

STATE OF VERMONT
VERMONT SUPREME COURT
_____TERM, 2017

**Order Promulgating Amendments to the
Vermont Rules of Criminal Procedure**

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

1. That Rule 12.1(a) of the Vermont Rules of Criminal Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 12.1. NOTICE OF ALIBI, INSANITY OR EXPERT TESTIMONY

(a) **Notice.** A defendant who wishes to offer an alibi, raise the issue of insanity or offer expert testimony relating to a mental disease, or defect or any other mental condition of the defendant bearing upon the issue of his or her guilt must give written notice thereof, together with the information required by subdivision (b) of this rule, to the prosecuting attorney on the date of the status conference, or at least ~~10~~ 30 days prior to trial, whichever is sooner. The prosecuting attorney must give the defendant the information required by subdivision (c) of this rule within ~~10~~ 14 days after receipt of notice of an alibi. The court may extend the time limits of this subdivision for good cause shown.

Reporter's Notes—2017 Amendment

Rule 12.1(a) is amended to conform its 10-day time periods to the contemporaneously amendment of V.R.Cr.P. 45, which adopts the “day is a day” standard for the computation of the running of time periods in criminal cases. In consideration of the practical difficulties associated with investigation of the circumstances of a proffered alibi defense, and with securing and disclosure of expert assessment in the case of insanity or other mental state defenses, the period for provision of notice of such defenses is increased to 30 days under the present amendments, in contrast to other contemporaneous amendments of 10-day periods, which are extended to 14 days.

2. That Rule 29(c) of the Vermont Rules of Criminal Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 29. MOTION FOR JUDGMENT OF ACQUITTAL

(c) **Motion After Discharge of Jury.** If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within ~~10~~ 14 days after the jury is discharged or within such time as the court may fix during the ~~10~~ 14-day period.

Reporter's Notes—2017 Amendment

Rule 29(c) is amended to conform its 10-day time period to the contemporaneously amendment of V.R.Cr.P. 45, which adopts the “day is a day” standard for the computation of the running of time periods in criminal cases.

3. That Rule 32(c)(4)(A) of the Vermont Rules of Criminal Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 32. SENTENCE AND JUDGMENT

(c) Sentencing Information.

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(4) Right to Comment and Offer Evidence.

(A) Prior to imposing sentence, the court shall afford the state, the defendant and his or her attorney an opportunity to comment upon any and all information submitted to the court for sentencing. Any objection to facts contained in the presentence investigation report shall be submitted, in writing, to the court at least ~~three~~ 5 days prior to the sentencing hearing, unless good cause is shown for later objection. Either party may offer evidence, including hearsay, specifically on any disputed factual issues in open court with full rights of cross-examination, confrontation, and representation. When a defendant objects to factual information submitted to the court or otherwise taken into account by the court in connection with sentencing, the court shall not consider such information unless, after hearing, the court makes a specific finding as to each fact objected to that the fact has been shown to be reliable by a preponderance of the evidence, including reliable hearsay. If the court does not find the alleged fact to be reliable, the court shall either make a finding that the allegation is unreliable or make a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report or other controverted document thereafter made available by the court to the Department of Corrections.

Reporter's Notes—2017 Amendment

Rule 32(c)(4)(A) is amended to conform its 3-day time period to the contemporaneously amendment of V.R.Cr.P. 45, which adopts the “day is a day” standard for the computation of the running of time periods in criminal cases.

4. That Rule 33 of the Vermont Rules of Criminal Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 33. NEW TRIAL

The court on motion of a defendant may grant a new trial to ~~him~~ the defendant if required in the interests of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within ~~10~~ 14 days after verdict or finding of guilty or within such further time as the court may fix during the ~~10~~ 14-day period.

Reporter's Notes—2017 Amendment

Rule 33 is amended to conform its 10-day time periods to the contemporaneously amendment of V.R.Cr.P. 45, which adopts the “day is a day” standard for the computation of the running of time periods in criminal cases.

5. That Rule 35(c) of the Vermont Rules of Criminal Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 35. CORRECTION, REDUCTION AND MODIFICATION OF SENTENCE

(c) **Modification of Sentence on Motion of Prosecuting Attorney.** A motion to modify a sentence filed by the prosecuting attorney shall be made within seven business days of the date of imposition of sentence.

