IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

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1. IN THE MATTER OF THE PROPOSED AMENDMENT OF SDCL 1-26-33.2 **2. IN THE MATTER OF THE PROPOSED AMENDMENT OF SDCL 15-6-5(a) through (j)** **3. IN THE MATTER OF THE PROPOSED AMENDMENT OF SDCL 15-6-45(a)** **4. IN THE MATTER OF THE PROPOSED AMENDMENTS OF THE APPENDIX OF FORMS TO SDCL CHAPTER 15-6 TO INCLUDE FORMS 8, 9, 14, 17, 19, 20, and 21** **5. IN THE MATTER OF THE PROPOSED AMENDMENT OF SDCL 15-12-37** **6. IN THE MATTER OF THE ADOPTION OF A NEW RULE CONCERNING COURT REPORTER TRANSCRIPT FEES**	**NOTICE OF SPECIAL RULES HEARING** **NO. 148**

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

NOTICE IS HEREBY GIVEN THAT ON November 9, 2022, at 11:00 A.M., C.S.T., at the Courtroom of the Supreme Court in the Capitol Building, Pierre, South Dakota, the Court will consider the following:

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1. Proposed Amendment to SDCL to 1-26-33.2. Time for serving briefs.

Unless otherwise ordered by the circuit court, the appellant shall serve a brief within thirty days after the delivery of the transcript of the contested case hearing to counsel for the parties or to the parties if unrepresented by counsel or within thirty days after the agency record is transmitted to the circuit court pursuant to § 1-26-33, whichever event occurs later. The appellee shall serve a brief within thirty days after the service of the brief of appellant, or in the case of multiple appellants, within thirty days after service of the last appellant's brief. The appellant may serve a reply brief within ten days after service of appellee's brief, or in the case of multiple appellees, within ten days after service of the last appellee's brief. ~~Pursuant to § 15-6-5(d), briefs may not be made a part of the record.~~

Explanation for Proposal

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

In 2017, SDCL 15-6-5(d) was amended to require, among other things, that briefs are to be filed. The proposed amendment is housekeeping in nature and is appropriate because SDCL 1-26-33.2 incorrectly provides—relying upon the earlier version of SDCL 15-6-5(d)—that briefs in an appeal pursuant to SDCL Chapter 1-26 may not be made part of the record.

The proposed amendment is not based upon a Federal Rule of Civil Procedure and should not affect other existing rules or statutes.

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2. Proposed Amendments to 15-6-5 (15-6-5(a) through (j)) - Service and Filing of Pleadings and Other Papers.

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 brief, notice, appearance, demand, offer 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.

15-6-5(b). Service--How made--Proof.

(1) Unless otherwise ordered by the court or provided by rule, ~~Whenever under~~ whenever this chapter ~~service is required~~ requires or ~~permitted~~ permits service to be made upon a party represented by an attorney, the service shall be made upon the attorney. ~~unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Service upon a party represented by an attorney may also be made by facsimile transmission as provided in § 15-6-5(f). Delivery of a copy within § 15-6-5 means: Handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person over the age of fourteen years then residing therein. Service by mail shall be by first class mail and is complete upon mailing. Service by facsimile~~

~~transmission is complete upon receipt by the attorney receiving service. An attorney's certificate of service, the written admission of service by the party or his attorney or an affidavit shall be sufficient proof of service. In the case of service by facsimile transmission, proof of service shall state the date and time of service and the facsimile telephone number or identifying symbol of the receiving attorney. The provisions of § 15-6-5 shall not apply to the service of a summons or other process or of any paper to bring a party into contempt.~~

(2) Unless otherwise ordered by the court, all documents filed with the court electronically through the Odyssey® system or served electronically through the Odyssey® system are presumed served upon all attorneys of record at the time of submission.

(3) Documents not filed with the court may be served upon an attorney by any of the following methods:

A. electronically through the Odyssey® system;

B. by electronic mail, using the email address designated by the attorney or law firm for service, or if none, the email address published in the Membership Directory of the State Bar of South Dakota;

C. by first class mail to the attorney's last known address, which is complete upon mailing;

D. by facsimile transmission subject to the following conditions:

(i) the attorney upon whom service is made has the necessary equipment to receive such transmission;
(ii) the attorney has agreed to accept service by facsimile transmission, or has served the serving party in the same case by facsimile transmission; and
(iii) the time and manner of transmission comply with the requirements of § 15-6-6(a), unless otherwise established by the Court; or

E. by delivery to the attorney, or an employee of the attorney, at the attorney's office.

(4) An attorney's certificate of service, the written admission of service by the party or his attorney, or an affidavit of service are sufficient proof of service.

(5) Service upon a party not represented by counsel must be made using one of the following methods:

A. by delivery to the party or leaving it at the party's dwelling house or usual place of abode with some person over the age of fourteen years then residing therein;
B. by first class mail to the party's last known address, which is complete upon mailing; or
C. if no address is known, by leaving it with the clerk of the court.

(6) The provisions of § 15-6-5 do not apply to the service of a summons or other process or of any paper to bring a party into contempt.

15-6-5(c). Service on numerous defendants.

In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

15-6-5(d). Filing of papers--Originals--Copies.

The original of all papers served upon a party or presented to any court or judge in support of any application or motion and

including the summons, all pleadings, notices, demands, offers, stipulations, affidavits, written motions, briefs, memorandums of law, and orders shall, if not filed before service, be filed with the court, together with proof of such service, forthwith upon such service. The foregoing requirement of filing applies to the notice of filing of an order and the notice of entry of a judgment together with proof of service thereof, both of which shall be filed forthwith; if not filed within ten days after service thereof, the time of service shall be deemed to be the date of filing of the notice and proof of service. If papers are not to be served, they must be filed with the court at the time of their presentation to the court for any action or consideration.

Any electronic version of any paper or document shall have the same force and effect as the original. A certified copy of an original made by electronic transmission shall have the same force and effect as a certified copy of an original.

15-6-5(e). Definition--Filing with the court.

Except as specifically exempted by these rules or court order, ~~The~~ the filing of pleadings and other papers with the court as required by this chapter ~~shall~~ must be made through the Odyssey® electronic filing system ~~by filing them~~ with the clerk of the court. Self-represented parties may file electronically, but are not required to file electronically. Upon leave of court, an attorney required to file electronically may be granted leave of court to file paper documents with the clerk of the court.~~, except that the~~ The judge may permit a party ~~the papers~~ to ~~be filed~~ file papers with him or her, in which event ~~he shall~~ the judge must note thereon the filing date and forthwith transmit them to the office of the clerk.

~~**15-6-5(f). Service by facsimile transmission (fax) to parties represented by attorney.**~~

~~Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, such service may be made by facsimile transmission pursuant to the following conditions:~~

~~(1) The attorney upon whom service is made has the necessary equipment to receive such transmission;~~

~~(2) The attorney has agreed to accept service by facsimile transmission, or has served the serving party in the same case by facsimile transmission; and~~

~~(3) The time and manner of transmission comply with the requirements of § 15-6-6(a), unless otherwise established by the Court.~~

~~The signature on the facsimile shall constitute a signature under § 15-6-11(a).~~

15-6-5(g). Documents not to be filed--Depositions.

No depositions (except notices to take depositions), interrogatories, requests for documents, requests for admissions, and answers and responses thereto shall be filed with the clerk of the court except as provided in this section. Any such filing shall be made electronically in full-size print unless otherwise ordered by the court. Any exhibits to such documents shall be clearly identified and included as a separate electronic file or hyperlinked within the transcript file.

Any discovery materials necessary for the disposition of any motion filed with the court or referenced in any filing with the court shall be attached as an exhibit to ~~and filed with~~ the party's motion ~~in its entirety~~ or as an exhibit to a declaration, affidavit, or other similar filing. Financial account information filed with the court as an exhibit under this section shall be

confidential pursuant to §§ 15-15A-8 and 15-15A-9, and shall remain confidential unless and until access is granted by the court under § 15-15A-10.

If any party designated any or all of any deposition as evidence to be offered in the trial of any case, such deposition shall be filed in electronic format in its entirety with the clerk of the court at the same time as that party's designation.

Depositions used by a party only for the purpose of contradicting or impeaching the testimony of deponent as a witness, pursuant to subdivision 15-6-32(a)(1), shall not be filed unless otherwise ordered by the judge presiding at the hearing or trial.

All depositions which have been read or offered into evidence by agreement of parties, or at the trial or submission of the case to the court, shall become a permanent part of the file.

15-6-5(h). Civil Case Filing Statements.

