South Dakota Law Review

Volume 63 | Issue 2

2018

South Dakota Evidence: Significant Developments

Chris Hutton

Follow this and additional works at: https://red.library.usd.edu/sdlrev

Recommended Citation
Chris Hutton, South Dakota Evidence: Significant Developments, 63 S.D. L. Rev. 239 (2018). Available at: https://red.library.usd.edu/sdlrev/vol63/iss2/6

This Article is brought to you for free and open access by USD RED. It has been accepted for inclusion in South Dakota Law Review by an authorized editor of USD RED. For more information, please contact dloftus@usd.edu.
SOUTH DAKOTA EVIDENCE: SIGNIFICANT DEVELOPMENTS

CHRIS HUTTON†

I. INTRODUCTION

Readers of the South Dakota Law Review who are on the alert for South Dakota Evidence Code updates received their last one in 2014. Given the activity from the South Dakota Supreme Court and the South Dakota Bar in the realm of evidence, another survey of recent developments is in order. This update covers cases from 2014 to mid-2017, and activity on the South Dakota Evidence Code ("Code") during the same period. The article is organized to follow the organization of the Code. In each section, the update for the Code provisions appears first, followed by the discussion of recent cases.

II. PART I—CODE UPDATE

The South Dakota Bar Evidence Committee initiated a project in 2011 to study and suggest revisions to the Code of Evidence. This was prompted by the 2011 revision to the Federal Rules of Evidence ("FRE"), which focused on stylistic changes. The point of the federal endeavor was to simplify the language and to clarify some points, resulting in a code that read more clearly for the most part. During that process, the United States Supreme Court also adopted some suggested substantive changes.

The South Dakota Bar approved the South Dakota Bar Evidence Committee’s suggested revisions to the Code at its June 2014 convention. The recommended changes were submitted to the South Dakota Supreme Court for its consideration. In the meantime, and as noted above, the United States Supreme Court adopted a handful of substantive changes; these were non-controversial amendments, and they were reviewed by the South Dakota Bar Commission. The
Bar Commissioners recommended adoption, and these changes were included in the larger proposal submitted to the South Dakota Supreme Court.\(^3\)

As part of its review, the South Dakota Bar Evidence Committee noted where substantive changes were at issue. It recommended adoption of a few such changes that would be non-controversial but refrained from recommending significant changes to the Code. The South Dakota Supreme Court, however, set a number of rules for hearing, where it considered several major substantive changes to the Code along with several minor amendments. The hearing was on September 1, 2015, and the Court adopted many of the revisions to the rules that it had included in the notice. The Court also approved re-numbering the Evidence Code to conform to the FRE numbering system and moved the Code to S.D.C.L. Ch. 19-19.

III. PART II—CASE UPDATE

United States Supreme Court

Five cases heard by the United States Supreme Court from 2014 to mid-2017 considered issues under the FRE. Two were unusual in that they addressed Rule 606(b), regarding juror testimony on impeachment of a verdict.\(^4\) One addressed the Confrontation Clause and hearsay rules,\(^5\) one dealt with expert testimony,\(^6\) and one was a case involving general relevance.\(^7\) The Court’s decision in Peña-Rodriguez broke new ground in endeavoring to address racial discrimination in the criminal justice system. The remaining cases were more routine in their application of existing rules. The cases appear in the ensuing sections, which are organized by the numerical articles of the rules.

South Dakota Supreme Court

The South Dakota Supreme Court has decided a number of important cases with evidence issues during the timeframe covered by this article. The vast majority of decisions reflected unanimity on the Court with respect to these issues. The opinions are categorized to track the topics of each article of the Code. Each case is discussed briefly, and the effort has been to include every case that discussed a pertinent provision of the Code. Some cases merely cited to a

---

3. The Committee did not recommend changes to Articles III and V. See infra notes 60-108, 200-238, and accompanying text. It also declined to recommend any changes to legislatively-enacted rules.


IV. UPDATES TO SOUTH DAKOTA RULES OF EVIDENCE

A. ARTICLE I—GENERAL PROVISIONS

Code Provisions

The South Dakota Supreme Court adopted the stylistic changes to Article I as reflected in the revised FRE and recommended by the South Dakota Bar Evidence Committee and South Dakota Bar. The Court made no substantive changes to the article but moved it to sections 19-19-101 through 19-19-106 of the South Dakota Codified Laws.

Case Law

Four noteworthy cases interpreting sections of Article I were decided during this article’s time frame. The first was *Liebig v. Kirchoff*, a suit for specific performance of a contract and numerous other claims. The evidence issue centered on a motion in limine filed by the defendant seeking to exclude evidence related to damages. The plaintiff argued the defendant’s objection to introduction at trial of evidence on this point was waived when the defendant failed to renew the objection despite succeeding at the motion stage. The Supreme Court cited Rule 19-9-3 (Rule 103(a)) and held that “the circuit court’s in limine ruling was a final and authoritative determination regarding the admission of evidence.” Therefore, the defendant’s “claimed error was preserved for appeal.”

Similarly, in *State v. Birdshead*, the Supreme Court addressed the requirements of Rule 103(a) in the context of a motion to exclude other acts evidence pursuant to Rule 404(b). The trial court had commented that the evidence of other acts would probably be admitted to refute any claim of accident,
but "left the matter open for a final ruling at trial."\textsuperscript{19} The Supreme Court reiterated that a defendant "must obtain a definitive ruling on the record admitting or excluding the evidence," concluding the defendant had objected sufficiently to preserve review of the admission of several pieces of evidence.\textsuperscript{20} The Court determined there was no prejudice identified with respect to the admission of three pieces of evidence and thus denied relief. On the fourth incident, the Court reviewed the facts of the proffered other act in detail, concluding it was factually relevant and not erroneously admitted under Rule 403.\textsuperscript{21} The Supreme Court noted that lack of record evidence that the trial court engaged in the Rule 403 balancing test would not preclude affirmance because the Supreme Court would "presume that the circuit court weighed the evidence before ruling on the motion."\textsuperscript{22}

Liebig and Birdshead stand for the proposition that Rule 103(a) does not require a subsequent objection to evidence admitted in violation of a court's ruling on a motion in limine excluding the evidence. However, such an objection—although not required—can be insurance against the trial court or Supreme Court's determining that the issue has been waived.\textsuperscript{23}

In a related matter, three criminal cases illustrated the pitfalls of a defendant's failure to object to evidence at trial. In \textit{State v. Chipps},\textsuperscript{24} the defendant was convicted of several counts involving burglary and theft.\textsuperscript{25} On direct appeal, he alleged ineffective assistance of counsel based on the failure to challenge "certain witness testimony and prosecutorial conduct."\textsuperscript{26} Because counsel had failed to object, the defendant had the burden of establishing that, if objections had been made, they would have been sustained and that the outcome of trial would have been different.\textsuperscript{27} The Court determined he had not met that burden.\textsuperscript{28}

Likewise, in \textit{State v. Janis},\textsuperscript{29} a trial alleging the defendant had sexually assaulted a person incapable of giving consent, counsel did not object to several comments made by the prosecutor.\textsuperscript{30} The Supreme Court reviewed for plain error and determined the prosecutor's comments on voir dire "could only serve to inflame the jurors' prejudices."\textsuperscript{31} Furthermore, the numerous comments about

\textsuperscript{19} Id.
\textsuperscript{20} Id. \textsuperscript{¶} 53-54, 871 N.W.2d at 79-80.
\textsuperscript{21} See id. \textsuperscript{¶} 56-59, 871 N.W.2d at 80-81 (holding that defendant's possession of weapons and drugs when stopped by police the year before was relevant).
\textsuperscript{22} Id. \textsuperscript{¶} 59, 871 N.W.2d at 81.
\textsuperscript{23} See Hutton, \textit{supra} note 1, at 345-46 n.25 (outlining relevancy). See also \textit{supra} notes 21-22 (illustrating the pitfalls of failing to object to irrelevant evidence at trial). See generally \textsc{Christopher B. Mueller & Laird C. Kirkpatrick, Evidence} \textsection{} 1.10, 47-48 (4th ed. 2009) (concerning relevancy of evidence at trial).
\textsuperscript{24} 2016 SD 8, 874 N.W.2d 475.
\textsuperscript{25} Id. \textsuperscript{¶} 1, 874 N.W.2d at 478.
\textsuperscript{26} Id. \textsuperscript{¶} 19, 874 N.W.2d at 482.
\textsuperscript{27} Id.
\textsuperscript{28} Id. \textsuperscript{¶} 19, 874 N.W.2d at 482-83.
\textsuperscript{29} 2016 SD 43, 880 N.W.2d 76.
\textsuperscript{30} Id. \textsuperscript{¶} 21, 880 N.W.2d at 81.
\textsuperscript{31} Id. \textsuperscript{¶} 23, 880 N.W.2d at 83. See also id. \textsuperscript{¶} 21, 880 N.W.2d at 81-82 (articulating the standard as follows: "(1) error, (2) that is plain, (3) affecting substantial rights; and only then may we exercise our
marriage and wedding vows during trial and closing amounted to inadmissible character evidence pursuant to the requirements of Rule 404(a). Although these errors thus amounted to plain error, the defendant did not obtain relief because he failed to demonstrate that the outcome of trial would have been different absent the error. Justice Kern dissented on this point.

Finally, *State v. Greenwood* was further confirmation of the obligation to lodge objections at trial. The defendant was forced to argue on appeal that plain error necessitated reversal of his conviction for aggravated assault. The alleged error was expert testimony that the victim had received “serious bodily injury.” The Court found neither plain error nor any error in admitting the testimony.

In contrast to *Liebig* and *Birdshead*, then, *Chipps*, *Janis*, and *Greenwood* reinforce the requirement for counsel to object and demonstrate the consequences on direct review, i.e., no relief absent proof that the outcome of trial would have been different.

### B. Article II—Judicial Notice of Adjudicative Facts

#### Code Provisions

As was the case with the other sections of the Evidence Code, the South Dakota Supreme Court adopted stylistic changes to Article II to align it with the language of the FRE and moved the article to S.D.C.L. Ch. 19-19. The Court also made substantive changes: it eliminated Rule 201(g) and amended Rule 201(f). These two changes to the rule addressed a potential problem under the Sixth Amendment with respect to prior Rule 201(g)’s command that the court instruct the jury in a criminal case that it “must” accept a noticed fact as conclusive. Recognizing that the jury has the power and responsibility to determine the facts at trial, the modified rule properly treats criminal and civil cases differently in requiring that the jury in a civil case is told that it “must” accept any noticed fact as conclusive, while the jury in a criminal case is told that it “may or may not” accept the noticed fact as conclusive.

---

32. *Id.* ¶ 24, 880 N.W.2d at 83.
33. *Id.* ¶¶ 24, 26, 880 N.W.2d at 83-84.
34. *Id.* ¶ 31, 880 N.W.2d at 84 (Kern, J., dissenting). See infra note 194 and accompanying text (noting same opinion in which Justice Kern expressed she would have reversed due to the injection of character evidence).
35. 2016 SD 81, 887 N.W.2d 726.
36. *Id.* ¶¶ 14, 16, 887 N.W.2d at 728-29.
37. *Id.* ¶ 17, 887 N.W.2d at 729.
38. *Id.* ¶ 21, 887 N.W.2d at 730. See infra notes 317-322 and accompanying text (discussing Greenwood in the context of expert testimony).
39. See LARSON & HUTTON, supra note 1 (discussing judicial notice); Hutton, supra note 1, at 346 (discussing judicial notice); and Adams, supra note 1, at 5-6 (discussing judicial notice).
Four recent civil cases raised questions concerning the taking of judicial notice. *Mendenhall v. Swanson*41 arose from a divorce/custody situation which involved several related lawsuits as well. The case at bar was a lawsuit for intentional infliction of emotional distress and alienation of affection.42 The plaintiff proffered fourteen exhibits which were documents from the related proceedings, and the trial court admitted them.43 The court instructed the jury that it had taken judicial notice of the “facts” in those documents and that it “must accept as conclusive any facts judicially noticed.”44 The Supreme Court reversed, determining the trial court had erred in its handling of judicial notice.45 After explaining the applicable rules, the Supreme Court added that “a court may not judicially notice a fact simply because it has been previously included in the findings of fact of a prior proceeding.”46 The Supreme Court then addressed whether issue preclusion should preclude re-litigation of the underlying facts.47 Concluding the trial court had not conducted the proper analysis for either issue-preclusion or judicial notice, the Supreme Court reversed.48

The topic of judicial notice is not limited to lawsuits between individual parties, such as the *Mendenhall* case. Two recent cases illustrate its application in the public domain. In *Wedel v. Beadle County Commission*,49 individuals challenged the grant of a conditional use permit to build and operate a concentrated animal feeding operation. The challengers asked the court to take judicial notice of certain minutes of Planning Commission meetings, and the court did so.50 The Supreme Court affirmed on this issue, agreeing that the minutes were instrumental in establishing the invalidity of ordinances the Commission had adopted.51

Likewise, in *Ageton v. Jackley*,52 official government action was at issue in connection with a ballot measure in the 2016 election. An individual challenged the Attorney General’s explanation of a “payday loan” measure and asked the circuit court to take judicial notice of a number of documents.53 Though the State objected because the documents were not part of the certified record, the court expanded the record to include two of the documents.54 It declined to take judicial

---

41. 2017 SD 2, 889 N.W.2d 416.
42. *Id.* ¶ 1, 889 N.W.2d at 417.
43. *Id.*
44. *Id.* ¶ 6, 889 N.W.2d at 418.
45. *Id.* ¶¶ 15-16, 889 N.W.2d at 422.
46. *See id.* ¶ 9, 889 N.W.2d at 419 (quoting 21B KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5106.4 (2d ed. 2017)) (“[M]ost courts agree that Rule 201 does not permit courts to judicially notice the truth of findings of fact.”).
47. *Id.* ¶¶ 10-11, 889 N.W.2d at 419-20.
48. *Id.* ¶¶ 13-14, 889 N.W.2d at 421.
49. 2016 SD 59, 884 N.W.2d 755.
50. *Id.* ¶ 6, 884 N.W.2d at 757.
51. *Id.* ¶¶ 17-19, 884 N.W.2d at 760.
52. 2016 SD 29, 878 N.W.2d 90.
53. *Id.* ¶ 6, 878 N.W.2d at 92.
54. *Id.*
notice of other documents, and the Supreme Court affirmed on this issue.\textsuperscript{55} The Supreme Court’s rationale was that the documents did not consist of “facts ... generally known or capable of accurate and ready determination ‘from sources whose accuracy cannot reasonably be questioned.’”\textsuperscript{56}

A fourth case addressing judicial notice depicted the most frequent use of the procedure. In a case involving termination of parental rights, \textit{Interest of A.K.A.-C.},\textsuperscript{57} the court took judicial notice of two abuse and neglect cases and one criminal case file of the mother, whose rights were at issue.\textsuperscript{58} Although the mother challenged the decision to do so, the Supreme Court found no error, particularly in light of her inability to pinpoint evidence improperly considered.\textsuperscript{59}

\section*{C. Article III—Presumptions}

\textbf{Code Provisions}

Presumptions are matters of state law because they are viewed as substantive, not simply procedural, law.\textsuperscript{60} When the FRE were revised as of December 2011, therefore, the stylistic changes to Article III were minimal and would have had little or no impact in South Dakota. Given this context, the South Dakota Bar Evidence Committee chose not to address the article in making its suggested changes to the Evidence Code. The South Dakota Supreme Court likewise made no alteration to the existing rule other than to recodify it at S.D.C.L. Ch. 19-19.

\textbf{Case Law}

Several recent cases address questions of presumptions and burdens of proof. For the most part, they do not change current practice or interpretations of the law, and they apply the principles in a conventional manner.\textsuperscript{61} The Court did, however, adopt a new presumption in \textit{Estate of Bronson}.\textsuperscript{62} Four of the cases dealing with presumptions arise in the context of decedents’ estates; one is a sentencing case.

\begin{itemize}
\item \textsuperscript{55} \textit{Id.} \textsuperscript{¶} 20, 878 N.W.2d at 95.
\item \textsuperscript{56} \textit{Id.} \textsuperscript{¶} 18, 878 N.W.2d at 95 (quoting S.D.C.L. § 19-19-201(b)(1)-(2) (2016)).
\item \textsuperscript{57} 2017 SD 38, 898 N.W.2d 5.
\item \textsuperscript{58} \textit{Id.} \textsuperscript{¶} 9, 898 N.W.2d at 7-8. \textit{See} Christopher B. Mueller \& Laird C. Kirkpatrick, \textit{Evidence} § 2.7, 82-85 (5th ed. 2012) (outlining judicial notice).
\item \textsuperscript{59} \textit{Interest of A.K.A.-C.}, 2017 SD 38, \textsuperscript{¶} 11, 898 N.W.2d at 8. \textit{See also} State v. Pentecost, 2016 SD 84, \textsuperscript{¶} 7, 887 N.W.2d 877, 880 (taking judicial notice of the case file in a burglary prosecution, including divorce pleadings).
\item \textsuperscript{60} Election R.R. \textit{v.} Tompkins, 304 U.S. 64 (1938). \textit{See generally} Mueller \& Kirkpatrick, \textit{supra} note 23, at § 3.10; \textit{supra} note 58, at § 3.10 (outlining presumptions).
\item \textsuperscript{61} Other cases mention burdens and presumptions but do not include additional guidance on their application. It is noteworthy that the South Dakota Supreme Court did strengthen the role presumptions play in two cases a decade ago. \textit{See} Stavig \textit{v.} Stavig, 2009 SD 89, 774 N.W.2d 454; \textit{Estate of Dimond}, 2008 SD 131, 759 N.W.2d 534. \textit{See generally} Larson \& Hutton, \textit{supra} note 1, § 301.1, at 123.
\item \textsuperscript{62} 2017 SD 9, 892 N.W.2d 604. \textit{See infra} notes 82-89 and accompanying text.
\end{itemize}
In *Estate of Deutsch*, the original will signed by decedent was not found. The trial court admitted a copy over the objection of decedent’s widow and her son, who sought probate under intestate succession. Two nephews who were beneficiaries under the will argued the copy should be admitted to probate because the will had not been revoked. The Supreme Court articulated that a presumption of revocation applies when an original will cannot be found. Further, proponents of a will bear the burden to overcome that presumption. In the case at bar, the trial court determined that the nephews had overcome the presumption of revocation based on their long-term and close relationship with the decedent and his statements to them about his planned distribution of property to them. The court further held that the widow had not overcome the presumption of revocation with sufficient evidence. The Supreme Court affirmed, noting that the trial court must be “reasonably satisfied” there was no revocation.

