

THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE PROPOSED	)	NOTICE OF RULES HEARING
AMENDMENTS TO THE RULES OF	)	
PROFESSIONAL CONDUCT RULE 1.8.	)	NO. 157
Conflict of Interest: Current	)	
Clients, Specific Rules. Re:1.8(e);	)	
ADOPTION OF A NEW RULE TO BE PART OF	)	
SDCL 15-6-58; and	)	
REPEAL OF SDCL 16-3-5.1 and ADOPTION	)	
OF NEW RULES AT SDCL CHAPTER 16-3	)	

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

NOTICE IS HEREBY GIVEN THAT ON February 18, 2025, 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 to Rule 1.8(e) of The South Dakota Rules Of Professional Conduct

Rule 1.8. Conflict of Interest: Current Clients, Specific Rules

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(3) a lawyer representing an indigent client pro bono, a lawyer representing an indigent client pro bono through a nonprofit

legal services or public interest organization, and a lawyer representing an indigent client pro bono through a law school

clinical or pro bono program may provide modest gifts to the client for food, lodging, transportation, and other expenses incidental to the representation. The lawyer:

(i) may not promise, assure or imply the availability of such gifts prior to retention or as an inducement to continue the client-lawyer relationship after retention;

(ii) may not seek or accept reimbursement from the client, a relative of the client or anyone affiliated with the client; and

(iii) may not publicize or advertise a willingness to provide such gifts to prospective clients.

Financial assistance under this rule may be provided even if the representation is eligible for fees under a fee-shifting statute.

Explanation for Proposal 1.

The State Bar of South Dakota filed the proposed amendment via a recommendation from the State Bar of South Dakota Ethics Committee, and via a vote by State Bar members at the June 14, 2024, business meeting.

The ABA modified Rule 1.8(e) of the ABA Model Rules of Professional Conduct to add a third exception to the general rule that a lawyer shall not provide financial assistance to a client. The State Bar of South Dakota Ethics Committee agrees with the ABA modifications, and the Ethics Committee also recommends some additional variations from the ABA modification. The modifications clarify that the permitted financial assistance should be limited to only that which facilitates the representation to avoid ongoing financial or personal entanglement between the lawyer and the client.

Rule 1.8(e) of the South Dakota Rules of Professional Conduct contains limitations on the provision of financial assistance by lawyers. The current version of Rule 1.8(e) contains two exceptions. The proposed amendment would add a third exception to the current version of the rule. The proposed third exception would allow lawyers representing an indigent client pro bono to provide modest gifts and other expenses incidental to the representation with limitations upon those gifts or expenses. The proposed amendment is similar to the amendments made by the ABA, with minor variations.

The proposed amendment will add a third exception to the two existing exceptions found in Rule 1.8(e). The Comments to the proposed amendment describe the amendment and the Comments provide guidance for interpretation of the amendment. As previously stated, this proposed amendment is based upon the ABA Model Rules of Professional Conduct, and the proposed amendment should not directly affect any other current rules or statutes.

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2. Proposed Adoption of a New Rule to Be Part of SDCL 15-6-58.

A party directed by the court to prepare an order or judgment shall prepare a proposed order or judgment and provide it to all parties within five days of being directed.

Thereafter, the parties shall have five days in which to confer in an effort to agree upon the form of the proposed order or judgment. If all parties agree as to the form of the proposed order or judgment, or if no objection to the form of the order or judgment is timely received from any opposing party, then the party preparing the proposed order or judgment shall insert "NO OBJECTION AS TO FORM BY COUNSEL" in the lower left-hand corner of the final page of the proposed order or judgment. If any party timely objects to the form of the order or judgment and the parties are unable to reach an agreement as to form during such five-day period, then each party shall submit a proposed order or judgment to the court within two days after the expiration of the five-day confer period.

Any objections as to form are waived by a party's failure to timely submit a proposed order or judgment to the court as provided in this rule, unless the party's failure is excused by the court for good cause shown.

This procedure may be modified by the court.

Explanation for Proposal 2.

The proposed rule originated from the Practice Rules Revision Committee of the South Dakota State Bar. On June 14, 2024, the Bar membership voted during its Business Meeting to submit the proposed rule to the South Dakota Supreme Court for consideration.

Generally, the proposed rule provides a process and timeline by which orders and judgments are to be prepared by counsel for the prevailing party, considered by opposing counsel, and submitted to the court. The reasons for and benefits of the proposed rule include the following.

