

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE PROPOSED)	NOTICE OF RULES HEARING
AMENDMENT OF SDCL 15-6-5(d))	
AMENDMENT OF SDCL 15-12-33)	NO. 141
AMENDMENT OF SDCL 15-15-4)	
AMENDMENT TO THE APPENDIX OF CHAPTER)	
16-18, SOUTH DAKOTA RULES OF)	
PROFESSIONAL CONDUCT, MAINTAINING THE)	
INTEGRITY OF THE PROFESSION)	
RULE 8.4, MISCONDUCT)	
AMENDMENT TO THE APPENDIX OF CHAPTER)	
25-4A, SOUTH DAKOTA PARENTING)	
GUIDELINES)	
ADOPTION OF A RULE REQUIRING A PARTY)	
TO DEMONSTRATE A PRIMA FACIE SHOWING)	
OF SUBSTANTIAL AND MATERIAL CHANGE IN)	
CIRCUMSTANCE BY AFFIDAVIT BEFORE THE)	
PARTY MAY PROCEED ON A MOTION FOR)	
CHANGE OF PHYSICAL CUSTODY)	

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

NOTICE IS HEREBY GIVEN THAT ON FEBRUARY 11, 2020, 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. **Proposed Amendment of SDCL 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.

Explanation for Proposal

I am the proponent of this rule change, John P. Blackburn, Attorney at Law, Yankton, SD.

I propose the rule change to SDCL 15-6-5(d). In the second and third lines (pocket part) of that statute the words "demands, offers," appear. I propose deletion of those words "demands, offers," because we do not file demands and offers between counsel because, at least in my opinion, demands and offers are made in settlement/negotiation discussions, communications. In fifty-one years, I have never filed a "demand" in litigation which is where demands are usually made and offers and demands are often made in all types of litigations or, if the words are necessary, then clarify the type demands or offers to be filed. If filed, the usual demands and offers could have an adverse effect on party's litigation filings and strategies. Ordinarily, demands and offers are confidential between or among parties. My suggestion for this proposed change is to delete those two words and leave the rest of the statute as is.

This discussion "analysis" is not made pursuant to or based upon any Federal or State statute.

I have not made any comparison to any Federal rule.

My analysis of how the change affects the existing rule/statute is: in spite of the fact those words have been in the statute for many years, I have never seen offers or demands filed which may mean a change is not necessary, but the statute requires these filings and that seems contrary to common practice and avoidance of adversely coloring the litigation.

2. Proposed Amendment of SDCL 15-12-33. Transmittal of copies of order to substitute judge or magistrate and counsel. When an order appointing a substitute judge or magistrate has been filed with the clerk of the circuit court, that clerk shall notify the appointed judge or magistrate of ~~his~~ their appointment by electronic mailing or by personally delivering to them ~~him~~ a certified copy of such order of appointment and a statement of the case if one has been prepared or requested by the said substitute, and shall provide via electronic or first-class mail a certified copy of such order of appointment to all parties or to their attorneys of record in the action involved.

Explanation for Proposal

The proposal by the State Court Administrator's Office is intended to avoid the requirement that a certified copy be provided of the order to substitute a judicial officer. With the transition to electronic documents clerks of court do not routinely print and then make certified copies of orders so this would eliminate that requirement.

3. Proposed Amendment of SDCL 15-15-4. Sale or destruction of exhibits if not collected when judgment final-- Retention of necessary copies--Fee. Whenever the decision or judgment of the court has become final, the clerk of courts shall give notice to the attorneys or parties of record by electronic or first-class ~~registered or certified~~ mail that the exhibits in the possession of the clerk, if not collected within thirty days, shall upon order of the court be destroyed or sold at sale under chapter 15-19. However, upon proper application to the court, the exhibit may be preserved as a part of the permanent record in the files. If an exhibit is a necessary part of the judgment or consists of a written instrument establishing the liability of a party against whom judgment has been rendered, a copy of it shall be made and retained by the clerk and the original canceled by endorsement across its face before being returned to the person entitled thereto as determined by the court. Unless the person entitled thereto as determined by the court shall furnish a true copy of such exhibit, he shall pay the fee of the clerk for making such copy.

Explanation for Proposal

The proposal by the State Court Administrator's Office is intended to avoid the requirement that the notice of sale or destruction be provided by registered or certified mail.

4. Proposed Amendment to:

APPENDIX TO CHAPTER 16-18 IN PART
SOUTH DAKOTA RULES OF PROFESSIONAL CONDUCT

Maintaining the Integrity of the Profession

Rule 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in harassing or discriminatory conduct by the known use of words or actions based upon race, sex, religion, national origin, disability, age, or sexual orientation when that conduct is directed to litigants, witnesses, lawyers, judges, court personnel, or others and that conduct is prejudicial to the administration of justice. This rule does not apply to legitimate advocacy when race, sex, religion, national origin, disability, age, or sexual orientation is an issue in any legal proceeding, action or forum where said counsel provides advice. This rule is not intended to prevent an attorney from declining to represent a client. A finding that a preemptory challenge is exercised in a biased or prejudicial fashion on any of the above-named reasons does not violate this rule. Any violation of the rule may be used solely for disciplinary proceedings and shall not form the basis of a private civil cause of action or a criminal or quasi-criminal complaint or charge.

Explanation for Proposal

The proposed amendment to Rule 8.4 is being sent to the Court, by the State Bar of South Dakota, after a great deal of discussion and debate by the State Bar Commission and the Bar at

large. This rule amendment was discussed and debated by the State Bar Commission at its regular meeting on April 24, 2019. After discussion, it was moved and seconded that the Commission present the proposed Rule 8.4 amendment to the Bar membership for a vote at the Bar's annual meeting in June 2019. The motion passed with 7 aye votes, 5 no votes and one abstention.

The proposed rule was then presented to the State Bar's membership at its June 2019 annual meeting. President Reed Rasmussen introduced the proposal to amend Rule 8.4 (Misconduct) of the South Dakota Rules of Professional Conduct by Supreme Court Rule. Thereafter, a motion was made that the State Bar of South Dakota propose and support a change to the South Dakota Rules of Professional Conduct before the Supreme Court by supporting the addition to Rule 8.4 as approved by the Bar Commission. The motion was seconded. Thereafter, comments were made by members both for and against the proposed change to Rule 8.4. After a lengthy discussion, the question was called, and the call was supported by the membership. A voice vote was then held, and the motion was declared passed by the President. Immediately thereafter, a request for a division of the house was made by a member and granted by the President. Those that supported the motion were asked to stand and then those that were opposed were asked to stand. After observing the division, President Rasmussen declared the motion passed by a majority of those present. However, the division did demonstrate that there was a considerable number of members present opposed.

The enclosed proposal adds a subsection to Rule 8.4. The new subsection would specifically make it professional misconduct for a lawyer to "engage in harassing or discriminatory conduct by the known use of words or actions based upon race, sex, religion, national origin, disability, age, or sexual orientation when that conduct is directed to litigants, witnesses, lawyers, judges, court personnel, or others and that conduct is prejudicial to the administration of justice." The new subsection also outlines when the rule does not apply and that it is not intended to prevent an attorney from declining to represent a client.

The proposed amendment to Rule 8.4 is not based upon any state or federal rule or statute and it should not affect any other current rules or statutes.

5. Proposed Amendment to:

**APPENDIX TO CHAPTER 25-4A
SOUTH DAKOTA PARENTING GUIDELINES**

Introduction

A powerful cause of stress, suffering, and maladjustment in children of divorce or separation is not simply the divorce or separation itself, but rather the continuing conflict between their parents before, during, and after the divorce and/or separation. To minimize harm to their children, parents should agree on a parenting arrangement that is most conducive to the children having frequent and meaningful contact with both parents, with as little conflict as possible. When parental maturity, personality, and communication skills are adequate, the ideal arrangement is reasonable time with the noncustodial parent upon reasonable notice, since that provides the greatest flexibility. The next best arrangement is a detailed parenting agreement made by the parents to fit their particular needs and, more importantly, the needs of their children. It is recommended that an annual calendar be prepared so that the parents and the children are aware of the parenting schedule. If the parents are unable to agree on their own Parenting Plan, however, these Guidelines become mandatory and will be used as their Parenting Plan and are enforceable as a court order. SDCL 25-4A-10, 25-4A-11. In the event a parent's time with the children becomes an issue in court, the judge will set whatever Parenting Plan best meets the needs of the children.

GUIDELINE 1. GENERAL RULES

A parent must always avoid speaking negatively about the other parent and must firmly discourage such conduct by relatives or friends. Each parent should speak in positive terms about the other parent in the presence of the children. Each parent must encourage the children to respect the other parent. Children should never be used by one parent to spy or report on the other parent. The basic rules of conduct and discipline established by the custodial parent should be the baseline standard for both parents and any step-parents, and consistently enforced by all caregivers, so that the children do not receive mixed messages.

Children will benefit from continued contact with all relatives and friends on both sides of the family for whom they feel affection. Such relationships must be protected and encouraged. But relatives, like parents, need to avoid being critical of either parent in front of the children. Parents

should have their children maintain ties with both the maternal and paternal relatives. Usually the children will visit the paternal relatives during times when the children are with their father and the maternal relatives during times when they are with their mother.

In cases where both parents reside in the same community at the time of separation, and then one parent leaves the area, thus changing the Parenting Plan, the court will consider imposing on the parent who moved the travel costs for the children necessary to facilitate future time with the children; however, the court will also consider other factors such as the economic circumstances of the parents and the reasons prompting the move. Before relocating the children, the custodial parent is required to comply with South Dakota's statutory forty-five-day written notice requirements. SDCL 25-4A-17.

1.1. Parental Communication. Parents must always keep each other advised of their home and work addresses and telephone numbers. Whenever feasible, all communication concerning the children must be conducted directly between the parents in person, or by telephone, or at their residences, or via email or text message. Absent an emergency, communication should not occur at a parent's place of employment.

1.2. Grade Reports and Medical Information. The custodial parent must provide the noncustodial parent with the name, address, and telephone number of the school where any child attends and must authorize the noncustodial parent to communicate concerning the child directly with the school and with the child's doctors and other professionals, outside the presence of the custodial parent. The noncustodial parent also has an obligation to contact the school to ensure receipt of school report cards, notices, etc., so that he/she can remain involved with their child's education. Both parents will be listed on all of the child's records. Each parent must immediately notify the other parent of any medical emergencies or serious illnesses of a child. Access to records and information pertaining to a minor child, including, but not limited to, medical, dental, orthodontia and similar health care, and school records must be made equally available to both parents. Counseling, psychiatric, psychotherapy, and other records subject to confidentiality or privilege must only be released in accordance with state and federal law; but, if available to one parent, must be available to both. The parents must make reasonable efforts to ensure that the name and address of the other parent is listed on all such records. If the child is taking medications, the custodial parent must provide a sufficient amount and appropriate instructions. If either parent enrolls the child in any social, beneficent,

religious, or peer group activity, service, benefit, or program for which written application is required, the enrolling parent must provide the name and address of the other parent on, or supplementary to, the application. [This provision does not apply to insurance or annuities.] The parent enrolling the child shall advise the other parent of the name of the coach, director, and organization providing the activity along with their contact information. The custodial parent must notify the noncustodial parent of all school or other events (for example, church and sports) involving parental participation. The noncustodial parent also has an obligation to contact the activity director to ensure receipt of information such as practice schedules, games, etc.

Attendance at academic or disciplinary meetings pertaining to the minor child shall be limited to the parents and the respective school professional(s). Others shall not attend such meetings without advance mutual parental agreement or court order.

1.3. Clothing. The custodial parent will send an appropriate supply of children's clothing with the children, which must be returned clean (when reasonably possible) with the children by the noncustodial parent. The noncustodial parent must advise, as far in advance as possible, of any special activities so that appropriate clothing belonging to the children may be sent. It is recommended that the noncustodial parent have some basic clothing available in his/her home to ensure that all of the children's basic needs are met.

1.4. Withholding Support or Time with the Children. Neither time with the children nor child support is to be withheld because of either parent's failure to comply with a court order. Only the court may enter sanctions for non-compliance. Children have a right both to support and, absent abuse or other safety concerns, time with the noncustodial parent, neither of which is dependent upon the other. In other words, no support does not mean the children will spend no time with the noncustodial parent, and no time with the noncustodial parent does not mean no support needs to be paid to the custodial parent. If there is a violation of either the parenting order or a support order, the exclusive remedy is to apply to the court for appropriate sanctions.

1.5. Adjustments in Parenting Plan. Although this is a specific schedule, the parents are expected to fairly modify the Parenting Plan when family necessities, illnesses, or commitments reasonably so require. The requesting parent must act in good faith and give as much notice as circumstances permit.

~~**1.6. Parent's Vacation with Children.** Unless otherwise specified in a court order or agreed upon by the parents, each parent is entitled to a vacation with the children for a reasonable period of time, usually equal. The custodial parent should plan a vacation during the time when the other parent is not scheduled to spend time with the children. Parents are encouraged to coordinate vacation plans.~~

1.76. Insurance Forms. The parent who has medical insurance coverage on the children must supply to the other parent an insurance card and, as applicable, insurance forms and a list of insurer-approved or HMO-qualified health care providers in the area where the other parent is residing. Except in emergencies, the parent taking the children to a doctor, dentist, or other provider not so approved or qualified may be required to pay the additional cost thus created. However, when there is a change in insurance, which requires a change in medical care providers and a child has a chronic illness, thoughtful consideration should be given by the parents to what is more important, i.e., allowing the child to remain with the original provider or the economic consequences of changing carriers. When there is an obligation to pay medical expenses, the parent responsible for paying must be promptly furnished with the bill, and where applicable, the explanation of benefits, by the other parent. The parents must cooperate in submitting bills to the appropriate insurance carrier. Thereafter, the parent responsible for paying the balance of the bill must make arrangements directly with the health care provider and will inform the other parent of such arrangements unless previously paid by the other parent. Insurance refunds must be promptly turned over to the parent who paid the bill for which the refund was received.

1.87. Child Support Abatement. Unless a court order otherwise provides, child support will not abate during any period when the children are with the noncustodial parent. South Dakota law allows for child support abatements and offsets under certain circumstances. See generally SDCL 25-7. However, no abatement or offset may be taken unless there is a court order authorizing it.

1.98. Noncustodial Parent's Missed Time with the Children. When scheduled time with the children cannot occur due to events beyond either parent's control, such as illness of the parent exercising time with the children, then a mutually agreeable substituted date will be arranged, as quickly as possible. Each parent must timely advise the other parent when scheduled time with the children cannot be exercised. Missed time with the children must not be unreasonably accumulated.

1.109. Children of Different Ages. Except with very young children and adolescents, it usually makes sense for all the children to share the same schedule of parenting time with the noncustodial parent. Having brothers or sisters along can be an important support for children. Infants have special needs that may well prevent a parent from being with both the infant and the older children at the same time. Teenagers' special needs for peer involvement and for some control of their own lives may place them on different schedules from their younger brothers and sisters. Because it is intended that the noncustodial parent's time with the children be a shared experience between siblings and, unless these guidelines, a court order, or circumstances such as age, illness, or a particular event suggests otherwise, all the children should participate together in spending time with the noncustodial parent.

