

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE PROPOSED)	NOTICE OF SPECIAL
AMENDMENT OF SDCL 15-6-45(b))	RULES HEARING
AMENDMENT OF SDCL 15-26A-75)	
AMENDMENT OF SDCL 19-19-502)	NO. 140
A PROPOSED COURT RULE CONCERNING)	
THE CARRYING OF A CONCEALED PISTOL)	
IN THE STATE CAPITOL AREAS UNDER)	
THE AUTHORITY OF THE SUPREME COURT.)	

Petitions for amendments of existing sections of the South Dakota Codified Laws and a proposed adoption of new rule having been filed with the Court and the Court having determined that the proposed amendments and proposed adoption of a new rule should be noticed for hearing, now therefore,

NOTICE IS HEREBY GIVEN THAT ON AUGUST 26, 2019, at 10:00 A.M., C.T., at the Courtroom of the Supreme Court in the Capitol Building, Pierre, South Dakota, the Court will consider the following:

1. **Proposed Amendment of SDCL 15-6-45(b). Subpoena for production of documentary evidence.** A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein, regardless of whether the attorney also notices the person's deposition; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may:

(1) Quash or modify the subpoena if it is unreasonable and oppressive; or

(2) Condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

Explanation for Proposal

In 1991, Federal Rule of Civil Procedure 45(a)(1) was amended to allow "the issuance of a subpoena to compel a non-party to produce evidence independent of any deposition. This revision spares the necessity of a deposition of the custodian of evidentiary material required to be produced." Advisory Committee Notes to 1991 Amendment of Rule 45(a) (the paragraph that begins "Fourth").

This amendment has proven useful in federal practice. It reduces the cost of obtaining records from a non-party because a deposition is not required. It is consistent with the goal of South Dakota's Rules of Civil Procedure "to secure the just, speedy and inexpensive determination of every action." Rule 1 (emphasis added). The reason for the proposed change is to increase the efficiency and reduce the cost of obtaining discoverable documents from a third party.

The change is based on F.R.Civ.P 45(a)(1)(A)(iii). The change is different in form from F.R.Civ.P. 5(a)(1)(A)(iii) because the 1991 federal changes to Rule 45 substantially revised Rule 45. The proposed change to South Dakota Rule of Civil Procedure 45 can be made without making any other changes to it, and without bothering with the other 1991 changes to F.R.Civ.P. 45. The right of a subpoenaed party to obtain relief from an unreasonable or oppressive subpoena is preserved in South Dakota's existing Rule 45.

The proposed change would bring state practice in line with federal practice.

The change would allow an attorney to subpoena a non-party to produce evidence without a deposition. Current law requires a deposition.

2. Proposed Amendment of SDCL 15-26A-75. Time for serving and filing briefs. (1) Appellant's brief. If a transcript is obtained prior to appeal, or if no transcript is ordered, the appellant's brief shall be due within forty-five days after service of the notice of appeal. If a transcript is ordered but not received prior to appeal, or if procedures pursuant to § 15-26A-54 or 15-26A-55 are followed, the appellant's brief shall be due within forty-five days after service of the transcript or filing of the statements provided for in § 15-26A-54 or 15-26A-55.

(2) **Appellee's brief.** The appellee's brief shall be due for service and filing within forty-five days after service of the appellant's brief, or in the case of multiple appellants, within forty-five days after service of the last appellant's brief.

(3) **Appellant's reply brief.** The appellant's reply brief shall be due for service and filing within ~~fifteen~~ thirty days after service of the appellee's brief, or in the case of multiple appellees, within ~~fifteen~~ thirty days after service of the last appellee's brief.

In any appeal from a judgment or order in an adoption or an abuse and neglect proceeding, including a judgment or order terminating parental rights, all time periods under subdivisions (1) and (2) of this section shall be reduced to twenty-five days.

Explanation for Proposal

A reply brief would be due thirty, not fifteen, days after service of the appellee's brief, or the last appellee's brief.

