

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

IN THE MATTER OF THE PROPOSED)
AMENDMENTS TO VARIOUS SECTIONS)
TO AUTHORIZE THE EXPANDED USE OF)
INTERACTIVE AUDIOVISUAL DEVICES)
AMENDMENT OF ARTICLE IV, SECTION 4.5)
OF THE APPENDIX TO SDCL CHAPTER 16-17)
ADOPTION OF THE PREAMBLE AND SCOPE)
TO THE RULES OF PROFESSIONAL CONDUCT,)
OF THE APPENDIX TO SDCL CHAPTER 16-18)
AMENDMENT OF THE RULES OF)
PROFESSIONAL CONDUCT, OF THE APPENDIX)
TO SDCL CHAPTER 16-18, RULE 1.2.)
AMENDMENT OF SDCL 19-19-404(b))
AMENDMENT OF SDCL 19-19-807)
AMENDMENT OF SDCL 23A-44-5.1)

NOTICE OF SPECIAL
RULES HEARING

NO. 145

Petitions for amendments of existing sections of the South Dakota Codified Laws and an adoption of a new rule 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 August 24, 2021, at 11:00 A.M., C.T., at the Courtroom of the Supreme Court in the Capitol Building, Pierre, South Dakota, the Court will consider the following:

1. A proposal to amend various sections to authorize the expanded use of interactive audiovisual devices.

Section 1. That § 15-5A-9 be amended as follows:

At the discretion of the court, interactive audiovisual devices may be used to conduct an arraignment, an initial appearance on a probation revocation petition, a probation revocation hearing, any non-evidentiary based motion hearing, a felony plea hearing or a sentencing hearing. Use of interactive audiovisual device will not be permitted to conduct any felony plea hearings, any stage of a trial, felony sentencing, or probation

~~revocation hearing~~ unless all parties to the proceeding stipulate to the use of the interactive audiovisual device. ~~for one of the aforementioned purposes.~~ For any felony sentencing hearing involving a Class 4 felony or higher, a defendant retains the right to appear in person. The judge presiding over the matter always retains the discretion not to allow an appearance by interactive audiovisual device if the judge believes that to do so would prejudice any party to the proceeding.

Section 2. That § 23A-39-1 be amended as follows:

(Rule 43 (a)) Presence required at all times except as provided. A defendant shall be present at his arraignment, at the time of his plea, at every stage of his trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as provided by §§ 23A-39-2 and 23A-39-3. For purposes of this rule a defendant's presence shall include participation via interactive audiovisual device for purposes of an arraignment, plea hearing or sentencing hearing.

Section 3. That a new section to chapter 23A be added as follows:

For the purposes of 23A-7-1 and 23A-7-2 the term "open court" shall include participation via an interactive audiovisual device for any court proceeding accessible to the public.

23A-7-1. (Rule 10) Arraignment in open court--Procedure--

Verification or correction of name--Copy given to defendant. An arraignment shall be conducted in open court, except that an arraignment for a Class 2 misdemeanor may be conducted in chambers, and shall consist of reading the indictment, information, or complaint, as is applicable, to the defendant or stating to him the substance of the charge and calling on him to plead thereto.

A defendant must be informed that if the name in the indictment, information, or complaint is not his true name, he must then declare his true name or be proceeded against by the name given in the indictment, information, or complaint. If he gives no other name, the court may proceed accordingly. If he alleges that another name is his true name, he shall be proceeded against pursuant to § 23A-6-20. He shall be given a copy of the indictment,

information, or complaint, as is applicable, before he is called upon to plead.

23A-7-2. (Rule 11(a)) Pleas permitted to defendant--Requirements for plea of guilty or nolo contendere. A defendant may plead:

- (1) Not guilty;
- (2) Not guilty and not guilty by reason of insanity;
- (3) Guilty;
- (4) Nolo contendere; or
- (5) Guilty but mentally ill.

Except as otherwise specifically provided, a plea of guilty or nolo contendere can only be entered by a defendant himself in open court. If a defendant refuses to plead, or if the court refuses to accept a plea of guilty or nolo contendere, the court shall enter a plea of not guilty. The court may not enter a judgment unless it is satisfied that there is a factual basis for any plea except a plea of nolo contendere.

