

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

IN THE MATTER OF THE PROPOSED)
ADOPTION OF A NEW RULE RELATING TO)
THE CREATION OF A COMMISSION ON)
PARENTING TIME GUIDELINES)
AMENDMENT TO THE APPENDIX OF CHAPTER)
16-2, SOUTH DAKOTA CODE OF JUDICIAL)
CONDUCT: CANON 3(B)(9). CONCERNING)
THE ABILITY OF A JUDGE TO COMMENT ON)
PENDING MATTERS UNDER CERTAIN)
CONDITIONS)
AMENDMENT TO THE APPENDIX OF CHAPTER)
16-2, SOUTH DAKOTA CODE OF JUDICIAL)
CONDUCT: CANON 3(D). CONCERNING THE)
DISCLOSURE OF INFORMATION OBTAINED AS)
PART OF A JUDICIAL OR LAWYER)
ASSISTANCE PROGRAM AND RULE 8.3 OF)
THE RULES OF PROFESSIONAL CONDUCT)

NOTICE OF SPECIAL
RULES HEARING

NO. 142

Petitions for amendments of existing sections of the South Dakota Codified Laws and adoption of a new rule 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 AUGUST 25, 2020, at 9:00 A.M., C.T., at the Courtroom of the Supreme Court in the Capitol Building, Pierre, South Dakota, the Court will consider the following:

1. Proposed Adoption for a New Supreme Court Rule Relating to the Creation of a Commission on Parenting Time Guidelines.

Section 1. That a new rule be added to SDCL ch. 25-4A as follows:

The Supreme Court shall, commencing in the year 2021, establish quadrennially a Commission on Parenting Time Guidelines. The commission shall review the standard parenting guidelines outlined in § 25-4A-10 and shall report its findings and recommendations to the Supreme Court, Governor and the Legislature no later than October 1 of the year in which it is appointed.

Section 2. That a new rule be added to SDCL ch. 25-4A as follows:

The commission shall be composed of seven members.

(1) The Supreme Court shall appoint the following positions:

(1) A member of the South Dakota Judiciary;

(2) A member in good standing of the South Dakota State Bar;

(3) A professional in the field of childhood development.

(2) The Governor shall appoint the following two positions:

(1) Noncustodial parent;

(2) Custodial parent.

(3) The Speaker of the House of Representatives shall appoint the following position:

(1) State Representative.

(4) The President Pro Tempore of the Senate shall appoint the following position:

(1) State Senator.

Section 3. That a new rule be added to SDCL ch. 25-4A as follows:

The Commission shall hold at least three public hearings on three separate occasions prior to the submission of the report. In addition to public testimony, the Commission may receive and review other information deemed necessary in preparation of its report and recommendations.

Explanation for Proposal

The proposed rule offered by the State Court Administrator is intended to create a Commission to review and make recommendations to the Supreme Court related to the minimum standard parenting time guidelines. SDCL § 25-4A-10, as amended during the 2020 Legislative Session (HB 1140), requires the Supreme Court to create a public hearing process to review the minimum standard guidelines and to recommend any amendments determined appropriate.

The proposed rule is not directly based on any other federal or state law, but does borrow from the structure created for the Child Support Commission as provided for in SDCL § 25-7-6.12 and enacted by Executive Order 2016-01.

Please find the following attached for reference:

- 2020 House Bill 1140
- Executive Order 2016-01
- SDCL 25-7-6.12

2020 House Bill 1140 - Enrolled

20.224.12 95th Legislative Session 870

2020 South Dakota Legislature
House Bill 1140
ENROLLED

AN ACT

ENTITLED An Act to provide for a regular review of parenting guidelines.

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

Section 1. That § 25-4A-10 be AMENDED:

25-4A-10. Noncustodial parenting time--Minimum standard guidelines--Promulgation of court rules.

The South Dakota Supreme Court shall promulgate court rules establishing standard guidelines to be used statewide for minimum noncustodial parenting time in divorce or separate maintenance actions or any other custody action or proceeding. The minimum standard guidelines shall provide a framework for noncustodial parenting time including frequency and time for noncustodial parenting time; hours or days of noncustodial parenting time; definitions for weekends, holidays, birthdays, and other special occasions; and time periods for summer noncustodial parenting time.

In establishing the minimum standard guidelines, the court may consider varying ages and circumstances of children and treat varying ages and circumstances differently.

