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NO. 131

At Rules Hearing No. 129 on January 13, 2015, the Court considered amendments to the Rules of Evidence proposed by the State Bar Rules of Evidence committee, approved by the membership of the State Bar on June 20, 2014, and approved by the Bar Commissioners on

October 9, 2014. The amendments were proposed to conform the language of the South Dakota Rules of Evidence more closely to the Federal Rules of Evidence. With the exceptions noted in the next paragraph, the amendments have been approved by the Court and will be published in the near future.

The following rules have been deferred for further study.

On these rules, the committee made the following recommendations:

- 1) SDCL 19-12-4 (Rule 404(a)): "Recommend adopting restyled language except for 1-FRE 404(a)(2)(B)(ii) which would create a substantive change in the current SD Rule and 2 - the state law references in FRE 404(a)(3);"
- 2) SDCL 19-14-12 (Rule 609 (a)): "Recommend retaining existing SD Rule. Adopting the restyled rule would make a substantive and substantial change to the existing SD Rules;"
- 3) SDCL 19-15-4 (Rule 704): "Recommend adopting restyled language of §704(a). Recommend not adopting §704(b), which would be a substantive and substantial change in the SD Rules;"
- 4) SDCL 19-15-9 to 19-15-13 (Rule 706(a)-(e)): "Recommend retaining SD Rule to avoid substantive change in the law;"
- 5) SDCL 19-16-2 (Rule 801(d)(1)); "Recommend adopting restyled language;" [The restyled language was not included in the Notice of Rules Hearing No. 129];
- 6) Rule 804 (b)(6): "The Committee notes that SD does not have this provision and recommends it be considered as part of the usual rule making process;"
- 7) Rule 902(11); "The Committee notes the provision for self-authenticating business records has not been adopted in SD and recommends it be considered in the normal rule making process;" and,
- 8) Rule 902(12): "The Committee notes the provision for self-authenticating business records has not been adopted in SD and recommends it be considered in the normal rule making process."

After consideration and study the Court has determined that these Federal Rules of Evidence that would change substantive South Dakota law, repeal existing law, or adopt new rules should be noticed for hearing. Now therefore,

NOTICE IS HEREBY GIVEN THAT ON September 1, 2015, 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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AMENDMENT TO SDCL TITLE 19-EVIDENCE-TO INCLUDE:  
CHAPTER 19-12-RELEVANCY

1. Amendment of SDCL 19-12-4. ~~(Rule 404(a)) Character evidence generally inadmissible Exceptions. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:~~

~~(1) Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;~~

~~(2) Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;~~

~~(3) Evidence of the character of a witness, as provided in §§ 19-14-8 to 19-14-16, inclusive.~~

SDCL 19-12-4. (Rule 404(a)) 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 § 19-12-15, 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 §§ 19-14-8 to 19-14-16, inclusive.

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#### CHAPTER 19-14-WITNESSES

2. Amendment of SDCL 19-14-12. ~~(Rule 609(a))~~  
~~Conviction of crime bearing on credibility of witness Preliminary determinations by court.~~ For the purpose of attacking the credibility of a witness, ~~evidence that he has been convicted of a crime shall be admitted but only if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party or the accused and the crime:~~

~~(1) Was punishable by death or imprisonment in excess of one year under the law under which he was convicted; or~~

~~(2) Involved dishonesty or false statement, regardless of the punishment.~~

SDCL 19-14-12. (Rule 609 (a)) 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 § 19-12-3, 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.

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CHAPTER 19-15-OPINIONS AND EXPERT TESTIMONY

3. Amendment of SDCL 19-15-4. (Rule 704) Opinion on an Ultimate Issue.

(a) In General - Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.

(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

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4. Amendment of SDCL 19-15-9. ~~(Rule 706(a)) Court appointment of expert witnesses.~~ Whenever, in a civil or criminal proceeding, issues arise upon which the court deems expert evidence is desirable, the court, on its own motion, or on the request of either the state or the defendant in a criminal proceeding, or of any party in a civil proceeding, may appoint one or more experts, not exceeding three on each issue, to testify at the trial.

SDCL 19-15-9 (Rule 706(a)). Court-Appointed Expert Witnesses. 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.

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5. Amendment of SDCL 19-15-10. ~~(Rule 706(b)) Notice to parties of court appointment of experts.~~ The appointment of expert witnesses by the court shall be made only after reasonable notice to the parties to the proceeding of the names and addresses of the experts proposed for appointment.

SDCL 19-15-10. Rule 706(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.
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6. ~~Amendments of SDCL 19-15-11. (Rule 706(c)) Agreement by parties as to experts appointed by court.~~ Before appointing expert witnesses, the court may seek to bring the parties to an agreement as to the experts desired, and if the parties agree, the experts so selected shall be appointed.

SDCL 19-15-11. (Rule 706(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.
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7. ~~Amendment of SDCL 19-15-12. (Rule 706(d)) Inspection and examination by court appointed experts.~~ Expert witnesses appointed by the court shall, at the request of the court or of any party, make such inspection and examination of the person or subject matter committed to them as they deem necessary for the full understanding thereof and such further reasonable inspection and examination as any party may request. Reasonable notice shall be given to each party of the proposed inspection and examination of persons, things, and places, and each party shall be permitted to be represented at such inspection and examination. Experts called by the court or by the parties in the proceeding shall be permitted access to the persons, things, or places under investigation for the purpose of inspection and examination.