Explanation for Proposal

The proposed rule changes are submitted to authorize continued expanded use of interactive audiovisual devices. The use of interactive audiovisual devices in court proceedings expanded in response to the COVID-19 pandemic and have proven to be highly successful; the SCAO survey of South Dakota circuits confirms the effectiveness of continued use. The use of interactive audiovisual devices reduces time associated with prisoner travel and a personal appearance at the courthouse, decreases time delays between appearances for many defendants, and comport with all due process requirements. The rule change supports the efficient administration of justice. These proposals are not based on any other federal or state rule; although many other states as surveyed by the SCAO have similar rules allowing for audiovisual device appearances.

2. Proposed Amendment of Article IV, Section 4.5 of the Appendix to SDCL Chapter 16-17 - The State Bar of South Dakota Bylaws

4.5. Membership Fees. The State Bar may annually impose upon the Members approved State Bar dues ("Dues"), CLE Fee, and Client Assistant Fee (collectively "Membership Fees"). Membership Fees will be set to meet the State Bar's financial obligations. The Bar Commission may set the Membership Fees based upon membership type or other criteria. The Executive Director will assess Membership Fees on a calendar-year basis. Members must pay the Membership Fees in advance each January 1st.

a. **Approval.** The Supreme Court must approve Membership Fees proposed by the Bar Commission before the Executive Director may assess them on the Members.

b. **Active Member Dues.** Active Member Dues are:

i. **Calendar Year of Admission.** Waived for newly admitted Members the calendar year of admission unless, in a prior year, that Member was a member of another state bar or practiced law in another state or jurisdiction without mandatory bar membership; in either of those cases, the newly admitted Member will pay Dues based on years in practice specified in Paragraph 4.5.b.ii, or 4.5.b.iii, below.

ii. **2nd - 4th Calendar Years after Admission Year.** ~~\$190~~\$290, except Members electing Emeritus Status will pay ~~\$100~~\$125.

iii. **5th Calendar Year after Admission Year and Thereafter.** ~~\$315~~\$415, except Members electing Emeritus Status will pay ~~\$100~~\$125.

c. **Inactive Member Dues.** Inactive Member Dues are ~~\$100~~\$125.

d. **Continuing Legal Education.** Each Active Member, except Supreme Court Justices, Circuit Court Judges, Magistrate Judges, and Members electing Emeritus Status, must pay a ~~\$100~~\$125 Continuing Legal Education program fee ("CLE Fee").

e. **Client Assistance Fund.** The State Bar may charge each Active Member, after the calendar year of admission, a Client Assistance Fund fee of \$25 ("Client Assistance Fee"). The State Bar will hold this fee in a separate Client Assistance Fund. The State Bar will charge the Client Assistance Fee whenever the fund balance is less

than \$80,000 and will continue to charge the fee until the Client Assistance Fund balance reaches \$100,000. The State Bar will not charge the Client Assistance Fee when the fund balance is \$100,000 or greater. Federal Judges, Supreme Court Justices, Circuit Court Judges, and Magistrate Judges will be exempt from the Client Assistance Fee. The Bar Commission may use the Client Assistance Fund to pay premiums on a group insurance policy should the Commission determine that the purchase of such coverage would be an appropriate use of the fund.

- f. **Failure to Pay.** The Bar Commission may suspend any Member who does not pay the Membership Fees when due, and upon suspension, that Member will not be in good standing with the State Bar. A suspended Member may, at any time within five years of the suspension date, be reinstated upon payment of all delinquent and current Membership Fees ("Delinquent Fees") together with any penalties imposed by the Bar Commission. Penalties imposed by the Bar Commission may not exceed double the Delinquent Fees amount ("Delinquency Penalty"). After five years, a Member may only be reinstated as specified in Paragraph 4.3.

Explanation for Proposal

The above amendment to Section 4.5 of the State Bar of South Dakota bylaws is being proposed by the State Bar of South Dakota for the purpose of raising active and inactive member dues, emeritus status member dues, and CLE fees to adequately support the ongoing future operations and regulatory functions of the State Bar of South Dakota. A motion was passed by the membership of the State Bar of South Dakota at its annual business meeting on June 18, 2021, in support of amending Section 4.5 of the South Dakota State Bar bylaws as depicted in the proposal above. Adoption of the proposed changes to Section 4.5 will raise active member dues by \$100.00, inactive member dues by \$25.00, emeritus status member dues by \$25.00 (see SDCL 16-17-4.1), and continuing legal education ("CLE") fees by \$25.00.