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Reporter's Notes—2017 Amendment

Rule 35(c) is amended to specify that a prosecuting attorney's motion to modify sentence must be made within seven business days of imposition of sentence. Addition of the term “business” to define the running of the days is required to render the rule consistent with the provisions of 13 V.S.A. § 7042(b), as amended by 2017, No. _____, § 29.

6. That Rules 45(a) and (b) of the Vermont Rules of Criminal Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 45. 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 some paper in court, a day on which weather or other conditions have made the office of the clerk of the court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.~~

Computing Time. The following rules apply in computing any time period specified in these rules by 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 legal holidays;

and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or 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 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 is inaccessible:

(A) on the last day for filing under Rule 45(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 45(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

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

(A) for electronic filing, at midnight in the court's time zone; 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.

(6) “Legal Holiday” Defined. “Legal Holiday” means:

(A) the day set aside by statute for observing New Year’s Day, Martin Luther King Jr.’s Birthday, President’s Day, Town Meeting Day, Memorial Day, Independence Day, Bennington Battle Day, Labor Day, Columbus Day, Veterans’ Day, Thanksgiving Day, or Christmas Day;

(B) any day declared a holiday by the President or Congress of the United States; and

(C) for periods that are measured after an event, any other day declared a holiday by the State of Vermont.

(7) “Business Day” Defined. A “business day” is a day that is not a Saturday, Sunday, or legal holiday.

~~(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 Rules 29, 33, and 34, except to the extent and under the conditions stated in them.~~

Extending Time.

(1) In General. When an act must be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party’s motion made:

(A) before the originally prescribed or previously extended time expires; or

(B) after the time expires if the party failed to act because of excusable neglect.

(2) Exception. The court may not extend the time to take any action under Rule 35, except as stated in that rule.

(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 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. 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 by Mail.** ~~Whenever a party has the right or is required to do an act within a prescribed period after the service of a notice or other~~

paper upon him and the notice or other paper is served upon him by mail, three days shall be added to the prescribed period unless the notice or other paper is served by the court. Whenever a party must or may act within a specified time after being served and service is made under V.R.C.P. 5(b)(2) (mailing), (3) (leaving with the clerk), or (4) (sending by electronic means), 3 days are added after the period would otherwise expire under subdivision (a).

Reporter's Notes—2017 Amendment

Rule 45(a) is amended to standardize and simplify the manner of computing the running of time under the rules, adopting what is known as the “day is a day” rule which governs computation of the running of time under Federal Rule of Criminal Procedure 45(a). As in 1995, the rule is amended contemporaneously with V.R.C.P. 6(a) (and V.R.P.P. 6(a)) so that time is computed identically under all of the rules of procedure. Note that the rule addresses the method of computation of time periods established elsewhere in the rules, and “externally” to the rules by reference, by provision of statute or by rules of appellate procedure. The amendment does not serve to alter such “external” times and deadlines, as in the case of the deadline for filing of presentence investigation reports under Rule 32(c)(3), which is also the subject of statute, 28 V.S.A. §§ 204(c), 204a(a)(5).

For clarity, amended V.R.Cr.P. 45(a) retains the language of the former Vermont rule making its computation provisions apply to a time period in “any applicable statute that does not specify a method of computing time.” Thus, if a statute pertaining to criminal procedure itself specifies the method of computation of time in the particular instance, the provisions of that statute would govern as to the method of computation. By Act __ of 2017, the Legislature amended a number of statutory procedural time periods of less than 10 days to be expressly “business days,” thus making Rule 45(a) inapplicable to them. For consistency, “business days” has been added to a few such time periods in several rules that were taken from one of the amended statutes. Act __ also amended statutory periods of 10 days to 14 days, thus making them consistent with the “day is a day” provisions of Rule 45(a).

As the 2009 Federal Advisory Committee’s Notes point out, the “day is a day” computation method does not apply when a court order has establishes a specific date as a deadline or when a statute prescribes a specific method for computing time. The Advisory Committee’s Notes provide a helpful further explanation of the change:

Under former Rule 45(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 45(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 is 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 in the rule as amended, former terms “act, event, or default” have been changed to “event” for brevity and simplicity. This change is not intended as a change in meaning.

Under the amended rule, periods of time 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. . . . Thirty-day and longer periods, however, were generally retained without change.