No particular type of evidence is required to meet this standard.

Two of the decedents’ estates cases dealt with joint bank accounts and the provision that proceeds in a joint account automatically pass to the survivor. In *Estate of Card*, the decedent had opened a savings account separate from her husband and deposited an inheritance. She included an adult son as a joint tenant on the account. She prepared a will giving a life estate in her property to her husband, with later distribution to her four children in equal shares. Subsequently, the decedent added to the account an adult daughter with whom she lived. Upon the decedent’s death, the son withdrew half of the money in the account. The trial court determined the decedent had opened the joint account for her convenience, and so the son had to convey the funds to the estate. The Supreme Court articulated that the presumption of a joint account having the right of survivorship must be rebutted by clear and convincing evidence. In affirming, the Court emphasized the trial court’s finding that the decedent deposited the

63. 2015 SD 47, 865 N.W.2d 874.
64. *Id.* ¶ 2, 865 N.W.2d at 875.
65. *Id.*
66. *Id.* ¶ 10, 865 N.W.2d at 877.
67. *Id.* ¶ 8, 865 N.W.2d at 876 (quoting *Estate of Gustafson*, 2007 SD 46, ¶ 9, 731 N.W.2d 922, 925).
68. *Id.* (quoting *Estate of Gustafson*, 2007 SD 46, ¶ 9, 731 N.W.2d at 925).
69. *Id.* ¶ 9, 865 N.W.2d at 876.
70. *Id.* ¶ 11, 865 N.W.2d at 876.
71. *Id.*
73. 2016 SD 4, ¶ 3, 874 N.W.2d 86, 88.
74. *Id.*
75. *Id.* ¶ 4, 874 N.W.2d at 88.
76. *Id.* ¶ 1, 874 N.W.2d at 87.
77. *Id.*
78. *Id.* ¶ 10, 874 N.W.2d at 90.
79. *Id.* ¶ 13, 874 N.W.2d at 91 (citing S.D.C.L. § 29A-6-104(1) (2016)).
money for her convenience to protect it from her husband and to ensure it would be available for his care. 80

Similarly, in *Estate of Bronson*, 81 two surviving daughters challenged the son/joint tenant’s withdrawal of funds after the decedent’s death. 82 The decedent had had some difficulty signing his name to add the son to the account, and it appeared that the son had signed the father’s name (purportedly at the latter’s direction). 83 The Court addressed two issues concerning presumptions. First, the Court rejected a potential “irrebuttable presumption that once a power of attorney is granted, every subsequent act of the attorney-in-fact involves a fiduciary duty of that agent—even if it is an act regarding a matter unconnected to the agency.” 84 In this case, the Court reasoned, such a presumption was inapplicable because the decedent was “independently and competently handling his own financial affairs” when the joint account was created. 85

Second, the Court adopted the approach of the California Supreme Court in *Estate of Stephens v. Williams*, 86 which recognized a presumption that “the signing of a grantor’s name by an interested amanuensis must be presumed invalid.” 87 Rebuttal of the presumption requires that the amanuensis must “show that his or her signing of the grantor’s name was a mechanical act in that the grantor intended to sign the document using the instrumentality of the amanuensis.” 88 In the case at bar, the Court determined the finding that the son/joint tenant served merely as an amanuensis was not clearly erroneous, that the decedent intended the son to own the funds after his death, and that the son was not acting pursuant to his power of attorney in signing the decedent’s name when adding himself to the account. 89

Finally, the Court addressed an issue of alleged undue influence in *Estate of Long*, 90 where a daughter of the deceased asserted that gifts and amendments to his trust in favor of another daughter were the result of undue influence. The Court reiterated that the presumption of undue influence arises if there is a “confidential relationship between the testator and a beneficiary who actively participates in preparation and execution of the will and unduly profits therefrom.” 91

80. See id. ¶¶ 16-17, 874 N.W.2d at 92 (noting her opinion that he was unable to manage money).
81. 2017 SD 9, 892 N.W.2d 604.
82. Id. ¶ 1, 892 N.W.2d at 606.
83. Id. ¶¶ 2-7, 892 N.W.2d at 606-07. See also id. ¶ 10, 892 N.W.2d at 608 (explaining the amanuensis doctrine in detail).
84. Bronson, 2017 SD 9, ¶ 11, 892 N.W.2d at 608 (quoting Bienash v. Moller, 2006 SD 78, ¶ 11, 721 N.W.2d 431, 434).
85. Id. ¶ 11, 892 N.W.2d at 609.
86. 49 P.3d 1093, 1095 (Cal. 2002).
87. Bronson, 2017 SD 9, ¶ 12, 892 N.W.2d at 609. See supra note 86 (adopting the Supreme Court of California’s approach).
88. Id. ¶ 12, 892 N.W.2d at 609.
89. Id. ¶¶ 14-15, 892 N.W.2d at 609.
91. 2014 SD 26, ¶ 24, 846 N.W.2d 782, 787 (quoting In re Estate of Pringle, 2008 SD 38, ¶ 39, 751 N.W.2d 277, 289).
presumption arose because the second daughter assisted her father with writing checks and other tasks.\textsuperscript{92} If the presumption arises, the beneficiary bears the burden of establishing he or she did not take unfair advantage.\textsuperscript{93} The burden of proof by a preponderance remains with the person contesting the will.\textsuperscript{94} Here, undue influence was not established, in particular because the challenger did not establish decedent’s susceptibility to it based on his independence and testamentary capacity.\textsuperscript{95} Further, the sister who benefitted had provided more assistance to the deceased, and she thus rebutted the presumption.\textsuperscript{96}

In the criminal case of State v. Woodard,\textsuperscript{97} burden of proof and presumption were analyzed in-depth by the Court in the context of sentencing. The defendant was convicted of driving under the influence, and the State offered her prior DUI conviction for enhancement.\textsuperscript{98} The prior proceeding was an uncounseled plea to DUI in magistrate court; no transcript existed.\textsuperscript{99} Defendant argued that absent a transcript, the State could not prove she entered her plea knowingly, voluntarily, and intelligently; therefore, the court should strike it.\textsuperscript{100} The Supreme Court affirmed, including the trial court’s use of the prior conviction to enhance the sentence.\textsuperscript{101} The Court explained the procedure as follows: the defendant has the burden of placing a prior conviction in issue.\textsuperscript{102} The burden then shifts to the State to prove the validity by a preponderance.\textsuperscript{103} If the State meets the burden by, for example, producing a document that appears to be a final judgment, a presumption of regularity arises which the defendant must rebut.\textsuperscript{104} Here, the defendant argued the lack of a transcript was equivalent to a silent record, which the Court has determined is insufficient to prove the prior conviction.\textsuperscript{105} The Court disagreed, stating that lack of a transcript does not overcome the presumption of regularity.\textsuperscript{106} The court may take testimony on the issue of validity of the prior conviction and will judge the credibility of defendant and any other witness on the issue.\textsuperscript{107} Here, the court was not persuaded by defendant’s testimony that she had not been advised of her rights and that determination was not clearly erroneous.\textsuperscript{108}

\textsuperscript{92} Id.
\textsuperscript{93} Id. ¶25, 846 N.W.2d at 787.
\textsuperscript{94} Id.
\textsuperscript{95} Id. ¶28, 846 N.W.2d at 788.
\textsuperscript{96} Id. ¶29, 846 N.W.2d at 788.
\textsuperscript{97} 2014 SD 39, 851 N.W.2d 188.
\textsuperscript{98} Id. ¶1-2, 851 N.W.2d at 190.
\textsuperscript{99} Id. ¶4, 851 N.W.2d at 190-91.
\textsuperscript{100} Id. ¶6, 851 N.W.2d at 191.
\textsuperscript{101} Id. ¶16-21, 851 N.W.2d at 193-94.
\textsuperscript{102} Id. ¶8, 851 N.W.2d at 192 (quoting State v. Jensen, 2011 SD 32, ¶9, 800 N.W.2d 359, 363).
\textsuperscript{103} Id.
\textsuperscript{104} Id. (citing State v. Moeller, 511 N.W.2d 803, 809-10 (S.D. 1994)).
\textsuperscript{105} Id. ¶13-14, 851 N.W.2d at 193 (citing Monette v. Weber, 2009 SD 77, ¶14, 771 N.W.2d 920, 926).
\textsuperscript{106} Id. ¶16, 851 N.W.2d at 193-94 (citing Moeller, 511 N.W.2d at 810).
\textsuperscript{107} Id. ¶19, 851 N.W.2d at 194 (citing Parke v. Raley, 506 U.S. 20, 32 (1992)).
\textsuperscript{108} Id. ¶17-19, 851 N.W.2d at 194.
D. ARTICLE IV—RELEVANCE AND ITS LIMITS

Code Provisions

Article IV of the Evidence Code posed a number of challenges for the South Dakota Bar Evidence Committee in analyzing possible revisions. The first was that the FRE includes Rules 413, 414, and 415.109 The South Dakota Supreme Court110 and South Dakota Legislature111 declined to adopt those rules when they were proposed in this state. The Evidence Committee did not deviate from this position, so those rules are not in effect in South Dakota.

The second issue revolved around FRE 404(a)(2)(B)(ii), now codified at S.D.C.L. § 19-19-404(a)(2)(B)(ii). The Evidence Committee did not recommend adoption of the rule because it represented a substantive change, not just a stylistic change, to the existing rule. After receiving the South Dakota Bar’s recommendations on the rules, the South Dakota Supreme Court set an Evidence Rules hearing for September 1, 2015. Among the rules considered was Rule 404(a)(2)(B)(ii), and the Court subsequently adopted the rule.

Background information on the rule is as follows: FRE 404(a)(2)(B)(ii) appears in the first section of FRE 404, entitled “Character Evidence.”112 It allows rebuttal of victim character evidence with evidence of the “same trait” of the defendant. This provision added a method of rebutting the evidence concerning the victim’s character while maintaining the rule’s original approach as well. The original approach is a more precise type of rebuttal, meaning that if the defense introduces evidence of the victim’s violent character, the prosecution can rebut


110. The South Dakota Supreme Court held Special Rules Hearing No. 111 on October 3, 2006, to consider the adoption of Rule 413 and 414. The Court chose not to adopt either rule as part of the South Dakota Evidence Code.

111. In 2009, legislation was proposed to adopt a rule addressing prior acts of child molestation similar to Rule 414, but the bill was defeated. See generally S.D. LEGISLATURE LEGISLATIVE RESEARCH COUNCIL, HOUSE BILL 1287, http://www.sdlegislature.gov/Legislative_Session/Bills/Bill.aspx?Bill=1287&Session=2009 (last visited Oct. 10, 2018).

112. This subsection was added to FRE 404(a)(1) in the year 2000 and then moved to 404(a)(2)(B) during the restyling in 2011. The purpose articulated in the Advisory Committee Notes (“ACN”) is to “make[] clear that the accused cannot attack the alleged victim’s character and yet remain shielded from the disclosure of equally relevant evidence concerning the same character trait of the accused.” The ACN continues with an example derived from a murder case—if the accused seeks to bolster a claim of self-defense by offering evidence of the victim’s violent disposition, the government can respond with evidence of the same aspect of the defendant’s character. The ACN adds that the jury should not have just part of the information about the character of those involved in a crime.
both by attacking the foundation for that evidence and by showing non-violent character of the victim. The 2000 amendment shifts the focus away from the alleged victim’s character—and back to the defendant’s—by allowing yet another type of attack, one which is focused on the defendant.113

There are limits to the reach of Rule 404(a)(2)(B)(ii) and, therefore, to its utility. For example, it would not be the typical case that the defendant would introduce evidence of the victim’s violent character in a vacuum. The defendant may instead introduce evidence of the victim’s prior violent acts or reputation to establish the defendant’s state of mind, i.e., fear of the victim, in an appropriate case. That remains unchanged by the 2000 amendment to the rule. The same is true of prior threats by the victim to the defendant, which also would be admissible to establish the defendant’s state of mind. Furthermore, in many of the decided cases, the defendant “opens the door” to evidence about his character, and the decisions tend to be liberal in permitting rebuttal evidence once a defendant does so.114

At present, there is very little federal case law interpreting the “same trait” phrasing of FRE 404(a). The lack of a body of federal case law interpreting the rule in the fifteen years since its adoption reinforces that it has limited reach. Therefore, it may have been an unnecessary amendment to the FRE.115

Case Law

The drafters of the federal rules approached the question of relevance expansively, as indicated by Rules 401-402 authorizing the admission of relevant evidence. Rule 403 places a curb on that but does not alter the basic approach. The remaining sections of Article IV dictate handling certain types of evidence—

---

113. It is worth remembering there are significant limitations on the evidence admissible to launch an attack on character pursuant to FRE 404(a)—character evidence is limited to reputation and opinion evidence under FRE 405(a). In this context, it is of interest that the ACN add that character evidence under FRE 404(a)(2)(B)(ii) is necessary even if “other acts” evidence about the accused is admitted under FRE 404(b). Proof of Rule 404(b) evidence is, of course, more expansive than what is admissible under Rule 405(a), although it is admissible only for purposes other than character itself. That said, where a trait of character such as “violent” is expressed as opinion or reputation evidence, the acts which support the opinion might well be separately admissible under Rule 404(b).

114. See 2 J ACK WEINSTEIN & MARGARET BERGER, WEINSTEIN’S FEDERAL EVIDENCE, § 404.11[2][b] (Joseph M. McLaughlin, ed., 2d ed. 2014) (noting a myriad of cases which address this issue such as United States v. Inserra, 34 F.3d 83, 89 (2d Cir. 1994); United States v. D’Auria, 672 F.2d 1085, 1094 (2d. Cir. 1982); United States v. Dunnigan, 944 F.2d 178, 182 (4th Cir.), modified 950 F.2d 149 (4th Cir. 1991), rev’d on other grounds 507 U.S. 870 (1993); United States v. Green, 180 F.3d 216, 223-24 (5th Cir. 1999); United States v. Wrice, 954 F.2d 406, 411-12 (6th Cir. 1992); United States v. Roper, 135 F.3d 430, 433-34 (6th Cir. 1998); United States v. Senffner, 280 F.3d 755, 762-63 (7th Cir. 2002); United States v. Pirvolos, 844 F.2d 415, 422-23 (7th Cir. 1988); United States v. Pierson, 544 F.3d 933, 940-41 (8th Cir. 2008); United States v. Segal, 867 F.2d 1173, 1179 (8th Cir. 1989); Cunningham v. Wong, 704 F.3d 1143, 1162 (9th Cir. 2013); United States v. Hough, 803 F.3d 1181, 1191-93 (11th Cir. 2015); United States v. Ramsey, 165 F.3d 980, 984 (D.C. Cir. 1999); United States v. Ruedlinger, 976 F.Supp. 976, 1002-1003 (D. Kan. 1997).

115. The author of this article provided written and oral testimony opposing adoption of the rule at the South Dakota Supreme Court hearing on September 1, 2015. (Written testimony on file with the author).
such as character evidence, subsequent remedial measures, offers to settle—in a particular manner. This is necessary for a variety of reasons, such as the need for uniformity, the strong possibility of misuse of the evidence, and for other policy reasons. Cases arise with both the general relevance rules, and with those that address specific topics, and the South Dakota Supreme Court has dealt with many such issues recently. The United States Supreme Court has had little to say on the topic of general relevance in the last few years, and the sole case is addressed below.

United States Supreme Court

In a case arising from a meat processing facility in Storm Lake, Iowa, employees sued under the Fair Labor Standards Act for compensation in connection with their use of protective gear at work. They were certified as a class under both federal and state law. The employer challenged class certification, arguing that individual assessments of employees and their work were necessary, as well as that relying on “representative evidence” was improper.

The Supreme Court responded by rejecting the argument and explaining that exclusion of representative evidence “would make little sense” because a representative sample might be the sole mechanism to present relevant information. The Court reiterated the admissibility standard of reliability “in proving or disproving the elements of the relevant cause of action.” The Court further explained that an “evidentiary gap” had been created by the employer’s failure to maintain “adequate records.” Furthermore, the Court observed that the sample created was “probative as to the experiences of all” of the employees.

117. Id. at 1043.
120. Id.
121. Id. at 1047.
122. Id. at 1048. See also id. at 1051 (Roberts, C.J., concurring) (stating he was satisfied that the representative evidence submitted was “sufficient proof” for the jury to find the “amount and extent” of individual employees’ work). But see id. at 1054 (Thomas, J. and Alito, J., dissenting) (dissenting on this issue on the grounds that the evidence submitted was not adequately analyzed by the trial judge to ascertain whether it was “appropriate common proof”).
In both civil and criminal cases, litigants frequently endeavor to introduce "other acts" evidence to strengthen their positions. Court decisions on Rule 404(b) proliferate. During the time frame included within this article, the pattern continued. This article will address "other acts" evidence in criminal and civil cases first, then discuss cases that raise other problems of relevance.

a. Rule 404(b) cases—other acts evidence

As noted in the discussion of pretrial motions above, State v. Birdshead involved a drug deal which led to a conviction of manslaughter in addition to weapons and drug offenses. The Rule 404(b) evidence consisted of police apprehending defendant with a gun on a prior occasion, which the State used to rebut the defendant's claim of accident. The Supreme Court agreed the evidence was relevant and not unfairly prejudicial.

A second criminal case, State v. Vargas, involved the defendant's conviction of attempted fetal homicide for allegedly providing certain drinks to his girlfriend that would cause termination of her pregnancy. The Rule 404(b) issue was defendant's knowledge of "cohosh," a substance that could be added to beverages that would induce premature labor. The witness, defendant's sister-in-law, also provided evidence that defendant could obtain the substance and had done so on a prior occasion when it was used to terminate a pregnancy. The Supreme Court affirmed on this issue, agreeing the evidence showed defendant knew of and used the substance earlier, establishing both knowledge and common scheme or plan.