Currently, after a court instructs counsel for the prevailing party to prepare an order or judgment and to submit it to opposing counsel for approval as to form, various approaches are employed to secure the timely approval or objection of opposing counsel. If opposing counsel fails to timely respond, there is uncertainty as to how to proceed. The proposed rule will bring consistency and reliability to the process and thereby benefit practitioners and the court. By providing time periods for action, the proposed rule will likewise facilitate the efficient administration of justice by ensuring that orders and judgments are entered timely. The proposed rule will separately benefit the court. Presently, when a court receives a proposed order or judgment, it may not be clear whether it has been agreed upon as to form by counsel or whether the court should refrain from promptly signing the order or judgment because an objection may be forthcoming at some undetermined date. Under the proposed rule, if the proposed order or judgment includes the phrase "NO OBJECTION AS TO FORM BY COUNSEL," the court can have confidence in signing the order or judgment. Finally, if the contemplated order or judgment is complex or otherwise justifies lengthening the applicable time periods, the rule makes clear that the court may modify the procedure.

The proposed rule is not based upon a particular federal rule or statute. However, it is worth noting that the process contemplated by the proposed rule is generally in the nature of the procedure governing the submission of findings of fact and conclusions of law and objections thereto found in SDCL 15-6-52(a)-i.e., ten days in which to submit proposed findings of fact and conclusions of law and five days thereafter for opposing counsel to submit any objections or additional proposals.

Because there is not a federal rule or local federal rule which governs this process, it is not feasible to perform a comparison. However, certain other jurisdictions have adopted rules governing this process. Cf. *Ca St Civil Rules 3.1312(a)* ("*Unless the parties waive notice or the court orders otherwise, the party prevailing on any motion must, within five days of the ruling, serve by any means authorized by law and reasonably calculated to ensure delivery to the other party or parties no later than the close of the next business day a proposed order for approval as conforming to the court's order. Within five days after service, the other party or*

*parties must notify the prevailing party as to whether or not the proposed order is so approved. * * *).*

With the exception of a minor numbering change, the proposed rule should not directly affect any other existing rules or statutes. However, because it is suggested that the proposed rule be made part of SDCL 15-6-58, it is recommended that the existing rule found at SDCL 15-6-58¹ be renumbered SDCL 15-6-58(a) and the proposed rule numbered SDCL 15-6-58(b).

3. Proposed Repeal of SDCL 16-3-5.1 and Adoption of New Rules at SDCL chapter 16-3 as follows:

1. Proposed Repeal of SDCL 16-3-5.1. Court rules--Filing of notice of rule changes proposed by Supreme Court--Publication hearing--Combined notices--Rules governing internal operation effective on filing.

~~Any new rule, amendment, or repeal of existing rules or statutes relating to the administration of the courts, the number and composition of circuits and judges assigned to the circuits, to pleading, practice, or procedure, or to the admission, disbarment, discipline, and reinstatement of attorneys to practice the profession of law may be adopted by the Supreme Court.~~

~~A proposed new rule, amendment, or repeal shall be filed in the office of the clerk of the Supreme Court with deletions shown by strike-throughs and additions shown by underscore. The proposed new rule, amendment, or repeal shall include a discussion of the proposed change and:~~

~~(1) The identity of the proponent or proponents of the change;~~

¹ SDCL 15-6-58 provides as follows:

Subject to the provisions of § 15-6-54(b), judgment upon the jury verdict or upon the decision of the court, shall be promptly rendered. Every judgment shall be set forth on a separate document. A judgment or an order becomes complete and effective when reduced to writing, signed by the court or judge, attested by the clerk and filed in the clerk's office. The clerk, immediately after the filing of any judgment, shall docket the same as provided by law. Judgments of divorce pursuant to chapter 25-4 and judgments of foreclosure pursuant to chapter 21-47 or chapter 21-48 shall be docketed by the notation "see file." Entry of the judgment shall not be delayed for the taxing of costs.