An exception under simultaneous amendment is established for a defendant's notice of alibi, insanity or expert testimony of mental state or condition, under V.R.Cr.P. 12.1, which is amended from 10 days to 30 days prior to trial.

As the Federal Advisory Committee's Notes indicate, time periods may be either forward-looking or backward-looking. "A forward-looking time period requires something to be done within a period of time after an event. See, e.g., [F.R.Cr.P.] 35(a) (stating that a court may correct an arithmetic or technical error in a sentence '[w]ithin 14 days after sentencing.')." Cf. existing V.R.Cr.P. 33 (providing that motion for new trial other than on grounds of newly discovered evidence must be made within 10 days after verdict or finding of guilty or within such further time as the court may fix during the 10-day period). The Federal Advisory Committee Notes further explain that a "backward-looking time period requires something to be done within a period of time before an event. See, e.g., [F.R.Cr.P.] 47(c) (stating that a party must serve a written motion 'at least 7 days before the hearing date')." Cf. existing V.R.Cr.P. 12.1 (explaining that defendant wishing to offer alibi or insanity defense, or offer expert testimony bearing upon mental condition must provide specified notice to the prosecuting attorney at time of status conference, or "at least 10 days prior to trial," whichever is sooner).

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 10 days after an event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, 2007, is Labor Day). But if a filing is due 10 days before an event, and the tenth 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 earlier 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.

Rule 45(b) is amended to provide generally for extension of the time established for an act under the rules, by the court, or on motion filed within the period established for an act, or upon showing of excusable neglect after expiration of the period to act, with the exception of a Motion for Reduction of Sentence under Rule 35, the time for which is expressly established by statute, 13 V.S.A. § 7042(a). Former Rule 45(b) additionally precluded cognizance of untimely motions to extend time for filing a post-trial Motion for Judgment of Acquittal under V.R.Cr.P. 29, Motion for New Trial under V.R.Cr.P. 33, or Motion in Arrest of Judgment under V.R.Cr.P. 34 under all circumstances. Consistent with 2005 amendments to F.R.Cr.P. 45(b)(1)(B), under amended V.R.Cr.P. 45(b), the court upon motion and the establishment of excusable neglect, may extend the time for an act, even after expiration of the time otherwise established for the filing of Rule 29, 33, or 34 motions.

The one-day time period in Rule 45(d) for service of opposing affidavits on motions is changed to 7 days, consistent with V.R.C.P. 6(d) and F.R.C.P. 6(c)(2).

Rule 45(e), providing an additional 3 days for actions required after service is amended for conformity with other rules. V.R.Cr.P. 49(b) adopts by reference the provisions of V.R.C.P. 5 governing service for criminal proceedings as well. Rule 45(e) is amended to adopt the simplified language of F.R.Cr.P. 45(c) as amended in 2007 and follows the federal rule in effect until December 1, 2016 by adding the additional 3 days after service by electronic means if permitted or required under V.R.C.P. 5(b)(4). Federal Rule 45(c) was amended, effective December 1, 2016, to eliminate the 3-day provision for electronic service because, as the Federal Advisory Committee's notes state, initial concerns with the reliability of electronic transmission "have been substantially alleviated by advances in technology and widespread skill in using electronic transmission." However, in view of the relatively recent availability and use of electronic transmission in Vermont practice, the 3-day provision encompassing electronic transmission has been retained in the present amendment.

7. That Rule 47(b)(1) of the Vermont Rules of Criminal Procedure be amended to read as follows (deleted matter struck through; new matter underlined):

RULE 47. MOTIONS

(b) Disposition of Written Motions With or Without Argument.

(1) *Memorandum in Opposition*. Any party opposed to the granting of a written motion shall file a memorandum in opposition thereto, not more than ~~10~~ 14 days after service of the motion, unless otherwise ordered by the court. The memorandum may be accompanied by affidavit. If a memorandum in opposition is not timely filed when required under this rule, the court may dispose of the motion without the memorandum.

Reporter’s Notes—2017 Amendment

Rule 47(b)(1) is amended to conform its 10-day time period to the contemporaneously amendment of V.R.Cr.P. 45, which adopts the “day is a day” standard for the computation of the running of time periods in criminal cases.

8. That these Rules, as amended, are prescribed and promulgated to become effective _____ . The Reporter’s Notes are advisory.

9. 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 _____, 2017.

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice