IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE PROPOSED ADOPTION OF A NEW RULE TO BE DESIGNATED AT SDCL 15-6-28A RELATING TO UNIFORM INTERSTATE DEPOSITION AND DISCOVERY ACT ADOPTION OF A NEW RULE RELATING TO UNSWORN FOREIGN DECLARATION ACT AMENDMENT OF SDCL 16-16-17.1 ADOPTION OF NEW RULES TO BE DESIGNATED AT SDCL 16-16-71.2; SDCL 16-16-71.3; SDCL 16-16-71.4; AMENDMENT OF SDCL 23A-44-5.1 AMENDMENT OF SDCL 25-4-58.1 ADOPTION OF A NEW RULE RELATING TO ELECTRONIC DOCUMENTS AS THE OFFICIAL COURT RECORD AND PROVIDE FOR AN ELECTRONIC DOCUMENT MANAGEMENT SYSTEM FOR COURT RECORDS.	NOTICE OF RULES HEARING NO. 124

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Petitions for amendments of existing sections of the South Dakota Codified Laws and adoptions of new rules 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 15, 2012, 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:

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1. Adoption of a new rule to be designated at SDCL 15-6-28A(a). Interstate depositions and discovery.

This rule shall govern depositions and discovery conducted in South Dakota in connection with a civil lawsuit brought in another state.

15-6-28A(b). Definitions. In this rule:

(1) "Foreign jurisdiction" means a state other than this state.

(2) "Foreign subpoena" means a subpoena issued under authority of a court of record of a foreign jurisdiction.

(3) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

(4) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

(5) "Subpoena" means a document, however denominated, issued under authority of a court of record requiring a person to:

(a) attend and give testimony at a deposition;

(b) produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person; or

(c) permit inspection of premises under the control of the person.

15-6-28A(c). Issuance of subpoena for interstate depositions and discovery.

(A) To request issuance of a subpoena under this rule, a party must submit a foreign subpoena to a clerk of court in the county in which discovery is sought to be conducted in this state. A request for the issuance of a subpoena under this rule does not constitute an appearance in the courts of this state. It does create the necessary jurisdiction in the State of South Dakota to:

(i) enforce the subpoena;

(ii) quash or modify the subpoena;

(iii) issue any protective order or resolve any other dispute relating to the subpoena;

(iv) impose sanctions on the attorney requesting the issuance of the subpoena for any action which would constitute a violation of the South Dakota Rules of Civil Procedure.

(B) When a party submits a foreign subpoena to a clerk of court in this state, the clerk shall promptly issue a subpoena for service upon the person to whom the foreign subpoena is directed.

(C) A subpoena under subsection (B) must:

(i) conform to the requirements of the South Dakota Rules of Civil Procedure, including 15-6-45, but may otherwise incorporate the terms used in the foreign subpoena so long as they conform to the South Dakota Rules of Civil Procedure;

(ii) advise the person to whom the subpoena is directed that such a person has a right to petition the South Dakota court to quash or modify the subpoena under Rule 15-6-45(b); and

(iii) contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

15-6-28A(d). Service of subpoena for interstate depositions and discovery.

A subpoena issued by a clerk of court under this rule must be served in compliance with 15-6-45(c).

15-6-28A(e). Deposition, production, inspection, witness fees, expenses, place of examination, attendance where required.

All other provisions of 15-6-45 shall also apply to subpoenas issued under this rule.

15-6-28A(f) Application to court.

An application to the court for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court under this rule must comply with the rules or laws of South Dakota and be

submitted to the court in the county in which discovery is to be conducted.

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2. IN THE MATTER OF THE ADOPTION OF A NEW RULE TO TAKING DISCOVERY AND DECLARATIONS IN FOREIGN COUNTRIES.

UNIFORM UNSWORN FOREIGN DECLARATIONS ACT

SECTION 1. SHORT TITLE. This rule may be cited as the Uniform Unsworn Foreign Declarations Act.

SECTION 2. DEFINITIONS. In this rule:

(1) "Boundaries of the United States" means the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, and any territory or insular possession subject to the jurisdiction of the United States.