- ~~(2) A detailed explanation of the change and the reasons for the change;~~
- ~~(3) An analysis of the state or federal rule or statute that the change is based upon, if any;~~
- ~~(4) A comparison of the change with federal rules or local federal rules on the same subject, if any, and an explanation of any differences, if any, and;~~
- ~~(5) An analysis of how the change affects existing rules or statutes.~~

~~The clerk of the Supreme Court shall give thirty days' notice of an intention to adopt, amend, or repeal rules by electronic mail notification to members of the State Bar of South Dakota, by posting notice at the Unified Judicial System's website at <http://www.ujls.sd.gov/> or at the State Bar of South Dakota's website at <http://www.sdbar.org/>, or such other notice as the Court may order. Notice shall include a copy of the proposed rule and the explanation of proposal described above in (1) (5). Any member of the State Bar of South Dakota may request notification of an intention to adopt, amend, or repeal rules through first class mail by contacting the clerk of the Supreme Court. The notice shall fix a time and place when any person interested may appear and be heard with reference to the adoption, amendment, or repeal of rules.~~

~~Notice of adoption of several rules, amendments, or repeals of rules may be given at one time and in one notice.~~

~~All other rules adopted by the Supreme Court concerning its internal operations under its constitutional or statutory rule-making power shall be filed with the clerk of the Supreme Court and unless otherwise ordered shall become effective when so filed without further notice.~~

2. Proposed Adoption of a New Rule at SDCL 16-3-5.2. Notice request for Supreme Court rule proposal—Court discretion to decline to consider proposal.

At the direction of the Supreme Court, the clerk of the Supreme Court shall issue a notice requesting any proposal for a new rule, amendment, or repeal of an existing rule relating to the administration of the courts, the number and composition of circuits and judges assigned to the circuits, to pleading, practice, or procedure, or to the admission, disbarment, discipline, and reinstatement of attorneys to the practice of law. The clerk shall post the notice at the Unified Judicial System's website at ujls.sd.gov or at the State Bar of South Dakota's website at statebarofsouthdakota.com, or such other posting as the Court may direct.

The notice must fix a time by which such proposal must be received in the office of the clerk to be considered by the Court.

The Court may, in its discretion, decline to consider any rule received pursuant to this section.

3. Proposed Adoption of a New Rule at SDCL 16-3-5.3. Rule proposal requirements.

Any proposal for a new rule, amendment, or repeal of an existing Supreme Court rule must show deletions by strikethroughs and additions shown by underscore. The proposal must include a discussion of the proposed change and:

- (1) The identity of the proponent or proponents of the change;
- (2) A detailed explanation of the change and the reasons for the change;
- (3) An analysis of the state or federal rule or statute that the change is based upon, if any;
- (4) A comparison of the change with federal rules or local federal rules on the same subject, if any, and an explanation of any differences, if any; and
- (5) An analysis of how the change affects existing rules or statutes.

4. Proposed Adoption of a New Rule at SDCL 16-3-5.4. Review of rule proposal for form, style, and clarity.

Upon receipt of a proposal submitted pursuant to § 16-3-5.2, the clerk of the Supreme Court shall immediately forward the proposal to the chief of legal research. The chief shall review each proposal for form, style, and clarity in compliance with the rule drafting standards established by the Court and posted at the Unified Judicial System's website at ujs.sd.gov. Within twenty days of receipt of the proposal in the office of the clerk, the clerk shall return the chief's form, style, and clarity suggestions to the proponent.

For purposes of this section and §§ 16-3-5.5, 16-3-5.7, and 16-3-5.9, the term, chief of legal research, means an officer of the court designated to manage the work of staff attorneys employed by the Supreme Court.

5. Proposed Adoption of a New Rule at SDCL 16-3-5.5. Proponent response to suggestions-Proponent fails to timely respond to suggestions -No suggestions.

The proponent may accept or reject the chief of legal research's suggestions provided pursuant to § 16-3-5.4. Within ten workdays of service of the suggestions, the proponent shall submit a final proposal to the clerk of the Supreme Court meeting

the requirements of § 16-3-5.3. If the proponent fails to submit a final proposal within ten workdays of service of the chief's suggestions, the clerk shall provide notice to the proponent that a final draft was not timely submitted, and that the proposal received pursuant to § 16-3-5.2 is considered final.

If the chief does not recommend any form, style, or clarity suggestions, the clerk shall provide notice to the proponent that no changes were recommended, and that the proposal as submitted pursuant to § 16-3-5.2 is considered final.

6. Proposed Adoption of a New Rule at SDCL 16-3-5.6. Notice and hearing of final rule proposals.

Following the procedure established in §§ 16-3-5.2 to 16-3-5.5, inclusive, the clerk of the Supreme Court shall give thirty days' notice of an intention to adopt, amend, or repeal rules by electronic mail notification to members of the State Bar of South Dakota, by posting notice at the Unified Judicial System's website at ujs.sd.gov or at the State Bar of South Dakota's website at statebarofsouthdakota.com, or such other posting as the Court may direct.

