

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE AMENDMENTS)	SUPREME COURT RULES
TO SDCL TITLE 19-EVIDENCE)	15-17 through 15-72
CHAPTER 19-19 SOUTH DAKOTA RULES)	
OF EVIDENCE TO INCLUDE:)	
ARTICLE I. GENERAL PROVISIONS)	
ARTICLE II. JUDICIAL NOTICE)	
ARTICLE IV. RELEVANCE AND)	
ITS LIMITS)	
ARTICLE VI. WITNESSES)	
ARTICLE VII. OPINIONS AND EXPERT)	
TESTIMONY)	
ARTICLE VIII. HEARSAY)	
ARTICLE IX. AUTHENTICATION AND)	
IDENTIFICATION)	
ARTICLE X. CONTENTS OF WRITINGS,)	
RECORDINGS, AND PHOTOGRAPHS)	

Hearings were held on January 13, 2015, and September 1, 2015, at Pierre, South Dakota, relating to the amendments of SDCL Title 19-Evidence, and the Court having considered the proposed amendments and repeals and being fully advised in the premises, now, therefore, it is

ORDERED that certain rules in SDCL Title 19-Evidence, be and they hereby are amended to read in their entirety as follows:

CHAPTER 19-19
SOUTH DAKOTA RULES OF EVIDENCE

ARTICLE I. GENERAL PROVISIONS

Rule 15-17. SDCL 19-19-101. Scope--definitions.

(a) **Scope.** This chapter governs proceedings in the courts of this state to the extent and with the exceptions stated in § 19-19-1101.

(b) **Definitions.** In these rules:

- (1) "civil case" means a civil action or proceeding;
- (2) "criminal case" includes a criminal proceeding;
- (3) "public office" includes a public agency;
- (4) "record" includes a memorandum, report, or data compilation;

(5) a "rule prescribed by the Supreme Court" means a rule adopted by the Supreme Court under statutory authority; and

(6) a reference to any kind of written material or any other medium includes electronically stored information.

Rule 15-18. SDCL 19-19-102. Purpose.

This chapter should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

Rule 15-19. SDCL 19-9-103. Rulings on evidence.

(a) **Preserving a claim of error.** A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

(1) if the ruling admits evidence, a party, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context; or

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(b) **Not needing to renew an objection or offer of proof.** Once the court rules definitively on the record---either before or at trial ---a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(c) **Court's statement about the ruling; directing an offer of proof.** The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question and answer form.

(d) **Preventing the jury from hearing inadmissible evidence.** To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

(e) **Taking notice of plain error.** A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

Rule 15-20. SDCL 19-19-104. Preliminary questions

(a) **In general.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

(b) **Relevance that depends on a fact.** When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

(c) **Conducting a hearing so that the jury cannot hear it.** The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:

- (1) the hearing involves the admissibility of a confession;
- (2) a defendant in a criminal case is a witness and so requests; or
- (3) justice so requires.

(d) **Cross-examining a defendant in a criminal case.** By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

(e) **Evidence relevant to weight and credibility.** This section does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

Rule 15-21. SDCL 19-19-105. Limiting evidence that is not admissible against other parties or for other purposes. If the court admits evidence that is admissible against a party or for a purpose - but not against another party or for another purpose - the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.

Rule 15-22. SDCL 19-19-106. Remainder of or related writings or recorded statements. If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part - or any other writing or recorded statement - that in fairness ought to be considered at the same time.

Article II. JUDICIAL NOTICE

Rule 15-23. SDCL 19-19-201. Judicial notice of adjudicative facts.

(a) **Scope.** This section governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) **Kinds of facts that may be judicially noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it:

- (1) is generally known within the trial court's territorial jurisdiction; or
- (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) **Taking notice.** The court:

- (1) may take judicial notice on its own; or
- (2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) **Timing.** The court may take judicial notice at any stage of the proceeding.

(e) **Opportunity to be heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) **Instructing the jury.** In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

ARTICLE IV. RELEVANCE AND ITS LIMITS

Rule 15-24. SDCL 19-19-401. Test for relevant evidence.
Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
 - (b) the fact is of consequence in determining the action.
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Rule 15-25. SDCL 19-19-403. Excluding relevant evidence for prejudice, confusion, waste of time, or other reasons.
The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Rule 15-26. SDCL 19-19-404 Character evidence--crimes or other acts.

