IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE PROPOSED AMENDMENT TO SDCL 15-6-5(a) AMENDMENT TO SDCL 15-6-26(b) AMENDMENT TO SDCL 15-6-45(a) AMENDMENT TO SDCL 15-6-56(c) AMENDMENT TO SDCL 15-15A-9(3); AMENDMENT TO THE APPENDIX OF CHAPTER 16-16, SECTION 4; AMENDMENT TO SDCL 16-18-34.7 AND TO CORRECT AN ERRANT CITATION	**NOTICE OF RULES HEARING** **NO. 144**

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

NOTICE IS HEREBY GIVEN THAT ON FEBRUARY 17, 2021, at 9:00 A.M., C.T., at the Courtroom of the Supreme Court in the Capitol Building, Pierre, South Dakota, the Court will consider the following:

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1. Proposed Amendment of SDCL 15-6-5(a). Service--When required. Except as otherwise provided in this chapter, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer ~~or~~ of judgment, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in § 15-6-4.

Explanation for Proposal

The amendment is proposed by the Practice Rules Revision Committee of the State Bar and the State Bar of South Dakota.

The objective of the proposed amendment is to correct what is believed to be a typo. Specifically, it is believed that the statute is supposed to read "offer of judgment," not "offer or judgment."

A number of considerations support this conclusion. If the drafter was intending to simply list the items required to be served, there was no need to insert "or" between "offer" and "judgment," given that the other listed items are separated by commas. Also, Fed. R. Civ. P. 5(a)(1)(E), the comparable Federal Rule of Civil Procedure, is nearly identical to SDCL 15-6-5(a) and uses "offer of judgment." Finally, the comparable statute in the South Dakota Code of 1939 and the 1960 Supplement to South Dakota Code of 1939, SDC § 33.0819, employed "offer of judgment."

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2. Proposed Amendment of 15-6-26(b). Scope of discovery.

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in § 15-6-26(a) shall be limited by the court if it determines that:

(A)(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(iii) discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy limitations on the party's resources, and the importance of the issues at stake in the litigation.

The court may act upon its own initiative after reasonable notice or pursuant to a motion under § 15-6-26(c).

(2) Insurance agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this

paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) Trial preparation: materials. Subject to the provisions of subdivision (4) of this section, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (1) of this section and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including such other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of subdivision 15-6-37(a)(4) apply to award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial preparation: experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (1) of this rule and acquired or developed in anticipation of litigation or for trial may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. A party may also take the testimony of each such expert witness by deposition upon oral examination.

(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (4)(C) of this section, concerning fees and expenses as the court may deem appropriate.

(B) Trial-preparation for draft reports or disclosures. Subdivision 15-6-26(b)(3) protects drafts of any report prepared by any witness who is retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involves giving expert testimony, regardless of the form in which the draft is recorded.

(C) Trial preparation protection for communication between a party's attorney and expert witnesses. Subdivision 15-6-26(b)(3) protects communications between the party's attorney and any witness who is retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony, regardless of the form of the communications, except to the extent that the communications:

(i) Relate to compensation for the expert's study or testimony;

(ii) Identify facts or data that the party's attorney provided and that the expert considered in forming the opinion to be expressed; or

(iii) Identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in § 15-6-35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(E) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (4)(A)(ii) and (4)(B) of this section; and (ii) with respect to discovery obtained under subdivision (4)(A) (ii) of this section the court may require, and with respect to discovery obtained under subdivision (4)(B) of this section the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of privilege or protection of trial preparation materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced in a manner that,

without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Explanation for Proposal

The amendment is proposed by the Practice Rules Revision Committee of the State Bar and the State Bar of South Dakota.

The objective of the proposed amendment is to make the statute consistent with conventional practice; specifically, that opposing experts are routinely deposed without having to file a motion and secure an order from the court. Although the proposed amendment is not inspired by a Federal Rule of Civil Procedure, the proposed amendment would make SDCL 15-6-26(b) consistent with the comparable Federal Rule of Civil Procedure, Fed. R. Civ. P. 26(b)(4)(A), which provides that "[a] party may depose any person who has been identified as an expert whose opinions may be presented at trial."

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3. Proposed Amendment to 15-6-45(a). Subpoena for attendance of witnesses--Form--Issuance.

Clerks of courts, judges, magistrates, notaries public, referees, and any other public officer or agency so empowered by § 1-26-19.1 or otherwise authorized by law in any matter pending before them, upon application of any person having a cause or any matter pending in court or before such agency, officer or tribunal, may issue a subpoena for a witness or witnesses, or for the production of books, papers, documents or tangible things designated therein pursuant to the provisions of § 15-6-45(b).

Any attorney of record who has been duly admitted to practice in this state and is in good standing upon the active list of attorneys of the State Bar of South Dakota may issue a subpoena for a witness or witnesses, and for production, inspection and copying of records and exhibits, in any action or proceeding, or collateral hearing, civil or criminal, in which ~~he~~ the attorney is the attorney of record for any party. When an attorney issues a subpoena, ~~he~~ the attorney must ~~forthwith~~ contemporaneously transmit a copy thereof to the clerk of the court, or to the secretary or other filing officer of the board or tribunal in which the matter is pending, for filing. Such officer shall file such copy as one of the public records of the action or proceeding.

A subpoena shall state the name of the court, or tribunal, the title of the action or proceeding, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. It shall state the name of the person or party for whom the testimony of the witness is required. The seal of the court or officer, or tribunal, shall be affixed to the original and all copies, if issued by a court or officer having a

seal. If the subpoena is issued by an attorney, it shall be issued in the name of the presiding officer of the court, or tribunal in which the matter is pending and shall be attested and signed by the attorney, designating the party for whom ~~he~~ the attorney is attorney of record.

Explanation for Proposal

The above rule proposal combines two proposals that were submitted to the Court related to SDCL 15-6-45(a).

The first proposal is submitted by the State Court Administrator's Office and appears at the end of the first paragraph. That proposal is intended to clarify that a subpoena issued by a clerk of court, judge, magistrate, notary public or referee may compel a witness to appear and give testimony and to produce records, books, papers and documents. A previous proposal was submitted for the November 2020 rules hearing but this language is intended to better track changes to the recent amendment to SDCL 15-6-45(b) adopted on September 6, 2019 (current version set forth below).

The second proposal was submitted by the Practice Rules Revision Committee of the State Bar and the State Bar of South Dakota.

That proposal is intended to address the fact that the Court recently amended SDCL 15-6-45(b) to provide, among other things, that before a documentary subpoena is served, "a notice and copy of the subpoena must be served on each party to the matter pending." The objective of the proposed amendment to SDCL 15-6-45(a) is two-fold. First, it will make the statute more consistent with SDCL 15-6-45(b) in terms of notice. Second, it will lessen the potential for gamesmanship with regard to notice of the issuance of a non-documentary subpoena (presently achieved by unreasonably delaying the filing of the subpoena, which is how an opposing party learns of the issuance of the subpoena).

This proposed amendment is not based upon a Federal Rule of Civil Procedure. And, in that regard, the corresponding Federal Rule of Civil Procedure, Fed. R. Civ. P. 45, does not contain language similar to SDCL 15-6-45(a)'s requirement that "[w]hen an attorney issues a subpoena, he must forthwith transmit a copy thereof to the clerk of the court, or to the secretary or other filing officer of the board or tribunal in which the matter is pending, for filing." In this regard, SDCL 15-6-45(a) already requires more than Fed. R. Civ. P. 45.