(2) "Law" includes the federal or a state constitution, a federal or state statute, a judicial decision or order, a rule of court, an executive order, and an administrative rule, regulation, or order.

(3) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(4) "Sign" means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(5) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(6) "Sworn declaration" means a declaration in a signed record given under oath. The term includes a sworn statement, verification, certificate, and affidavit.

(7) "Unsworn declaration" means a declaration in a signed record that is not given under oath, but is given under penalty of perjury.

SECTION 3. APPLICABILITY. This rule applies to an unsworn declaration by a declarant who at the time of making the declaration is physically located outside the boundaries of the United States whether or not the location is subject to the jurisdiction of the United States. This rule does not apply to a declaration by a declarant who is physically located on property that is within the boundaries of the United States and subject to the jurisdiction of another country or a federally recognized Indian tribe.

SECTION 4. VALIDITY OF UNSWORN DECLARATION.

(a) Except as otherwise provided in subsection (b), if a law of this state requires or permits use of a sworn declaration, an unsworn declaration meeting the requirements of this rule has the same effect as a sworn declaration.

(b) This rule does not apply to:

(1) a deposition under 15-6-26;

(2) an oath of office;

(3) an oath required to be given before a specified official other than a notary public;

(4) a declaration to be recorded pursuant to Title 43 or

(5) an oath required by 29A-2-504.

SECTION 5. REQUIRED MEDIUM. If a law of this state requires that a sworn declaration be presented in a particular medium, an unsworn declaration must be presented in that medium.

SECTION 6. FORM OF UNSWORN DECLARATION. An unsworn declaration under this rule must be in substantially the following form:

FORM OF UNSWORN DECLARATION

I declare under penalty of perjury under the law of South Dakota that the foregoing is true and correct, and that I am physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, and any territory or insular possession subject to the jurisdiction of the United States.

Executed on the _____ day of _____, _____, at
(date) (month) (year)

_____, _____.
(city or other location, and state) (country)

_____
(printed name)

_____
(signature)

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3. Amendment of SDCL 16-16-17.1. Conditional admission.

~~If the Board of Bar Examiners determines that there are unresolved issues of good moral character, fitness, or general qualifications of the applicant, the board, in its discretion, may make a recommendation to the Supreme Court of conditional admission. The recommendation may incorporate such terms, conditions, and restrictions and be for such duration as the board determines appropriate. The Supreme Court may accept or reject the recommendation.~~

~~The Board of Bar Examiners shall review the conditional admission no later than the date specified in the recommendation and 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.~~

~~A conditional admission shall be confidential except that the Board of Bar Examiners shall advise the secretary-treasurer of the State Bar of such conditional admission, and except as provided in §§ 16-16-15 and 16-19-99. An applicant admitted to the practice of law pursuant to this section is bound by the terms of such conditional admission. Applicants aggrieved by the decision of the Board of Bar Examiners may seek review pursuant to § 16-16-16.~~

In its sole discretion, the Board of Bar Examiners may recommend to the Supreme Court that an applicant be admitted to the bar on a conditional basis in accordance with these rules. The recommendation may incorporate such terms, conditions and restrictions and be for such duration as the board determines appropriate. The Supreme Court may accept, reject, or modify the recommendation.

A conditional admission shall be confidential except that the Board of Bar Examiners shall advise the secretary-treasurer of the State Bar of such conditional admission, and except as provided in §§ 16-16-15 and 16-19-99. An applicant admitted to the practice of law pursuant to this section is bound by the terms of such conditional admission. Applicants aggrieved by the decision of the Board of Bar Examiners may seek review pursuant to § 16-16-16.

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4. Adoption of a new rule to be designated at SDCL 16-16-17.2. Limited purpose of conditional admission.

As provided by 16-16-7.3, conditional admission may be employed to permit an applicant who currently satisfies character and fitness requirements to practice law while his or her continued

participation in an ongoing course of treatment or remediation for previous misconduct or unfitness is monitored to protect the public. Conditional admission is neither to be used as a method of achieving fitness nor as a method of monitoring the behavior of all applicants who have rehabilitated themselves from misconduct or unfitness. Conditional admission may be employed only when an applicant has been engaged in a sustained and effective course of treatment or remediation for a period of time sufficient to demonstrate his or her commitment and progress.

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5. Adoption of a new rule to be designated at SDCL 16-16-17.3. Limited circumstances under which conditional admission may be considered.

The Board of Bar Examiners may recommend that an applicant be admitted to the bar conditioned on the applicant's compliance with relevant conditions prescribed by the Board if the applicant currently satisfies all requirements for admission to the bar and possesses the requisite good moral character and fitness for admission, *except that* the applicant is engaged in a sustained and effective course of treatment for or remediation of:

a. substance abuse or dependence;

b. a diagnosed mental or physical impairment that, should it reoccur, would likely impair the applicant's ability to practice law or pose a threat to the public; or

c. neglect of financial affairs;

that previously rendered the applicant unfit for admission to the bar, *and* the applicant has been engaged in such course of treatment or remediation for no fewer than 6 continuous months if the subject of remediation is neglect of financial affairs.

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6. Adoption of a new rule to be designated at SDCL SDCL 16-16-17.4. Report of recommendation to Supreme Court.

In the event that a majority of the members of the Board of Bar Examiners votes to recommend the conditional admission of an applicant, the Board shall report to the Supreme Court the matters of concern, the nature, substance, and duration of the course of treatment or remediation in which the applicant is engaged, complete and detailed information regarding the applicant's progress in connection therewith including any lapses or failures, the Board's recommendation regarding the terms and conditions of admission, any additional facts relevant to the recommendation, and confirmation of the applicant's consent to admission on a conditional basis.

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7. Amendment of SDCL 23A-44-5.1. 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. ~~As to indictments, informations, complaints or orders for a new trial pending on July 1, 1991, such one hundred eighty day period shall commence to run from July 1, 1991.~~

(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;

(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; ~~and~~

(f) The period of time from the date of arraignment until a request of the defendant for a change of judge brought under SDCL chapter 15-12; and

(g) ~~(f)~~ 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.

(5) If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, the defendant shall be entitled to a dismissal with prejudice of the offense charged and any other offense required by law to be joined with the offense charged.

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8. Amendment of SDCL 25-4-58.1. Minimum Qualifications for Family Court Mediators.

To be eligible as a court appointed mediator under § 25-4-56, a mediator must have the following minimum qualifications:

(1) A mediator must file an approved application on the prescribed form with the presiding judge for the circuit or circuits in which the mediator will conduct mediations. See prescribed form attached as Exhibit A.

(2) A mediator must have both a minimum of forty (40) hours formal mediation training, plus experience in actual mediation sessions either by consulting with a mediator approved under this rule for at least three mediation sessions, or, if the applicant is a licensed and practicing attorney-at-law, by participating in at least three mediation sessions as legal counsel representing a participant in such mediation sessions. ~~and consultation with an experienced mediator for at least three mediation sessions.~~ In place of forty (40) hours' training and consultation, a person may, with court approval, qualify as a mediator if that person has had five years' experience in mediating custody and visitation issues with a minimum of twenty (20) mediations during that period. A mediator must have competence in the following areas:

(a) general knowledge of the South Dakota court system and its procedures in contested family matters;

(b) general knowledge of South Dakota family law, especially as applied to custody and visitation issues;

(c) knowledge of child development and specifically the impact of divorce or separation on family members;

(d) knowledge of resources available in the state to which the parties and the children can be referred for assistance;

(e) knowledge of interviewing and mediation techniques applicable to the family setting.

(3) A mediator must be committed to and participate in continuing education courses.

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9. IN THE MATTER OF THE ADOPTION OF A NEW RULE TO RECOGNIZE ELECTRONIC DOCUMENTS AS THE OFFICIAL COURT RECORD AND PROVIDE FOR AN ELECTRONIC DOCUMENT MANAGEMENT SYSTEM FOR COURT RECORDS.

Section 1. Definitions.