(a) **Character evidence.**

(1) **Prohibited uses.** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) **Exceptions for a defendant or victim in a criminal case.** The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in § 19-19-412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) **Exceptions for a witness.** Evidence of a witness's character may be admitted under §§ 19-19-607 to 19-19-609, inclusive.

(b) Crimes, wrongs, or other acts.

(1) **Prohibited uses.** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) **Permitted uses; notice in a criminal case.** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial or during trial if the court, for good cause, excuses lack of pretrial notice.

Rule 15-27. SDCL 19-19-405. Methods of proving character.

(a) **By reputation or opinion.** When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

(b) **By specific instances of conduct.** When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

Rule 15-28. SDCL 19-19-406. Habit--routine practice.
Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

Rule 15-29. SDCL 19-19-407. Subsequent remedial measures. When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- (1) negligence;
- (2) culpable conduct;
- (3) a defect in a product or its design; or
- (4) a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or — if disputed — proving ownership, control, or the feasibility of precautionary measures.

Rule 15-30. SDCL 19-19-408. Compromise offers and negotiations.

(a) **Prohibited uses.** Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

(b) **Exceptions.** The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Rule 15-31. SDCL 19-19-409. Offers to pay medical and similar expenses. Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

Rule 15-32. SDCL 19-19-410. Pleas, plea discussions, and related statements.

(a) **Prohibited uses.** In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

(1) a guilty plea that was later withdrawn;

(2) a nolo contendere plea;

(3) a statement made during a proceeding on either of those pleas under §§ 23A-7-2 to 23A-7-15, inclusive; or

(4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

(b) **Exceptions.** The court may admit a statement described in this section in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

Rule 15-33. SDCL 19-19-411. Liability insurance. Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or

otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness' bias or prejudice or proving agency, ownership, or control.

Rule 15-34. SDCL 19-19-412. Sex-offense cases--victim's sexual behavior or predisposition.

(a) Prohibited uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

- (1) evidence offered to prove that a victim engaged in other sexual behavior; or
- (2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions.

(1) Criminal cases. The court may admit the following evidence in a criminal case:

- (A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
- (B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and
- (C) evidence whose exclusion would violate the defendant's constitutional rights.

(2) Civil cases. In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

(c) Procedure to determine admissibility.

(1) Motion. If a party intends to offer evidence under this section, the party must:

- (A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;
- (B) do so at least 14 days before trial unless the court, for good cause, sets a different time;
- (C) serve the motion on all parties; and
- (D) notify the victim or, when appropriate, the victim's guardian or representative.

(2) Hearing. Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.

(d) **Definition of "victim."** In this section, "victim" includes an alleged victim.

ARTICLE VI. WITNESSES

Rule 15-35. SDCL 19-19-601. Competency to testify in general. Every person is competent to be a witness unless otherwise provided in this chapter.

Rule 15-36. SDCL 19-19-602. Need for personal knowledge--exception for expert opinion. A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under § 19-19-703.

Rule 15-37. SDCL 19-19-603. Oath or affirmation to testify truthfully. Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

Rule 15-38. SDCL 19-19-605. Judge's competency as a witness. The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.

Rule 15-39. SDCL 19-19-606. Juror's competency as a witness.

(a) **At the trial.** A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.

(b) **During an inquiry into the validity of a verdict or indictment.**

(1) **Prohibited testimony or other evidence.** During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) **Exceptions.** A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention;

(B) an outside influence was improperly brought to bear on any juror; or

(C) a mistake was made in entering the verdict on the verdict form.

Rule 15-40. SDCL 19-19-607. Who may impeach a witness.

Any party, including the party that called the witness, may attack the witness's credibility.

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Rule 15-41. SDCL 19-19-608. A witness's character for truthfulness or untruthfulness.

(a) **Reputation or opinion evidence.** A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) **Specific instances of conduct.** Except for a criminal conviction under § 19-19-609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

- (1) the witness; or
- (2) another witness whose character the witness being cross-examined has testified about.

(c) **Privilege against self-incrimination not waived by testimony on credibility.** By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

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Rule 15-42. SDCL 19-19-609. Impeachment by evidence of a criminal conviction.

(a) **In general.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

- (1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to § 19-19-403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

- (2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving - or the witness's admitting - a dishonest act or false statement.