The reason for the change is to improve the quality of justice by improving the quality of reply briefs. A good reply brief requires deep thought and analysis of the appellee's brief; careful legal research to determine the weak points in the appellee's brief to explore issues that have not been previously researched; careful first drafting of the reply brief, making sure not to repeat the opening brief, and to be fully responsive to appellee's brief, while at the same time being as concise as possible; reviewing the first draft and making substantive changes, additions, and deletions needed; completing additional legal research that on second thought is needed; reviewing, revising, and editing the brief at least once (preferably more), as suggested by Justice Brandeis' dictum that "there is no great writing, only great rewriting"

(<https://www.goodreads.com/quotes/6772530-there-is-no-great-writing-only-great-rewriting>) (last visited March 27, 2019); making final changes in the brief to produce the best possible finished product; stepping back from the finished product and saying to oneself "what's wrong with this, and how can I improve it?"; making

In a large law firm where a senior partner has junior partners or associates who can be assigned to do this work, perhaps fifteen days is a reasonable amount of time for all this to occur.

Never having worked in a large law firm, I don't know. But for a small firm or sole practitioner, who are most of the lawyers in South Dakota, fifteen days is too few.

I have spent my career as a sole practitioner or in a small firm. Between the South Dakota Supreme Court and federal appellate courts (mainly the Eighth Circuit), I estimate I've written 50 to 60 reply briefs. It is always a struggle to comply with this Court's fifteen-day time limit. The other demands of practice (depositions, motions, telephone calls, e-mail, office administration, client conferences, other briefs, etc.) don't stop, and limit my ability to set aside the blocks of time needed to prepare the best possible reply brief. Some of these demands can be postponed; others can't be.

Perhaps 20 years ago, I heard Justice John Konenkamp give the Pennington County Bar suggestions about practicing in the Supreme Court. He told us always to file a reply brief. He said that his reaction to an initial brief was often "Sounds pretty good," and his reaction to a response brief was often "Sounds pretty good." He said he then looked to the reply brief.

A good lawyer writes the best reply brief possible. The ultimate winner is this Court, and its administration of justice, which benefits from high-quality legal work. Extending the time limit for a reply brief to thirty days would make it much easier for a lawyer to provide this Court with high-quality legal work.

Federal Rule of Appellate Procedure 31(a)(1) provides a twenty-one day time limit for a reply brief, and provides that a reply brief must be filed at least seven days before argument. I have never had a case in which the "seven days before argument" provision applied, because federal courts of appeal do not ordinarily set oral argument so close to the due date for the reply brief.

United States Supreme Court Rule 25.3 provides thirty days for filing a reply brief.

The change would extend the time for filing a reply brief from fifteen to thirty days.

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3. Proposed Amendment of SDCL 19-19-502. Lawyer-client privilege. (a) Definitions. As used in this section:

(1) A "client" is a person, a fiduciary of a trust or estate, public officer, or corporation, limited liability company, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him;

(2) A representative of the client is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client;

(3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation;

(4) A "representative of the lawyer" is one employed by the lawyer to assist the lawyer in the rendition of professional legal services;

(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(1) Between himself or his representative and his lawyer or his lawyer's representative;

(2) Between his lawyer and the lawyer's representative;

(3) By him or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(4) Between representatives of the client or between the client and a representative of the client; or

(5) Among lawyers and their representatives representing the same client.

(c) Who may claim privilege. The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.

(d) Exceptions. There is no privilege under this section:

(1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) Breach of duty by a lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer;

(4) Documents attested by a lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

(5) Joint clients. As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

4. Proposed adoption of a court rule concerning the carrying of a concealed pistol in the state capitol areas under the authority of the Supreme Court.

Section 1. That a new rule be added to SDCL Ch. 22-14 as follows:

For purposes of SDCL 22-14-24(5), the Supreme Court chamber in the state capitol building shall include the courtroom, the offices of the justices, the clerk of courts office, law library and the non-public areas of the Supreme Court's administrative and legal staff offices. The public area of the state court administrator's office is not included as part of the Supreme Court chamber.