123. See generally LARSON & HUTTON, supra note 1, § 404.2-404.2(2); Hutton, supra note 1, at 358 (examining other acts evidence under Rule 404(b)).

124. See supra notes 17-23 and accompanying text (discussing the South Dakota Supreme Court's review of relevancy and the applicability of Rule 103(a), Rule 403, and Rule 404(b) to this case).

125. 2015 SD 77, 871 N.W.2d 62, aff'd 2016 SD 87, 888 N.W.2d 209 (remanded for consideration of an issue under Brady v. Maryland, 373 U.S. 83 (1963)). The trial judge was directed to review certain files in camera and concluded they did not include any favorable evidence for the defense. The Supreme Court affirmed the ruling.

126. See also Birdshead, 2015 SD 77, ¶73-79, 871 N.W.2d at 84-85 (Severson, J., concurring) (reiterating that the court must employ a four-part test in evaluating proffered "other acts" evidence under Rules 401, 403, and 404(b)). First, the court must determine whether the evidence is relevant. Id. ¶ 74, 871 N.W.2d at 85. Second, evidence which is not relevant is not admissible. Id. ¶ 75, 871 N.W.2d at 85. Third, if evidence of other crimes, wrongs, or acts is used "to prove the character of a person in order to show that he acted in conformity therewith," it is not admissible. Id. ¶ 76, 871 N.W.2d at 85. Fourth, apply the balancing test to determine whether the probative value is substantially outweighed by unfair prejudice to the defendant. Id. ¶ 77, 871 N.W.2d at 85. For a general discussion of Rule 404(b) evidence, see EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE (1998 & Supp. 2017).

127. 2015 SD 72, 869 N.W.2d 150.

128. Id. ¶ 2, 869 N.W.2d at 152.

129. Id. ¶ 31, 869 N.W.2d at 161.

130. Id. ¶ 3, 869 N.W.2d at 152-53.

131. Id. ¶ 32, 869 N.W.2d at 161. But see id. ¶¶ 25-28, 869 N.W.2d at 159-60 (reversing on a Confrontation Clause issue).
A third Rule 404(b) criminal case was *State v. Boe*. The defendant was convicted of aggravated assault and related offenses arising from an incident with his girlfriend where his shotgun discharged and shattered the window in her vehicle, resulting in the victim being injured by flying glass. The State sought to use defendant's prior conviction for aggravated assault (domestic) as other acts evidence, arguing the two incidents involved similar crimes and similar victims. The defendant countered that the prior incident was unlike the present because in the prior, defendant was intoxicated, showing off in front of friends, and struck the victim with a gun, while in the present, he was sober, alone with the victim, and did not strike her. The Supreme Court reviewed for abuse of discretion, and it found sufficient similarities in the two situations for the prior act to be relevant to prove intent and to rebut defendant's defense of accident and mistake. Furthermore, the danger of unfair prejudice did not substantially outweigh the probative value of the evidence.

Other acts evidence was also at issue in several civil cases. In *St. John v. Peterson*, the Court commented this was the third appeal of a suit alleging medical malpractice in connection with repair of a vesicovaginal fistula. The plaintiff alleged the trial court had erred in excluding evidence of defendant’s treatment of three other patients as irrelevant. The Supreme Court affirmed, citing Rules 401, 403, and 404(b) and focusing on the differences in treatment between the plaintiff and the other patients.

In a different context, the Court addressed a second case involving exclusion of proffered Rule 404(b) evidence. In *Kern v. Progressive Northern Insurance Co.*, plaintiff proffered evidence from a local federal case, *Bjornestad v. Progressive Northern Insurance Co.*, concerning settlement offers. In *Bjornestad*, the trial court awarded attorney’s fees after finding the insurance company had “intentionally made settlement offers below its internal valuation of

132. 2014 SD 29, 847 N.W.2d 315.
133. Id. ¶ 5, 847 N.W.2d at 316.
134. Id. ¶ 19, 847 N.W.2d at 320.
135. Id. ¶ 18, 847 N.W.2d at 320.
137. *Boe*, 2014 SD 29, ¶ 25, 847 N.W.2d at 322. The Court availed itself of the opportunity to overrule the incorrect section of *State v. Chamley*, 1997 SD 107, ¶¶ 10, 16, 568 N.W.2d 607, 611, 614, which misstated the test as requiring the probative value to substantially outweigh the danger of unfair prejudice. The reverse is the correct test under Rule 403: the danger of unfair prejudice must substantially outweigh the probative value.
138. 2015 SD 41, 865 N.W.2d 125. See also infra notes 362-364 and accompanying text (analyzing expert testimony within the same factual scenario).
139. See generally St. John v. Peterson, 2013 SD 67, 837 N.W.2d 394 (comprising the previous appellate record of the case); St. John v. Peterson, 2011 SD 58, 804 N.W.2d 71 (same).
140. *Peterson*, 2015 SD 41, ¶ 10, 865 N.W.2d at 128-29.
141. Id. ¶¶ 14-18, 865 N.W.2d at 129-30.
142. 2016 SD 52, 883 N.W.2d 511.
144. *Kern*, 2016 SD 52, ¶ 9, 883 N.W.2d at 514 (citing *Bjornestad*, 2010 WL 4687640, at *3).
the claim” and was “dishonest with the plaintiff’s doctor.”\textsuperscript{145} Plaintiff sought to introduce this evidence to establish “absence of mistake” under Rule 404(b) after defendant testified that “mistakes occurred.”\textsuperscript{146} The trial court excluded the evidence, and the Supreme Court ruled this was “correct” due to “the potential for confusion and waste of time” which “substantially outweighed the evidence’s limited probative value.”\textsuperscript{147} The Court rationalized that the jury in the prior case had not found bad faith by the defendant; therefore, the case’s applicability to plaintiff was “limited.”\textsuperscript{148}

b. General relevance and unfair prejudice

In the realm of general relevance, a number of criminal and civil cases presented challenging questions for the Court. In \textit{Milstead v. Smith},\textsuperscript{149} individuals who were charged with assault on a law enforcement officer sought personnel records of the officer involved.\textsuperscript{150} The records subpoenaed included “all disciplinary records/reprimands/complaints.”\textsuperscript{151} The court ordered production to enable it to conduct in camera review, but the Supreme Court reversed.\textsuperscript{152} It acknowledged that such records may reveal “a motive to falsify” or provide evidence of “prior bad acts.”\textsuperscript{153} However, the Court held that the individual seeking them must “establish a factual predicate showing that it is reasonably likely that the requested file will bear information both relevant and material to her defense.”\textsuperscript{154}

Continuing with the category of general relevance, the Court offered an important clarification of what evidence should be considered “other acts” evidence under Rule 404(b). In \textit{Donat v. Johnson},\textsuperscript{155} plaintiff sought a protection order based on a series of incidents with defendant.\textsuperscript{156} Defendant argued evidence of these incidents was improperly admitted “other acts” evidence.\textsuperscript{157} The Court rejected this assertion, clarifying that the incidents were not offered under Rule 404(b) but were relevant incidents introduced to establish the “course of conduct” required to obtain a protection order based on stalking.\textsuperscript{158}

\begin{itemize}
  \item \textsuperscript{145} Id. ¶23, 883 N.W.2d at 516-17 (citing Bjornestad, 2010 WL 4687640, at *3).
  \item \textsuperscript{146} Id. ¶24, 883 N.W.2d at 517.
  \item \textsuperscript{147} Id. ¶26, 883 N.W.2d at 517.
  \item \textsuperscript{148} Id.
  \item \textsuperscript{149} 2016 SD 55, 883 N.W.2d 711. See generally Milstead v. Johnson, 2016 SD 56, 883 N.W.2d 725 (serving as a companion case).
  \item \textsuperscript{150} Smith, 2016 SD 55, ¶1, 883 N.W.2d at 714.
  \item \textsuperscript{151} Id. ¶2, 883 N.W.2d at 715.
  \item \textsuperscript{152} Id. ¶1, 883 N.W.2d at 714.
  \item \textsuperscript{153} Id. ¶22, 883 N.W.2d at 721 (quoting People v. Gissendanner, 399 N.E.2d 893, 928 (N.Y. 1979)).
  \item \textsuperscript{154} Id. ¶25, 883 N.W.2d at 722.
  \item \textsuperscript{155} 2015 SD 16, 862 N.W.2d 122.
  \item \textsuperscript{156} Id. ¶1, 862 N.W.2d at 125.
  \item \textsuperscript{157} Id.
  \item \textsuperscript{158} Id. ¶¶20, 25, 862 N.W.2d at 129, 131 (quoting S.D.C.L. § 22-19A-5 (2016)). The Court noted in dicta that even if the incidents amounted to “other acts” evidence, they would have been admissible
In contrast, another protection order case resulted in the trial court’s rejection of a collection of text messages that the defendant sought to have admitted. In *Repp v. Van Someren*, text messages were proffered by the defendant to shed light on the parties’ relationship. The Supreme Court affirmed, declining to determine whether or not the evidence was relevant because defendant did not establish how he was prejudiced by exclusion of the messages.