1.110. Communication with Children. Either parent may call, text, email, or Skype (or use similar technology) to communicate with the children at reasonable times and with reasonable frequency during those periods the children are with the other parent. The children may, of course, call, text, email, or Skype (or use similar technology) to communicate with either parent, at reasonable hours and with reasonable frequencies. Parents are cautioned that communication between the parent and the children should not be so excessive as to interfere with the other parent's time, nor used to undermine the other parent's authority. During long vacations, the parent with whom the children are on vacation is required to make the children available for telephone calls with the other parent at least every three days. At all other times, the parent the children are with must not refuse to answer the other parent's telephone calls or turn off the telephone in order to deny the other parent telephone contact. If a parent uses an answering machine or cell phone voicemail, messages left should be returned by a telephone call to that parent as soon as possible. Parents should agree on a specified time for calls to the children so that the children will be made available no less than three days per week. ~~Either parent may wish to provide an elder a child with a cell phone to facilitate these communications.~~ In such instances, it is not appropriate for a parent to use restrictions from talking to the other parent on that cell phone as a means of punishing the child subject to a parent's ability to set reasonable restrictions on cell phone use while the child is present in that parent's home. Communication between a parent and child must not be censored, recorded, or monitored, absent a court order. With older children, establishing an email account for communication with the other parent is recommended and should likewise not be read or monitored by the other parent without court permission. Email communication or text messaging between parents is also

helpful in keeping the other parent informed about the children. Abuse, neglect, criminal activity, or protection orders may impact access to information regarding the custodial parent or the children.

1.1211. Other Contact. Parents have an unrestricted right to send cards, letters, packages, audio and video cassettes, CDs, or similar items, to their children. Children also have the same right to send items to their parents. Neither parent will interfere with this right. A parent may wish to provide the children with self-addressed, stamped envelopes for the children's use in corresponding with that parent.

1.12. Social Media. Parents shall be entitled to the username and passwords to all social media accounts of the minor children. Each parent shall have unfettered full access to the social media accounts of the minor children with the exception of private communications between the other parent and children.

1.13. Privacy of Residence. A parent may not enter the residence of the other parent except by express invitation of the resident parent, regardless of whether a parent retains a property interest in the residence. The children must be picked up at and returned to the front entrance of the other parent's residence. The parent dropping off the children must not leave until the children are safely inside the other parent's residence. Parents must refrain from surprise visits to the other parent's home. A parent's time with the children is his/her own, and the children's time with the other parent is equally private.

1.14. Parenting Time Refusal. Parents should always encourage the children to attend parenting time with the other parent absent circumstances outlined in 1.17. Parents shall not deny parenting time with the other parent solely based on the refusal of the children.

1.1415. Special Considerations for Adolescents. While children never get to choose where they live, within reason, the parents should honestly and fairly consider their teenager's wishes on time with a parent. Neither parent should attempt to pressure their teenager to make a decision on time with a parent adverse to the other parent. Teenagers should explain the reasons for their wishes directly to the affected parent, without intervention by the other parent.

1.1516. Day Care Providers. When parents reside in the same community, they should use the same day care provider. To the extent feasible, the parents should rely on each other to care for the children when the other parent is unavailable.

1.1617. Special Circumstances:

- A. **Child Abuse.** When child abuse has been established and a continuing danger is shown to exist, all time with the abusive parent must cease or only be allowed under supervision, depending on the circumstances. Court intervention is usually required in child abuse cases.
- B. **Domestic Abuse.** Witnessing domestic abuse has long-term, emotionally detrimental effects on children. A person who loses control and acts impulsively with the other parent may be capable of doing so with children as well. Depending on the nature of the spousal abuse and when it occurred, the court may require an abusive parent to successfully complete appropriate counseling before being permitted unsupervised time with the children.
- C. **Substance Abuse.** Time with the children must not occur when a parent is abusing substances.
- D. **Long Interruption of Contact.** In those situations where the noncustodial parent has not had an ongoing relationship with the children for an extended period, time with the children should begin with brief parenting time and a gradual transition to the Parenting Plan in these guidelines.
- E. **Abduction Threats.** Noncustodial parents who have threatened to abduct or hide the children will have either no time with the children or only supervised time.
- F. **Breastfeeding Child.** Parents must be sensitive to the special needs of breastfeeding children. A child's basic sleep, feeding, and waking cycles should be maintained to limit disruption in the child's routine. Forcibly changing these routines due to the upheaval of parental disagreement is detrimental to the physical health and emotional well-being of the child. On the other hand, it is important that the child be able to bond with both parents.

- (a) For children being exclusively breastfed, the nursing child can still have frequent parenting time with the father. The amount of time will be dictated by the infant's feeding schedule, progressing to more time as the child grows older. Yet where both parents have been engaged in an ongoing caregiving routine with a nursing child, the same caregiving arrangement should be continued as much as possible to maintain

stability for the child. If the father has been caring for the child overnight or for twenty-four hour periods while the nursing mother sleeps or works, then these guidelines encourage that arrangement to continue.

- (b) A mother may not use breastfeeding as a means to deprive the father of time with the child. If, for example, a nursing mother uses day care or a babysitter for the child, the same accommodations (i.e., bottle feeding with breast milk or formula, or increased time between breast feeding sessions) used with the day care provider or babysitter will be used with the father, if the father is capable of personally providing the same caregiving.