(b) **Limit on using the evidence after 10 years.** This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

(c) **Effect of a pardon, annulment, or certificate of rehabilitation.** Evidence of a conviction is not admissible under subdivisions (a) or (b) if:

(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) **Juvenile adjudications.** Evidence of a juvenile adjudication is admissible under subdivision (a) only if:

(1) it is offered in a criminal case;

(2) the adjudication was of a witness other than the defendant;

(3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and

(4) admitting the evidence is necessary to fairly determine guilt or innocence.

(e) **Pendency of an appeal.** A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

Rule 15-43. SDCL 19-19-610. Religious beliefs or opinions. Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

Rule 15-44. SDCL 19-19-611. Mode and order of examining witnesses and presenting evidence.

(a) **Control by the court; purposes.** The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

(1) make those procedures effective for determining the truth;

(2) avoid wasting time; and

(3) protect witnesses from harassment or undue embarrassment.

(b) **Scope of cross-examination.** Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.

(c) **Leading questions.** Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:

- (1) on cross-examination; and
- (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

Rule 15-45. SDCL 19-19-612. Writing used to refresh a witness's memory.

(a) **Scope.** This section gives an adverse party certain options when a witness uses a writing to refresh memory:

- (1) while testifying; or
- (2) before testifying, if the court decides that justice requires the party to have those options.

(b) **Adverse party's options; deleting unrelated matter.**

An adverse party entitled to have the writing produced at the hearing under subdivision (a) is entitled to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) **Failure to produce or deliver the writing.** If a writing is not produced or is not delivered as ordered under subdivision (a) or (b), the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or - if justice so requires - declare a mistrial.

Rule 15-46. SDCL 19-19-613. Witness's prior statement.

(a) **Showing or disclosing the statement during examination.**

When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

(b) **Extrinsic evidence of a prior inconsistent statement.** Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under subdivision 19-19-801(d) (2).

Rule 15-47. SDCL 19-19-614. Court's calling or examining a witness.

(a) **Calling.** The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.

(b) **Examining.** The court may examine a witness regardless of who calls the witness.

(c) **Objections.** A party may object to the court's calling or examining a witness either at that time or at the next opportunity when the jury is not present.

Rule 15-48. SDCL 19-19-615. Excluding witnesses. At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

- (a) a party who is a natural person;
 - (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;
 - (c) a person whose presence a party shows to be essential to resenting the party's claim or defense;
 - (d) a person authorized by statute to be present; or
 - (e) a victim of a crime and his parent or guardian following the victim's testimony.
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ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 15-49. SDCL 19-19-701. Opinion testimony by lay witnesses. If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness's perception;
 - (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
 - (c) not based on scientific, technical, or other specialized knowledge within the scope of § 19-19-702.
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Rule 15-50. SDCL 19-19-702. Testimony by expert. A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
 - (b) the testimony is based on sufficient facts or data;
 - (c) the testimony is the product of reliable principles and methods; and
 - (d) the expert has reliably applied the principles and methods to the facts of the case.
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Rule 15-51. SDCL 19-19-703. Bases of opinion testimony by experts. An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Rule 15-52. SDCL 19-19-704. Opinion on an ultimate issue. In general - not automatically objectionable. An opinion is not objectionable just because it embraces an ultimate issue.

Rule 15-53. SDCL 19-19-705. Disclosure of facts or data underlying expert opinion. Unless the court orders otherwise, an expert may state an opinion--and give the reasons for it--without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

Rule 15-54. SDCL 19-19-706. Court-appointed expert witnesses.

(a) Appointment process. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

(b) Expert's role. The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

- (1) must advise the parties of any findings the expert makes;
- (2) may be deposed by any party;
- (3) may be called to testify by the court or any party; and
- (4) may be cross-examined by any party, including the party that called the expert.

(c) Compensation. The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:

- (1) in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and
- (2) in any other civil case, by the parties in the proportion and at the time that the court directs - and the compensation is then charged like other costs.

(d) **Disclosing the appointment to the jury.** The court may authorize disclosure to the jury that the court appointed the expert.

(e) **Parties' choice of their own experts.** This rule does not limit a party in calling its own experts.

ARTICLE VIII. HEARSAY

Rule 15-55. SDCL 19-19-801. Definitions that apply to this article--exclusions from hearsay. The following definitions apply under this article:

(a) **Statement.** "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) **Declarant.** "Declarant" means the person who made the statement.

(c) **Hearsay.** "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) **Statements that are not hearsay.** A statement that meets the following conditions is not hearsay:

(1) **A declarant-witness's prior statement.** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) identifies a person as someone the declarant perceived earlier.

(2) **An opposing party's statement.** The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Rule 15-56. SDCL 19-19-802. Rule against hearsay.

Hearsay is not admissible unless any of the following provide otherwise:

- (1) a statute;
 - (2) these rules; or
 - (3) other rules prescribed by the Supreme Court.
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Rule 15-57. SDCL 19-19-803. Exceptions to the rule against hearsay--regardless of whether the declarant is available as a witness. The statements described in this section are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

- (1) **Present sense impression.** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
- (2) **Excited utterance.** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.
- (3) **Then-existing mental, emotional, or physical condition.** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.
- (4) **Statement made for medical diagnosis or treatment.** A statement that:
 - (A) is made for -- and is reasonably pertinent to -- medical diagnosis or treatment; and
 - (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.
- (5) **Recorded recollection.** A record that:
 - (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
 - (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and
 - (C) accurately reflects the witness's knowledge.If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.
- (6) **Records of regularly conducted business activity.** A record of an act, event, condition, opinion, or diagnosis if:
 - (A) the record was made at or near the time by -- or from information transmitted by -- someone with knowledge;

- (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
 - (C) making the record was a regular practice of that activity;
 - (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with a rule or a statute permitting certification; and
 - (E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.
- (7) **Absence of a record of a regularly conducted activity.** Evidence that a matter is not included in a record as described in subdivision (6) if:
- (A) the evidence is admitted to prove that the matter did not occur or exist;
 - (B) a record was regularly kept for a matter of that kind; and
 - (C) the opponent does not show that the possible source of the information or other circumstances indicate a lack of trustworthiness.
- (8) **Public records.** A record or statement of a public office if:
- (A) it sets out:
 - (i) the office's activities;
 - (ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or
 - (iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and
 - (B) the opponent does not show that the source of Information or other circumstances indicate a lack of trustworthiness.
- (9) **Public records of vital statistics.** A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.
- (10) **Absence of public record.** Testimony -- or a certification under § 19-19-902 -- that a diligent search failed to disclose a public record or statement if:
- (A) the testimony or certification is admitted to prove that
 - (i) the record or statement does not exist; or
 - (ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

- (B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice - unless the court sets a different time for the notice or the objection.
- (11) **Records of religious organizations concerning personal or family history.** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.
- (12) **Certificates of marriage, baptism, and similar ceremonies.** A statement of fact contained in a certificate:
 - (A) made by a person who is authorized by a religious organization or by law to perform the act certified;
 - (B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and
 - (C) purporting to have been issued at the time of the act or within a reasonable time after it.
- (13) **Family records.** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.
- (14) **Records of documents that affect an interest in property.** The record of a document that purports to establish or affect an interest in property if:
 - (A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;
 - (B) the record is kept in a public office; and
 - (C) a statute authorizes recording documents of that kind in that office.
- (15) **Statements in documents that affect an interest in property.** A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose - unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.
- (16) **Statements in ancient documents.** A statement in a document that is at least 20 years old and whose authenticity is established.
- (17) **Market reports and similar commercial publications.** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

- (18) **Statements in learned treatises, periodicals, or pamphlets.** A statement contained in a treatise, periodical, or pamphlet if:
- (A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and
 - (B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

- (19) **Reputation concerning personal or family history.** A reputation among a person's family by blood, adoption, or marriage – or among a person's associates or in the community concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.
- (20) **Reputation concerning boundaries or general history.** A reputation in a community – arising before the controversy – concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.
- (21) **Reputation concerning character.** A reputation among a person's associates or in the community concerning the person's character.
- (22) **Judgment of a previous conviction.** Evidence of a final judgment of conviction if:
- (A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;
 - (B) the conviction was for a crime punishable by death or by imprisonment for more than a year;
 - (C) the evidence is admitted to prove any fact essential to the judgment; and
 - (D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

- (23) **Judgments involving personal, family, or general history, or a boundary.** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:
- (A) was essential to the judgment; and
 - (B) could be proved by evidence of reputation.
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Rule 15-58. SDCL 19-19-804. Exceptions to rule against hearsay--when declarant unavailable as witness.

(a) Criteria for being unavailable. A declarant is considered to be unavailable as a witness if the declarant:

- (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
- (2) refuses to testify about the subject matter despite a court order to do so;
- (3) testifies to not remembering the subject matter;
- (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
- (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:
 - (A) the declarant's attendance, in the case of a hearsay exception under subdivision (b)(1); or
 - (B) the declarant's attendance or testimony, in the case of a hearsay exception under subdivision (b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) Former testimony. Testimony that:

- (A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and
- (B) is now offered against a party who had -- or, in a civil case, whose predecessor in interest had -- an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) Statement under the belief of imminent death. In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) Statement against interest. A statement that:

- (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against

- someone else or to expose the declarant to civil or criminal liability; and
- (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.
- (4) **Statement of personal or family history.** A statement about:
- (A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or
 - (B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.
- (5) **Decedent's statements.** In actions, suits, or proceedings by or against the representatives of deceased persons including proceedings for the probate of wills, any statement of the deceased whether oral or written shall not be excluded as hearsay, provided that the trial judge shall first find as a fact that the statement was made by decedent, and that it was in good faith and on decedent's personal knowledge.
- (6) **Statement offered against a party that wrongfully caused the declarant's unavailability.** A statement offered against a party that wrongfully caused - or acquiesced in wrongfully causing - the declarant's unavailability as a witness, and did so intending that result.

Rule 15-59. SDCL 19-19-805. Hearsay within hearsay.

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

Rule 15-60. SDCL 19-19-806. Attacking and supporting the declarant. When a hearsay statement - or a statement described in subdivision 19-19-801(d)(2)(C), (D), or (E)-- has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant

had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Rule 15-61. SDCL 19-19-807. Residual exception.

(a) **In general.** Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in § 19-19-803 or 19-19-804.

- (1) the statement has equivalent circumstantial guarantees of trustworthiness;
- (2) it is offered as evidence of a material fact;
- (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts, and
- (4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) **Notice.** The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

Rule 15-62. SDCL 19-19-901. Authenticating or identifying evidence.

(a) **In general.** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) **Examples.** The following are examples only - not a complete list - of evidence that satisfies the requirement:

- (1) **Testimony of a witness with knowledge.** Testimony that an item is what it is claimed to be.
- (2) **Nonexpert opinion about handwriting.** A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.
- (3) **Comparison by an expert witness or the trier of fact.** A comparison with an authenticated specimen by an expert witness or the trier of fact.
- (4) **Distinctive characteristics and the like.** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.
- (5) **Opinion about a voice.** An opinion identifying a person's voice - whether heard firsthand or through mechanical or electronic transmission or recording - based on hearing the voice at any time under

circumstances that connect it with the alleged speaker.

- (6) **Evidence about a telephone conversation.** For a telephone conversation, evidence that a call was made to the number assigned at the time to:
 - (A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or
 - (B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.
 - (7) **Evidence about public records.** Evidence that:
 - (A) a document was recorded or filed in a public office as authorized by law; or
 - (B) a purported public record or statement is from the office where items of this kind are kept.
 - (8) **Evidence about ancient documents or data compilations.** For a document or data compilation, evidence that it:
 - (A) is in a condition that creates no suspicion about its authenticity;
 - (B) was in a place where, if authentic, it would likely be; and
 - (C) is at least 20 years old when offered.
 - (9) **Evidence about a process or system.** Evidence describing a process or system and showing that it produces an accurate result.
 - (10) **Methods provided by a statute or rule.** Any method of authentication or identification allowed by a state statute or a rule prescribed by the Supreme Court.
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Rule 15-63. SDCL 19-19-902. Evidence that is self-authenticating. The following items of evidence are self-authenticating. They require no extrinsic evidence of authenticity in order to be admitted.