General relevance was also at issue in *Hein v. Zoss*, where a son had been given a power of attorney by his now-deceased mother and was alleged to have breached his fiduciary duty to her. The son challenged the trial court’s exclusion of his proffered evidence regarding the creation of a joint bank account with his mother, as well as evidence that would have established that, in the past, neither he nor his brothers paid rent to farm their mother’s land (and therefore his failure to do so was not a breach of his fiduciary duty). The Supreme Court reversed on those issues, determining the excluded evidence was relevant and defendant was prejudiced by its exclusion.

The topic of spoliation of evidence arose in *Red Bear v. SESDAC*. After a resident of a group home died, his relatives alleged his death was caused by the home’s negligence. There had been a delay in notifying the relatives of the death, and by the time of the notification, the deceased’s body had been cremated. The relatives characterized this as spoliation and unsuccessfully requested an instruction to the jury. The Supreme Court affirmed on this issue because the plaintiff failed to show defendant was in control of the body due to the state’s involvement in the situation. More importantly, plaintiff failed to show “an intentional act of destruction in bad faith.”

In an apparent case of first impression, the Court addressed the nettlesome issue of whether reference to a plaintiff’s having had an abortion should be excluded under Rule 403. In *Ruschenberg v. Eliason*, plaintiff sued her former
employer for allegedly raping her several times, ultimately resulting in a pregnancy that she terminated.\textsuperscript{173} She included this as part of her claim and described its impact as part of her damages.\textsuperscript{174} The trial court refused to exclude the evidence because of its bearing on damages and credibility.\textsuperscript{175} The Supreme Court affirmed, finding no abuse of discretion.\textsuperscript{176}

In the criminal case realm, general relevance was at issue in \textit{State v. Bausch},\textsuperscript{177} which involved allegations of sexual assault by the defendant against a child.\textsuperscript{178} Defendant unsuccessfully sought to introduce statements by the child about self-harm.\textsuperscript{179} The defendant’s theory of admissibility was that the child was seeking attention.\textsuperscript{180} After defining relevant evidence and explaining its possible exclusion under Rule 403, the Court concluded the defendant had many options for presenting his defense, including cross-examination of the child about possible motivations and testimony about the “complex” social situation in which the child lived.\textsuperscript{181} Thus, although the Court acknowledged the defendant’s case may have been “strengthened” with the evidence, it was not error to exclude it because the defendant “established a possible motive . . . to lie without [the child’s] statements about self-harm.”\textsuperscript{182} The Court distinguished the case from \textit{Davis v. Alaska}\textsuperscript{183} on the grounds that \textit{Davis}’s exclusion of evidence of improper motive “precluded the defense from meaningfully raising the defense altogether.”\textsuperscript{184}

General relevance was also contested in \textit{State v. Stanley},\textsuperscript{185} where defendant was convicted of possession of cocaine after an officer overheard her discussing possible drug activity in a portable toilet at the Sturgis Motorcycle Rally.\textsuperscript{186} The defendant challenged the admissibility of testimony about her refusal to give a urine sample, and the concomitant exclusion of her evidence that the police did not seek a warrant.\textsuperscript{187} The Court found no error in permitting the former and excluding the latter, reiterating the standard for relevance and denominating the excluded testimony as possibly confusing and misleading under Rule 403.\textsuperscript{188}
Character evidence was at issue in State v. Janis, where the prosecutor disregarded the limitations on use of character evidence by the prosecution to show defendant’s guilt. The rule prohibits prosecutors from initiating the use of character evidence and instead requires that character evidence be excluded unless the defendant puts it in issue. In Janis, the Court found plain error when the prosecutor violated the rule by asking the jury to “judge” the defendant and “his character when he took [his wedding] vows.” Despite this violation of the rule, the Court found defendant’s substantial rights were not affected. Concurring in part, Justice Kern agreed with the Court’s determination that there was plain error, but would have reversed because “[t]he State’s uninterrupted strategy to interject Janis’s character into the case from beginning to end so tainted the integrity of the judicial proceedings as to violate Janis’s basic right to due process and a fair trial.”

Finally, in a case raising a procedural issue under Article IV, State v. Golliher-Weyer, the Court addressed Rule 412. The case involved statutory rape and the alleged previous lies of the victim about prior sexual behavior. The defendant alleged ineffective assistance of counsel with respect to Rule 412 issues, but the Court declined to resolve the claim on direct appeal. It did address the trial court’s refusal to hold a hearing on the possible Rule 412 issue because the defense had not provided fourteen days’ notice before trial. The Court clarified that the trial court has discretion whether to conduct a hearing despite noncompliance with the fourteen-day notice requirement.

E. ARTICLE V—PRIVILEGES

Code Provisions

Rules governing privilege are matters of state law, so the South Dakota Rules do not conform to the federal. In the course of reviewing the Evidence Code, the South Dakota Bar Evidence Committee did not address Article V and thus made no recommendation to the South Dakota Supreme Court for changes to those

189. 2016 SD 43, 880 N.W.2d 76. See supra notes 29-34 and accompanying text (reviewing the plain error standard).
190. S.D.C.L. § 19-19-404(a) (2016); Janis, 2016 SD 43, ¶¶ 23-25, 880 N.W.2d at 82-83.
192. Janis, 2016 SD 43, ¶ 24, 880 N.W.2d at 83.
193. Id. ¶ 25, 880 N.W.2d at 83.
194. Id. ¶ 38, 880 N.W.2d at 87-88 (Kern, J., concurring in part and dissenting in part).
195. 2016 SD 10, 875 N.W.2d 28.
196. Id. ¶ 10, 875 N.W.2d at 32. See generally Mueller & Kirkpatrick, supra note 23, at § 4.32 (discussing Rule 412 and the prohibited use of a victim’s sexual behavior).
197. Golliher-Weyer, 2016 SD 10, ¶¶ 8-9, 875 N.W.2d at 31-32.
198. Id. ¶ 10, 875 N.W.2d at 31-32.
199. Id. ¶¶ 12-13, 875 N.W.2d at 32-33. The Court declined to reverse on this issue, however, because the defendant did not establish prejudice. Id.
rules. The Court made no change other than moving the rules from S.D.C.L. Ch. 19-13 to S.D.C.L. 19-19-501, et seq.

Case Law

Several recent cases posed questions concerning the attorney-client privilege, physician- and psychotherapist-patient privilege, and the privilege for peer review in the medical setting. They are addressed in turn below.

a. Attorney-client privilege

In a remarkable case, Voorhees Cattle Co. v. Dakota Feeding Co., the trial court permitted plaintiff’s counsel to depose and to seek requests for admission from counsel for the defendants. The Supreme Court determined that confidential communications were at issue and that they involved legal advice. The Court further determined that the client had not put “advice of counsel” in issue and that the attorney had not merely provided business advice rather than legal advice. Thus, the Supreme Court concluded the trial court had erred in permitting the deposition and requests for admission, as opposed to determining whether another source for the information existed. Although the subpoena should have been quashed and this discovery prohibited, given the posture of the case and other evidence produced, the error was not unfairly prejudicial.

A second case involving discovery of documents and records of conversations with an attorney arose in Nylen v. Nylen. The case posed the problem of whether the plaintiff had an attorney-client relationship with a friend who was an attorney. The attorney had previously represented the plaintiff, but the attorney had informed her that in the current case she could not do so because she had previously represented the plaintiff’s husband. The case centered on the trial court’s determination, based on plaintiff’s contradictory testimony, that plaintiff did not reasonably believe she was being represented by the attorney. The Supreme Court affirmed that no attorney-client relationship was formed, so most of the evidence sought was not privileged. Further, even though there

201. 2015 SD 68, 868 N.W.2d 399. See generally IMWINKELRIED, supra note 200, at § 6.2.4 (discussing attorney-client privilege).
203. Id. ¶¶ 11-12, 868 N.W.2d at 405-06.
204. Id. ¶¶ 13-14, 868 N.W.2d at 406.
205. Id. ¶¶ 15-16, 868 N.W.2d at 407.
206. Id. ¶¶ 17, 19, 868 N.W.2d at 407-08.
207. 2015 SD 98, 873 N.W.2d 76.
208. Id. ¶ 1, 873 N.W.2d at 76.
209. Id. ¶ 3, 873 N.W.2d at 76. The husband soon filed for divorce. Id.
210. Id. ¶¶ 8-9, 873 N.W.2d at 78-79.
211. Id. ¶ 18, 873 N.W.2d at 81.
were some privileged communications with other attorneys, plaintiff waived them when she divulged them to her friend-attorney. 212

A different aspect of the attorney-client privilege was at issue in Andrews v. Ridco, Inc., 213 a suit alleging bad faith in resolution of a workers’ compensation claim. In endeavoring to conduct discovery, plaintiff sought documents that the defendant claimed were protected by the attorney-client privilege. 214 The documents consisted of claim file notes from a considerable number of other files. 215 The circuit court had ordered release of the files while ruling that “communication from an attorney to the claims people” and “communication from claims people to the attorney seeking legal advice” should not be produced. 216 Later, after more aspects of the dispute were aired, the court ruled that defendant had waived the attorney-client privilege for plaintiff’s file and for the additional 199 files sought by plaintiff by relying on the “advice of counsel” defense. 217