3. Proposed Adoption of the Preamble and Scope to the Rules of Professional Conduct of the Appendix to SDCL Chapter 16-18.

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a

public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In

addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

SCOPE

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[15] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

[21] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

Explanation for Proposal

As noted by the Code Commission in the Appendix to Chapter 16-18:

The Supreme Court Rules that adopted and amended the South Dakota Rules of Professional Conduct did not include the Preamble, Scope, and Comments included with these rules. The Preamble, Scope, and Comments were adapted by the Ethics Committee of the State Bar of South Dakota from the American Bar Association *Model Rules of Professional Conduct*.

The proposal submitted by the State Court Administrator's Office would adopt the Preamble and Scope as a court rule.

This would provide the overarching structure to the Rules while allowing the State Bar Ethics Committee to continue to adapt the Comments to the Rules.

4. Proposed Amendment of the Appendix to SDCL Chapter 16-18, the Rules of Professional Conduct, Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer.

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) Notwithstanding subsection (d), a lawyer may counsel or assist a client regarding conduct expressly permitted by South Dakota Cannabis laws, even if the same conduct violates federal law, but the lawyer must inform the client that the conduct violates federal law and advise the client about the legal consequences under federal law of the client's proposed course of conduct.

Explanation for Proposal

The amendment to Rule 1.2 is being proposed by the State Bar of South Dakota. At the State Bar's annual meeting on June 18, 2021, a motion was passed by the membership to seek to amend Rule 1.2 as presented above through the Supreme Court's rule making process. In addition to amending Rule 1.2 as depicted above, the motion also encompassed adding a new comment to Rule 1.2 as follows:

Comment: "Subsection (e) addresses the conflict between South Dakota state law and federal law related to the cultivation, distribution, or use of marijuana. This subsection is intended to clarify that, notwithstanding federal law prohibitions, a lawyer may ethically advise a client about complying with South Dakota's Cannabis laws. This advice and assistance may include providing legal services to a client to help the client create or operate a business that is lawful under South Dakota's Cannabis laws, such as: advice and services related to incorporating a business; tax, employment, and contract-related advice and services; lobbying to government agencies about the scope of or changes to the law; and otherwise assisting a client with operating a business in compliance with South Dakota law. It may also include providing legal advice or advocacy to a state, county, or municipal government body in discussing, drafting, and enacting statutes or regulations to implement South Dakota's Cannabis laws. This list of potential acceptable conduct is intended to be exemplary, not limiting.

However, a lawyer may not advise a client about how to avoid the detection or prosecution by federal authorities of the same conduct. The lawyer must also inform the client of the conflict between state and federal law, including the potential for criminal liability and the penalties that could be associated with violating federal law. Where appropriate the lawyer must also advise the client of other potential impacts on the lawyer-client relationship, including on the attorney-client privilege, which could arise from the fact the client's conduct may be prohibited under federal law. Finally, the rules of the Federal District Court for the District of South Dakota are not impacted by this comment, even if it has adopted these rules as its own."

The addition of section "(e)" to Rule 1.2 is being proposed to make it clear that lawyers may advise or assist a client regarding conduct permitted by South Dakota cannabis law while at the same time advising the client that the conduct under South Dakota law is prohibited under federal law and the legal consequences that may result under federal law because of the client's proposed course of conduct. This proposal was precipitated by the passage of Amendment A and Initiated Measure 26 during the November 2020 general election.

Pursuant to current practice the comment proposed above will be submitted to the Legislative Research Counsel, by recommendation of the Ethics Committee of the State Bar, for publication under the

making process. In addition to amending Rule 1.2 as depicted above, the motion also encompassed adding a new comment to Rule 1.2 as follows:

Comment: "Subsection (e) addresses the conflict between South Dakota state law and federal law related to the cultivation, distribution, or use of marijuana. This subsection is intended to clarify that, notwithstanding federal law prohibitions, a lawyer may ethically advise a client about complying with South Dakota's Cannabis laws. This advice and assistance may include providing legal services to a client to help the client create or operate a business that is lawful under South Dakota's Cannabis laws, such as: advice and services related to incorporating a business; tax, employment, and contract-related advice and services; lobbying to government agencies about the scope of or changes to the law; and otherwise assisting a client with operating a business in compliance with South Dakota law. It may also include providing legal advice or advocacy to a state, county, or municipal government body in discussing, drafting, and enacting statutes or regulations to implement South Dakota's Cannabis laws. This list of potential acceptable conduct is intended to be exemplary, not limiting.