Whenever a party or an attorney representing a party commences a civil action, files a notice of appearance, or files an answer or first responsive pleading in a civil action, the party or attorney representing the party shall file a completed civil case filing statement containing identifying information available to that party or attorney regarding all parties, including the adverse party, with the clerk of the court. A statement must also be filed whenever a new party is added to the action. The statement shall be available from the clerk or online at the Unified Judicial System's website. The identifying information for the filing party must be submitted on the filing statement. If the party or attorney representing a party is unable to provide the required information for the filing party, he or she may seek a waiver from the judge assigned to the action. After the information is recorded in the Unified Judicial System docketing system, the filing statement may be destroyed or kept by the clerk of the court in a nonpublic file

for internal record management use by the Unified Judicial System. Access to the filed statement will only be available to court personnel or by court order.

15-6-5(i). Service of discovery requests by electronic mail or portable storage media device ~~computer diskette~~--Costs.

Any party or attorney serving discovery requests pursuant to § 15-6-31, § 15-6-33, § 15-6-34 or § 15-6-36 shall also, upon receipt of a written request, serve those items on the opposing party or attorney by electronic mail or on a portable storage media device ~~computer diskette~~. Failure to comply with such a request shall not make service invalid or extend the time to file a response, but the court shall order payment of the actual costs of reproducing the item and may award such other terms as it deems proper under § 15-6-37 unless good cause for failure to comply with the request is shown.

~~**15-6-5(j). Service by electronic mail (email) to parties represented by attorney.**~~

~~Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, such service may be made by email transmission pursuant to the following conditions:~~

~~(1) The attorney upon whom service is made has the necessary equipment to receive such transmission;~~

~~(2) Prior to the service, the attorney upon whom service is made has agreed in writing to accept service by email, or has served the serving party in the same case by email;~~

~~(3) The time and manner of transmission comply with the requirements of § 15-6-6(a), unless otherwise established by the court; and~~

~~(4) The sending attorney by facsimile or mail sends a certificate of service specifying the items electronically served.~~

~~The signature or electronic signature on the email shall constitute a signature under § 15-6-11(a). If within two days after the certificate of service is received, the attorney upon whom service is made attests in writing that he or she did not receive the electronic mail submission, then service shall not have been deemed to have been made.~~

Explanation for Proposal

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

The proposed amendment is intended to: (i) update the rule given the recent adoption of electronic filing rules (SDCL Chapter 16-21A) and the implementation of the Odyssey® file and serve system; and (ii) make the rule more user-friendly to the practitioner by rewriting certain provisions and removing obsolete text. Although the proposed amendments are not based upon a corresponding Federal Rule of Civil Procedure, reference is made to such Rule where appropriate.

The proposed amendments are as follows:

Subpart (a) (Service-When Required): The proposed amendment adds briefs to the list of filings to be served upon all parties. This is appropriate given that briefs are required to be filed pursuant to SDCL 15-6-5(d). Although the corresponding Federal Rule of Civil Procedure, Fed. R. Civ. P. 5(a), does not specify that briefs are to be filed, the Local Rules for the District Court of South Dakota require that briefs be filed and served. *See Local Rule 7.1(B).*

Subpart (b) (Service-How Made-Proof): The proposed amendment reworks subpart (b). The revision begins by providing that all documents filed or served through Odyssey® are presumed served at the time of submission. Then, by rewording some of the existing text and incorporating certain text from other subparts, the various methods of serving attorneys and unrepresented parties are listed in a more straight-forward manner. The result is a new subpart (b)(3), which lists the various methods of serving attorneys (i.e., Odyssey®, email,

mail, facsimile, and delivery) and a new subpart (b)(5), which lists the various methods of serving unrepresented parties (i.e., delivery, mail, or leaving it with the clerk of courts if no address is known).

With regard to service by email, the proposed rule would provide that emails should be sent to the email address designated by the recipient attorney or law firm for service, or if none, then to the email address published in the Membership Directory.

The corresponding Federal Rule of Civil Procedure is Fed. R. Civ. P. 5(b)(2), which provides that service may be accomplished by the following means:

> (A) handing it to the person;
> (B) leaving it:
> (i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or
> (ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;
> (C) mailing it to the person's last known address;
> (D) leaving it with the court clerk if the person has no known address;
> (E) sending it to a registered user by filing it with the court's electronic-filing system or sending it by other electronic means that the person consented to in writing—in either of which events service is complete upon filing or sending, but is not effective if the filer or sender learns that it did not reach the person to be served; or
> (F) delivering it by any other means that the person consented to in writing—in which event service is complete when the person making service delivers it to the agency designated to make delivery.

Subpart (c) (Service on number defendants): No proposed changes.

Subpart (d) (Filing of papers-Originals-Copies): No proposed changes.

Subpart (e) (Definition-Filing with the court): The present rule provides that documents are filed "with the clerk of

court." The proposed amendment provides that filings are to be made through the Odyssey® electronic filing system. The proposed amendment also provides that while unrepresented persons may file electronically, they are not required to do so.