15-6-45(b). Subpoena for production of documentary evidence. A subpoena may 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 or commands the presence of the person to which it is directed to give testimony at a hearing or trial. Before a subpoena commanding the production of documentary evidence is served on the person to whom it is directed, a notice and copy of the subpoena must be served on each party to the matter pending. 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.

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4. Proposed Amendment of SDCL 15-6-56(c). Motion for summary judgment and proceedings thereon. Unless different periods are fixed or permitted by order of the court, ~~The~~ the motion and supporting brief, statement of undisputed material facts, and any affidavits~~,~~ shall be served not later than twenty-eight calendar days before the time specified for the hearing; ~~and~~ any response or reply thereto, including any response to the movant's statement of undisputed material facts, shall be served not later than fourteen calendar days before the hearing; and a reply brief or affidavit may be served by the movant not later than seven calendar days before the hearing. ~~shall be served within the dates set forth in § 15-6-6(d).~~

(1) A party moving for summary judgment shall attach to the motion a separate, short, and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. Each material fact in this required statement must be presented in a separate numbered statement and with appropriate citation to the record in the case.

(2) A party opposing a motion for summary judgment shall include a separate, short, and concise statement of the material facts as to which the opposing party contends a genuine issue exists to be tried. The opposing party must respond to each numbered paragraph

in the moving party's statement with a separately numbered response and appropriate citations to the record.

(3) All material facts set forth in the statement that the moving party is required to serve shall be admitted unless controverted by the statement required to be served by the opposing party.

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Explanation for Proposal

The amendment is proposed by the Practice Rules Revision Committee of the State Bar and the State Bar of South Dakota.

The objective of the proposed amendment is to provide for a lengthier briefing schedule for summary judgment motions. It is designed to be a compromise of competing concerns expressed by Bar members. The 10 days / 5 days / 2 days briefing schedule set forth in SDCL 15-6-6(d) is crucial for those motions which need to be heard promptly due to their nature or because they are time-sensitive, and that schedule is also suitable for most straightforward motions. In contrast, the 10 days / 5 days / 2 days briefing schedule often presents a burden to counsel—and the court—for summary judgment motions. This is due to the fact that summary judgment motions are often more complicated and document intensive. Therefore, the proposed resolution is to provide for a separate, lengthier briefing schedule for summary judgment motions filed under SDCL 15-6-56.

Notably, SDCL 15-6-56 previously contained language governing the time for filing summary judgment motions. As late as 2006, the statute provided that "[t]he motion shall be served at least ten days before the time fixed for the hearing."

Although the proposed amendment is not based upon a Federal Rule of Civil Procedure, Local Rule 7.1 of the United States District Court for the District of South Dakota affords the non-moving party 21 days to respond to a motion, and then affords the moving party 14 days to reply. The general Federal Rule of Civil Procedure, Fed. R. Civ. P. 6(c), in turn, provides that a motion must be served at least 14 days prior to the hearing.

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5. Proposed Amendment of SDCL 15-15A-9. Filing confidential numbers, financial documents, and name of child victim in court record.

(1) Social security numbers, employer or taxpayer identification numbers, and financial or medical account numbers of an individual where required to be filed with the court shall be submitted on a separate Confidential Information Form, appended to these rules, and filed with the pleading or other document required to be filed. The Confidential Information Form is not accessible to the public.

(2) Financial documents named in subdivision 15-15A-8(2) that are required to be filed with the court shall be submitted as a confidential document and designated as such to the clerk upon filing. The Confidential Financial Documents Information Form appended to these rules shall be attached to financial documents being filed with the court. The Confidential Financial Documents Information Form is not accessible to the public. The confidential financial documents will not be publicly accessible, even if admitted as a trial or hearing exhibit, unless the court permits access pursuant to § 15-15A-10. The court may, on its own motion, protect financial documents that have been submitted without the Confidential Financial Documents Information Form.

(3) Names of any ~~minor~~ child under eighteen years of age alleged to be the victim of a crime in any adult criminal proceeding shall appear as initials only. The names shall be provided on a separate Confidential Information Form.

(4) Any case in which a child under eighteen years of age is identified as the petitioner or respondent in a protection order proceeding shall be treated as confidential and excluded from public access.

(45) Parties with cases filed prior to the effective date of this rule, or the court on its own, may, by motion, protect the privacy of confidential information as defined in § 15-15A-8. Parties filing this motion will submit a completed Confidential Information Form or Confidential Financial Documents Information Form as appropriate.

Explanation for Proposal

The proposal offered by the State Court Administrator's Office is intended to protect the names of minor children that are named as either the petitioner or respondent in any protection order proceeding. The exposure of minor children's

identity could detrimentally impact the youth and potentially revictimize them if that information is publicly available. Cases involving minor children would be treated as confidential and could only be accessed by Unified Judicial System staff; persons or entities that provide services to the court; public agencies whose access to court records is defined by statute, court rule, policy or a database access agreement; and parties to the case or their lawyers. See SDCL 15-15A-2. This proposal is not based on any other federal or state law.

To implement any new forms required or programming changes to the public access system it is requested the rule change become effective July 1, 2021.

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6. Proposed Amendment to Appendix to Chapter 16-16, Section 4.

4. Passing Score

The bar examination is comprised of three portions:

(A) The combined MPT, MEE, and Indian law portion,

(B) The MBE, and

(C) The MPRE.

~~An applicant must pass each portion of the examination. A general average of 75% or higher on the combined MPT, MEE, and Indian law portion of the examination shall be deemed a passing score on that portion of the examination. A scaled score of 133 or higher shall be deemed a passing score on the MBE portion of the examination. An applicant may receive additional points on their MBE score, not to exceed three additional points, based on their score on the combined MPT, MEE, and Indian law portion of the examination as follows: 80 to 84 percent, one point; 85 to 89 percent, two points; and 90 percent or more, three points. These additional points may not be transferred to an examination administration other than the one in which they are obtained. A scaled score of 85 shall be deemed a passing score on the MPRE portion of the examination. The Board of Bar Examiners shall determine the passing score on each portion of the bar examination in advance of the examination. Written notice of any deviation from the scores enumerated in this regulation will be given to the dean of the University of South Dakota School of Law and all applicants for admission to practice law by examination.~~

~~An applicant who has failed only one portion of the exam may elect to retake both portions of the examination or only that portion which the applicant failed; however, a passing score on one portion of the examination shall only be valid for a period of two~~

~~years to exempt the applicant from retaking that portion of the examination. An applicant who elects to retake both portions of the examination must obtain a passing score on both portions of the examination in that administration of the bar examination in order to pass. An applicant who fails either: A) the MPT, MEE, and Indian law portion of the examination: and/or B) the MBE portion of the examination three times must receive Supre3me Court permission pursuant to 16-16-11 to take another examination.~~

The combined score of the MEE and MPT is to be given equal weight as the MBE score utilizing the standard deviation method to determine an applicant's final score on that portion of the bar examination. A separate passing score is set for the MPRE.

The passing score on the combined MPR, MEE and MBE and on the MPRE shall be determined by the Board of Bar Examiners, which determination shall be made in advance of the examination.

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

Explanation for Proposal

A. The change would return the bar examination to the way it was under South Dakota Supreme Court rule 03-25. No evidence exists that the prior rule was ineffectual. The rule change would follow the states that have a compensatory bar examination system. Under the compensatory system a bar examination taker can reach a minimum established passing score by any combination of MBE and written examination scores, provided you pass it at the same time. In essence the essay scores which are scored on a different scale than the MBE multi choice test is scaled and equated to each other so a higher score on one portion of the test can offset a lower score on another.