The Supreme Court reversed, determining that the record did not support a finding that defendant had relied on the advice of counsel defense and therefore did not impliedly waive it. 218 The Court cautioned that, when “advice of counsel” is raised, the attorney-client privilege is waived “only to the extent necessary to reveal the advice of counsel” at issue. 219 Furthermore, the Court advised that based on the facts of this case, in camera review was required before making a determination of implied waiver. 220 The Court concluded by holding that, for each of the 199 files at issue, the trial court must determine which state has the “most significant relationship” with the claim and “apply the law of that state to determine whether the attorney-client privilege is waived.” 221

b. Other privileges

Privilege issues arose in two recent medical malpractice cases of interest. In Wipf v. Altstiel, 222 plaintiff alleged medical malpractice during surgery. Plaintiff successfully sought copies of the defendant’s operative notes for the past five

212. Id. ¶¶ 19-21, 873 N.W.2d at 81.
213. 2015 SD 24, 863 N.W.2d 540.
214. Id. ¶¶ 16-17, 863 N.W.2d at 546-47.
215. Id. ¶ 5, 863 N.W.2d at 543, 543 n.2. The Court described these as activity logs or “contemporaneous diaries.” Id. ¶ 5, n.2, 863 N.W.2d at 543 n.2.
216. Id. ¶ 7, 863 N.W.2d at 544.
217. Id. ¶ 9-12, 863 N.W.2d at 544-45.
218. Id. ¶¶ 23-26, 863 N.W.2d at 549-50. The Court also noted that the record did not support that defendant had “completely delegated” the claims handling function to outside counsel, thus losing the attorney-client privilege. See id. ¶ 26, 863 N.W.2d at 550 (quoting Dakota, Minn. & E.R.R. Corp. v. Acuity, 2009 SD 69, ¶ 27, 771 N.W.2d 623, 631).
220. Id. ¶ 30, 863 N.W.2d at 551. See also id. ¶ 34, 863 N.W.2d at 552-53 (declining to hold that such a hearing is required in every case).
221. Id. ¶ 41, 863 N.W.2d at 554. See also IMWINKELRIED, supra note 201, at § 6.12 (providing a general discussion of waiver).
222. 2016 SD 97, 888 N.W.2d 790.
years for operations of this kind with identifying information redacted. The defendant asserted physician-patient privilege. The Supreme Court explained that the privilege under S.D.C.L. § 19-19-503(b) covers “confidential communications,” and most courts have determined non-identifying information is not privileged in this context. The Court adopted that analysis, but it reversed to enable the trial court to ensure the redaction and any other needed safeguards would adequately protect the patients’ anonymity. Chief Justice Gilbertson and Justice Severson dissented separately and joined each other’s dissenting opinions. The Chief Justice was of the opinion that the plain language of S.D.C.L. § 19-19-503 applied the privilege to the information at issue and did not include a redaction exception. Justice Severson focused on the patient as the holder of the privilege and noted that redaction is not an “exception to the privilege” but applies only when a record is subject to disclosure. Agreeing that the plain language of the rule governs, Justice Severson would have reversed the order to produce the records.

Medical malpractice was also at issue in Novotny v. Sacred Heart Health Services, where plaintiff sought production of peer review materials protected from release under the legislatively-enacted privilege at S.D.C.L. § 36-4-26.1. The trial court ordered release of the materials based on its determination that the statute would be unconstitutional without a crime-fraud exception. The Court determined that the privilege protects not only deliberative materials but objective information as well, noting such information may be obtained from other sources and is not protected simply because the peer review committee also has it. Continuing in this vein, the Court rejected a constitutional challenge to the

223. Id. ¶ 5, 888 N.W.2d at 791.
224. Id. ¶ 6, 888 N.W.2d at 792.
225. Id. ¶ 8, 888 N.W.2d at 792.
226. Id. ¶¶ 10-11, 888 N.W.2d at 794-95.
227. Id. ¶ 16, 888 N.W.2d at 796 (Gilbertson, C.J., dissenting).
228. Id. ¶ 37, 888 N.W.2d at 804 (Severson, J., dissenting).
229. See id. ¶ 36, 888 N.W.2d at 804 (Gilbertson, C.J., dissenting) (indicating that Justice Severson joined). See also id. ¶ 43, 888 N.W.2d at 805 (Severson, J., dissenting) (indicating that Chief Justice Gilbertson joined).
230. Id. ¶ 16, 888 N.W.2d at 796 (Gilbertson, C.J., dissenting). The Chief Justice cited to precedents establishing that “a patient’s medical records are confidential communications within the meaning of the physician-patient privilege,” and are not simply “information.” Id. ¶ 18, 888 N.W.2d at 796. Redaction does not solve the problem because it does not remove the statutory definition of a confidential communication as one “not intended to be disclosed.” Id. ¶ 19, 888 N.W.2d at 797. Since none of the patients whose records were at issue intended them to be disclosed, they remained confidential. The Chief Justice also pointed to use of the term “confidential communication” in other privilege sections of the Code and expressed concern that “the privacy interests of South Dakotans” would be impinged by the interpretation in this case. Id. ¶ 24, 888 N.W.2d at 800. He also rejected plaintiff’s argument that a federal statute, HIPAA, 42 U.S.C. § 1320d-7(a)(1), preempts state privilege law where information in a medical file is redacted. Id. ¶ 28, 888 N.W.2d at 801.
231. Id. ¶¶ 38, 41, 888 N.W.2d at 804-05 (Severson, J., dissenting).
232. Id. ¶ 42, 888 N.W.2d at 805.
233. 2016 SD 75, 887 N.W.2d 83.
234. Id. ¶ 2, 887 N.W.2d at 86.
235. Id. ¶ 3, 887 N.W.2d at 86.
236. Id. ¶¶ 9-10, 13, 887 N.W.2d at 89-90.
privilege because here, plaintiffs had access to the materials sought from other sources; litigants are also not necessarily entitled to "the best and most relevant information to establish their claim." Moreover, the statute did not "restrict or destroy plaintiffs' ability to bring their causes of action."

F. ARTICLE VI—WITNESSES

Code Provisions

The South Dakota Bar Evidence Committee recommended that the South Dakota Supreme Court adopt the stylistic changes to Article VI but made more detailed recommendations for Rules 606, 609, and 615. Substantive and noncontroversial actions were recommended for Rules 606 and 615, which the Court adopted. A third substantive change was set for hearing by the Court and was subsequently incorporated into Rule 609. These three modifications to Article VI are explained below.

The first substantive change the Evidence Committee recommended was to Rule 606, relating to jurors' competency as witnesses. The rule generally bars jurors' testimony but creates exceptions pursuant to "an inquiry into the validity of a verdict or indictment." Previously, the rule had allowed only testimony about "extraneous prejudicial information" and improper "outside influence." The Court amended the rule to include a third exception for permissible testimony: "a mistake was made in entering the verdict on the verdict form."

A second noncontroversial action recommended by the Evidence Committee and adopted by the Court was the retention of South Dakota's version of S.D.C.L. § 19-19-615. The rule addressed the circumstances under which witnesses may be excluded from the courtroom and also listed categories of participants who may not be excluded. The South Dakota Legislature enacted an amendment to the rule, which included "a victim of a crime and his parent or guardian following the victim's testimony." Although this language deviates from the federal rule, the Evidence Committee did not urge its repeal. The Court deferred to the legislature, and the rule remains part of the section.

The third modification to Article VI was significant and involved an amendment to Rule 609. The South Dakota version of the rule differed from the federal version when it was adopted in 1979 in its treatment of impeachment of
The gist of original FRE 609 was as follows:

with respect to impeachment of a witness with prior convictions, the FRE dictate that a prior conviction of any offense involving dishonesty or false statement must be admitted, whether or not the witness is the accused. Other felony convictions are admissible against the accused if the probative value outweighs prejudice. Felony convictions of any other witness, however, are admissible subject to FRE 403. The effect of these provisions is to favor the admission of prior convictions for impeachment.

The South Dakota rule in its original form took a different path in two ways. First, it did not mandate that prior convictions involving dishonesty or false statement be admitted for impeachment; second, it provided the option to the judge to exclude prior convictions to impeach in that it required the probative value to outweigh the prejudice, not only for the accused but for other witnesses as well.

After the Rules hearing on September 1, 2015, the Supreme Court abandoned the original South Dakota approach to impeachment with prior convictions and aligned the state rule with the FRE.

The sections of Article VI in the Evidence Code set forth rules governing a myriad of topics, from competence and impeachment of witnesses to restrictions
on their cross-examination which implicate the rules and the Confrontation Clause in criminal cases. These and other topics were addressed by the United States and South Dakota Supreme Courts in a number of recent cases.

United States Supreme Court

Although the United States Supreme Court decides few cases addressing Article VI, it issued two decisions on Rule 606 within the last few years. The rule deals with impeachment of a verdict with juror testimony, and the two new cases added helpful clarification to its language.

In a case arising in Rapid City, South Dakota, a truck-motorcycle accident resulted in serious injuries to plaintiff-motorcyclist, ultimately requiring amputation of his leg. The problem presented in Warger v. Shauers was that after a verdict for defendant, a juror contacted plaintiff’s counsel to report on a statement by another juror which appeared to indicate she had lied during voir dire. The district court denied the motion for a new trial because the juror’s affidavit was the only evidence of any lie, and Rule 606(b) precludes use of a juror’s statement to inquire into the validity of a verdict, with exceptions not applicable to the facts of the case. The Eighth Circuit affirmed, and so did the Supreme Court. The Court contrasted the “restrictive” federal rule with the more liberal “Iowa rule,” concluding the juror’s testimony was not admissible to impeach the verdict.