- (1) **Domestic public documents that are sealed and signed.** A document that bears:
 - (A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and
 - (B) a signature purporting to be an execution or attestation.
- (2) **Domestic public documents that are not sealed but are signed and certified.** A document that bears no seal if:

- (A) it bears the signature of an officer or employee of an entity named in subdivision (1) (A); and
 - (B) another public officer who has a seal and official duties within that same entity certifies under seal – or its equivalent – that the signer has the official capacity and that the signature is genuine.
- (3) **Foreign public documents.** A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester – or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:
 - (A) order that it be treated as presumptively authentic without final certification; or
 - (B) allow it to be evidenced by an attested summary with or without final certification.
- (4) **Certified copies of public records.** A copy of an official record – or a copy of a document that was recorded or filed in a public office as authorized by law – if the copy is certified as correct by:
 - (A) the custodian or another person authorized to make the certification; or
 - (B) a certificate that complies with subdivision (1), (2) or (3), inclusive, or complying with any law of the United States or state thereof.
- (5) **Official publications.** A book, pamphlet, or other publication purporting to be issued by a public authority.
- (6) **Newspapers and periodicals.** Printed material purporting to be a newspaper or periodical.
- (7) **Trade inscriptions and the like.** An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

- (8) **Acknowledged documents.** A document accompanied by a certificate of acknowledgement that is lawfully executed by a notary public or another officer who is authorized to take acknowledgements.
- (9) **Commercial paper and related documents.** Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.
- (10) **Presumptions under a statute.** A signature, document, or anything else that a statute of this state declares to be presumptively or prima facie genuine or authentic.
- (11) **Certified domestic records of a regularly conducted activity.** The original or copy of a domestic record that meets the requirements of subdivision 19-19-803(6)(A)-(C) as shown by a certification of the custodian or another qualified person that complies with a statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record - and must make the record and certification available for inspection - so that the party has a fair opportunity to challenge them.
- (12) **Certified foreign records of a regularly conducted activity.** In a civil case, the original or copy of a foreign record that meets the requirements of subdivision(11), modified as follows: the certification, rather than complying with a statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of subdivision (11).

Rule 15-64. SDCL 19-19-903. Subscribing witnesses. A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS AND PHOTOGRAPHS

Rule 15-65. SDCL 19-19-1001. Definitions that apply to this article.

(a) A "writing" consists of letters, words, numbers, or their equivalent set down in any form.

(b) A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner.

(c) A "photograph" means a photographic image or its equivalent stored in any form.

(d) An "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout - or other output readable by sight - if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.

(e) A "duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

(f) "TDD," or "TTY," any auxiliary aids or services consisting of assistive listening or transcription systems which allow the reception or transmission of aurally delivered communication and materials for the benefit of individuals with hearing, speech, or physical impairments.

Rule 15-66. SDCL 19-19-1002. Requirement of the original. An original writing, recording, or photograph is required in order to prove its content unless this chapter or rules adopted by the Supreme Court of this state, or a state statute provides otherwise.

Rule 15-67. SDCL 19-19-1003. Admissibility of duplicates. A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

Rule 15-68. SDCL 19-19-1004. Admissibility of other evidence of content. An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:

- (a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;
- (b) an original cannot be obtained by any available judicial process;
- (c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or
- (d) the writing, recording, or photograph is not closely related to a controlling issue.

Rule 15-69. SDCL 19-19-1005. Copies of public records to prove content. The proponent may use a copy to prove the content of an official record - or of a document that was recorded or filed in a public office as authorized by law - if these conditions are met:

the record or document is otherwise admissible; and the copy is certified as correct in accordance with subdivision 19-19-902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

Rule 15-70. SDCL 19-19-1006. Summaries to prove content.

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

Rule 15-71. SDCL 19-19-1007. Testimony or statement of a third party to prove content. The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

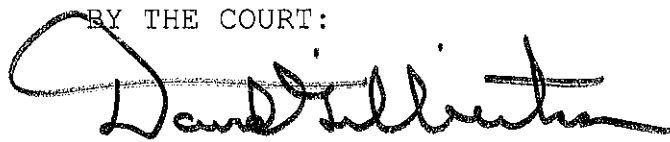
Rule 15-72. SDCL 19-19-1008. Functions of the court and jury. Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under § 19-19-1004 or 19-19-1005. But in a jury trial, the jury determines--in accordance with subdivision 19-19-104(b)--any issue about whether:

- (a) an asserted writing, recording, or photograph ever existed;
- (b) another one produced at the trial or hearing is the original; or
- (c) other evidence of content accurately reflects the content.

IT IS FURTHER ORDERED that rules 15-17 through 15-72 shall become effective January 1, 2016.


DATED at Pierre, South Dakota, this 19th day of October, 2015.

BY THE COURT:



David Gilbertson, Chief Justice

ATTEST:


Clerk of the Supreme Court
(SEAL)

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

OCT 19 2015


Clerk