In 2015 South Dakota adopted the Kentucky style non-compensatory bar examination. Under that system, the written component of the bar examination and the MBE must be independently passed, and compensation is not allowed. Commencing February 2021 Kentucky will join the UBE, a compensatory bar examination system. A press statement from the Supreme Court of Kentucky indicating the adoption of the UBE is attached hereto as an exhibit, and incorporated herein.

The State of South Dakota may now be the only state where the written component is not scaled to the MBE, and MBE and written component scores are not combined. See Chart 10: Grading and Scoring from the 2020 National Conference of Bar Examiners Comprehensive Guide to Bar Admission Requirements attached and incorporated herein as an exhibit.

In an attempt to achieve equity a bonus point rule was established under the current South Dakota bar examination rule. This rule entitles a gifted legal writer who obtains a score of 90% to 100% on the MEE to add three additional points to his MBE score in order to pass the South Dakota bar examination. A gifted legal writer should never need additional points to pass our bar examination, but that is in fact what the current rule envisions. In other state bar examination systems those anomalies would have been more equitably accounted for under the procedures that the statisticians who specialize in testing design into the compensatory system.

B. Since adoption of the non-compensatory bar examination rule in South Dakota bar examination passage rates have fallen. In 2011 the passage rate was 94 percent. After the non-compensatory rule was adopted in 2015 the average South Dakota over -all bar passage rates from 2015 to 2019 is 59 percent. The Bar Examiner Ten -Year Summary of Bar Passage Rates is attached hero and incorporated herein as an exhibit. In conclusion, South Dakota's bar examination needs to offer the same advantages other states give its test takers under the compensatory bar examination system.

C. The proposed rule would not alter the authority of the South Dakota Supreme Court to license lawyers. The South Dakota Constitution Article 5 Section 12 vests the South Dakota Supreme Court with sole authority to license lawyers. Adoption of this rule change has no effect on the Constitution. The adoption of the rule change improves the existing system, and follows the well-established compensatory bar examination system.

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7. Proposed Amendment of SDCL 16-18-34.7. Recommendations in attorney disciplinary proceedings. Any recommendation for disbarment or suspension made by the Disciplinary Board or the referee under § 16-19-67 ~~or the referee under § 16-19-68~~ shall contain a recommendation as to the restrictions or conditions of employment and supervision of the accused attorney as a legal assistant.

Explanation for Proposal

The amendment proposed by the State Court Administrator's Office is intended to correct an errant citation. § 16-19-68 was repealed by Supreme Court Rule 16-47 effective July 1, 2016. The correct citation related to the referee process is now § 16-19-67.

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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 five copies thereof filed with the Clerk of the Supreme Court no later than February 2, 2021. 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 https://ujs.sd.gov/Supreme Court/Hearings.aspx or the State Bar of South Dakota's website https://www.statebarofsouthdakota.com.

DATED at Pierre, South Dakota this 8th day of January, 2021.

BY THE COURT:

Steven R. Jensen, Chief Justice

ATTEST:

Clerk of the Supreme Court
(SEAL)

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

JAN - 8 2021

Clerk

Proposed Amendments to SDCL 15-6-5(a), SDCL 15-6-26(b), SDCL 15-6-45(a), and SDCL 15-6-56(c), by Practice Rules Revision Committee

#1

Proposed Amendment to 15-6-5(a). Service--When required.

Except as otherwise provided in this chapter, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer ~~or~~ of judgment, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in § 15-6-4.

Explanation for Proposal

The amendment is proposed by the Practice Rules Revision Committee of the State Bar and the State Bar of South Dakota.

The objective of the proposed amendment is to correct what is believed to be a typo. Specifically, it is believed that the statute is supposed to read "offer of judgment," not "offer or judgment."

A number of considerations support this conclusion. If the drafter was intending to simply list the items required to be served, there was no need to insert "or" between "offer" and "judgment," given that the other listed items are separated by commas. Also, Fed. R. Civ. P. 5(a)(1)(E), the comparable Federal Rule of Civil Procedure, is nearly identical to SDCL 15-6-5(a) and uses "offer of judgment." Finally, the comparable statute in the South Dakota Code of 1939 and the 1960 Supplement to South Dakota Code of 1939, SDC § 33.0819, employed "offer of judgment."

#2

Proposed Amendment to 15-6-26(b). Scope of discovery.

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any

books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in § 15-6-26(a) shall be limited by the court if it determines that:

(A)(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(iii) discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy limitations on the party's resources, and the importance of the issues at stake in the litigation.

The court may act upon its own initiative after reasonable notice or pursuant to a motion under § 15-6-26(c).

(2) Insurance agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) Trial preparation: materials. Subject to the provisions of subdivision (4) of this section, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (1) of this section and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including such other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of subdivision 15-6-37(a)(4) apply to award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial preparation: experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (1) of this rule and acquired or developed in anticipation of litigation or for trial may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. A party may also take the testimony of each such expert witness by deposition upon oral examination.

(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (4)(C) of this section, concerning fees and expenses as the court may deem appropriate.

(B) Trial-preparation for draft reports or disclosures. Subdivision 15-6-26(b)(3) protects drafts of any report prepared by any witness who is retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involves giving expert testimony, regardless of the form in which the draft is recorded.

(C) Trial preparation protection for communication between a party's attorney and expert witnesses. Subdivision 15-6-26(b)(3) protects communications between the party's attorney and any witness who is retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony, regardless of the form of the communications, except to the extent that the communications:

(i) Relate to compensation for the expert's study or testimony;

(ii) Identify facts or data that the party's attorney provided and that the expert considered in forming the opinion to be expressed; or

(iii) Identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in § 15-6-35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(E) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (4)(A)(ii) and (4)(B) of this section; and (ii) with respect to discovery obtained under subdivision (4)(A) (ii) of this section the court may require, and with respect to discovery obtained under subdivision (4)(B) of this section the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of privilege or protection of trial preparation materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Explanation for Proposal

The amendment is proposed by the Practice Rules Revision Committee of the State Bar and the State Bar of South Dakota.

The objective of the proposed amendment is to make the statute consistent with conventional practice; specifically, that opposing experts are routinely deposed without having to file a motion and secure an order from the court. Although the proposed amendment is not inspired by a Federal Rule of Civil Procedure, the proposed amendment would make SDCL 15-6-26(b)

consistent with the comparable Federal Rule of Civil Procedure, Fed. R. Civ. P. 26(b)(4)(A), which provides that "[a] party may depose any person who has been identified as an expert whose opinions may be presented at trial."

#3

Proposed Amendment to 15-6-45(a). Subpoena for attendance of witnesses--Form--Issuance.

Clerks of courts, judges, magistrates, notaries public, referees, and any other public officer or agency so empowered by § 1-26-19.1 or otherwise authorized by law in any matter pending before them, upon application of any person having a cause or any matter pending in court or before such agency, officer or tribunal, may issue a subpoena for a witness or witnesses.

Any attorney of record who has been duly admitted to practice in this state and is in good standing upon the active list of attorneys of the State Bar of South Dakota may issue a subpoena for a witness or witnesses, and for production, inspection and copying of records and exhibits, in any action or proceeding, or collateral hearing, civil or criminal, in which ~~he~~ the attorney is the attorney of record for any party. When an attorney issues a subpoena, ~~he~~ the attorney must ~~forthwith~~ contemporaneously transmit a copy thereof to the clerk of the court, or to the secretary or other filing officer of the board or tribunal in which the matter is pending, for filing. Such officer shall file such copy as one of the public records of the action or proceeding.