However, a lawyer may not advise a client about how to avoid the detection or prosecution by federal authorities of the same conduct. The lawyer must also inform the client of the conflict between state and federal law, including the potential for criminal liability and the penalties that could be associated with violating federal law. Where appropriate the lawyer must also advise the client of other potential impacts on the lawyer-client relationship, including on the attorney-client privilege, which could arise from the fact the client's conduct may be prohibited under federal law. Finally, the rules of the Federal District Court for the District of South Dakota are not impacted by this comment, even if it has adopted these rules as its own."

The addition of section "(e)" to Rule 1.2 is being proposed to make it clear that lawyers may advise or assist a client regarding conduct permitted by South Dakota cannabis law while at the same time advising the client that the conduct allowed under South Dakota law is prohibited under federal law and the legal consequences that may result under federal law because of the client's proposed course of conduct. This proposal was

amended rule in the code should the Court approve the proposed amendment. The amendment to Rule 1.2 and the proposed comment illustrate that there is a difference between South Dakota cannabis law and the federal law on cannabis.

5. Proposed Amendment of SDCL 19-19-404(b).

(b) **Other Crimes crimes, wrongs, or ~~other~~ acts.**

- (1) Prohibited Uses. Evidence of a any other crime, wrong, or ~~other~~ act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
- (2) Permitted uses; ~~notice in a criminal case~~. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. ~~On request by a defendant in a criminal case, the prosecutor must:~~
- (3) Notice in a criminal case. In a criminal case, the prosecutor must:
 - (A) Provide reasonable notice ~~of the general nature~~ of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it; and
 - (B) Articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and
 - (C) Do so in writing before trial - or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

Explanation for Proposal

The proposal to amend SDCL 19-19-404(b) originated in the State Bar's Evidence Committee and is being proposed by the State Bar of South Dakota. At the recent State Bar annual meeting a motion was passed to submit the proposal to the Supreme Court's rule making process.

The reason for changing SDCL 19-19-404(b) is to replicate the current federal rule, FRE 404(b), which was amended and became effective on December 1, 2020. The amendments reflected in 404(b), 404(b)(1), and 404(b)(2), were intended for textual clarification without substantive impact, while the amendments reflected in 404(b)(3) are more substantive. Most noteworthy is: 1) The new

requirement that the prosecutor affirmatively provide the other acts evidence without being asked, a change meant to streamline the pretrial process; 2) The new notice provisions which require written notice, which will help avoid needless disputes over the occurrence and validity of a notice provided; and 3) The new requirement that the notice provide more substance than the rule required before, which will permit a trial court and the parties to better prepare for a more efficient trial. The new Rule 404(b)(3)(C) leaves the trial court discretion for unique circumstances where the more rigid notice requirements are not met and the moving party can show good cause.

Amending SDCL 19-19-404(b) to mimic FRE 404(b) would continue on with the work done in 2016 to adjust South Dakota's rules of evidence to match, where appropriate and logical, the Federal Rules of Evidence.

6. Proposed Amendment of SDCL 19-19-807. Residual exception.

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

- (1) The statement ~~has equivalent circumstantial guarantees of trustworthiness~~ is supported by sufficient guarantees of trustworthiness--after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and
- (2) ~~It is offered as evidence of a material fact;~~
- (3) ~~It is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and.~~
- (4) ~~Admitting it will best serve the purposes of these rules and the interests of justice.~~

(b) Notice. The statement is admissible only if, ~~before the trial or hearing,~~ the proponent gives an adverse party reasonable notice of the intent to offer the statement ~~and its particulars, including the declarant's name and address,~~ --including its substance and the declarant's name-- so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing--or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Explanation for Proposal

The proposal to amend SDCL 19-19-807 originated in the State Bar's Evidence Committee and is being proposed by the State Bar of South Dakota. At the recent State Bar annual meeting a motion was passed to submit the proposal to the Supreme Court's rule making process. The reason for changing SDCL 19-19-807 is to replicate the current federal rule, FRE 807, which was amended and became effective on December 1, 2019. The amendments reflected in 807(a), 807(a)(2), and 807(a)(4) were intended for textual clarification and removal of surplusage due to similar issues already having been covered by other rules. The amendments to 807(a)(1) were intended to provide some clarification to the trustworthiness prong of the analysis due to some confusion at the federal court level as to how to apply the prior "equivalent circumstantial guarantees" language. The State Bar Evidence Committee concluded that South Dakota precedent utilizes a multifactor test for this prong of the rule which would remain consistent with the new proposed language.

The changes to 807(b) relate to notice requirements and are meant to further streamline the pretrial and trial process. The new Rule 807(b) leaves the trial court discretion for unique circumstances where the moving party failed the notice requirement but can come forth with good cause during the trial itself.

Amending SDCL 19-19-807 to mimic FRE 807 would continue on with the work done in 2016 to adjust South Dakota's rules of evidence to match, where appropriate and logical, the Federal Rules of Evidence.

7. Proposed Amendment of SDCL 23A-44-5.1. Time allowed for disposition of criminal case--Periods excluded--Dismissal.

(1) Every person indicted, informed or complained against for any offense shall be brought to trial within one hundred eighty days, and such time shall be computed as provided in this section.

(2) Such one hundred eighty day period shall commence to run from the date the defendant has first appeared before a judicial officer on an indictment, information or complaint.

(3) If such defendant is to be tried again following a mistrial, an order for a new trial, or an appeal or collateral attack, such period shall commence to run from the date of the mistrial, filing of the order granting a new trial, or the filing of the mandate on remand.

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(4) The following periods shall be excluded in computing the time for trial:

(a) The period of delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on competency and the period during which he is incompetent to stand trial; the time from filing until final disposition of pretrial motions of the defendant, including motions brought under § 23A-8-3; motions for a change of venue; and the time consumed in the trial of other charges against the defendant;

(b) The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel provided it is approved by the court and a written order filed. A defendant without counsel shall not be deemed to have consented to a continuance unless he has been advised by the court of his right to a speedy trial and the effect of his consent;

(c) The period of delay resulting from a continuance granted by the court at the request of the prosecuting attorney if the continuance is granted because of the unavailability of evidence material to the state's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at the later date and provided a written order is filed;

(d) The period of delay resulting from the absence or unavailability of the defendant;

(e) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant shall be granted a severance so that he may be tried within the time limits applicable to him;

(f) The period of delay resulting from a change of judge or magistrate obtained by the defendant under chapter 15-12; and

(g) The period of delay during the declaration of a judicial emergency by the Supreme Court pursuant to chapter 16-3 which shall be retroactive to the date the judicial emergency is declared; and

(h) Other periods of delay not specifically enumerated herein, but only if the court finds that they are for good

cause. A motion for good cause need not be made within the one hundred eighty day period.

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

Explanation for Proposal

The proposal by the State Court Administrator's Office would exclude the period of time in which a judicial emergency has been declared by the Supreme Court pursuant to SDCL ch. 16-3. The period or duration of delay for the impacted jurisdiction(s) as delineated by the judicial emergency order would be excluded from the computation of time to bring a matter to trial.

As the Court is aware, the March 13, 2020, "COVID-19 Order Suspending 180-Day Rule" provides in part:

"IT IS HEREBY ORDERED THAT the provisions of SDCL § 23A-44-5.1, commonly known as the 180-day rule, are hereby suspended effective as of March 13, 2020, for all counties statewide until rescinded by further order of the Court."

The proposed change effectuates this order in practice when the COVID-19 emergency order is rescinded and would avoid the necessity for good cause findings in individual cases for the time that judicial emergency, or a future judicial emergency, is declared by the Court.

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 August 9, 2021. Subsequent to the hearing, the Court may reject or adopt the proposed amendments or adoption of any rule germane to the subject thereof.


Notice of Rules Hearing No. 145 - August 24, 2021

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://uj.s.sd.gov/Supreme Court/Hearings.aspx> or the State Bar of South Dakota's website <https://www.statebarofsouthdakota.com>.

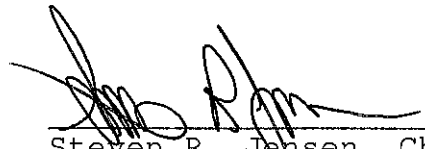
DATED at Pierre, South Dakota this 8th day of July, 2021.

BY THE COURT:

ATTEST:



Clerk of the Supreme Court
(SEAL)



Steven R. Jensen, Chief Justice

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

JUL 8 2021


Clerk