

STATE OF VERMONT
VERMONT SUPREME COURT
_____ TERM, 2016

ORDER PROMULGATING AMENDMENTS TO THE
VERMONT RULES OF CIVIL PROCEDURE AND
THE APPENDIX OF FORMS

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

* * *

5. That Rules 6(a), (b), (d) and (e) of the Vermont Rules of Civil Procedure be amended to read as follows (new matter underlined; deleted matter struck through):

RULE 6. TIME

(a) Computation. ~~In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a State or federal legal holiday, or, when the act to be done is the filing of a document in court, a day on which weather or other conditions have made the office of the clerk inaccessible or the court's electronic filing system is unavailable, in which event the period runs until the end of the next day which is not one of the aforementioned days. Intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation, when the period of time prescribed or allowed, not including any calendar days added in accordance with subdivision (e) of this rule, is less than 11 days.~~

Computing Time. The following rules apply in computing any time period specified in these rules, in any court order, or in any applicable statute that does not specify a method of computing time.

(1) *Period Stated in Days or a Longer Unit.* When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and state or federal legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or state or federal legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) Period Stated in Hours. When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or state or federal legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) Inaccessibility of the Clerk's Office. Unless the court orders otherwise, if the clerk's office or the court's electronic filing system is inaccessible:

(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or state or federal legal holiday; or

(B) during the last hour for filing under Rule 6(a)(2), the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or state or federal legal holiday.

(4) "Last Day" Defined. Unless a different time is set by a statute or court order, the last day ends:

(A) for electronic filing, at midnight; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) "Next Day" Defined. The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under ~~Rule 60(b), except to the extent and under the conditions stated therein, and it may extend the time for taking any action under Rules 50(b) and~~

(c)(2), 52(b), 59(b), (d) and (e), 60(b), and 80.1(m) ~~no more than 20 additional days unless the specific rule otherwise provides.~~

(c) Unaffected by Expiration of Term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

(d) Affidavits on Motions. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rules 56~~(e)~~(b) and 59(c) opposing affidavits may be served not later than ~~one~~ 7 days before the hearing, unless the court permits them to be served at some other time.

(e) Additional Time After Certain Kinds of Service Under Rule 5~~(b)~~(2) or (3).
~~Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other document upon the party and the notice or document is served upon the party under Rule 5(b)(2) or (3), three calendar days shall be added to the prescribed period after that period has been computed pursuant to subdivision (a) of this rule unless the notice or other document is served by the court or unless a document served other than by electronic means is received by the party on the date of service. When a party may or must act within a specified time after service and service is made under Rule 5(b)(2), (3), or (4), 3 days are added after the period would otherwise expire under Rule 6(a).~~

Reporter's Notes—2016 Amendment

Rule 6(a) is amended to adopt the “day is a day” rule, a simplified method of computing time periods by incorporating, with minor changes, the language of a 2009 amendment to F.R.C.P. 6(a). The amendment serves the purposes of both achieving simplicity and maintaining uniformity with the federal practice. By simultaneous amendment, other time provisions of the civil and appellate rules have been made consistent with the new computation method. The Advisory Committee and Reporter particularly wish to express their gratitude to Elizabeth Tisher, J.D., now a Vermont Supreme Court law clerk, for her essential preliminary drafting of this and other necessary amendment orders.

As the Federal Advisory Committee's Notes point out, this computation method does not apply when a statute prescribes a specific method for computing time. For clarity, amended V.R.C.P. 6(a) retains the language of the former rule making its computation provisions apply to a time period “prescribed or allowed by... any applicable statute that does not specify a method of computing time” (emphasis added). Federal Rule 6(a) as amended in 2009 omitted “applicable” from the prior federal rule in adopting language otherwise substantially identical to the language of amended V.R.C.P. 6(a). The Federal Advisory Committee's Note does

not address the question whether “statute” standing alone includes every enacted provision containing a time period.