A subpoena shall state the name of the court, or tribunal, the title of the action or proceeding, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. It shall state the name of the person or party for whom the testimony of the witness is required. The seal of the court or officer, or tribunal, shall be affixed to the original and all copies, if issued by a court or officer having a seal. If the subpoena is issued by an attorney, it shall be issued in the name of the presiding officer of the court, or tribunal in which the matter is pending and shall be attested and signed by the attorney, designating the party for whom ~~he~~ the attorney is attorney of record.

Explanation for Proposal

The amendment is proposed by the Practice Rules Revision Committee of the State Bar and the State Bar of South Dakota.

This Court recently amended SDCL 15-6-45(b) to provide, among other things, that before a documentary subpoena is served, "a notice and copy of the subpoena must be served on each party to the matter pending." The objective of the

proposed amendment to SDCL 15-6-45(a) is two-fold. First, it will make the statute more consistent with SDCL 15-6-45(b) in terms of notice. Second, it will lessen the potential for gamesmanship with regard to notice of the issuance of a non-documentary subpoena (presently achieved by unreasonably delaying the filing of the subpoena, which is how an opposing party learns of the issuance of the subpoena).

This proposed amendment is not based upon a Federal Rule of Civil Procedure. And, in that regard, the corresponding Federal Rule of Civil Procedure, Fed. R. Civ. P. 45, does not contain language similar to SDCL 15-6-45(a)'s requirement that "[w]hen an attorney issues a subpoena, he must forthwith transmit a copy thereof to the clerk of the court, or to the secretary or other filing officer of the board or tribunal in which the matter is pending, for filing." In this regard, SDCL 15-6-45(a) already requires more than Fed. R. Civ. P. 45.

Proposed Amendment to 15-6-56(c). Motion for summary judgment and proceedings thereon. #4

Unless different periods are fixed or permitted by order of the court, ~~The~~ the motion and supporting brief, statement of undisputed material facts, and any affidavits~~,~~ shall be served not later than twenty-eight calendar days before the time specified for the hearing; ~~and~~ any response or reply thereto, including any response to the movant's statement of undisputed material facts, shall be served not later than fourteen calendar days before the hearing; and a reply brief or affidavit may be served by the movant not later than seven calendar days before the hearing. ~~shall be served within the dates set forth in § 15-6-6(d).~~

(1) A party moving for summary judgment shall attach to the motion a separate, short, and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. Each material fact in this required statement must be presented in a separate numbered statement and with appropriate citation to the record in the case.

(2) A party opposing a motion for summary judgment shall include a separate, short, and concise statement of the material facts as to which the opposing party contends a genuine issue exists to be tried. The opposing party must respond to each numbered paragraph in the moving party's statement with a separately numbered response and appropriate citations to the record.

(3) All material facts set forth in the statement that the moving party is required to serve shall be admitted unless controverted by the statement required to be served by the opposing party.

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Explanation for Proposal

The amendment is proposed by the Practice Rules Revision Committee of the State Bar and the State Bar of South Dakota.

The objective of the proposed amendment is to provide for a lengthier briefing schedule for summary judgment motions. It is designed to be a compromise of competing concerns expressed by Bar members. The 10 days / 5 days / 2 days briefing schedule set forth in SDCL 15-6-6(d) is crucial for those motions which need to be heard promptly due to their nature or because they are time-sensitive, and that schedule is also suitable for most straightforward motions. In contrast, the 10 days / 5 days / 2 days briefing schedule often presents a burden to counsel—and the court—for summary judgment motions. This is due to the fact that summary judgment motions are often more complicated and document intensive. Therefore, the proposed resolution is to provide for a separate, lengthier briefing schedule for summary judgment motions filed under SDCL 15-6-56.

Notably, SDCL 15-6-56 previously contained language governing the time for filing summary judgment motions. As late as 2006, the statute provided that "[t]he motion shall be served at least ten days before the time fixed for the hearing."

Although the proposed amendment is not based upon a Federal Rule of Civil Procedure, Local Rule 7.1 of the United States District Court for the District of South Dakota affords the non-moving party 21 days to respond to a motion, and then affords the moving party 14 days to reply. The general Federal Rule of Civil Procedure, Fed. R. Civ. P. 6(c), in turn, provides that a motion must be served at least 14 days prior to the hearing.

#5

Proposed Court Rule: 2021 Rules Hearing

A proposal to amend the court records rule related to the names of any minor child petitioner or respondent in a protection order proceeding.

Section 1. That §15-15A-9(3) be amended as follows:

(1) Social security numbers, employer or taxpayer identification numbers, and financial or medical account numbers of an individual where required to be filed with the court shall be submitted on a separate Confidential Information Form, appended to these rules, and filed with the pleading or other document required to be filed. The Confidential Information Form is not accessible to the public.

(2) Financial documents named in subdivision 15-15A-8(2) that are required to be filed with the court shall be submitted as a confidential document and designated as such to the clerk upon filing. The Confidential Financial Documents Information Form appended to these rules shall be attached to financial documents being filed with the court. The Confidential Financial Documents Information Form is not accessible to the public. The confidential financial documents will not be publicly accessible, even if admitted as a trial or hearing exhibit, unless the court permits access pursuant to § 15-15A-10. The court may, on its own motion, protect financial documents that have been submitted without the Confidential Financial Documents Information Form.

(3) Names of any ~~minor~~ child under eighteen years of age alleged to be the victim of a crime in any adult criminal proceeding shall appear as initials only. The names shall be provided on a separate Confidential Information Form.

(4) Any case in which a child under eighteen years of age is identified as the petitioner or respondent in a protection order proceeding shall be treated as confidential and excluded from public access.

(45) Parties with cases filed prior to the effective date of this rule, or the court on its own, may, by motion, protect the privacy of confidential information as defined in § 15-15A-8. Parties filing this motion will submit a completed Confidential Information Form or Confidential Financial Documents Information Form as appropriate.

Explanation for Proposal

The proposal offered by the State Court Administrator's Office is intended to protect the names of minor children that are named as either the petitioner or respondent in any protection order proceeding. The exposure of minor children's identity could detrimentally impact the youth and

potentially revictimize them if that information is publicly available. Cases involving minor children would be treated as confidential and could only be accessed by Unified Judicial System staff; persons or entities that provide services to the court; public agencies whose access to court records is defined by statute, court rule, policy or a database access agreement; and parties to the case or their lawyers. See SDCL 15-15A-2. This proposal is not based on any other federal or state law.

To implement any new forms required or programming changes to the public access system it is requested the rule change become effective July 1, 2021.

#6

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

DEC 18 2020

Clerk

December 14, 2020

Chief Justice and Associate Justices

South Dakota Supreme Court
State Capitol 500 E. Capitol Ave.

Pierre, SD 57501-5070

RE: Adoption of Amendment to Appendix to Chapter 16-16 Regulations of the Board of Bar Examiners State of South Dakota Section 4

The undersigned identified proponents respectfully submit in compliance with SDCL 16-3-5.1 that an Amendment to the Appendix to Chapter 16-16 Regulations of the Board of Bar Examiners State of South Dakota Section 4 be amended with deletions shown by strike – throughs and additions shown by underscore.