The Supreme Court shall establish rules pursuant to § 16-3-1 to provide for a public hearing process to review the minimum standard guidelines and to recommend any amendments deemed to be necessary.

An Act to provide for a regular review of parenting guidelines.

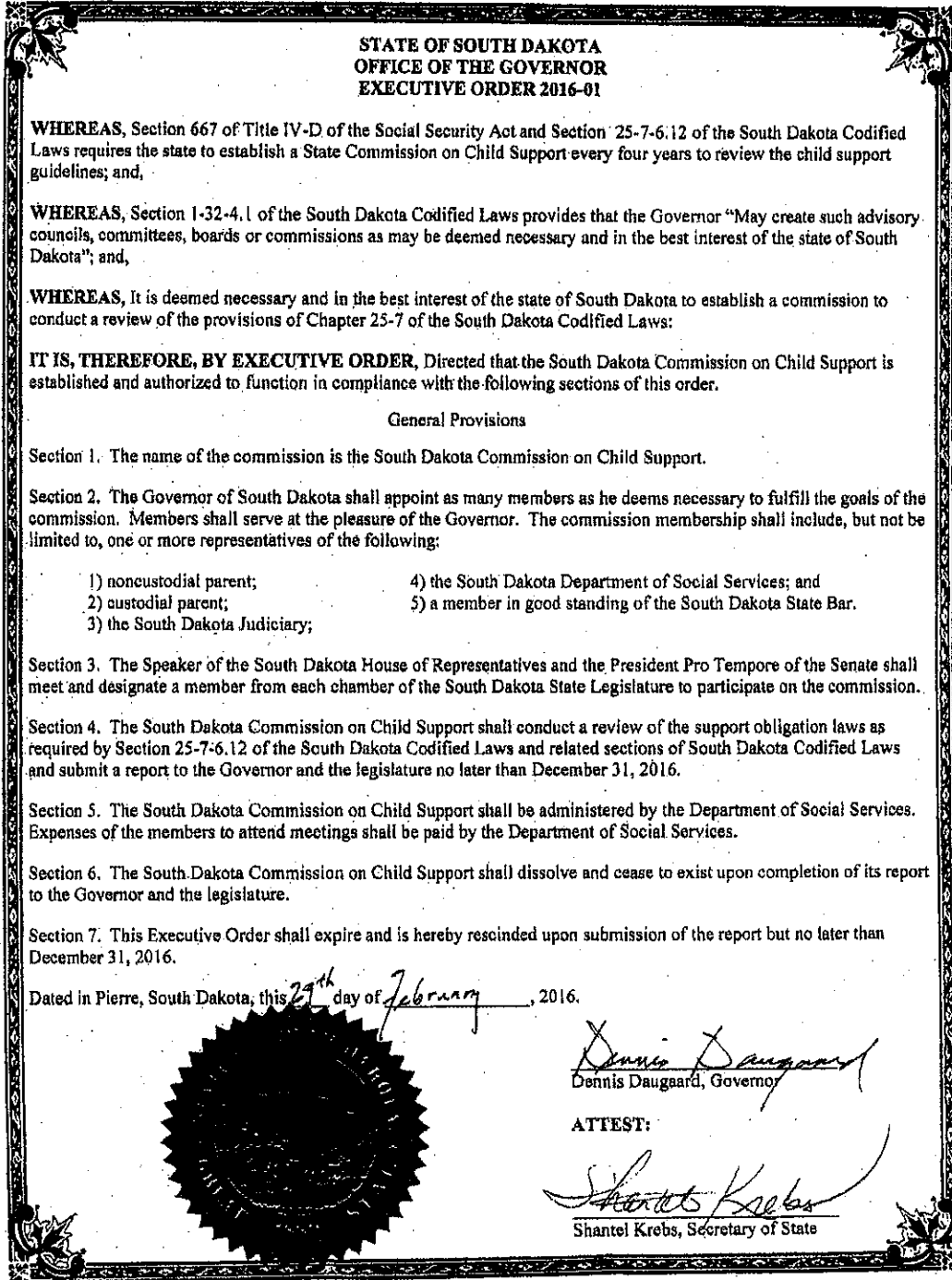
I certify that the attached Act originated in the:
House as Bill No. 1140
Chief Clerk
Speaker of the House
Attest:
Chief Clerk
President of the Senate
Attest:
Secretary of the Senate
House Bill No. 1140
File No. _____
Chapter No. _____

Received at this Executive Office
this _____ day of _____,
2020 at _____ M.
By
for the Governor
The attached Act is hereby
approved this _____ day of
_____, A.D., 2020
Governor
STATE OF SOUTH DAKOTA,
ss.
Office of the Secretary of State
Filed _____, 2020
at _____ o'clock __ M.
Secretary of State
By
Asst. Secretary of State

Attachment 1A

EXECUTIVE ORDER

Executive order 2016-01 establishes and outlines the commission required by §25-7-6.12. The final report can be found [here](#).