The corresponding Federal Rule of Civil Procedure, Fed. R. Civ. P. 5(c)(3)(A), provides that a person represented by an attorney "must" file electronically unless the court allows otherwise. As for unrepresented persons, Fed. R. Civ. P. 5(c)(3)(b) provides that they (i) may file electronically if allowed by the court or local rule, and (ii) may be required to file electronically only by court order or a local rule that includes "reasonable exceptions."

Subpart (f) (Service by facsimile transmission (fax) to parties represented by attorney): The proposed amendment is not substantive in nature as it simply moves these provisions—which provide for the conditions of serving via facsimile—into subpart (b)(3)(D).

As for the corresponding Federal Rule of Civil Procedure, Fed. R. Civ. P. 5(b)(2)(E) provides that service can be accomplished by "sending it by other electronic means that the person consented to in writing." Thus, service by fax is permitted in federal court so long as the recipient has consented in writing to service by fax. However, the service is not effective if the sender learns that the fax did not reach the person to be served.

Subpart (g) (Document not to be filed-Depositions): The existing rule suggests that the only method of filing discovery materials necessary for the disposition of a motion is by attaching them to the motion. In practice, discovery materials and other documents are often attached to a declaration, affidavit, or other similar filing to provide foundation for the document. The proposed amendment allows the movant to file such materials by these other methods.

As for the corresponding Federal Rule of Civil Procedure, by way of example, the Local Rules for the District Court of South Dakota provide that documentary evidence in support of or in opposition to a motion for summary judgment must be attached to an affidavit. *See Local Rule 56.1(B).*

Subpart (h) (Civil Case Filing Statements): The proposed amendment provides that a civil case filing statement must also be filed when filing a notice of appearance in a case.

Although a Civil Cover Sheet—which is somewhat comparable to a Civil Case Filing Statement is required to be filed

whenever a Complaint is filed in federal court, it does not appear that a Civil Cover Sheet must be filed when an attorney files a notice of appearance.

Subpart (i) (Service of discovery requests by electronic mail or portable storage media device computer diskette-Costs): This subpart requires that parties that serve discovery requests must, upon receipt of a written request, serve them "by electronic mail or computer diskette." Given that computer diskettes are no longer used, the proposed amendment replaces "computer diskette" with "portable storage media device."

There does not appear to be a comparable Federal Rule of Civil Procedure requiring that discovery requests also be served, if requested, by email or portable storage media device.

Subpart (j) (Service by electronic mail (email) to parties represented by attorney): The proposed amendment deletes this subpart as service by email is addressed in the proposed subpart (b)(3)(B). The proposed amendment presumes that the recipient attorney is able to receive email, does not require the recipient's prior agreement to accepting service by email, eliminates the requirement that the sender separately serve—via facsimile or mail—a certificate of service specifying the document(s) just served by email; and removes the rule that service is deemed to have not been made if, within two days of receiving the certificate of service by fax or mail, the recipient attests in writing that he/she did not receive the email.

As for the corresponding Federal Rule of Civil Procedure, Fed. R. Civ. P. 5(b)(2)(E) provides that service can be accomplished by "sending it by other electronic means that the person consented to in writing." Thus, service by email is permitted in federal court so long as the recipient has consented in writing to service by email. However, the service is not effective if the sender learns that the email did not reach the person to be served.

Because SDCL 15-6-5 concerns the service and filing of documents, it necessarily relates to a number of other rules or statutes. However, the proposed amendments should not affect other existing rules or statutes.

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3. **Proposed Amendment to 15-6-45(a). Subpoena for attendance of witnesses and for production of documentary evidence--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 the attorney is the attorney of record for any party. When an attorney issues a subpoena, the attorney must 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 the attorney is attorney of record. A subpoena shall also include the following text in bold, capitalized type immediately above the signature of the individual signing the subpoena:

YOU SHOULD TREAT THIS DOCUMENT AS YOU WOULD A COURT ORDER. IF YOU FAIL TO COMPLY WITH THE COMMAND(S) IN THIS DOCUMENT WITHOUT ADEQUATE EXCUSE, THE COURT MAY FIND YOU IN CONTEMPT AND ASSESS MONETARY OR OTHER SANCTIONS AGAINST YOU.

YOU HAVE CERTAIN OBLIGATIONS AND RIGHTS AS IT CONCERNS THIS DOCUMENT, INCLUDING THOSE SET FORTH IN SDCL § 15-6-45.

YOU SHOULD CONSIDER CONTACTING AN ATTORNEY REGARDING YOUR OBLIGATIONS AND RIGHTS.

Explanation for Proposal

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

The proposed amendment requires that subpoenas issued pursuant to SDCL 15-6-45 include provisions designed to inform the recipient of certain basic, yet important, information. Generally, the language: (i) emphasizes that a subpoena is an important document and should be treated like a court order; (ii) advises the recipient that he/she has obligations, and rights, as it concerns the subpoena; (iii) informs the recipient that a failure to comply with the subpoena may result in the recipient being found in contempt; and (iv) states that the recipient should consider contacting an attorney regarding the recipient's obligations and rights.

All parties—including the recipient, the parties to the pending lawsuit, and the court—benefit from recipients of subpoenas being better informed. For example, the parties and the court

benefit when subpoenas are not ignored because resources are not needlessly expended enforcing compliance. Likewise, recipients of subpoenas benefit by understanding that they have rights, such as when a subpoena is unreasonable or oppressive.

Although the proposed amendment is not based on it, the corresponding Federal Rule of Civil Procedure is Fed. R. Civ. P. 45. That rule requires that subpoenas include the following text aimed at protecting persons subject to subpoenas and explaining their duties in responding:

> **(d) Protecting a Person Subject to a Subpoena; Enforcement.**
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> **(1)** ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.
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> **(2)** ***Command to Produce Materials or Permit Inspection.***
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> **(A)** *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.
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> **(B)** *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:
>
> **(i)** At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms

in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

Fed. R. Civ. P. 45(a)(1)(A)(iv).

Although far less extensive, the proposed amendment would result in SDCL 15-6-45(a) being consistent with the objective of its federal counterpart.

The proposed amendment should not affect other existing rules or statutes.

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4. Proposed Changes to Forms 8, 9, 14, 17, 19, 20, AND 21 OF THE APPENDIX OF FORMS TO SDCL CHAPTER 15-6.

Form 8. Complaint for negligence

1. On June 1, 1956, in a public highway called Phillips Avenue in Sioux Falls, South Dakota, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.

2. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

Wherefore plaintiff demands judgment against defendant in ~~the sum of _____ dollars and costs~~ <u>an amount to be determined by the trier of fact</u>.

Note:

Since contributory negligence is an affirmative defense, the complaint need contain no allegation of due care of plaintiff.

Form 9. Complaint for negligence where plaintiff is unable to determine definitely whether the person responsible is C.D. or E.F. or whether both are responsible ~~and where his evidence may justify a finding of willfulness or of recklessness or of negligence~~

A.B., Plaintiff
vs. COMPLAINT
C.D. and E.F., Defendants

1. On June 1, 1956, in a public highway called Phillips Avenue in Sioux Falls, South Dakota, defendant, C.D. or defendant E.F., or both defendants, C.D. and E.F. ~~willfully or recklessly or~~ negligently drove or caused to be driven a motor vehicle against plaintiff who was then crossing said highway.

2. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting

his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

Wherefore plaintiff demands judgment against C.D. or against E.F. or against both in the sum of _____ dollars and costs.

Form 14. Motion to dismiss, presenting defenses of failure to state a claim, of lack of service of process, and of lack of jurisdiction under § 15-6-12(b)

The defendant moves the court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

2. To dismiss the action or in lieu thereof to quash the return of service of summons on the grounds (a) that the defendant is a corporation organized under the laws of Delaware and was not and is not subject to service of process within the state of South Dakota, and (b) that the defendant has not been properly served with process in this action, all of which more clearly appears in the affidavits of M.N. and X.Y. hereto annexed as Exhibit A and Exhibit B respectively.

Signed:

_____

Attorney for Defendant
Address:

_____

~~Notice of Motion~~
~~To: _____~~
~~Attorney for Plaintiff~~
~~_____~~

~~Please take notice, that the undersigned will bring the above motion on for hearing before this Court in the courtroom at the Court House in the City of Sioux Falls, South Dakota on the _____ day of _____, 20____, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.~~
~~Signed:~~

_____

~~Attorney for Defendant~~
~~Address: _____~~

Form 17. Motion to bring in third-party defendant

Defendant moves for leave to make E.F. a party to this action and that there be served upon him summons and third-party complaint as set forth in Exhibit A hereto attached.

Signed:

_____

Attorney for Defendant C.D.

Address: _____

~~Notice of Motion~~

~~(Contents the same as in Form 14. No notice is necessary if the motion is made before the moving defendant has served his answer).~~

~~Exhibit A~~

~~STATE OF SOUTH DAKOTA IN CIRCUIT COURT~~

~~COUNTY OF MINNEHAHA SECOND JUDICIAL CIRCUIT~~

~~A.B., Plaintiff~~

~~vs.~~

~~C.D., Defendant and Third-Party SUMMONS~~

~~Plaintiff~~

~~vs.~~

~~E.F., Third-Party Defendant~~

~~To the above-named Third-Party Defendant:~~

~~You are hereby summoned and required to serve upon _____, plaintiff's attorney whose address is _____, and upon _____, who is attorney for C.D., defendant and third-party plaintiff, and whose address is _____, an answer to the third-party complaint which is herewith served upon you and an answer to the complaint of the plaintiff, a copy of which is herewith served upon you, within 30 days after the service of this summons upon you exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the third-party complaint.~~

_____

_____

~~Attorney for C.D.~~

~~Third-Party Plaintiff~~

~~STATE OF SOUTH DAKOTA IN CIRCUIT COURT~~

~~COUNTY OF MINNEHAHA SECOND JUDICIAL CIRCUIT A.B., Plaintiff~~

~~vs. THIRD-PARTY~~

~~C.D., Defendant and Third-Party COMPLAINT~~

~~Plaintiff~~

~~vs.~~

~~E.F., Third-Party Defendant~~

~~1. Plaintiff A.B. has filed against defendant C.D. a complaint, a copy of which is hereto attached as "Exhibit C."~~

~~2. (Here state the grounds upon which C.D. is entitled to recover from E.F., all or part of what A.B. may recover from C.D.~~

~~The statement should be framed as in an original complaint.)~~
~~Wherefore C.D. demands judgment against third-party defendant E.F. for all sums that may be adjudged against defendant C.D. in favor of plaintiff A.B.~~
~~Signed:~~

~~Attorney for C.D.~~
~~Third-Party Plaintiff~~
~~Address:~~

~~Source: SD RCP, Form 17.~~

Form 19. ~~Motion to bring in third-party defendant~~ Notice of Hearing

~~Defendant moves for leave, as third-party plaintiff, to cause to be served upon E.F. a summons and third-party complaint, copies of which are hereto attached to Exhibit X.~~
~~Signed:~~

~~Attorney for Defendant C.D.~~
~~Address:~~

~~Notice of Motion~~
~~(Contents the same as in Form 14. The notice shall be addressed to all parties to the action.)~~
~~Exhibit X~~
~~(Contents the same as in Form 18.)~~
~~Note:~~
~~Form 19 is intended for use when, under § 15-6-14(a), leave of court is required to bring in a third-party defendant.~~
To: [adverse party] and [his/her/its] attorney[s], [attorney's[s'] address]:
PLEASE TAKE NOTICE that [moving party]'s [name of motion] will be brought on for hearing before the Honorable [name of judge], Circuit Court Judge, in the [name of County] County Courthouse, [City], South Dakota, on the day of , , at .m., or as soon thereafter as counsel can be heard.

Form 20. Motion to intervene as a defendant under § 15-6-24

STATE OF SOUTH DAKOTA IN CIRCUIT COURT
COUNTY OF MINNEHAHA SECOND JUDICIAL CIRCUIT
A.B., Plaintiff
vs. MOTION TO INTERVENE
C.D., Defendant AS A DEFENDANT
E.F., Inc., Applicant for

Intervention

E.F., Inc., moves for leave to intervene as a defendant in this action, in order to assert the defenses set forth in its proposed answer, of which a copy is hereto attached, on the ground that it is the manufacturer and vendor to the defendant of the automobile described in plaintiff's complaint, the brakes of which are alleged to have been defectively manufactured; and as such, if the allegations of plaintiff's complaint be true, would be the one ultimately liable to the plaintiff, and as such has a defense to plaintiff's claim presenting both questions of law and of fact which are common to the main action. Signed:

_____

Attorney for E.F., Inc.,
Applicant for Intervention
Address: _____

~~Notice of Motion~~

~~(Contents the same as in Form 14)~~

STATE OF SOUTH DAKOTA IN CIRCUIT COURT
COUNTY OF MINNEHAHA SECOND JUDICIAL CIRCUIT
A.B., Plaintiff
vs. INTERVENER'S ANSWER
C.D., Defendant
E.F., Inc., Intervener

First Defense

Intervener admits the allegations stated in paragraphs 1 and 4 of the complaint; denies the allegations in paragraph 3, and denies the allegations in paragraph 2 in so far as they assert that the brakes of the automobile described in plaintiff's complaint were defectively manufactured.

Second Defense

Plaintiff was guilty of contributory negligence which proximately caused or contributed to the accident and to the personal injuries which he sustained therein, if any, in that he drove said automobile at a high rate of speed in a negligent and careless manner after the discovery of the defective condition of the brakes which contributory negligence on the part of the plaintiff was greatly more than slight in comparison to the negligence, if any, of this intervener.

Signed:

_____

Attorney for E.F., Inc.,
Intervener
Address:

_____

Note:

Under § 15-6-24 the motion to intervene must be served upon all parties as provided in § 15-6-5.

Form 21. Motion ~~for production of documents etc.~~to Compel under § ~~15-6-34~~15-6-37.

~~Plaintiff A.B. moves the court for an order requiring defendant C.D.~~

~~(1) To produce and to permit plaintiff to inspect and to copy each of the following documents: (Here list the documents and describe each of them.)~~

~~(2) To produce and permit plaintiff to inspect and to photograph each of the following objects: (Here list the objects and describe each of them.)~~

~~(3) To permit plaintiff to enter (here describe property to be entered) and to inspect and to photograph (here describe the portion of the real property and the objects to be inspected and photographed).~~

~~Defendant C.D. has the possession, custody, or control of each of the foregoing documents and objects and of the above-mentioned real estate. Each of them constitutes or contains evidence relevant and material to a matter involved in this action, as is more fully shown in Exhibit A hereto attached.~~

~~Signed:~~

~~_____~~

~~Attorney for Plaintiff~~

~~Address:~~

~~_____~~

~~Notice of Motion~~

~~(Contents the same as in Form 14)~~

~~Exhibit A State of South Dakota~~

~~County of _____~~

~~A.B., being first duly sworn says:~~

~~(1) (Here set forth all that plaintiff knows which shows that defendant has the papers or objects in his possession or control).~~

~~(2) (Here set forth all that plaintiff knows which shows that each of the above-mentioned items is relevant to some issue in the action).~~

~~Signed: A.B.~~

~~(Jurat)~~

[Movant], pursuant to SDCL 15-6-37(a), respectfully moves the Court for an order compelling [opposing party] to [specific relief sought]. The Court should enter the requested order because:

1. The discovery was properly served;
2. [Opposing party] has failed to respond to the discovery;
3. Counsel for [movant] certifies that he has, in good faith, conferred or attempted to confer with [opposing party] in an effort to secure the information or material without court action;

all as set forth in the accompanying Brief in Support of [movant]'s Motion to Compel Discovery.

Attach the following certification:

Certification of Good Faith Efforts to Resolve

Counsel for [movant] hereby certifies, pursuant to SDCL 15-6-37(a)(2), that counsel attempted, in good faith, to resolve this discovery dispute without involving the Court.

On [date], the undersigned communicated to [opposing party] that [opposing party's] responses to outstanding discovery requests were inadequate because [explain what you believe you are entitled to.]

[list each successive communication, including:

a. who participated,

b. the date, and, if relevant, the time of each communication, and

c. the manner of each communication.]

Summarize the outcome of these communications, identifying the substantive dispute that has stalemated the parties discussions, and which the Court must resolve.

Explanation for Proposal

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

Appendix C to SDCL Chapter 15-6 contains a number of forms that, as the Introductory Statement to the forms states, "are intended for illustration only." After reviewing the forms, the Committee determined that a few modifications would make the forms more accurate and helpful to practitioners. The forms proposed to be amended and the nature of the amendment are as follows:

Form 8: The proposed amendment removes the reference to a specific dollar amount and replaces it with language stating that the plaintiff seeks "an amount to be determined by the trier of fact." In addition to a plaintiff not being required to allege a specific dollar amount, this change results in the form being more consistent with attorneys' practice of not specifying a specific dollar amount sought, which is often

because the precise amount of damages is not known at the inception of the action.

Form 9: The form presently combines two different and significant issues: (i) the potential liability of two defendants; and (ii) differing theories of liability, i.e., negligence and willfulness/recklessness. The proposed amendment will make the form less confusing by limiting its application to a complaint for negligence when it is unclear which of the defendants is liable or whether both are.

Form 14: The form presently includes a "Notice of Motion" and accompanying text. While other jurisdictions require a "Notice of Motion," SDCL Chapter 15-6 does not contemplate such a "Notice of Motion." Instead, a motion is typically filed and notice of the hearing is provided either in the motion or a separate filing. The proposed amendment removes the "Notice of Motion" text.

Form 17: In addition to an illustrative motion to add a third-party defendant, the form includes a "Notice of Motion" and accompanying text as well as examples of a Third-Party Summons and Complaint. The proposed amendment removes the "Notice of Motion" for the reasons discussed previously. The proposed amendment also removes the illustrative Third-Party Summons and Complaint because illustrative examples of both are already contained in Form 18.

Form 19: The present form contains a motion to add a third-party defendant. Because an example of a motion to add a third-party defendant is already set forth in Form 17, this form is duplicative. For that reason, the proposed amendment replaces the form in its entirety and replaces it with an example of a Notice of Hearing. A Notice of Hearing was selected because it is a commonly prepared document and the forms do not contain an example of one.

Form 20: The proposed amendment removes the "Notice of Motion" for the reasons discussed previously.

Form 21: This form presently contains an example of a "motion for production of documents" and also contains a "Notice of Motion." Although the motion for production of documents includes language from SDCL 15-6-34, the proposed amendment provides a form that is broader in its scope of use (i.e., not limited to documents and inspections) and more typical of what is seen in practice. The proposed amendment also removes the

"Notice of Motion" for the reasons previously discussed. Finally, the proposed form includes an example of a certification by counsel of his/her good faith efforts to secure the information or material without court action as required by SDCL 15-6-37(a)(2).

The proposed changes are not based on any particular Federal Rules of Civil Procedure and will affect other existing rules or statutes.

---

5. Proposed Amendment to 15-12-37. Disqualification on court's own motion.

A judge or magistrate having knowledge of a ground for self-disqualification under the guidelines established by Canon 3E ~~C~~ shall not, unless Canon 3F ~~D~~ is utilized, await the filing of an affidavit but shall remove himself on written motion to be filed in duplicate by the judge or magistrate with the clerk of courts of the county wherein the action is pending. The clerk of courts shall notify the presiding judge, and the parties or their attorneys in the manner provided by this chapter for notification on filing of an affidavit for change of judge or magistrate.

Explanation for Proposal

The proposal offered by the State Court Administrator's Office would fix two errant statutory references to the Code of Judicial Conduct contained in 15-12-37 (Supreme Court Rule 75-5, section 18). The proposal is not based on any other federal or state law and would not impact other rules or statutes.

---

6. A Proposal for the Adoption of a New Rule Concerning Court Reporter Transcript Fees.

Section 1. The fee for the preparation of a transcript from a court reporter's notes of evidence is three dollars and sixty cents per page for the original. The fee for a copy, furnished on

request, is sixty-five cents per page, to be paid to the officer of the court who prepared the transcript.

Section 2. Implementation Date:

This rule change shall become effective January 1, 2023.

Explanation for Proposal

The proposal by the Unified Judicial System's Court Reporter Committee is intended to implement the provisions of HB 1079 which was passed during the 2022 Legislative Session. This proposal was based on a comparison of current rates provided in the surrounding states and the federal courts. Information related to those charges are attached to this rule proposal as Appendix A.

HB 1079 during the 2022 Legislative Session provided:

An Act to revise provisions regarding court transcript costs.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That § 15-15-7 be AMENDED:

15-15-7. Unless ordered by the court to be supplied to an indigent or an indigent's counsel and paid out of the county treasury where court was held, a fee shall be charged to the person ordering a typewritten transcript by filing of an order for transcript on appeal of a proceeding taken by an officer of the court, which shall be certified to be a correct transcript of the reporter's notes of the evidence.~~, at the rate of three dollars per page for the original. The fee for a copy, furnished on request, is forty cents per page, to be paid to the officer of the court who prepared the transcript.~~

Section 2. The amendment to § 15-15-7 provided in section 1 of this Act is subject to the Supreme Court's adoption of a new rule establishing the page rate cost for both an original and copy of the transcript, effective January 1, 2023.

Appendix A

Court Reporter Page Rates

South Dakota	$3.00/Original	.40/copy
Minnesota	$3.25/Original $4.75/Original	.25/copy (Criminal) .25/copy (Civil)
North Dakota	$3.25 Original	.75/copy
Iowa	$3.50/Original	.50/copy
Montana	$2.60/Original	.50/copy
Nebraska	$3.25/Original	.50/copy

- -

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 October 21, 2022. 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 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 6th day of October, 2022.

BY THE COURT:

Steven R. Jensen, Chief Justice

ATTEST:

Clerk of the Supreme Court
(SEAL)

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

OCT - 6 2022

Clerk