~~An applicant must pass each portion of the examination. A general average of 75% or higher on the combined MPT, MEE and Indian law portion of the examination shall be deemed a passing score on that portion of the examination. A scaled score of 133 or higher shall be deemed a passing score on the MBE portion of the examination. An applicant may receive additional points on their MBE score not to exceed three additional points based on their score on the combined MPT MEE and Indian law portion of the examination as follows 80 to 84 percent one point 85-89 percent two points and 90 percent or more three points These additional points may not be transferred to an examination administered other than the one in which they are obtained A scaled score of 85 shall be deemed a passing score on the MPRE portion of the examination . The Board of Bar Examiners shall determine the passing score on each portion of the bar examination in advance of the examination. Written notice of any deviation from the scores enumerated in this regulation will be given to the dean of the University of South Dakota Law School and all applicants for admission to practice law by examination~~

~~An applicant who has failed only one portion of the exam may elect to retake both portions of the examination or only that portion which the applicant has failed however a passing score on one portion of the examination shall only be valid for a period of two years to exempt the applicant from retaking that portion of the examination . An applicant who elects to retake both portions of the examination must obtain a passing score on both portions of the examination in that administration of the bar examination in order to pass. An applicant who failes either A) the MPT,MEE and Indian law portion of the examination and /or B) the MBE portion of the examination three times must receive Supreme Court permission pursuant to 16-16-11 to take another examination.~~

Passing score- The combined score of the MEE and MPT is to be given equal weight as the MBE score utilizing the standard deviation method to determine an applicant's final score on that portion of the bar examination. A separate passing score is set for the MPRE.

The passing score on the combined MPT MEE and MBE and on the MPRE shall be determined by the Board of Bar Examiners, which determination shall be made in advance of the examination.

An applicant who fails to obtain a passing score on the combined MPT MEE and MBE and who applies for a subsequent bar examination shall be required to take the MPT MEE and MBE portions of the subsequent examination

The explanation of the change and reasons for the change.

A. The change would return the bar examination to the way it was under South Dakota Supreme Court rule 03-25. No evidence exists that the prior rule was ineffectual. The rule change would follow the states that have a compensatory bar examination system. Under the compensatory system a bar examination taker can reach a minimum established passing score by any combination of MBE and written examination scores, provided you pass it at the same time. In essence the essay scores which are scored on a different scale than the MBE multi choice test is scaled and equated to each other so a higher score on one portion of the test can offset a lower score on another.

In 2015 South Dakota adopted the Kentucky style non- compensatory bar examination. Under that system the written component of the bar examination and the MBE must be independently passed, and compensation is not allowed. Commencing February 2021 Kentucky will join the UBE, a compensatory bar examination system. A press statement from the Supreme Court of Kentucky indicating the adoption of the UBE is attached hereto as an exhibit, and incorporated herein.

The State of South Dakota may now be the only state where the written component is not scaled to the MBE, and MBE and written component scores are not combined. See Chart 10: Grading and Scoring from the 2020 National Conference of Bar Examiners Comprehensive Guide to Bar Admission Requirements attached and incorporated herein as an exhibit.

In an attempt to achieve equity a bonus point rule was established under the current South Dakota bar examination rule. This rule entitles a gifted legal writer who obtains a score of 90% to 100% on the MEE to add three additional points to his MBE score in order to pass the South Dakota bar examination. A gifted legal writer should never need additional points to pass our bar examination, but that is in fact what the current rule envisions. In other state bar

examination systems those anomalies would have been more equitably accounted for under the procedures that the statisticians who specialize in testing design into the compensatory system.

B. Since adoption of the non-compensatory bar examination rule in South Dakota bar examination passage rates have fallen. In 2011 the passage rate was 94 percent. After the non-compensatory rule was adopted in 2015 the average South Dakota over -all bar passage rates from 2015 to 2019 is 59 percent. The Bar Examiner Ten -Year Summary of Bar Passage Rates is attached hero and incorporated herein as an exhibit. In conclusion, South Dakota's bar examination needs to offer the same advantages other states give its test takers under the compensatory bar examination system.

D. The proposed rule would not alter the authority of the South Dakota Supreme Court to license lawyers. The South Dakota Constitution Article 5 Section 12 vests the South Dakota Supreme Court with sole authority to license lawyers. Adoption of this rule change has no effect on the Constitution. The adoption of the rule change improves the existing system, and follows the well-established compensatory bar examination system.

The undersigned proponent(s) by signing, request that a rule hearing be held in accordance with the foregoing 3 page amendment to the appendix to chapter 16-16 Regulations of the Board of Bar Examiners State of South Dakota Section 4

Proponent Bruce Ellis Date 12-16-2020

Proponent Thomas E Adam Date 12-16-2020

Proponent Jeffrey Edwards Date 12-16-20

Proponent Dan H Fitzgerald Date 12-16-20

Proponent _____ Date _____

Proponent _____ Date _____

Proponent _____ Date _____

examination systems those anomalies would have been more equitably accounted for under the procedures that the statisticians who specialize in testing design into the compensatory system.

B. Since adoption of the non-compensatory bar examination rule in South Dakota bar examination passage rates have fallen. In 2011 the passage rate was 94 percent. After the non-compensatory rule was adopted in 2015 the average South Dakota over -all bar passage rates from 2015 to 2019 is 59 percent. The Bar Examiner Ten -Year Summary of Bar Passage Rates is attached hero and incorporated herein as an exhibit. In conclusion, South Dakota's bar examination needs to offer the same advantages other states give its test takers under the compensatory bar examination system.

D. The proposed rule would not alter the authority of the South Dakota Supreme Court to license lawyers. The South Dakota Constitution Article 5 Section 12 vests the South Dakota Supreme Court with sole authority to license lawyers. Adoption of this rule change has no effect on the Constitution. The adoption of the rule change improves the existing system, and follows the well-established compensatory bar examination system.

The undersigned proponent(s) by signing, request that a rule hearing be held in accordance with the foregoing 3 page amendment to the appendix to chapter 16-16 Regulations of the Board of Bar Examiners State of South Dakota Section 4

Proponent _____ Date _____

Proponent [signature] Date 12/16/20
State Bar ID #703

Proponent _____ Date _____

Proponent _____ Date _____

Proponent _____ Date _____

Proponent _____ Date _____

Proponent _____ Date _____

examination systems those anomalies would have been more equitably accounted for under the procedures that the statisticians who specialize in testing design into the compensatory system.

B. Since adoption of the non-compensatory bar examination rule in South Dakota bar examination passage rates have fallen. In 2011 the passage rate was 94 percent. After the non-compensatory rule was adopted in 2015 the average South Dakota over -all bar passage rates from 2015 to 2019 is 59 percent. The Bar Examiner Ten -Year Summary of Bar Passage Rates is attached hero and incorporated herein as an exhibit. In conclusion, South Dakota's bar examination needs to offer the same advantages other states give its test takers under the compensatory bar examination system.

D. The proposed rule would not alter the authority of the South Dakota Supreme Court to license lawyers. The South Dakota Constitution Article 5 Section 12 vests the South Dakota Supreme Court with sole authority to license lawyers. Adoption of this rule change has no effect on the Constitution. The adoption of the rule change improves the existing system, and follows the well-established compensatory bar examination system.

The undersigned proponent(s) by signing, request that a rule hearing be held in accordance with the foregoing 3 page amendment to the appendix to chapter 16-16 Regulations of the Board of Bar Examiners State of South Dakota Section 4

Proponent _____ Date _____

Proponent Richard T. Jurgens Date Dec. 17, 2020

Proponent Thomas R. Connelly Date 12/18/2020

Proponent Jeffrey P Hallem Date 12/18/2020

Proponent _____ Date _____

Proponent _____ Date _____

Proponent _____ Date _____

CHART 10: Grading and Scoring

Note: All Uniform Bar Examination jurisdictions (see Chart 5, pages 18–23) observe the same policies pertaining to the grading and scoring of the exam.