Printed from Dakota Disc

25-7-6.12 Review and amendment of schedule.

25-7-6.12. Review and amendment of schedule. The Governor shall, commencing in the year 2000, establish quadrennially a commission on child support. The commission shall review the provisions of this chapter, shall report its findings to the Governor and the Legislature, and may propose amendment thereof to the Legislature.

Source:(1)

**2. Proposed Amendment of Judicial Canon 3(B)(9).
Concerning the ability of a judge to comment on pending matters
under certain conditions.**

Section 1. That Canon 3(B)(9) of the Code of Judicial Conduct found in SDCL ch. 16-2 (appendix) be amended as follows:

CANON 3 A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently.

B. Adjudicative Responsibilities.

(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require * similar abstention on the part of court personnel * subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity. In connection with a judicial election or recall campaign, this canon does not prohibit a judge from making a public comment about a pending proceeding, provided (a) the comment would not reasonably be expected to affect the outcome or impair the fairness of the proceeding, and (b) the comment is about the procedural, factual, or legal basis of a decision about which a judge has been criticized during the election or recall campaign.

(10) A judge shall not, with respect to cases, controversies or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial * performance of the adjudicative duties of the office.

B(9)(10) COMMENTARY

Sections 3B(9) and (10) restrictions on judicial speech are essential to the maintenance of the integrity, impartiality, and independence of the judiciary. A pending proceeding is one that has begun but not yet reached final disposition. An impending proceeding is one that is anticipated but not yet begun. The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. Sections 3B(9) and (10) do not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official

capacity, the judge must not comment publicly. The conduct of lawyers relating to trial publicity is governed by South Dakota Rule of Professional Conduct 3.6.

Explanation for Proposal

The proposed rule would allow a judge to comment on pending matters under certain conditions. The proposed rule is based on a recent proposed amendment to the California Code of Judicial Conduct.

**3. Proposed Amendment of Judicial Canon 3D.
Concerning the disclosure of information obtained as part of
a judicial or lawyer assistance program.**

Section 1. That Canon 3D of the Code of Judicial Conduct (SDCL 16-2 Appendix) be amended as follows:

D. Disciplinary Responsibilities.

(1) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge * that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the appropriate authority.*

(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Code of Professional Responsibility should take appropriate action. A judge having knowledge * that a lawyer has committed a violation of the Code of Professional Responsibility that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority.*

(3) Sections 3D(1) and 3D(2) shall not apply to information obtained by a judge as a member of a committee, organization or related group established or approved by the South Dakota Judges Association, the State Bar or the Supreme Court to assist lawyers, judges or law students with a medical condition as defined in §16-19-29(1), including the name of any individual in contact with the member and sources of information or information obtained therefrom.

(4) A judicial member of an entity described in Section 3D(3) shall not be required to treat as confidential, communications that cause him or her to believe a person intends or contemplates causing harm to himself, herself or a reasonably identifiable person and that disclosure of the communications to the potential victim or individuals or entities reasonably believed to be able to assist in preventing the harm is necessary.

(3 5) Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1), 3D(2), 3(D)3 and 3(D)4 are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.

COMMENTARY

Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority or other agency or body.

Information about a lawyer's or judge's misconduct or fitness may be received by a judge in the course of that judge's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of Sections 3D(1) and 3D(2) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public.

Section 2. That Rule 8.3 of the Rules of Professional Conduct (SDCL 16-18 Appendix) be amended as follows:

Rule 8.3. Reporting Professional Misconduct

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) Paragraphs (a) and (b) shall not apply to information obtained by a lawyer or judge as a member of a committee, organization or related group established or approved by the State Bar or the Supreme Court to assist lawyers, judges or law students with a medical condition as defined in § 16-19-48 29(1), including the name of any individual in contact with the member and sources of information or information obtained therefrom. Any such information shall be deemed privileged on the same basis as provided by law between attorney and client.