- G. **A Parent's New Relationship.** Parents should be sensitive to the danger of exposing the children too quickly to new relationships while they are still adjusting to the trauma of their parents' separation and/or divorce.
- H. **Religious Holidays and Native American Ceremonies.** Parents must respect their children's needs to be raised in their faith and to maintain their cultural heritage and must cooperate with each other to achieve these goals. However, religious holidays and Native American ceremonies should not be used to unreasonably deprive the noncustodial parent of time with the children.
- I. **Other.** The court will limit or deny time with the children to parents who show neglectful, impulsive, immoral, criminal, assaultive, or other risk-taking behavior with or in the presence of the children.

1.18. Additional Time with the Noncustodial Parent. The children's time with the noncustodial parent should be liberal and flexible. For many parents, these guidelines should be considered only a minimum direction for interaction with the children. These guidelines are not meant to foreclose the parents from agreeing to modify the Parenting Plan as they find reasonable and in the best interests of their children at any given time.

GUIDELINE 2. NONCUSTODIAL PARENTING TIME WITH CHILDREN UNDER AGE FIVE

2.1. Children Under Age Five Generally. Newborns (birth to three months) and infants (three to six months) have a great need for continuous contact with their primary caregiver, but also

frequent contact with both parents who provide a sense of security, nurturing, and predictability. Generally, overnights for a very young child is not recommended unless the noncustodial parent is very closely attached to the child and is able personally to provide primary care, the child is adaptable, and the parents are cooperative. Older children are able to tolerate more and longer separations from one parent or the other. The following guidelines for children under age five are designed to take into account childhood developmental milestones. Since children mature at different rates, these may need to be adjusted to fit a child's individual circumstances. These guidelines will not apply in those instances where the parents are truly sharing equally all the caregiving responsibilities for the children and the children are equally attached to both parents. In those situations where the custodial parent has been the primary caregiver and the noncustodial parent has maintained a continuous relationship with the children, but has not shared equally in child caregiving, the following guidelines generally apply.

2.2. Newborns - Birth ~~to~~ until Three Months. Three, two-hour custodial periods per week and one weekend custodial period for six hours at the custodial parent's residence or another agreed location. No overnights, except in circumstances described in 1.1617 F(a) and (b) (noncustodial parent caring for infant in accord with previous arrangements). Breastfeeding must be accommodated, but the parents must cooperate in working out alternatives. See Paragraph 1.1617 F (breastfeeding).

2.3. Infants - Three ~~to~~ until Six Months. Alternative Parenting Plans: (1) Three, three-hour custodial periods per week, ~~with and~~ one weekend day for six hours. Breast feeding must be accommodated, but the parents must cooperate in working out alternatives. Or (2) Three, three-hour custodial periods per week, ~~with and~~ one overnight on a weekend not to exceed for no longer than a twelve eighteen-hours-period, if the child is not breastfeeding and the noncustodial parent is capable of personally providing primary care. See exceptions in Paragraph 1.1617 F (a) and (b) (breastfeeding).

2.4. Babies - Six ~~to~~ until Twelve Months. Alternative Parenting Plans: (1) Three, four-hour custodial periods per week of ~~up to four hours each with and~~ one weekend day for six hours; or (2) Three, four-hour custodial periods per week of ~~up to four hours each with and one weekend day for six hours, but with one overnight on a weekend not to exceed twelve~~ eighteen hours, if the child is not breastfeeding, and the noncustodial parent is capable of providing personal primary care; or (3) Child spends time in alternate homes, but spends significantly more time in one parent's home and no more than one to two overnights spaced

regularly throughout the week at the other parent's home, if the child is not breastfeeding. As to arrangements (1), (2), and (3), see exceptions in Paragraph 1. ~~1617 F(a) and (b)~~. Arrangement (3) ~~should be considered only for mature, requires an~~ adaptable children and cooperative parents.

2.5. Toddlers - Twelve to until Thirty-six Months.

Alternative Parenting Plans: (1) Three, eight-hour custodial periods per week ~~of up to eight hours each~~ on a predictable schedule; or (2) Three, eight-hour custodial periods per week ~~of up to eight hours each~~ on a predictable schedule ~~in addition to~~ and one overnight per week not to exceed eighteen hours; or (3) Child spends time in alternate homes, but with significantly more time in one parent's home with one or two overnights spaced regularly throughout the week. Arrangement (3) requires an adaptable child ~~and cooperative parents.~~

2.6. Preschoolers - Three to until Five Years. Alternative Parenting Plans: (1) One overnight custodial period not to exceed eighteen hours and one two additional eight-hour parenting periods each week, separate from the overnight custodial period, midweek custodial period with the child returning to the custodial parent's home at least one hour before bedtime; or (2) Two or three nights at one home, spaced throughout the week, the remaining time at the other parent's home. Arrangement (2) requires an adaptable child ~~and cooperative parents.~~

If parents cannot agree on which provision shall apply in sections 2.2 through 2.6, the parties shall use option 1 until further order of the court.