Electronic Document Management System. "Electronic Document Management System" ("EDMS") means a collection of computer software application programs and hardware devices that provide a means of organizing and controlling the creation, management and retrieval of documents through their life cycle.

Electronic record. "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means within the Unified Judicial System's EDMS.

Electronic signature. "Electronic signature" means an electronic symbol or process attached to or logically associated with a document, that can be executed or adopted by the user with the intent to sign a document.

Section 2. Electronic Document Management System Policy.

The State Court Administrator, in consultation with the Unified Judicial System Technology Council, shall prepare and publish an Electronic Document Management System Policy specifying EDMS policy and procedure within the clerk of courts office. Such policy may be amended as necessary and appropriate to carry out the provisions of these rules establishing an EDMS.

Section 3. EDMS Conversion.

For those counties with EDMS capabilities, the clerk of courts office shall not maintain a paper court file in any case commenced after the effective date of this rule except as otherwise provided in the EDMS Policy. The clerk of courts shall electronically scan all paper documents and convert them to electronic documents pursuant to the EDMS policy.

Section 4. Official Record.

1. Whenever available, the official court record shall be the electronic file maintained by the Unified Judicial System. The official record shall also include, however, any conventional documents or exhibits filed and maintained in accordance with the policy for EDMS. The clerk of court shall maintain the official court record in an electronic format or in a combination of electronic and non-electronic formats as required. Documents filed by traditional methods shall be electronically scanned and made part of the official record in accordance with the EDMS Policy. If a document submitted by traditional methods is not of sufficient graphical quality to be legible when electronically scanned into the EDMS, the clerk shall maintain the document in paper format.

2. An electronic transmission or print-out from the EDMS that shows the clerk's seal attesting to the document's authenticity shall be considered an official record or certified copy of the original.

3. Any court rule requiring that a document be an original, be on paper or another tangible medium, or be in writing, is satisfied by the electronic image defined as the original document in this rule. No record or signature may be denied legal effect or enforceability solely because it is in electronic form.

4. A requirement that a document or signature associated with a document be notarized, acknowledged, verified, witnessed, or made under oath is satisfied if the electronic signature of the person authorized to perform that act, and all other information required to be included, is attached or logically associated with the document or signature.

5. Court personnel will electronically file all official documents entered by the court. This applies to any electronic documents generated by the court and shall include orders, judgments, memoranda, papers, notices and any other official document.

Section 5. Signatures of Judges and Court Officials.

The requirement that any court record or document be signed is met by use of an electronic signature. The submission of a document signed with an "/s/ name" or electronic image of the traditional signature when filed with the login and password of a judge or court official shall constitute an original signature for all purposes. An electronic signature is considered to be the original signature upon the court record or document for all purposes under this rule and other applicable statutes or rules.

Section 6. Confidential Information.

The confidentiality of an electronic record, or an electronic copy thereof, is the same for the equivalent paper record. Access to confidential information, regardless of form, shall only be to the extent provided by law. The EMDS shall place a visible mark identifying confidential or sealed information and restrict access accordingly.

Section 7. Certification/Authentication of a Court Record.

A court document may be certified as an official copy only if the original document is on file with the court. In addition to manually certifying documents with a handwritten signature, any

custodian of a court document may also use an electronic signature and seal to certify or authenticate documents that are in electronic format. A raised seal on the copy from the issuing court shall not be required.

Section 8. Public Access.

Public access to the electronic documents filed in the EDMS shall be available at no charge at the clerk's office during regular business hours through a public access terminal or any other reasonable means to provide access to publicly available portions of an electronic record. Fees for copies of electronic documents shall be as provided by law.

Section 9. Electronic Transmission.

To the extent reasonably practicable, a clerk shall distribute through electronic means all communications, including orders, judgments, notices and any other communications to attorneys and self-represented litigants in any pending proceeding.

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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 2, 2012.

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 2012 State Bar Newsletter.

DATED at Pierre, South Dakota this 28th day of December, 2011.

BY THE COURT:

David Gilbertson, Chief Justice

ATTEST:

Clerk of the Supreme Court

(SEAL)