(d) A member of an entity described in paragraph (c) shall not be required to treat as confidential, communications that cause him or her to believe a person intends or contemplates causing harm to himself, herself or a reasonably identifiable person and that

disclosure of the communications to the potential victim or individuals or entities reasonably believed to be able to assist in preventing the harm is necessary.

COMMENT:

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

Explanation for Proposal

The proposed rule change is intended to mirror the language found in the Rules of Professional Conduct related to the disclosure of information obtained as part of a judicial or lawyer assistance program and bring those provisions into the Code of Judicial Conduct. The proposed rule also fixes an errant statutory reference to SDCL 16-19-48 in Rule 8.3 concerning the definition of "medical condition" which is instead defined in SDCL 16-19-29(1).

REFERENCED STATUTES

16-19-48. Transfer to medical inactive status for a medical condition. If, during the course of a disciplinary investigation or proceeding, the attorney claims to be unable to assist in the attorney's defense to a disciplinary complaint because of a medical condition, the Supreme Court shall enter an order immediately transferring the attorney to medical inactive status until a determination is made of the attorney's ability to comply with the Rules of Professional Conduct and § 16-19-31. The determination shall be made in a proceeding instituted in accordance with the provisions of § 16-19-89. An attorney transferred to medical inactive status shall not practice law. An attorney transferred to medical inactive status shall not act as a legal assistant except as provided by §§ 16-18-34.4 to 16-18-34.7, inclusive. The Supreme Court shall enter such orders as are necessary to notify the attorney's clients of the attorney's change in status.

16-19-29. Powers and duties of disciplinary board generally. The board shall exercise the powers and perform the duties conferred and imposed upon it by rule of the Supreme Court, including the power and duty:

(1) To consider and investigate any alleged ground for discipline or alleged medical condition of any attorney called to its attention, or upon its own motion, and to take such action appropriate to effectuate the purposes of this chapter. As used in this chapter, "medical condition" is any condition that deprives an attorney of the ability to act in compliance with the Rules of Professional Conduct and any other standards required of practicing attorneys.

(2) To appoint a board secretary, board counsel, deputy board counsel, and such personnel as may from time to time be required to assist in the performance of the functions and duties of the board.

(3) To hold informal conferences.

(4) To privately reprimand attorneys for misconduct.

(5) To maintain permanent records of all matters processed and the disposition thereof.

- (6) To prosecute all disciplinary proceedings before the Supreme Court.
- (7) To prosecute all proceedings before the Supreme Court to determine the medical condition of attorneys as set forth in §§ 16-19-88 to 16-19-91, inclusive.
- (8) To hear applications for approval and complaints for revocation of approval of disqualified persons to act as legal assistants under subdivisions 16-18-34.4(2) to (4), inclusive.
- (9) To adopt internal rules of procedure not inconsistent with this chapter and to file the same with the clerk of the Supreme Court.

Jurisdiction for complaints against members of the judiciary for conduct that occurred prior to becoming a member of the judiciary shall be vested with the Judicial Qualifications Commission.

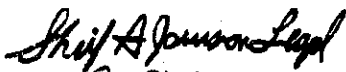
Any person interested may appear at the hearing and be heard, provided that all objections or proposed amendments shall be reduced to writing and the original and five copies thereof filed with the Clerk of the Supreme Court no later than August 10, 2020. Subsequent to the hearing, the Court may reject or adopt the proposed amendments or adoption or any rule germane to the subject thereof.

Notice of this hearing shall be made to the members of the State Bar by electronic mail notification, by posting notice at the Unified Judicial System's website at <https://uj.s.sd.gov/Supreme Court/Hearings.aspx> or the State Bar of South Dakota's website at <http://www.sdbar.org/>.

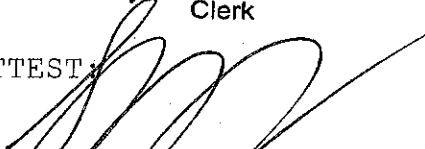
DATED at Pierre, South Dakota this 7th day of July, 2020.

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

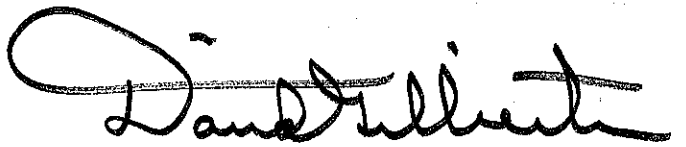
JUL - 7 2020


Clerk

ATTEST:


Clerk of the Supreme Court
(SEAL)

BY THE COURT:


David Gilbertson, Chief Justice