Trial-Preparation Protection for Communications Between a Party's Attorney and Certain Expert Witnesses. Rule 26(b)(3) protects communications between the party's attorney and any 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, regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) Expert Employed Only for Trial Preparation. A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(E) Payment. Unless manifest injustice would result, (i) the judge shall require that the party seeking discovery pay any expert who has been identified under subparagraph (A)(i) a reasonable fee for time spent in responding to discovery under this paragraph (4); and (ii) with respect to discovery obtained under subparagraph (D) of this paragraph the judge shall also require the party seeking discovery to pay the other party a fair portion of the fees and expenses incurred by the latter party in obtaining facts and opinions from the expert.

(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.

Reporter's Notes—2017 Amendment

Rule 26(b) is amended to clarify its provisions and bring them more closely in line with comparable provisions of the Federal Rules of Civil Procedure. Rules 26(b)(1)-(3) are amended to make the numbering of their provisions clearer and consistent with the remainder of the rule.

Rule 26(b)(4)(A)(i) is amended to adapt from Federal Rule 26(a)(2)(A), as adopted in 1993, language making clear that its disclosure requirement extends to all opinion witnesses qualified and testifying as experts under V.R.E. 702, 703, and 705. The language thus includes an "event" witness who is not retained or specially employed as an expert. This disclosure requirement does not extend to the V.R.E. 701 lay opinion witness. The amendment supersedes the holding of Hutchins v. Fletcher Allen Health Care, Inc., 172 Vt. 580, 582, 776 A.2d 376, 379 (2001) (mem.), that an expert who is an "event" witness should be treated for discovery purposes as an ordinary witness.

Thanks to the liberality of V.R.E. 702, opinion witnesses with expertise in a wide variety of fields are now commonly used in most litigation. Cf. Reporter's Notes to 2004 Amendments of V.R.E. 701-703; State v. Streich, 163 Vt. 331, 658 A.2d 38 (1995), following Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The extension of pretrial disclosure requirements to opinions of "event" witnesses is necessary to reflect the increased use and importance of opinion testimony and the consequent need to prevent surprise and unfairness. Since "event" witnesses will invariably be called at trial, their expertise and the basis of their opinions should be routinely disclosed in response to initial interrogatories. Subparagraphs (A)(ii) and (iii) establish different requirements for nonevent and other expert witnesses.

Note that the rule applies only to the use of the discovery methods provided in V.R.C.P. 26-36 and is silent on the availability or propriety of other means of obtaining information or documentation, such as investigation or informal inquiry. See Schmitt v. Lalancette, 2003 VT 24, ¶ 12, 175 Vt. 284, 830 A.2d 16 (nothing in Rule 26(c) implies that courts have authority to prevent a party to litigation from conducting its own private investigation to

identify witnesses or obtain desired information, without relying upon formal discovery).Thus, the amended rule does not preclude informal communication by a lawyer with an event witness in the course of investigation. Federal case law, however, generally prohibits such communication with a retained or employed expert, whether because implied from the structure and intent of Federal Rule 26 or prohibited by the Rules of Professional Conduct. See 6 Moore's Federal Practice - Civil § 26.80[4]. Common-law work product protection might provide another basis for prohibition. Of course, any communication with a represented party witness without permission of counsel would clearly be precluded by V.R.Pr.C. 4.2. See Baisley v. Missisquoi Cemetery Ass'n, 167 Vt. 473, 480, 708 A.2d 924, 932-33 (1998).

Rule 26(b)(4)(A)(ii) applies to a retained or specially or regularly employed expert not testifying from personal knowledge. That expert must provide a signed written report and supporting exhibits in language adopted from F.R.C.P. 26(a)(2)(B). Under subparagraph (A)(iii), the subject matter, substance, and grounds of any other expert, which would include an individual like a treating physician who may be both a fact witness and qualify as an expert, must be disclosed. Note that under both provisions drafts are not discoverable pursuant to Rule 26(b)(3) and 26(b)(4)(B).

Subparagraph (A)(iv) provides default times for disclosures not otherwise scheduled by order or stipulation: 90 days before trial for evidence in chief and 30 days after another party's disclosure for rebuttal evidence. Subparagraph (a)(v) and (vi) make clear the applicability of the rule to depositions and requests for production or subpoenas.

2. That this rule, as added, is prescribed and promulgated effective _____, 2017. The Reporter's Notes are advisory.

3. That the Chief Justice is authorized to report this amendment 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 _____, 2017.

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate 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