Jurisdiction	What is your average grading/ reporting period? (February/July exams)	Do you administer both the MBE and a written component?		Do you scale the written component to the MBE?		Are your MBE and written component scores combined?		Combined score weights				Minimum passing standards		
												Total bar exam score		MPRE‡
		Yes	No	Yes	No	Yes	No	% MBE	% MEE and/or local essay	% MPT and/or local PT	Other*	Reported score scale	200-point scale†	
Alabama	both 9 weeks	X		X		X		50	30	20	—	260	130	75
Alaska	both 10–12 weeks	X		X		X		50	30	20	—	280	140	80
Arizona	both 9 weeks	X		X		X		50	30	20	—	273	136.5	85
Arkansas	both 5 weeks	X		X		X		50	30	20	—	270	135	85
California	in May/in Nov.	X		X		X		50	**	**	—	1,440	144	86
Colorado	both approx. 9 wks.	X		X		X		50	30	20	—	276	138	85
Connecticut	10 wks./9 wks.	X		X		X		50	30	20	—	266	133	80
Delaware	11 weeks	X		X		X		40	40	20	—	145	145	85
District of Columbia	both 9–10 weeks	X		X		X		50	30	20	—	268	133	75
Florida	both 6–8 weeks	X		X		X		50	50**	—	50**	136	136	80
Georgia	both 13 weeks	X		X		X		50	28.6	21.4	—	270	135	75
Hawaii	both 10–12 weeks	X		X		X		50	**	**	**	134	134	85
Idaho	both 6 weeks	X		X		X		50	30	20	—	272	136	85
Illinois	both 7 weeks	X		X		X		50	30	20	—	266	133	80
Indiana	both 8–9 weeks	X		X		X		50	30	20	—	264	132	80
Iowa	both 7 weeks	X		X		X		50	30	20	—	266	133	80
Kansas	both 6 weeks	X		X		X		50	30	20	—	266	133	80
Kentucky	both 9 weeks	X			X**		X	—	—	—	—	—	—	80
Louisiana	5–6 wks./8–9 wks.		X					—	—	—	100	—	—	80
Maine	both 7–9 weeks	X		X		X		50	30	20	—	270	135	80
Maryland	8 wks./12 wks.	X		X		X		50	30	20	—	266	133	85
Massachusetts	8 wks./12 wks.	X		X		X		50	30	20	—	270	135	85
Michigan	May 15/Nov. 15	X		X**		X		60	50	—	—	135	135	85
Minnesota	6 wks./10 wks.	X		X		X		50	30	20	—	260	130	85
Mississippi	both 7–8 weeks	X		X		X		40	45	15	—	132	132	75
Missouri	both 7 weeks	X		X		X		50	30	20	—	260	130	80
Montana	both 7–8 weeks	X		X		X		50	30	20	—	266	133	80
Nebraska	both 6–7 weeks	X		X		X		50	30	20	—	270	135	85
Nevada	both 8 weeks	X		X		X		33	56.5	10.5	—	75	138	85

*Local multiple-choice or short-answer component.

†Each value is a rough approximation of the score on a 200-point scale that would be required to meet the jurisdiction's minimum passing standard. Please note that this value is not applicable to individual bar examination components, nor is it used to determine actual pass/fail outcome. In addition, local grading policies, bar exam characteristics, and other statistical factors may lead to fluctuations in these values and may affect the comparability of these scores across jurisdictions.

‡The MPRE score scale runs from 50 to 150.

**See supplemental remarks for scoring details.

†† Chart indicates information for the July 2020 examination. See supplemental remarks for information pertaining to the February 2020 examination.

CHART 10: Grading and Scoring (*continued*)

Note: All Uniform Bar Examination jurisdictions (see Chart 5, pages 18–23) observe the same policies pertaining to the grading and scoring of the exam.

Jurisdiction	What is your average grading/ reporting period? (February/July exams)	Do you administer both the MBE and a written component?		Do you scale the written component to the MBE?		Are your MBE and written component scores combined?		Combined score weights				Minimum passing standards		
												Total bar exam score		MPRE‡
		Yes	No	Yes	No	Yes	No	% MBE	% MEE and/or local essay	% MPT and/or local PT	Other*	Reported score scale	200-point scale†	
New Hampshire	both 10 weeks	X		X		X		50	30	20	—	270	135	79
New Jersey	in May/in Nov.	X		X		X		50	30	20	—	266	133	75
New Mexico	both 6–8 weeks	X		X		X		50	30	20	—	260	130	80
New York	9 wks./12 wks.	X		X		X		50	30	20	—	266	133	85
North Carolina	both 4 weeks	X		X		X		50	30	20	—	270	135	80
North Dakota	both 7 weeks	X		X		X		50	30	20	—	260	130	85
Ohio ††	9 wks./12 wks.	X		X		X		50	30	20	—	270	135	85
Oklahoma	both 7 weeks	X			X	X		50	50	—	—	2,400	—	75
Oregon	both 7 weeks	X		X		X		50	30	20	—	274	137	85
Pennsylvania	5 wks./9 wks.	X		X		X		45	44	11	—	272	136	75
Rhode Island	both 10 weeks	X		X		X		50	30	20	—	276	138	80
South Carolina	8 wks./12 wks.	X		X		X		50	30	20	—	266	133	77
South Dakota	both 12 weeks	X			X**		X	—	—	—	—	—	—	85
Tennessee	6 wks./9 wks.	X		X		X		50	30	20	—	270	135	82
Texas	10 wks./14 wks.	X		X		X		40	40	10	10	675	135	85
Utah	both 8 weeks	X		X		X		50	30	20	—	270	135	86
Vermont	both 8–10 wks.	X		X		X		50	30	20	—	270	135	80
Virginia	8 wks./12 wks.	X		X		X		40	60	—	—	140	140	85
Washington	both 6 weeks	X		X		X		50	30	20	—	270	135	85
West Virginia	both 7 weeks	X		X		X		50	30	20	—	270	135	80
Wisconsin	both 6 weeks	X		X		X		50	—	—	—	258	129	—
Wyoming	both 6–8 wks.	X		X		X		50	30	20	—	270	135	85
Guam	both 6–8 wks.	X		X		X		50	38.9	11.1	—	132.5	132.5	80
Northern Mariana Islands	both 8–9 wks.	X		X		X		50	30	20	—	260	—	80
Palau	10–12 weeks	X			X**		X	—	—	—	—	—	—	75
Puerto Rico	both 8–9 wks.		X		**			—	—	—	—	—	—	—
Virgin Islands	both 12–14 wks.	X		X		X		50	30	20	—	266	133	75

*Local multiple-choice or short-answer component.

†Each value is a rough approximation of the score on a 200-point scale that would be required to meet the jurisdiction's minimum passing standard. Please note that this value is not applicable to individual bar examination components, nor is it used to determine actual pass/fail outcome. In addition, local grading policies, bar exam characteristics, and other statistical factors may lead to fluctuations in these values and may affect the comparability of these scores across jurisdictions.

‡The MPRE score scale runs from 50 to 150.

**See supplemental remarks for scoring details.

†† Chart indicates information for the July 2020 examination. See supplemental remarks for information pertaining to the February 2020 examination.

(continued)

Supplemental Remarks

California The exam is weighted 50% MBE and 50% written (both essay and performance test scores).

Florida The state component of the Florida General Bar Examination contains both locally developed essay and multiple-choice questions. Equal weight is given to all subparts of the state component of the General Bar Examination. The result of the state component is weighted equally with the MBE in determining whether an applicant passes the General Bar Examination.