Former V.R.C.P. 6(a) also applied to a time period in “any applicable statute.” The retention of “applicable” in the amended rule is intended to preserve the effect of two Vermont Supreme Court decisions making clear that the test of whether a statute is “applicable” under V.R.C.P. 6(a) is whether the statute concerns matters to which the Rules of Civil Procedure apply under V.R.C.P. 1. In *Allen v. Employment Sec. Bd.*, 133 Vt. 166, 168 (1975), affirming the Board’s dismissal of two appeals as untimely under applicable statutory provisions, the Court stated, “The scope of the Rules of Civil Procedure is clearly defined in V.R.C.P. 1. They govern procedure ‘in the Superior Court in all suits of a civil nature’ as well as causes transferred from District Court and appeals to the Superior Court, with stated exceptions. Clearly they do not apply to the cases here in issue.” Appellant had argued that the statutory provisions should incorporate former V.R.C.P. 6(a) extending time periods that ended on weekends or holidays and former V.R.C.P. 6(e) adding time after service by mail. In *State v. Hanlon*, 164 Vt. 125, 128 (1995), the Court found the State’s appeal timely, holding that the provision of 13 V.S.A. §7403(e) establishing a time period for the State to file an appeal in a criminal matter was an “applicable statute” under V.R.C.P. 6(a), incorporated in V.R.A.P. 26(a); thus, the statutory time period could be extended by the weekend and holiday provisions of the rule as it then stood.

The Advisory Committee’s Notes provide a helpful further explanation of the change:

Under former Rule 6(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 6(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day—and the 10-day period not infrequently ended later than the 14-day period....

Under [the amended rule], all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days—including intermediate Saturdays, Sundays, and legal holidays—are counted, [except that if] the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday.

Of course, if the clerk's office is inaccessible or the electronic filing system unavailable on the last day or the day to which the period has been extended, the deadline falls on the next accessible or available day. Note that "act, event, or default" has been changed to "event" for brevity and simplicity. The change is not intended as a change in meaning.

Periods of less than 11 days in other provisions of the rules would be shortened by the inclusion of intermediate Saturdays, Sundays, and legal holidays. Accordingly, shorter time periods in other rules are being extended by simultaneous amendments, generally following guidelines stated in the Federal Advisory Committee's Notes:

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method—two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period—the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day periods.

Thirty-day time periods remain unchanged. Several 10-day time periods were changed to 28 days for consistency with the new federal standard for motion practice. Forty-five and 50-day periods, not found in the Federal Rules, have been changed to 42 and 49 days, consistent with the "multiple of 7" simplification adopted in the Federal Rules.

Note that time periods may be either forward-looking or backward-looking. Thus, Rule 59(b) is forward-looking, requiring a motion for new trial to be filed "not later than 10 days after the entry of judgment." Rule 68 is backward-looking, requiring service of an offer of judgment "[a]t any time more than 10 days before the trial begins" unless the court approves a shorter time. The last day of a period ending on a weekend or holiday should be determined by counting in the same direction that the time period runs. For example, the Federal Advisory Committee's Notes suggest, that if

a filing is due within 30 days after an event, and the thirtieth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007

(Monday, September 3, is Labor Day). But if a filing is due 21 days before an event, and the twenty-first day falls on Saturday, September 1, then the filing is due on Friday, August 31. If the clerk's office is inaccessible on August 31, then [the rule] extends the filing deadline forward to the next accessible day that is not a Saturday, Sunday, or legal holiday—no later than Tuesday, September 4.

In either the “after” or “before” situation, if the clerk's office were inaccessible on Tuesday, September 4, the extension would continue until the office was accessible.

Rules 6(b) and (d) are amended in minor ways for consistency with other amendments. The one-day time period in Rule 6(d) for service of opposing affidavits on motions is changed to 7 days.

Rule 6(e), providing an additional three days for actions required after service under V.R.C.P. 5(b)(2) or (3), has been amended to adapt the language of F.R.C.P. 6(d) to the Vermont Rules.

* * *

48. That these rules and forms, as added or amended, are prescribed and promulgated effective July 1, 2016. The Reporter's Notes are advisory.

49. 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 _____, 2016.

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice