

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE PROPOSED)	
AMENDMENT OF SDCL 15-6-28(c))	NOTICE OF RULES HEARING
AMENDMENT OF SDCL 15-24-5)	
AMENDMENT OF SDCL 16-16-6)	NO. 128
AMENDMENT OF SDCL 16-16-7.3)	
AMENDMENT OF SDCL 16-16-10)	
AMENDMENT OF SDCL 16-16-11)	
AMENDMENT OF SDCL 16-16-13)	
ADOPTION OF A NEW RULE TO BE)	
DESIGNATED AT SDCL 16-16-17.5)	
AMENDMENT OF BOARD OF BAR EXAMINER)	
REGULATIONS: 1, 3, 4, 5 AND 8)	
REPEAL OF BOARD OF BAR EXAMINER)	
REGULATION 7)	
RENUMBERING OF BOARD OF BAR EXAMINER)	
REGULATIONS: 9 to 8 AND 9.1 to 8.1)	
AMENDMENT OF SDCL 16-20-1)	
ADOPTION OF A NEW RULE TO BE)	
DESIGNATED AT SDCL 19-12-3.1)	
AMENDMENT OF SDCL 23-44-5.1)	

Petitions for amendments of existing sections of the South Dakota Codified Laws, adoptions of new rules and amendments to the Board of Bar Examiners Regulations having been filed with the Court, and the Court having determined that the proposed amendments and adoptions should be noticed for hearing, now therefore,

NOTICE IS HEREBY GIVEN THAT ON FEBRUARY 19, 2014, at 9:00 A.M., C.S.T., at the Courtroom of the Supreme Court in the Capitol Building, Pierre, South Dakota, the Court will consider the following:

1. Amendment of SDCL 15-6-28(c). Disqualification to take deposition for interest. No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

An employee, as described above, includes a person who has a contractual relationship with a person or entity interested in the

outcome of the litigation, including anyone who may ultimately be responsible for payment to provide reporting or other court services, and a person who is employed part-time or full-time under contract or otherwise by a person who has a contractual relationship with a party to provide reporting or other court services.

The officer taking the deposition, or any other person with whom such officer has a principal and agency relationship, shall not enter into an agreement for reporting service which does any of the following: (1) requires or allows the court reporter reporting the deposition to relinquish control of an original deposition transcript and copies of the transcript before it is certified and delivered to the custodial attorney as required in SDCL 15-6-30(f)(1); (2) requires the court reporter to provide special financial terms or other services that are not offered at the same time and on the same terms to all other parties in the litigation, or in any way offers any incentives or rewards to the attorneys, parties to the litigation, or to anyone else who has an interest in the litigation; (3) gives an exclusive monetary or other advantage to any party; (4) compromises the authenticity of the record or the impartiality of the court reporter, or that may result in the appearance that the authenticity of the record or the impartiality of the court reporter has been compromised; (5) allows a person, other than the court reporter or firm, to establish the rates charged by the court reporter or firm; (6) includes the court reporter, entity or firm providing or arranging for court reporting services on any list of preferred providers of court reporting services that is maintained by any person, entity or firm that has entered into an oral or written contractual agreement for more than one case with any attorney, party to an action, insurance company, third-party administrator, or any other person or entity that has a financial interest in the case, (7) requires the noticing attorney to utilize a specified court reporter, entity or firm, or requires the noticing attorney to act in a manner that may lead to violation of any provision; or (8) restricts said attorney from reimbursement for such court reporting services.

Contracts for court reporting services for federal, state, or local governments and subdivisions thereof are excluded. Negotiating or bidding reasonable fees, equal to all parties, by the attorneys or the parties, with the court reporter of their choice, on a case-by-case basis is not prohibited.

These provisions may not be waived by disclosure, agreement, stipulation, or by any other means unless a request for waiver is contained in the notice of deposition.

Any deposition taken in violation of these provisions shall be considered void.

2. Amendment of SDCL 15-24-5. Definitions. As used in §§ 15-24-5 to 15-24-12, inclusive, the following terms mean:

- (a) "Judicial proceeding" or "proceeding" referenced in these rules includes all public appellate arguments, hearings, or other proceedings before the Supreme Court, except those specifically excluded by the rules. These rules do not apply to coverage of ceremonial or nonjudicial proceedings.
- (b) "Expanded media coverage" includes broadcasting, televising, electronic recording, or photographing of judicial proceedings for the purpose of gathering and disseminating news and educational or instructional information to the public. Any other use, absent express written permission of the court, is prohibited.
- (c) "Supreme Court" or the "court" means the Supreme Court of South Dakota.
- (d) "Chief Justice" means the Chief Justice of the Supreme Court of South Dakota.
- (e) "Clerk" means the clerk of the Supreme Court of South Dakota.
- (f) "Media coordinator" means the representative from the news media appointed by the court to coordinate expanded media coverage of judicial proceedings of the court under these rules.
- (g) "News media" means personnel of a newspaper or other periodical, news service, radio station, television station, or television network, who deliver news to the general public on a regular and consistent basis in print, electronic or digital format.

3. Amendment of SDCL 16-16-6. Examination required of applicants to practice law--Educational requirements. All applicants for admission, except those applying pursuant to SDCL 16-16-7.6, and SDCL 16-16-12.1, or Supreme Court Rule 13-10 shall be required to pass satisfactorily an examination conducted by the Board of Bar Examiners. An applicant for permission to take an examination, in addition to the general qualifications prescribed in §16-16-2, must furnish satisfactory evidence that he graduated from a law school accredited by the American Bar Association with a J.D. degree or that he will so graduate prior to the examination, or that he has successfully completed all of the requirements for graduation prior to the examination.

4. Amendment of SDCL 16-16-7.3. Order of admission--Duration. If the Supreme Court shall find that the applicant is of good moral character and otherwise qualified to practice law, the Court may make an order of admission to be effective upon the filing of the oath of attorney in the office of the clerk.

The admission to practice under this section shall remain in effect until the occurrence of the earliest of the following events:

- (1) The failure to sit for the first bar examination administered by the Board of Bar Examiners subsequent to the order of admission; or
- (2) The announcement by the Board of Bar Examiners of this state of the results of the first bar examination following the applicant's admission under this section, provided, however, that as to any applicant who passes such examination his or her admission under this section shall continue in effect for sixty days, during which time applicant may proceed to be admitted to practice pursuant to §16-16-17; or
- (3) The termination of the applicant's employment with the legal aid bureau or public defender agency under which the applicant was admitted under this section; or
- (4) The termination by the Supreme Court of the applicant's admission under this section.

It shall be the duty of the supervising attorney of the legal aid bureau or public defender agency by whom such attorney is employed under §16-16-7.2 to inform the Supreme Court immediately of the termination of employment of such attorney admitted to practice pursuant to this section.

For the purpose of subdivisions (1) and (2) above, the bar examination referred to means the combined Multistate Essay Examination which includes an Indian Law question, and Multistate Performance Test, and the Multistate Bar Examination administered by the Board of Bar Examiners as well as the Multistate Professional Responsibility Examination.

5. Amendment of SDCL 16-16-10. Subjects covered by examination--Public notice. The subjects upon which applicants shall be examined shall be such as the Board of Bar Examiners deems necessary to prepare properly for the practice of law in this state, including the subjects of legal ethics and Indian Law. The Board shall make public such subjects, giving full and ample public notice of any change or addition thereto and written notice to the dean of the law school, University of South Dakota.

6. Amendment of SDCL 16-16-11. Re-examination after three failures prohibited. An applicant who fails three times to pass the bar examination in any jurisdiction or combination of jurisdictions, may not be permitted to take another examination in South Dakota except by permission of the Supreme Court upon a showing that the reasons for previous failures no longer exist and there is a reasonable likelihood the applicant will pass the examination if allowed to take it.

7. **Amendment of SDCL 16-16-13. Fees payable with application for admission--Disposition of fees.** An applicant for an admission on examination shall pay a fee of three hundred dollars, and a fee of one hundred seventy-five dollars for subsequent examinations. An applicant for admission without examination shall pay a fee of four hundred fifty dollars. An applicant shall also pay the National Conference of Bar Examiners the applicable fee for preparation of an initial or supplemental character report. If an applicant fails to appear for the examination, the fee paid shall only be applied to the next scheduled combined Multistate Essay Examination which includes an Indian Law question and Multistate Performance Test, and/or to the Multistate Bar Examination. The fees thus paid to the Secretary shall be retained in a special fund and shall be paid out by the state court administrator when authorized by the Secretary for the compensation and necessary expenses of the Board of Bar Examiners.

8. **Proposed adoption of a new rule relating to: Review of conditional admission.** To be designated at SDCL 16-16-17.5. The Board of Bar Examiners shall review each conditional admission no later than the date specified in the Supreme Court's order granting conditional admission. The Board shall recommend to the Supreme Court that:

- (1) The conditional admission be terminated, resulting in loss of license; or
- (2) That the conditional admission be modified and/or extended; or
- (3) That full admission be granted.

The Supreme Court may accept or reject the recommendation.

BOARD OF BAR EXAMINER REGULATIONS

9. (1) **Application for Admission to Practice Law.** Each applicant for admission to practice law shall file with the Secretary of the Board of Bar Examiners a written application, together with five complete machine or photo copies thereof, in the form prescribed by the Board of Bar Examiners. Such application and copies thereof shall be postmarked by on or before November 1 for the February examination and on or before April 1 for the July examination and shall be accompanied by the fee prescribed in the applicable rules of court and a recent photograph of the applicant, and DCI and FBI fingerprint cards.

Each applicant for admission shall also file a request for preparation of a character report and application with the National Conference of Bar Examiners. Such request and application shall be postmarked by on or before November 1 for the February examination and on or before April 1 for the July examination and shall be accompanied by the fee prescribed by the National Conference of Bar Examiners.

10. (3) **Bar Examination Subjects.** All applicants, except those applying pursuant to SDCL 16-16-7.6, and SDCL 16-16-12.1, or Supreme Court Rule 13-10 are required to take the bar examination which consists of the Multistate Essay Examination (MEE), an essay question on Indian Law, the Multistate Performance Test (MPT), the Multistate Bar Examination (MBE), and the Multistate Professional Responsibility Examination (MPRE). Subject matter outlines for the MEE, MPT, MBE, and MPRE are available at the National Conference of Bar Examiners' website at <http://www.ncbex.org/>

The MEE is a two and one-half hour examination consisting of five 30-minute essay questions. ~~which will test subject areas which are available at the National Conference of Bar Examiners' website at <http://www.ncbex.org/>~~ The MEE will test both general and South Dakota principles of law.

Indian Law includes basic principles of federal Indian law, including but not limited to civil and criminal jurisdiction, the Indian Civil Rights Act, the Indian Child Welfare Act, and the Indian Gaming Regulatory Act. It does not include tribal laws or customary laws. Indian Law is tested by one ~~30-minute~~ essay question on the MEE.

The MPT consists of two ninety-minute questions which test the fundamental skills of problem solving, legal analysis and reasoning, factual analysis, communication, organization and management of a legal task, and recognizing and resolving ethical dilemmas. Each question shall contain all of the resource material necessary to complete the performance examination. The MPT will test both general and South Dakota principles of law.

The MBE is an objective six-hour examination containing 200 multiple-choice test questions covering the subjects:

Constitutional Law	Contracts
Criminal Law and Procedure	Evidence
Real Property	Torts

The MPRE consists of 50 multiple-choice test questions and measures an applicant's knowledge of the ethical standards of the legal profession.

11. (4) ~~Passing Score. The combined score of the MPT, MEE and Indian Law Question is to be given equal weight as the MBE score utilizing the standard deviation method to determine an applicant's final score on that portion of the bar examination. A separate passing score is set for the MPRE.~~

~~The passing grade on the combined MPT, MEE, Indian Law Question and MBE and on the MPRE shall be determined by the Board of Bar Examiners, which determinations shall be made in advance of the examination.~~

~~An applicant who fails to attain a passing score on the combined MPT, MEE, Indian Law Question and MBE and who applies for a subsequent bar examination shall be required to take the MPT, MEE, Indian Law and MBE portions of the subsequent examinations.~~

The bar examination is comprised of three portions:

- A) The combined MPT, MEE, and Indian law portion,
- B) The MBE, and
- C) The MPRE.

An applicant must pass each portion of the examination. A general average of 75% or higher on the combined MPT, MEE, and Indian law portion of the examination shall be deemed a passing score on that portion of the examination. A scaled score of 135 or higher shall be deemed a passing score on the MBE portion of the examination. A scaled score of 85 shall be deemed a passing score on the MPRE portion of the examination. The Board of Bar Examiners shall determine the passing score on each portion of the bar examination in advance of the examination. Written notice of any deviation from the scores enumerated in this regulation will be given to the dean of the University of South Dakota School of Law and all applicants for admission to practice law by examination.

An applicant who has failed only one portion of the exam must only reapply to sit for the failed portion; however, a passing score on one portion of the examination shall only be valid for a period of two years to exempt the applicant from retaking that portion of the examination. An applicant who fails either the MPT, MEE, and Indian law portion of the examination and/or the MBE portion of the examination three times must receive Supreme Court permission pursuant to SDCL 16-16-11 to take another examination.

12. (5) **Acceptance of Multistate Bar Examination Results from Other States.** In its discretion, the Board of Bar Examiners may accept an applicant's previous scores on the MBE and the MPRE administered in a jurisdiction other than South Dakota if taken within ~~twenty-five months~~ two years prior to the next scheduled examination, if the score on the MBE is a scaled score of ~~130~~ 135 or above and ~~the score on the MPRE is a scaled score of 75 or above,~~ and if the applicant passed the entire bar examination in the other jurisdiction. The Board of Bar Examiners may accept an applicant's MPRE score if taken within twenty-eight months prior to the next scheduled examination and if the score is a scaled score of 85 or above.

~~13. Repeal of (7) Law Student Registration. First year law students who intend to take the South Dakota bar examination following graduation may register with the Board of Bar Examiners on forms prescribed by the Board. The registration must be accompanied by the \$50 South Dakota registration fee as well as the fee required by the National Conference of Bar Examiners' law student registrant program for an initial character report. Registration under the rule is not deemed an application for permission to take the bar examination.~~

~~The Board of Bar Examiners shall review the registration and character report to identify character and fitness issues that may preclude or hinder later admission. The Board will report its findings to the law student. The Board's findings shall be deemed preliminary. They shall not be deemed a commitment or permission to take the bar examination or a waiver of facts or conduct later discovered or occurring after the Board's investigation.~~

14. ~~(8)~~ (7) **Places and Dates of Examinations.** Unless different times and places are fixed by the Board of Bar Examiners, the examinations will be administered at the following times and places:

The MPT, MEE, Indian Law Question and MBE are given on the last Tuesday and Wednesday of February and the last Tuesday and Wednesday of July in Pierre, South Dakota. The MPT, MEE and Indian Law Question are given Tuesday; the MBE is given on Wednesday.

The MPRE is given in March, August and November. in Vermillion, South Dakota, and in August in Pierre, South Dakota.

Notice of the times and places shall be given each applicant at the time of granting permission to take such examinations.

15. ~~(9)~~ (8) **Appeal.** The Secretary of the Board of Bar Examiners shall make an initial determination regarding whether any act taken by an applicant pursuant to these rules satisfies the requirement of the rules. In addition, whenever the rules provide for a waiver of any deadline or other exercise of discretion by the Board including acceptance of results from other states the Secretary of the Board of Bar Examiners shall make an initial determination which shall, within twenty days, become a final decision of the Board unless appealed as provided herein. Nothing in this rule shall prohibit the Board from sua sponte altering or reversing any initial decision of the Secretary of the Board of Bar Examiners or from directing the Secretary of the Board of Bar Examiners to transfer any case, issue or question directly to the Board without entering an initial decision without notice to the applicant; however, such action shall constitute final action by the Board for the purpose of review by the Supreme Court pursuant to §16-16-16. In addition, the Secretary of the Board of Bar Examiners or an applicant may submit an application or other issue directly to the Board of Bar Examiners for determination whenever an application, or acknowledgement by an applicant, discloses a facial violation of bar entry requirements. The procedures provided in Rule 9.1 will apply except that the Secretary of the Board of Bar Examiners shall make a recommendation to the Board of Bar Examiners regarding the issue submitted directly to the Board. Results of examinations administered by the Board are not determined by the Secretary and constitute final action by the Board.

16. ~~(9.1)~~ (8.1) **Procedure.** Whenever an applicant is aggrieved by an initial decision of the Secretary of the Board of Bar Examiners the applicant shall request that the Secretary reduce the determination to writing if necessary and may, within twenty days of the date of mailing of Secretary's initial decision, appeal to the Board of Bar Examiners. Any applicant seeking review of the Secretary's initial decision shall transmit to the Board a copy of the initial decision sought to be reviewed together with such argument, authorities and evidence in the form of sworn affidavits as the applicant deems necessary. The submission may not exceed sixty pages in length and shall consist of an original and nine copies of the submission. Upon receipt of a request for review the Secretary shall respond setting forth the reasons for taking the action under review. A copy of the Secretary's response shall be served upon the applicant and Board.

The Board of Bar Examiners in its sole discretion may seek additional evidence or explanation, including testimony under oath, from the applicant or the Secretary. In addition, the Board may request oral argument from the applicant. When the Board of Bar

Examiners has satisfied itself that it is fully informed in the premises, it may adopt, modify and adopt as modified, or reverse the Secretary's initial decision. In the event the Board reverses the Secretary's initial decision it shall render a final decision which shall be communicated to the applicant in writing. The foregoing shall constitute final action by the Board of Bar Examiners for the purposes of review by the Supreme Court pursuant to SDCL 16-16-16.

NOTE: Applications for admission to practice law may be obtained from the Secretary, State Board of Bar Examiners, State Capitol, 500 East Capitol Avenue, Pierre, South Dakota 57501.

17. Amendment of SDCL 16-20-1. Definitions. As used in these rules, the following terms mean:

(a) "Judicial proceeding" or "proceeding" includes all public arguments, hearings, trials, or other proceedings before a trial court, except those specifically excluded by these rules. These rules do not apply to coverage of ceremonial or nonjudicial proceedings.

(b) "Expanded media coverage" includes audio or video recording or broadcasting, televising, electronic recording, or photographing of judicial proceedings for the purpose of gathering and disseminating news and educational or instructional information to the public. Any other use, absent express written permission of the court is prohibited.

(c) "Audio media coverage" includes audio recording or broadcasting or electronic recording of judicial proceedings for the purpose of gathering and disseminating news and educational or instructional information to the public. Any other use, absent express written permission of the court is prohibited.

(d) "Trial court" or the "court" means a South Dakota circuit or magistrate court in which a judicial proceeding is taking place.

(e) "Media coordinator" means the circuit court administrator for the circuit in which judicial proceedings are taking place.

(f) "News media" means personnel of a newspaper or other periodical, news service, radio station, television station, or television network, who deliver news to the general public on a regular and consistent basis in print, electronic or digital format.

18. Proposed adoption of a new rule relating to: Actual Medicial Expenses Incurred Admissible; Limitations. To be designated at SDCL 19-12-3.1. The full amount of any medical, chiropractic, dental or other expense charged by a practitioner of the healing arts licensed under SDCL Title 36 for services furnished for treatment of an injury or condition to or for a party in a proceeding in which such party seeks to recover such expenses from a party or parties alleged to be responsible therefor, if attested by affidavit or other testimony from said party or the provider of such expense as being the actual expense incurred, shall be admissible in evidence without

further foundation or authentication evidence being required. Such affidavit or other testimony shall constitute prima facie evidence of the necessity and reasonableness of the treatment and the reasonableness of the amounts of said charges. The admission of such expense into evidence shall not, in and of itself, be deemed to establish the relevance or materiality of such treatment or of the expense therefor or the causation of such treatment by the incidents or conduct at issue in the proceeding, nor shall such admission preclude contesting the reasonableness of such treatment or of the amount of such expense, provided however that nothing contained herein shall permit the introduction of collateral sources or amounts paid, approved, or discounted due to collateral sources.

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19. Amendment of 23A-44-5.1 (4). Time allowed for disposition of criminal case--Periods excluded--Dismissal.

(1) Every person indicted, informed or complained against for any offense shall be brought to trial within one hundred eighty days, and such time shall be computed as provided in this section.

(2) Such one hundred eighty day period shall commence to run from the date the defendant has first appeared before a judicial officer on an indictment, information or complaint.

(3) If such defendant is to be tried again following a mistrial, an order for a new trial, or an appeal or collateral attack, such period shall commence to run from the date of the mistrial, filing of the order granting a new trial, or the filing of the mandate on remand

(4) The following periods shall be excluded in computing the time for trial:

(a) The period of delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on competency and the period during which he is incompetent to stand trial; the time from filing until final disposition of pretrial motions of the defendant, including motions brought under § 23A-8-3; motions for a change of venue; and the time consumed in the trial of other charges against the defendant;

(b) The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel provided it is approved by the court and a written order filed. A defendant without counsel shall not be deemed to have consented to a continuance unless he has been advised by the court of his right to a speedy trial and the effect of his consent;

(c) The period of delay resulting from a continuance granted by the court at the request of the prosecuting attorney if the continuance is granted because of the unavailability of evidence material to the state's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at the later date and provided a written order is filed;

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(d) The period of delay resulting from the absence or unavailability of the defendant;

(e) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant shall be granted a severance so that he may be tried within the time limits applicable to him;

(f) The period of delay resulting from a change of judge or magistrate obtained by the defendant under SDCL chapter 15-12; and

(g) If the court utilizes a set "stack week" for scheduling pending criminal trials and the defendant's case is set for an upcoming "stack week," the period of time from the start of that "stack week" through the defendant's trial shall be excluded. "Stack week" means the time the court schedules and sets aside for jury trials in pending criminal matters.

(h) Other periods of delay not specifically enumerated herein, but only if the court finds that they are for good cause. A motion for good cause need not be made within the one hundred eighty day period.

Any person interested may appear at the hearing and be heard, provided that all objections or proposed amendments shall be reduced to writing and the original and ten copies thereof filed with the Clerk of the Supreme Court no later than February 5, 2014.

Subsequent to the hearing, the Court may reject or adopt the proposed rules or any rules germane to the subject thereof.

Notice of this hearing shall be made to the members of the State Bar by publication of this notice in the January 2014 State Bar Newsletter. Copies of proposals or comments may be obtained from the Office of the Supreme Court Clerk.

DATED at Pierre, South Dakota this 27th day of December, 2013.

BY THE COURT:

David Gilbertson, Chief Justice

ATTEST:

Clerk of the Supreme Court
(SEAL)