

PROPOSED

**STATE OF VERMONT
VERMONT SUPREME COURT
TERM, 2018**

**Order Amending Rules 3 and 5(e) of the Vermont Rules of Civil Procedure and
Rule 25(a)(2)(C) of the Vermont Rules of Appellate Procedure**

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

1. That Rule 3 of the Vermont Rules of Civil Procedure be amended to read as follows (new matter underlined):

RULE 3. COMMENCEMENT OF ACTION

(a) In general. A civil action is commenced by filing a complaint with the court, except that in any case where attachment of real or personal property or attachment on trustee process is not to be made, or goods are not to be replevied, an action may be commenced by the service of a summons and complaint. When an action is commenced by filing, summons and complaint must be served upon the defendant within 60 days after the filing of the complaint. When an action is commenced by service, the complaint must be filed with the court within 21 days after the completion of service upon the first defendant served. If service is not timely made or the complaint is not timely filed, the action may be dismissed on motion, including motion of the court pursuant to Rule 41(b)(1), and notice, and in such case the court may in its discretion, if it shall be of the opinion that the action was vexatiously commenced, tax a reasonable attorney's fee as costs in favor of the defendant, to be recovered of the plaintiff or plaintiff's attorney.

(b) Complaint filed by an inmate confined in an institution.

(1) A complaint filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a notarized statement accompanying the complaint stating the date the complaint was deposited in the institution's internal mailing system. The notarized statement establishes a presumption that the complaint was deposited in the institution's internal mailing system on the date shown in the statement. The presumption may be rebutted by documentary or other evidence.

(2) Nothing in this rule precludes other evidence of timely filing such as a postmark or an official date stamp showing the filing date of the document.

Reporter's Notes—2018 Amendment

Present Rule 3 is designated Rule 3(a), and Rule 3(b) is added to provide a "prisoner's mailbox" procedure for the filing of a complaint

in a civil action by an inmate confined in an institution. The amended rule is virtually identical to V.R.A.P. 4(f), adopted effective March 13, 2017. As stated in the Reporter's Notes to that rule, which is similar, but not identical to, F.R.A.P. 4(c)(1), the rule

provides that deposit of a [complaint] in the internal prison mailing system can constitute timely filing and requires use of a prison "legal mail" system if available. The rule also explicitly creates a rebuttable presumption that the filing is timely if accompanied by a notarized statement showing deposit in the institution's internal mailing system on or before the last day for filing. Paragraph [(2)] follows the federal [appellate] rule in allowing evidence of timely filing other than the notarized statement. Unlike the federal rule, the rule does not require a statement that postage has been or "is being" prepaid, nor does it give the Court discretion to allow later filing of the notarized statement.

Although most prisoner filings are not complaints, a rule governing complaints is desirable, particularly in view of issues raised by the housing of prisoners in out-of-state prisons with differing systems. Simultaneous amendments adding V.R.C.P. 5(e)(4) and V.R.A.P. 25(a)(2)(C) establish an identical procedure for inmate filing of documents after the complaint that are required to be filed by V.R.C.P. 5 and papers after the notice of appeal required to be filed by V.R.A.P. 25.

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

RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

(e) Filing With the Court Defined.

* * * * *

(4) A document filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a notarized statement accompanying the document stating the date the document was deposited in the institution's internal mailing system. The notarized statement establishes a presumption that the document was deposited in the institution's internal mailing system on the date shown in the statement. The presumption may be rebutted by documentary or other evidence. Nothing in this rule precludes other evidence of timely filing such as a postmark or an official date stamp showing the filing date of the document.

(4) The clerk shall not refuse to accept for filing any document presented for that purpose solely because it is not presented in proper form as required by these rules.

Reporter's Notes—2018 Amendment

Rule 5(e)(4) is added, and present Rule 5(e)(4) is redesignated (5), to provide a “prisoner’s mailbox” procedure for the filing of documents after the complaint in a civil action by an inmate confined in an institution. The provision is virtually identical to the simultaneously added V.R.C.P. 3(b) providing the procedure for inmate filing of a complaint. See Reporter’s Notes to that rule.

3. That Rule 25(a)(2)(C) of the Vermont Rules of Appellate procedure be added to read as follows (new matter underlined):

RULE 25. FILING AND SERVICE

(a) Filing.

* * * * *

(2) Method and Timeliness.

* * * * *

(C) Filing by an inmate confined in an institution.

(i) A paper filed by an inmate confined in an institution is timely if deposited in the institution’s internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a notarized statement accompanying the paper stating the date the paper was deposited in the institution’s internal mailing system. The notarized statement establishes a presumption that the paper was deposited in the institution’s internal mailing system on the date shown in the statement. The presumption may be rebutted by documentary or other evidence.

(ii) Nothing in this rule precludes other evidence of timely filing such as a postmark or an official date stamp showing the filing date of the paper.

Reporter's Notes—2018 Amendment

Rule 25(a)(2)(C) is added to provide a “prisoner’s mailbox” procedure for the filing of papers in the Supreme Court by an inmate confined in an institution. The provision is virtually identical to V.R.A.P. 4(f) (prisoner filing of notice of appeal), the simultaneously added V.R.C.P. 3(b) (commencement of a civil action), and V.R.C.P. 5(e)(4) (inmate filing of a document in a civil action). See Reporter’s

Notes to simultaneously added V.R.C.P. 3(b) (prisoner filing of civil complaint), and to 2017 amendment adding V.R.A.P. 4(f).

4. That these rules as amended are prescribed and promulgated effective _____, 2018.
The Reporter's Notes are advisory.

5. 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 _____, 2018.

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