~~In addition, a vacation of no longer than two weeks with the noncustodial parent.~~

2.7. Children in Day Care. In families where a child has been in day care before the parental separation, the child may be able to tolerate more time with the noncustodial parent earlier because the child is more accustomed to separations from both parents. The noncustodial parent of a child under age five should not during his/her time place the child with a babysitter or day care provider. If the noncustodial parent cannot be with the child personally, the child should be returned to the custodial parent. Allowing the child to visit with relatives for short periods of time may be appropriate, if the relatives are not merely serving as babysitters. While a child is in day care, the noncustodial parent may remove the child to have parenting time, provided that suitable prior arrangements are made with both the custodial parent and the day care provider. This parenting time must also not jeopardize the provision of the day care by that provider. The noncustodial parent must be available to provide

direct care and at least one day's notice is given to the custodial parent. The parent removing the child is either to take the child to the other parent at the regular pick up time, or see that the child is returned to day care prior to the pick up time. Parental responsibility for day care costs will remain the same.

2.8. ~~Holidays and Summer.~~ For toddlers and preschool-age children, when the parents celebrate the holiday in the same or a nearby community, the parents will alternate Easter, Memorial Day, 4th of July, Labor Day, Thanksgiving, Christmas Eve and Christmas Day each year so that the children spend equal time with each parent during this holiday period. Prior to a child's 5th birthday, holiday parenting time shall be consistent with the longest period of parenting time currently being exercised by the noncustodial parent starting on the day of the holiday. ~~Other major holidays should also be divided between the parents. With children ages three to five, a vacation of up to two weeks of uninterrupted time in the summer upon thirty days advance written notice (by mail, email, or text message) is reasonable. Parents are encouraged to coordinate vacation plans.~~

2.9. Mother's Day - Father's Day. The children shall be with their mother each Mother's Day and with their father each Father's Day. Prior to a child's 5th birthday, this parenting time shall be consistent with the longest period of parenting time currently being exercised by the noncustodial parent.

2.10. Vacation for Children Three until Five Years Old. Upon thirty days advance written notice (by mail, email, or text message), each parent is entitled to a vacation of up to two separate one-week periods of uninterrupted time with children each year, not to conflict with the other parent's holiday parenting time. Parents are encouraged to coordinate vacation plans.

GUIDELINE 3. NONCUSTODIAL PARENTING TIME FOR CHILDREN OVER AGE FIVE AND OLDER WHEN THERE IS SOLE CUSTODY OR PRIMARY PHYSICAL CUSTODY AND THE PARENTS RESIDE NO MORE THAN 200 MILES APART

3.1. Weekends. Parenting time will consist of alternate weekends from Friday at 5:30 p.m. to Sunday at 7:00 p.m., or an equivalent period of time if the noncustodial parent is unavailable on weekends and the children do not miss school. The starting and ending times may change to fit the parents' schedules. In addition, if time and distance allow, the noncustodial parent may spend time on a regular schedule with the children once or twice per week for two or three hours, or have one midweek overnight time. In most cases, it is a positive

experience for the children to have the noncustodial parent involved in taking the children to and from school, and it is recommended that the noncustodial parent extend the alternating weekends by picking up the children from school on Friday and taking the children to school on Monday. All transportation for the midweek custodial periods is the responsibility of the parent exercising them.

3.2. Mother's Day - Father's Day. The children shall be with their mother each Mother's Day and with their father each Father's Day from 9:00 a.m. to 8:00 p.m. ~~Conflicts between these special days and regular parenting time will be resolved under Paragraph 1.9.~~

3.3. Summer Vacation. The children will be with each parent for one-half of the school summer vacation. Summer vacation begins the day after school is released and ends the day before school commences. The custodial parent may elect to have the child the week before school resumes as part of their summer vacation to allow the child to be well prepared to recommence school. At the option of the noncustodial parent, the time may be consecutive or it may be split into two or more blocks of time. If the children go to summer school and it is impossible for the noncustodial parent to schedule this time other than during summer school, the noncustodial parent may elect to take the time when the children are in summer school and transport the children to the summer school sessions at the children's school or an equivalent summer school session in the noncustodial parent's community.

3.4. Winter (Christmas) Vacation. The children will spend with each parent one-half of the school winter vacation, a period that begins ~~the evening when~~ the children are released from school and continues to the morning evening of the day ~~before~~ the children ~~will~~ return to school. If the parents cannot agree on the division of this period, the noncustodial parent will have the first half in even-numbered years. If there are an odd number of days during winter vacation, the noncustodial parent shall get the extra day. Holidays, such as Christmas, are extremely important times of shared enjoyment, family tradition, and meaning. Families living in the same or nearby communities must work out ways for the children to spend part of each important holiday at both homes. If the parents are unable to work out a shared arrangement for the Christmas/New Year holiday and they celebrate the holidays in the same or a nearby community, in those years when Christmas does not fall in a parent's week, the children will be with the other parent from 11:00 a.m. to 8:00 p.m. on Christmas Day.