The notice must include a copy of the final proposal pursuant to § 16-3-5.5. The notice must fix a time and place when any person interested may appear and be heard with reference to the adoption, amendment, or repeal of rules. Notice of adoption of several rules, amendments, or repeals may be given at one time and in one notice.

7. Proposed Adoption of a New Rule at SDCL 16-3-5.7. Court to receive copies of initial proposal, chief's suggestions, and final proposals prior to hearing.

Prior to the hearing set by § 16-3-5.6, the clerk of the Supreme Court shall provide the Supreme Court a copy of each proposal submitted pursuant to § 16-3-5.2, the chief of legal research's suggestions for each proposal pursuant to § 16-3-5.4, and each final proposal as established by § 16-3-5.5.

8. Proposed Adoption of a New Rule at SDCL 16-3-5.8. Rules governing internal operation effective on filing.

All rules adopted by the Supreme Court concerning its internal operations under its constitutional or statutory rule-making power must be filed with the clerk of the Supreme Court and become effective when filed without further notice, unless otherwise ordered.

9. Proposed Adoption of a New Rule at SDCL 16-3-5.9. Court may issue notice of hearing on proposed rules changes without issuing notice requesting rules proposal.

The Supreme Court may, in its discretion, direct the clerk of the Supreme Court to give thirty days' notice of an intention to adopt, amend, or repeal rules by electronic mail notification to members of the State Bar of South Dakota, by posting notice at the Unified Judicial System's website at ujs.sd.gov or at the State Bar of South Dakota's website at statebarofsouthdakota.com, or such other posting as the Court may direct without issuing the notice requesting proposal provided by § 16-3-5.2.

The notice must include a copy of the proposal in the form required by § 16-3-5.3. The notice must fix a time and place when any person interested may appear and be heard with reference to the adoption, amendment, or repeal of rules. Notice of adoption of several rules, amendments, or repeals may be given at one time and in one notice. Prior to issuing notice pursuant to this section, the proposal may be reviewed for form, style, and clarity by the chief of legal research within a time directed by the Court.

Explanation for Proposal 3.

Proposal 3 is proposed by the State Court Administrator's Office. The proposal would repeal SDCL 16-3-5.1, the current rule on the filing, notice, and hearing of proposed rule changes. New rules would institute a revised process for the filing, notice, and hearing of rules to accommodate review of proposed rules for style, form, and clarity prior to hearing. Many of the requirements of SDCL 16-3-5.1 are retained in this revised process, including the discussion of proposed changes. The intent is to put rule proponents and the Court on notice of potential style and form concerns, create a formalized process for review, and make the style and form of Court rules more consistent. The change is not based on any state or federal rules or statutes, and it should not affect any existing rules or statutes.

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Any person interested may appear at the hearing and be heard, provided that all objections or proposed amendments shall be reduced to writing and filed with the Clerk of the Supreme Court no later than February 7, 2025. Subsequent to the hearing, the Court may reject or adopt the proposed amendments of any rule germane to the subject thereof.

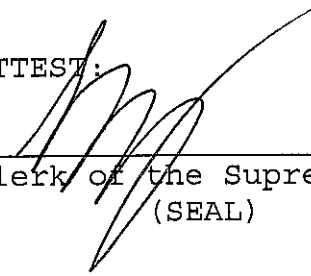
Notice of Rules Hearing No. 157 - February 18, 2025

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

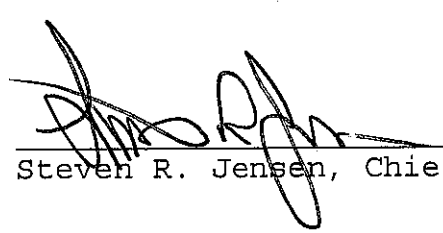
DATED at Pierre, South Dakota this 10th day of January, 2025.

BY THE COURT:

ATTEST:



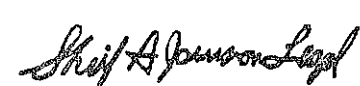
Clerk of the Supreme Court
(SEAL)



Steven R. Jensen, Chief Justice

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

JAN 10 2025


Clerk