Section 2. No firearms are permitted in any of the areas included in the Supreme Court chamber as defined in Section 1.

Section 3. Public notice of these provisions shall be posted conspicuously at each public entrance to an area included in the Supreme Court chamber as defined in Section 1.

Section 4. The Chief Justice may waive the application of this rule upon petition of an interested person for good cause shown.

Section 5. This rule is adopted pursuant to SDCL 22-14-25 and shall be effective immediately.

Explanation for Proposal

This rule is proposed in response to the legislative changes made during the 2019 session in SB 115 authorizing certain persons to carry concealed pistols in the state capitol building. The rule defines "chamber" of the Supreme Court to include the courtroom, justice's offices, clerk of courts office, law library and those non-public administrative areas where the justices work and confer with their staff. The restriction does not apply to the public office of the state court administrator for those that comply with the provisions of SDCL 22-14-24(5). The intent is to clarify that the only area under the authority of the Supreme Court in the state capitol building where a member of the public may carry a concealed pistol under the new provisions is the office of the state court administrator.

22-14-24. Exceptions to penalty for possession in a county courthouse or state capitol. The provisions of § 22-14-23 do not apply to:

(1) The lawful performance of official duties by an officer, agent, or employee of the United States, the state, political subdivision thereof, or a municipality, who is authorized by law to engage in or supervise the prevention, detection, investigation, or prosecution of any violation of law or who is an officer of the court;

(2) The possession of a firearm or other dangerous weapon by a judge or magistrate;

(3) The possession of a firearm or other dangerous weapon by a federal or state official or by a member of the armed services, if such possession is authorized by law;

(4) The possession of a concealed pistol in the state capitol by a qualified law enforcement officer or a qualified retired law enforcement officer in accordance with the Law Enforcement Officers Safety Act of 2004, 18 U.S.C. § 926B-C;

(5) The possession of a concealed pistol anywhere in the state capitol, other than in the Supreme Court chamber or other access-controlled private office under the supervision of security personnel, by any person not otherwise referenced in this section, provided:

(a) The person possessing the concealed pistol holds an enhanced permit issued in accordance with § 23-7-53;

(b) At least twenty-four hours prior to initially entering the state capitol with a concealed pistol, the person notifies the superintendent of the Division of Highway Patrol, orally or in writing, that the person intends to possess a concealed pistol in the state capitol;

(c) The notification required by this subdivision includes the date on which or the range of dates during which the person intends to possess a concealed pistol in the state capitol, provided the range of dates may not exceed thirty consecutive days; and

(d) The notification required by the subdivision may be renewed, as necessary and without limit; and

(6) The lawful carrying of a firearm or other dangerous weapon in a county courthouse incident to a hunter safety or a gun safety course or for any other lawful purposes.

Notice of Special Rules Hearing No. 140 - August 26, 2019

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 August 14, 2019.

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

Notice of this hearing shall be made to the members of the State Bar by electronic mail notification, by posting notice at the Unified Judicial System's website at <http://www.ujs.sd.gov/> or the State Bar of South Dakota's website at <http://www.sdbar.org/>.

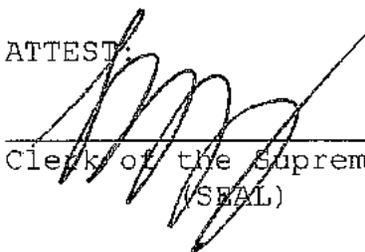
DATED at Pierre, South Dakota this 25th day of July, 2019.

BY THE COURT:



David Gilbertson, Chief Justice

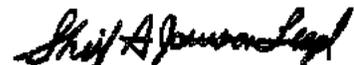
ATTEST:



Clerk of the Supreme Court
(SEAL)

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

JUL 25 2019


Clerk