Hawaii The MBE is weighted 50%. The individual remaining items, which consist of 6 MEE questions, 2 MPT tasks, and a locally developed Hawaii Legal Ethics Examination consisting of 15 multiple-choice questions, are all equally weighted for a cumulative total of 50%.

Kentucky The examination includes the MBE and both Kentucky-drafted essay questions and some MEE questions, along with 1 MPT question at the present time. Currently, there is a separate minimum passing standard for each component. To pass the examination, an applicant must achieve a scaled score of 132 on the MBE and an average score of 75 or greater on the written component. Effective January 1, 2021, Kentucky will require a minimum passing scaled score of 135 on the MBE and will continue to require a general average of 75 on the essay portion of the examination. Also effective January 1, 2021, applicants must pass the essay and MBE portions of the examination in one sitting. Kentucky's minimum passing score for the MPRE is 80 for applicants taking the exam after July 1, 2017. For scores earned before that date, the previous minimum passing score of 75 will continue to be honored.

Louisiana Each of 9 subject-matter tests which comprise the examination may include short answer and/or multiple-choice items.

Michigan Michigan uses a unique method of scoring the examination that places the essay and MBE scores on a common scale. Information about Michigan's scoring formula is available on the Board of Law Examiners' website.

Nevada In order to pass, applicants must also earn a scaled score of 75 or higher on at least 3 written essay questions.

Ohio The chart shows the combined score weights and minimum passing standard for July 2020, at which time Ohio will administer the UBE. For the February 2020 exam, the combined score weights were as follows: MBE 33⅓%, local essay 53⅓%, MPT 13⅓%.

Pennsylvania The 6 answers to the essay examination and the performance test (valued at 1.5 times an essay question) are graded, totaled, and scaled to the MBE. The combined essay and performance test scores are weighted at 55%, and the MBE score is weighted at 45% of the total scaled score. The scaled scores of the performance test/essay examination and MBE are then combined to determine whether a scaled score of 272 or higher has been attained.

Rhode Island To pass the examination, applicants seeking admission under Article II, Rule 1 (admission on examination) must achieve a combined total score of 276 or greater. Applicants seeking admission under Article II, Rule 2(a) (attorney admission on examination) do not take the MBE and must score 138 or greater on the written component of the examination.

South Dakota The examination includes both the MBE and a written component that consists of 1 locally developed essay question, 5 MEEs, and 2 MPTs. There is a separate minimum passing standard on each component. To pass the examination, an applicant must achieve a score of 133 or greater on the MBE and an average score of 75% on the written component.

Texas The total score includes performance on a locally developed short-answer component that is weighted 10% and assesses Texas and/or federal rules related to Procedure and Evidence. The chart shows the combined score weights and minimum passing standard for the bar examinations administered in February and July 2020. Texas will begin administering the UBE in February 2021, at which time the combined score weights will be as follows: MBE 50%, MEE 30%, MPT 20%. The minimum passing score required on the UBE is 270. Reporting periods on the UBE beginning in February 2021 will be reduced.

Wisconsin The written component of the examination may include performance on the MPT, the MEE, and/or locally developed essay questions. The composition and weight of these written subcomponents may vary by administration.

Northern Mariana Islands The examination includes both the MBE and a written component that consists of the MPT, the MEE, and locally developed essay questions.

Palau The exam includes the MBE and a written component that includes the MEE, the MPT, and locally developed essay questions. There is a separate minimum passing standard for each component. To pass the exam, an applicant must achieve a score of 120 or higher on the MBE and a score of 65 or higher on each individual component.

Puerto Rico The combined passing score is 596 points out of 1,000. Exam dates are in March and September.

News & Press: Supreme Court of Kentucky

Email to a Friend

Supreme Court announces 2 orders related to administration of Kentucky bar exam

Monday, August 17, 2020

Supreme Court of Kentucky
State Capitol
700 Capital Avenue
Frankfort, Kentucky 40601
kycourts.gov

For Immediate Release

Contact: Katie Shepherd, Chief of Staff and Counsel, Office of Chief Justice katieshepherd@kycourts.net

Supreme Court announces 2 orders related to administration of Kentucky bar exam

FRANKFORT, Ky., Aug. 17, 2020 — The Supreme Court of Kentucky has entered two orders related to the administration of the Kentucky bar examination.

Administrative Order 2020-60 adopts the Uniform Bar Examination as the official bar examination for Kentucky beginning in February 2021. The UBE is coordinated through the National Council of Bar Examiners and is uniformly administered, graded and scored, resulting in a portable score that can be transferred to other UBE jurisdictions. Kentucky joins 35 other states, plus the District of Columbia and the U.S. Virgin Islands, in offering the UBE. Five neighboring states have already adopted the exam, including Illinois, Missouri, Ohio, Tennessee and West Virginia.

"The Uniform Bar Examination will benefit law students by creating consistency in the subjects tested and maximizing job opportunities," said Justice Laurance B. VanMeter, who serves as the Supreme Court liaison to the Kentucky Office of Bar Admissions. "The UBE will also make Kentucky's law schools more attractive to undergraduates who might not be sure which state they will practice in and make new lawyers more marketable to firms with multistate practices."

The Supreme Court also entered Administrative Order 2020-61, which amends Administrative Order 2020-

The Bar Examiner
The bar admissions information source

Ten-Year Summary of Bar Passage Rates, Overall and First-Time, 2010–2019

Jurisdiction: **Bar Passage Type:**

Excel

Show entries Search:

Jurisdiction	Bar Passage Type	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Oregon	First-Time	75%	78%	81%	80%	73%	68%	64%	82%	76%	81%

Jurisdiction	Bar Passage Type	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Pennsylvania	Overall	74%	77%	73%	73%	71%	66%	66%	68%	66%	69%
Pennsylvania	First-Time	83%	85%	82%	81%	81%	77%	75%	80%	77%	80%
Rhode Island	Overall	74%	69%	78%	71%	73%	63%	58%	58%	54%	56%
Rhode Island	First-Time	79%	74%	83%	76%	77%	69%	65%	65%	63%	62%
South Carolina	Overall	73%	73%	67%	75%	68%	69%	63%	65%	60%	67%
South Carolina	First-Time	80%	77%	73%	79%	73%	73%	71%	72%	72%	75%
South Dakota	Overall	94%	94%	83%	87%	72%	56%	50%	58%	56%	75%
South Dakota	First-Time	99%	94%	86%	91%	75%	70%	55%	68%	78%	82%
Tennessee	Overall	70%	69%	68%	73%	66%	61%	59%	60%	56%	64%
Tennessee	First-Time	79%	77%	73%	82%	72%	72%	72%	74%	74%	78%
Texas	Overall	76%	80%	75%	80%	70%	65%	66%	65%	59%	64%
Texas	First-Time	83%	86%	82%	85%	77%	71%	75%	75%	71%	75%
Utah	Overall	82%	84%	77%	82%	80%	76%	71%	76%	74%	78%
Utah	First-Time	89%	88%	82%	87%	87%	79%	78%	83%	84%	86%
Vermont	Overall	76%	68%	65%	76%	67%	50%	65%	59%	68%	60%

#6

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December 18, 2020

South Dakota Supreme Court
500 E. Capitol Ave.
Pierre, SD 57501-5070

Re: Comment in support of proposed rule change to Chapter 16-16, Section 4

To the Esteemed Members of the Supreme Court for the State of South Dakota:

I submit this letter of support for a review of the standards for admission to the State Bar of South Dakota because I am a proponent of regular re-evaluation and evolution of the Bar examination process in South Dakota. In my former position as president of the State Bar of South Dakota, I attended several regional and national Bar leadership conferences where one of the most common shared concerns was the increasing reliance upon the NCBE in the Bar admission process and a perceived correlation to reduced Bar admissions. These concerns were triggered in part because of a lack of transparency in the development and scoring of NCBE exams. The main focus, though, involved an effort to understand all of the reasons – including systemic reasons – for the dramatic drop in Bar passage rates across the country. It was a subject of discussion because it is a problem that directly impacts the future of our profession in terms of access to justice issues.