3.5. Holidays ~~Weekends~~. Parents will alternate the following holidays weekends so long as they are observed by the child's school district: Martin Luther King, Jr. Day; President's Day; Easter; Memorial Day; the 4th of July; Labor Day; Native Americans' Day; Halloween; and Thanksgiving. Thanksgiving will begin on Wednesday evening and end on Sunday evening; Easter weekend will begin on Thursday evening and end on Sunday evening; Martin Luther King Jr. Day, President's Day, and Native Americans' Day weekends will begin on the preceding Friday evening and end on Monday evening; the 4th of July will begin the evening of July 3 at 5:00 p.m. and end the morning of July 5 at 10:00 a.m.; Halloween will begin at 3:00 p.m. and end at 8:00 p.m. Unless otherwise specified, holiday weekends begin at ~~5:30 p.m.~~ when the children are released from school and continues to the morning of the day the children are returned to school. ~~and end at 7:00 p.m. on the designated days. The noncustodial parent will have Memorial Day weekend and the custodial parent will have Labor Day weekend.~~

3.6. Children's Birthdays. As with holidays, a child's birthday will be alternated annually between the parents. If a child's birthday falls on a weekday, it will be celebrated from 3:00 p.m. to 8:00 p.m. If a child's birthday falls on a weekend, it will be celebrated with ~~the noncustodial parent~~ from 11:00 a.m. to 8:00 p.m. ~~(or so much of the period as the noncustodial parent elects to use).~~ In some instances, the parents may agree to share the child's birthday, with each parent spending a few hours with the child.

3.7. Parent's Birthdays. The children will spend the day with the parent on the parent's birthday, unless it interferes with the other parent's scheduled time during a vacation or a major holiday. If a parent's birthday falls on a holiday, that parent may elect to exercise parenting time on another day during that month, upon sufficient advance notice to the other parent.

3.8. Conflicts Between Regular and Holiday Weekends. When there is a conflict between a holiday weekend and the regularly scheduled weekend time with the parent, the holiday takes precedence. Unless mutually agreed, there will be no makeup parenting time in conflicts between holiday weekend and the regularly scheduled weekend time.

3.9. Parenting Time Before and During Summer Periods. The custodial parent will have the weekend before the beginning and the weekend after the end of the noncustodial parent's summer period, regardless of whose weekend it may be. Weekend time "missed" during the summer period will not be "made up." During the noncustodial parent's extended summer time with the children

of more than three consecutive weeks, it will be the noncustodial parent's duty to arrange for a mutually convenient 48-hour continuous period of time for the custodial parent to spend with the children, unless impractical because of distance.

3.10. Parent's Vacation with Children Age Five and Older. Unless otherwise specified in a court order or agreed upon by the parents, each parent is entitled to a vacation with the children for a reasonable period of time, usually equal. The custodial parent should plan a vacation during the time when the other parent is not scheduled to spend time with the children. Parents are encouraged to coordinate vacation plans.

3.1011. Notice of Canceled Time with the Children. Whenever possible, the noncustodial parent will give a minimum of three days notice of intent not to exercise all or part of the scheduled time with the children. When such notice is not reasonably possible, the maximum notice permitted by the circumstances, and the explanation, will be provided to the other parent. Custodial parents will give the same type of notice when events beyond their control make the cancellation or modification of the scheduled time with the noncustodial parent necessary. If the custodial parent cancels or modifies the noncustodial parent's time with the children because the children have a scheduling conflict, the noncustodial parent will be given the opportunity to take the children to the scheduled event or appointment.

3.1112. Pick Up and Return of Children. When the parents live in the same community, the responsibility for picking up and returning the children will be shared. Usually the parent who receives the children will handle the transportation. The person picking up or returning the children has an obligation to be punctual, to arrive at the agreed-upon time, not substantially earlier or later. Repeated, unjustified violations of this provision may subject the offender to court sanctions.

~~3.12. Additional Time with the Noncustodial Parent.~~ The children's time with the noncustodial parent should be liberal and flexible. For many parents, these guidelines should be considered only a minimum direction for interaction with the children. These guidelines are not meant to foreclose the parents from agreeing to modify the Parenting Plan as they find reasonable and in the best interests of their children at any given time.

GUIDELINE 4. NONCUSTODIAL PARENTING TIME WITH CHILDREN OVER AGE FIVE AND OLDER WHEN PARENTS RESIDE MORE THAN 200 MILES APART

~~4.1. Summer and Holidays. This parenting time will consist of all but three weeks of the school summer vacation period. It is recommended that the time start one week after school is out and end two weeks before school begins so that the child will be well prepared to recommence school. In addition, w~~ Where distance and finances permit, on an alternating basis, the Thanksgiving break, school winter (Christmas) break, and spring break will be with the noncustodial parent.

4.2. Summers. This parenting time will consist of all but 10 days of the school summer vacation period beginning three days after school is released and ending one week before school recommences so the children will be well prepared to recommence school.

4.23. Priority of Summer Time with Noncustodial Parent. Summer time with the noncustodial parent takes precedence over summer activities (such as sports) when the noncustodial parent's time cannot be reasonably scheduled around such events. Even so, the conscientious noncustodial parent will often be able to enroll the child in a similar activity in the noncustodial parent's community.

4.34. Notice. At least sixty (60) days written notice (by mail, email, or text message) must be given by the noncustodial parent of the date for commencing extended summer parenting time with the children so that the most efficient means of transportation may be obtained and the parents and the children may arrange their schedules. Failure to give the precise number of days notice does not entitle the custodial parent the right to deny the noncustodial parent parenting time with the children.

4.45. Additional Time with the Noncustodial Parent. Where distance and finances permit, additional parenting time for the noncustodial parent, such as holiday weekends or special events, is encouraged. When the noncustodial parent is in the area where the children reside, or the children are in the area where the noncustodial parent resides, liberal time with the children must be allowed and because the noncustodial parent does not get weekly time with the children, the children can miss some school to spend time with the noncustodial parent, so long as it does not substantially impair the children's scholastic progress.

GUIDELINE 5. SHARED PARENTING PLAN

5.1. Shared Parenting Plan. South Dakota law allows parents to agree in writing to a detailed Shared Parenting Plan, which provides that the children will reside no less than one hundred eighty nights per calendar year in each parent's home, and that the parents will share the duties and responsibilities of parenting the children and the expenses of the children in proportion to their incomes. Such Shared Parenting Plan must be incorporated into the custody order. SDCL 25-7-6.27. A Shared Parenting Plan requires adaptable children and cooperative parents.

5.2. Factors for Shared Parenting. SDCL 25-4A-24 sets forth the factors the court considers in granting shared parenting.

Explanation for Proposal

Over the past year the Family Law Committee of the State Bar of South Dakota worked on the enclosed proposal to modify the guidelines. The Committee noted, while the guidelines are implemented as an initial custody order, they lack clarity as to which parenting plan is imposed when children are less than five years of age. Further, the Committee noted the guidelines have not been modified to reflect factors to be considered when determining whether a shared parenting plan should be implemented or not pursuant to SDCL § 25-4A-24. Finally, the Committee felt it would be beneficial to address issues concerning social media and other regularly discussed parenting issues that are not addressed in the current guidelines.

For the Court's information, the enclosed proposed guidelines were presented to the South Dakota Bar Commission on April 24, 2019. At that time, the Commission voted to present the proposed amended parenting guidelines to the Bar membership at the annual meeting in June. Thereafter, the revised parenting guidelines were presented to the State Bar membership at its June 2019 annual meeting at which time the members present, by voice vote, voted to support amending the guidelines without any audible opposition.

The revised guidelines are not based upon any specific state or federal rule or statute and they should not affect any other current rules or statutes.

6. Proposed adoption for a new Supreme Court Rule requiring a party to demonstrate a prima facie showing of a substantial and material change in circumstances by affidavit before the party may proceed on a motion for change of physical custody.

A party seeking modification of a child custody order entered after a contested hearing has the burden of proving (1) there has been a substantial and material change of circumstances since the existing custody order was entered and (2) the welfare and best interests of the child require modification. The fact conditions have changed since the custody order is not sufficient in itself to warrant a custody modification. Either factor standing alone will not justify a change of custody; both must be present.

Before a party may proceed on a motion for a change of physical custody, the moving party must submit an affidavit sufficient to demonstrate a prima facie showing of a substantial and material change in circumstances. Upon the filing of the motion and affidavit, the court shall schedule an expedited hearing as soon as practical. Further, the court may order the parties to adhere to SDCL § 15-6-6(d) for filing further pleadings before the scheduled hearing.

At the prima facie hearing, the court shall make the determination as to whether the matter may proceed to trial and if so, whether a custody evaluation, consistent with SDCL § 25-4A-23, or mediation, consistent with SDCL § 25-4-56, shall be ordered.

Explanation for Proposal

This proposed rule is being brought by the State Bar as a result of State Bar's Family Law Committee working through and discussing various proposals. The purpose of the rule is to set a threshold a party must overcome before a change in custody matter may proceed through the court process in instances where a child custody order was previously entered after a contested hearing. The State Bar's Family Law Committee believes the proposed rule will provide for judicial economy and save party litigants' time and resources.

For the Court's information, the enclosed proposed rule was presented to the South Dakota Bar Commission on April 24, 2019. At that time, the Commission voted to present the proposed rule to the Bar membership at the annual meeting in June.

Notice of Rules Hearing No. 141 - February 11, 2020

Thereafter, the rule was presented to the State Bar membership at its June 2019 annual meeting at which time the members present voted to support it.

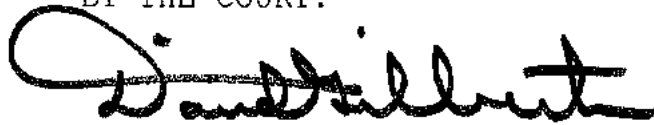
The proposed rule is not based upon any specific state or federal rule or statute and it should not affect any other current rules or statutes.

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 January 21, 2020. 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 <http://www.ujs.sd.gov/> or the State Bar of South Dakota's website at <http://www.sdbar.org/>.

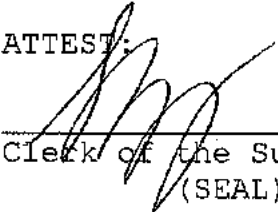
DATED at Pierre, South Dakota this 12th day of December, 2019.

BY THE COURT:



David Gilbertson, Chief Justice
SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

ATTEST:



Clerk of the Supreme Court
(SEAL)

DEC 12 2019


Clerk