

STATE BAR OF TEXAS
COURT RULES COMMITTEE
REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE
TEXAS RULES OF CIVIL PROCEDURE

I. Existing Rule:

Rule 166b

(6) Duty to Supplement

A party who has responded to a request for discovery that was correct and complete when made is under no duty to supplement his response to include information thereafter acquired, except the following shall be supplemented not less than thirty days prior to the beginning of trial unless the court finds that a good cause exists for permitting or requiring later supplementation.

a. A party is under a duty to reasonably supplement his response if he obtains information upon the basis of which:

- (1)** he knows that the response was incorrect or incomplete when made;
- (2)** he knows that the response though correct and complete when made is no longer true and complete and the circumstances are such that failure to amend the answer is in substance misleading; or

b. If the party expects to call an expert witness when the identity or the subject matter of such expert witness' testimony has not been previously disclosed in response to an appropriate inquiry directly addressed to these matters, such response must be supplemented to include the name, address and telephone number of the expert witness and the substance of the testimony concerning which the expert witness is expected to testify, as soon as is practical, but in no event less than thirty (30) day prior to the beginning of trial except on leave of court.

c. In addition, a duty to supplement answers may be imposed by order of the court or agreement of the parties, or at any time prior to trial through new requests for supplementation of prior answers.

II. Exact wording of proposed Rule:

Rule 166b

(6) Duty to Supplement

a. To supplement discovery means to amend or add to a prior response. A party who has responded to a request for discovery pursuant to any discovery rule is under a duty to supplement the responses when:

(1) the party learns that the response was incorrect or incomplete when made,

(2) the party learns that a response which was correct and complete when made is no longer correct and complete and the circumstances are such that failure to supplement the response is in substance misleading,

(3) the parties have agreed to supplement,

- (4) the court has ordered supplementation, or
- (5) a party expects to offer expert testimony and the identity of the expert, the subject matter, opinion(s) and/or supporting basis of such testimony has not been previously disclosed in response to an appropriate inquiry directly addressed to those matters.

b. **Time** Unless otherwise agreed by the parties or unless the court finds that good cause exists for permitting later supplementation, supplemental responses shall be served on the party who requested the discovery, copies served on all other parties and a copy filed with the clerk of the court as soon as practical after the Responding Party determines that a supplemental response is required, however:

- (1) supplementation of responses to all discovery must be made not less than seventy-five (75) days prior to the date the case is set for trial.
- (2) supplementation of responses to discovery in cases filed under the Texas Family Code must be made at times ordered by the court,

c. **Additional Discovery** Any party receiving a supplemental response has a right to initiate additional discovery relating to the matters disclosed in the supplemental response, including deposing any new witness disclosed. If the court permits supplementation of any response later than the time required in paragraph 6b above, the court shall continue the trial setting if, pursuant to these rules, the additional discovery initiated cannot be reasonably completed prior to the trial date.

d. **Form** All supplemental responses shall be in writing and shall conform to the signature requirements of the rule governing the discovery being supplemented.

e. Sanctions Failure of a party to supplement a discovery response may subject that party to sanctions under Rule 215. In addition, a party who has failed to supplement as required by this rule shall, at the time of trial, not be permitted to introduce evidence or call witnesses which, but for the failure, would have been disclosed to the party requesting discovery. Provided, however, that such evidence may be allowed if the trial court finds good cause for failing to comply with the duty to supplement. The burden of establishing good cause is on the party offering the evidence and good cause must be shown in the record. If the court determines the exclusion of evidence will work an injustice, the court may continue the trial, enter orders relating to the disclosure of the evidence in question and shall impose such appropriate sanctions so as to not prejudice the non-offending party, including but not limited to, compensating the non-offending party for any expense and attorney's fees in preparing for trial.

III. Brief statement of reasons for requested change and advantages to be served by the proposed new rule:

The purpose of the proposed rule is to redraft and reorganize the existing rule to make it clearer; to change the time for supplementation to seventy-five (75) days before the date the case is set for trial (except for family law cases) to make it clear that if an expert changes an opinion or has an additional opinion from what has been previously disclosed in response to a discovery request, including an oral deposition, the expert testimony must be supplemented. The rule also precludes use of evidence not disclosed by supplementation.