There were two primary points shared among Bar leaders that I suggest should be considered in the context of evaluating our current system for admission to the South Dakota Bar. The first is how heavy reliance upon the standardized testing prepared and administered by the NCBE can create pressure for law schools to "teach to the test" instead of teaching law student the relevant rules and laws of the jurisdiction where they will be taking the Bar exam. Law students can become so focused upon being able to pass a certain percentage of the multiple-choice test questions on the NCBE exams that they will forego the unique, important classes and extracurricular opportunities that law schools offer to help them expand the base of their legal knowledge about their state's procedures and rules. This creates a risk of less dimensional lawyers who have a harder learning curve when starting in the practice.

As a mentor to first-generation law students, I have observed how extreme focus upon passing the NCBE exam can interfere with valuable experiential learning opportunities. A recent mentee of mine had earned high academic scores in law school, but declined to apply to or participate in Moot Court or Law Review despite being encouraged to do so. The reason this student declined the chance to participate in these enriching law school programs? The feeling of needing to spend time during law school to prepare for the NCBE Multistate exam. This

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student's class selections were likewise calculated based upon the most likely topics tested on the NCBE rather than the student's personal interests. The student finished with a fine GPA and class rank, and ultimately, a passing score on the South Dakota Bar exam. However, as a lawyer, this person faced significant, unanticipated frustration during the job interview process because of a rather one-dimensional law school resume.

I recognize that some lawyers and law school professors strongly believe that law school should entail the process of intense studying for the Bar exam. I cannot dispute that there is significant value in preparing law students for the practice of law via teaching the importance of prolonged preparation and performing under pressure. However, learning the art of collaboration in a group, developing one's communication muscles, and having the ability to research in unexpected niches of the law are also law school skills that have true value in the practice of law.

I have often wondered how many practicing lawyers could actually pass the MBE. Out of curiosity, I tried my hand at taking the NCBE's sample MBE questions (available for free on its webpage). I did not do well despite 25+ years in a research-heavy practice that routinely involves complicated or novel issues of civil procedure. Moreover, I did not see the utility of learning how to answer the questions as posed because I have never encountered a situation where selecting from a multiple-choice menu within 1.8 minutes was the sort of response expected by a court or a client. In short, I fear that some law students are sacrificing the ability to develop important skills that will be necessary to be an effective lawyer in order to earn a passable score on the MBE – a test whose correct answers are often far-removed from the practical responses that South Dakota clients, judges and jurors routinely expect.

The second issue about NCBE reliance that Bar leaders from around the country shared with each other relates to the narrowing of our profession incidental to the application of its standardized, nationally curved test. Though NCBE is a not-for-profit entity, the test preparation business related to its tests has become a highly profitable business. Some law students simply cannot afford the expensive study materials necessary to succeed at the exam. While law schools now routinely buy these materials for their students, the selection of an effective study guide is not a one-size fits all proposition. Different students learn differently, so having Bar study materials keyed to whether one is a visual, auditory or experiential learner can make a marked difference in a student's successful preparation for the MBE. This creates an unintentional but decided barrier to Bar admission for law graduates who do not have the advantage of expendable financial resources.

Diversity of lawyers in active practice aside, it is not a stretch to say that Bar associations that had have engaged in professional "futures planning" have been raising an alarm for almost a decade, warning of how a narrowing of our profession has coincided with the application of the NCBE's nationally curved test. According to the statistics maintained by the American Bar Association, since the 1980's, the median age of the American lawyer has increased from thirty-nine to approximately 50 years of age. Many Bars have logged even older median member ages. For example, the Washington State Bar Association conducted a futures survey in 2012 and discovered that 71% of its bar members were over age 50 and many were

already contemplating retirement. Some Bars have discovered that the average age of their Bar membership is closer to 65.

Often referred to as "the silver tsunami," this imbalance between lawyers close to retirement and lawyers at the beginning of their careers will eventually create an access to justice issue for every state Bar that has it. The people to suffer are likely to be in the wide pool of clients who fall between those who qualify for free legal services and those who can easily afford a standard $200/hr billable fee rate. In other words, limiting Bar admissions to those who can successfully take a multiple-choice exam under serious time constraints at a time when a large number of our members are preparing for retirement can add to both the perception and reality of legal deserts and a "justice for some" legal system.

South Dakota has never formally studied the median age of our members, but anecdotally, we seem to reflect the national trend toward an aging Bar population. At the same time, reputable statistical sources indicate that South Dakota is experiencing mild population growth. Indeed, several times in recent years, we have rallied to expand the size of our judiciary to meet the growing demand for the sort of legal services that require courtroom work.

On the plus side, a reduction in the number of practicing lawyers arguably has the market advantage of improving hourly billable rates for those practicing in South Dakota. Frankly, this is an argument that few South Dakota lawyers would prioritize. We want and need to avoid legal deserts, and the only way to do that is to support and promote bright people to attend law school and join our Bar.

With a price tag of approximately $100,000 for a law school education, law school recruitment can be a tough sell. A person weighing their economics and odds must consider a Bar's passage rate before committing the tremendous resources of time and treasure necessary to adequately prepare for any state's Bar exam process. The announcement of new admittees to our Bar is always a cause of celebration, but the relatively small numbers of names announced should be a concern for every South Dakota Bar member because of what it may mean for access to justice for clients – not to mention our Bar dues and the Bar services that can be offered to Bar members.

I am not suggesting that the South Dakota Supreme Court should lower admission standards so that the State Bar of South Dakota has more members. I want to practice with competent, creative lawyers as much as anyone else in the State Bar of South Dakota. Instead, toward this end, I urge that we should study our admission system to assure that it is encouraging students to participate in a wide range of educational, enriching learning experiences during law school, not just ones focused on passing the MBE.

My comments here are intended only to encourage the Court to explore the idea of creating an additional avenue for law school graduates to establish competency to practice law in South Dakota. Doing so should help assure that an adequate number of experienced lawyers will exist 20 years from now to serve our public; it will also help assure that our outstanding Bar association will continue to exist to serve and meet the needs of our members. Perhaps there could be an alternative means of entry into the practice for those who have good character, a

qualifying law school GPA and documented testing anxiety. After all, not every person who does not succeed at the rigorous exam format created by the NCBE is incapable of competently, successfully serving clients. A highly supervised, "residency" process for those with provable testing anxiety may be one means to assure that qualified, tested and true lawyers will continue to populate every circuit in South Dakota well into the future.

Submitted with respect,

Stephanie E. Pechop

#7

Proposed Court Rule: 2021 Rules Hearing

A proposal to correct an errant citation in § 16-18-34.7 concerning recommendations in attorney disciplinary proceedings.

Section 1. That §16-18-34.7 be amended as follows:

Any recommendation for disbarment or suspension made by the Disciplinary Board or the referee under § 16-19-67 ~~or the referee under § 16-19-68~~ shall contain a recommendation as to the restrictions or conditions of employment and supervision of the accused attorney as a legal assistant.

Explanation for Proposal

The amendment proposed by the State Court Administrator's Office is intended to correct an errant citation. § 16-19-68 was repealed by Supreme Court Rule 16-47 effective July 1, 2016. The correct citation related to the referee process is now § 16-19-67.