SDCL 19-15-12. (Rule 706(d)) Disclosing the Appointment to the Jury. The court may authorize disclosure to the jury that the court appointed the expert.

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8. ~~Amendment of SDCL 19-15-13. (Rule 706(e)) Reports by court appointed experts Filing and use at trial.~~ The court may require each expert it has appointed to prepare a written report under oath upon the subject he has inspected and examined. This report shall be placed on file with the clerk of the court at such

~~time as may be fixed by the court and be open to inspection by any party. By order of the court, or on the request of any party, the report shall be read, subject to all lawful objections as to the admissibility of the report or any part thereof, by the witness at the trial.~~

SDCL 19-15-13. (Rule 706(e)) Parties' Choice of Their Own Experts. This rule does not limit a party in calling its own experts.

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9. ~~Repeal of SDCL 19-15-14. (Rule 706(f)) Pretrial conference of experts.~~ The court may permit or require a conference before the trial on the part of some or all of the expert witnesses, whether summoned by the court or the parties or both, and two or more of them may unite in a report which may be introduced at the trial by any party or by order of the court, subject to all lawful objections as to the admissibility of the report or any part thereof.

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10. ~~Repeal of SDCL 19-15-15. (Rule 706(g)) Testimony at trial by court appointed expert.~~ At the trial the court or any party may call an expert witness appointed by the court. The fact that he has been appointed by the court shall be made known to the jury, and he shall be subject to cross examination by any party on his qualifications and the subject of his testimony.

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11. ~~Repeal of SDCL 19-15-16. (Rule 706(h)) Compensation of court appointed experts.~~ The compensation of expert witnesses appointed by the court shall be fixed by the court at a reasonable amount. In criminal proceedings it shall be paid by the county under the order of the court, as a part of the costs of the action. In civil proceedings the compensation of experts appointed by the court shall, after it has been fixed by the court, be paid in equal parts by the opposing litigants to the clerk of the court at such time as the court shall prescribe, and thereafter assessed as costs of the suit.

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12. ~~Repeal of SDCL 19-15-17. (Rule 706(i)) Extra compensation to court appointed experts unlawful.~~ The receipt by any witness appointed by the court of any compensation other than that fixed by the court, and the payment of, or the offer or promise by any person to pay such other compensation shall be unlawful.

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13. Repeal of SDCL 19-15-18. ~~(Rule 707(a)) Expert witnesses called by parties Limitations on number called.~~ The provisions of §§ 19-15-9 to 19-15-17, inclusive, shall not preclude any party to either a criminal or civil proceeding from calling expert witnesses, but the court may impose reasonable limitations upon the number of witnesses so called.

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14. Repeal of SDCL 19-15-19. ~~(Rule 707(b)) Compensation of experts called by parties Disclosure on cross examination.~~ The fee of an expert witness called by a party but not appointed by the court shall be paid by the party by whom he was called, and the amount of such fee shall be disclosed if requested upon cross-examination.

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#### CHAPTER 19-16-HEARSAY

15. Amendment of SDCL 19-16-2. ~~(Rule 801(d)(1)) Statement not hearsay if declarant testifies.~~ A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

(1) ~~Inconsistent with his testimony and was given under oath and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition; or~~

(2) ~~Consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive; or~~

(3) ~~One of identification of a person made after perceiving him.~~

SDCL 19-16-2. (Rule 801(d)(1)) Definitions that Apply to This Article; Exclusions from Hearsay.

(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.



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16. Adoption of Rule 804(b)(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.

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CHAPTER 19-17 AUTHENTICATION AND IDENTIFICATION

17. Adoption of Rule 902(11). Certified Domestic Records of a Regularly Conducted Activity. The original or copy of a domestic record that meets the requirements of § 19-16-10(6)(A)-(C) as shown by a certification of the custodian or another qualified person that complies with a federal 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.

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18. Adoption of Rule 902(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 Rule 902(11), modified as follows: the certification, rather than complying with a federal 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 Rule 902(11).

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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 August 18, 2015.

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

Notice of Rules Hearing No. 131 - September 1, 2015

Notice of this hearing shall be made to the members of the State Bar by publication of this notice in the June 2015 and July 2015 State Bar Newsletters.

The proposed amendments, repeals and adoptions of new rules set out above may be found in their entirety at [http://ujs.sd.gov/Supreme\\_Court/ruleshearing.aspx](http://ujs.sd.gov/Supreme_Court/ruleshearing.aspx) or <http://www.sdbar.org/2015specialruleshearing.pdf>.


Written copies are available from the Clerk of the Supreme Court upon request.

DATED at Pierre, South Dakota this 18th day of May, 2015.

BY THE COURT:

ATTEST:

  
Clerk of the Supreme Court  
(SEAL)

  
David Gilbertson, Chief Justice

SUPREME COURT  
STATE OF SOUTH DAKOTA  
**FILED**

MAY 18 2015

  
Clerk