The outcome in Peña-Rodriguez v. Colorado was the opposite, and context provides the rationale. Peña-Rodriguez was a sexual contact/sexual assault prosecution which resulted in a guilty verdict on some charges. Two jurors spoke with the defense counsel and reported statements by another juror displaying animus against “Mexican men.” Obtaining no relief in the state courts, defendant successfully sought Supreme Court review. Recognizing the importance of protecting jury deliberations—but also that racial discrimination is “odious,” especially in the administration of justice—the Court modified its former approach and held as follows:

[W]here a juror makes a clear statement that indicated he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the

250. Id.
251. Id. at 525.
252. Id.
253. Id. at 526.
255. Id. at 862.
256. Id. at 863. The Court acknowledged that the “ethnicity” of the defendant, rather than his race, was under consideration but chose to adopt the terminology from precedent which addresses race and ethnicity as “race.” Id.
evidence of the juror’s statement and any resulting denial of the jury trial guarantee.\textsuperscript{257} The Court added that with “racial bias as serious” as the juror demonstrated, “the law must not wholly disregard its occurrence.”\textsuperscript{258}

\textit{Peña-Rodríguez} will pose challenges to the criminal justice system, including determining whether racial bias was a “significant motivating factor in the juror’s vote to convict.”\textsuperscript{259} The lines will not be well-defined as the criminal justice system moves ahead with this rule in place. But counsel are often aware of the racial bias against their clients in society at large—where, for example, people feel no hesitation in making comments reflecting anti-Native American attitudes. This case provides a mechanism for responding to that bias in criminal cases, at least where jurors mistakenly think it is acceptable—socially or legally—to express their “odious” views during deliberations.

\textit{South Dakota Supreme Court}

In \textit{State v. Spaniol},\textsuperscript{260} the defendant was convicted of several counts involving rape and sexual contact with a four-year-old girl. The defendant challenged her competency to testify and alleged she was unavailable for purposes of confrontation and cross-examination.\textsuperscript{261} The Court on appeal affirmed the denial of relief on both claims.\textsuperscript{262} Regarding the first claim, the trial court assessed the child’s age (five by the time of the hearing), developmental disability, ability to communicate, and other factors in finding her competent.\textsuperscript{263} In affirming, the Supreme Court emphasized these factors as well the child’s “ability to observe, recollect facts from her life and to communicate.”\textsuperscript{264} She also “showed a sufficient sense of moral responsibility by distinguishing truth from falsehood several times during her testimony.”\textsuperscript{265}

The Confrontation Clause issue before the Court posed a more difficult question, but the Court concluded that although the child’s “memory and communication were imperfect, they were not constitutionally deficient.”\textsuperscript{266} The defense counsel had endeavored to establish inconsistencies in the child’s testimony, but when she testified that she could not remember the previous

\begin{thebibliography}{99}

\bibitem{257} Id. at 869.
\bibitem{258} Id. at 870.
\bibitem{259} Id. at 869. \textit{See generally} \textit{GRAHAM, supra} note 183, at § 606.2 n.11 (discussing racial bias).
\bibitem{260} 2017 SD 20, 895 N.W.2d 329. \textit{See infra} notes 413-418, 475-482 and accompanying text (determining the applicability of the Confrontation Clause and \textit{Miranda} warnings to the facts of this case).
\bibitem{261} \textit{Spaniol}, 2017 SD 20, ¶ 8, 895 N.W.2d at 334.
\bibitem{262} Id. ¶¶ 19, 32, 895 N.W.2d at 337-41. \textit{See generally} \textit{KENNETH S. BROWN, MCCORMICK ON EVIDENCE}, § 62, at 417 (7th ed. 2013); \textit{GRAHAM, supra} note 183, at § 601.1 (outlining the requirements of the Confrontation Clause).
\bibitem{263} \textit{Spaniol}, 2017 SD 20, ¶ 15, 895 N.W.2d at 336.
\bibitem{264} Id. ¶ 17, 895 N.W.2d at 336-37.
\bibitem{265} Id. ¶ 18, 895 N.W.2d at 337.
\bibitem{266} Id. ¶ 31, 895 N.W.2d at 341.
\end{thebibliography}
statements, counsel could not establish the impeachment.\textsuperscript{267} The trial judge would not declare the child unavailable as a result, but it did authorize the defense to read the questions and inconsistent answers to the jury.\textsuperscript{268} The trial court’s instructions on which statements were inconsistent and how to evaluate them were sufficient to satisfy the Supreme Court that “[defendant] had an opportunity for effective cross-examination,” especially because the child “recalled the past and spoke about specific events and places.”\textsuperscript{269}

Restrictions on cross-examination were at issue in \textit{State v. McCahren},\textsuperscript{270} where the teenaged defendant was convicted of second-degree murder in the shooting death of his friend. Defendant had been roommates at a juvenile facility with a witness who testified to statements defendant allegedly had made to him.\textsuperscript{271} Defendant sought to cross-examine the witness about his mental health because of his “inability to properly perceive and process events . . . and his motivation to exaggerate, fabricate or lie . . . .”\textsuperscript{272} The circuit court had allowed impeachment with prior inconsistent statements, and the defense succeeded in having the witness admit to his “lying problem” at the time he spoke about defendant to police and to his prior crimes of dishonesty.\textsuperscript{273} The Supreme Court viewed this as sufficient compliance with the Confrontation Clause.\textsuperscript{274}

In \textit{State v. Miller},\textsuperscript{275} a decision raising a relatively rare issue, the Court addressed Rule 612 regarding a “writing used to refresh a witness’s memory.”\textsuperscript{276} The defendant was convicted of second-degree murder and aggravated assault of his four-month-old son.\textsuperscript{277} An inmate held in the local jail with defendant testified the latter had admitted he hit the baby, and apparently the inmate wrote a note to himself with that comment before he arranged to meet with law enforcement and share the information.\textsuperscript{278} Because the inmate-witness used the note prior to meeting with law enforcement during the investigation and did not use it to refresh his memory at trial, Rule 612 did not apply.\textsuperscript{279} Specifically, the writing was not required to be produced pursuant to Rule 612(b), and the witness’s testimony was not required to be stricken for failure to produce the writing pursuant to Rule 612(c).\textsuperscript{280}

\begin{itemize}
\item \textsuperscript{267} \textit{Id.} ¶ 27, 895 N.W.2d at 340.
\item \textsuperscript{268} \textit{Id.}
\item \textsuperscript{269} \textit{Id.} ¶¶ 27, 29, 31, 895 N.W.2d at 340-41.
\item \textsuperscript{270} 2016 SD 34, 878 N.W.2d 586. \textit{See infra} notes 499-505 and accompanying text (discerning what constitutes custody in regards to the applicability of \textit{Miranda} warnings).
\item \textsuperscript{271} \textit{McCahren}, 2016 SD 34, ¶ 18, 878 N.W.2d at 596.
\item \textsuperscript{272} \textit{Id.} ¶¶ 25-26, 878 N.W.2d at 597. \textit{See generally} \textit{Park} \& \textit{Lininger}, \textit{supra} note 247, at § 8.2.1 (discussing cross-examination and use of prior inconsistent statements).
\item \textsuperscript{273} \textit{McCahren}, 2016 SD 34, ¶ 28, 878 N.W.2d at 598.
\item \textsuperscript{274} \textit{Id.}
\item \textsuperscript{275} 2014 SD 49, 851 N.W.2d 703.
\item \textsuperscript{276} \textit{Fed. R. Evid.} 612; \textit{S.D.C.L.} § 19-14-22 (2014).
\item \textsuperscript{277} \textit{Miller}, 2014 SD 49, ¶ 1-3, 851 N.W.2d at 704-05.
\item \textsuperscript{278} \textit{Id.} ¶¶ 23, 35, 851 N.W.2d at 708, 711.
\item \textsuperscript{279} \textit{Id.} ¶ 35, 851 N.W.2d at 711. \textit{See generally} 4 \textit{Jack B. Weinstein} \& \textit{Margaret A. Berger}, \textit{Weinstein’s Federal Evidence} § 612.02 (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 2014) (describing Rule 612 and the use of evidence to refresh a witness’ memory).
\item \textsuperscript{280} \textit{Miller}, 2014 SD 49, ¶¶ 34, 35, 851 N.W.2d at 711.
\end{itemize}
G. ARTICLE VII—OPINIONS AND EXPERT TESTIMONY

Code Provisions

The South Dakota Bar Evidence Committee recommended that the state Supreme Court adopt the stylistic changes for Article VII, and the Court did so. The Evidence Committee recommended that the Court not enact FRE 704(b), which would have been a substantive change relating to expert testimony on the ultimate issue and prohibiting the expert from offering an opinion on "whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense."281 The Court included Rule 704(b) in its notice of hearing for September 1, 2015, and subsequently chose not to adopt the rule.282

The Court revamped other sections of Article VII as well.283 Although the Evidence Committee had recommended retaining the existing rules governing court appointment of expert witnesses, the Court repealed the original provisions that appeared at Rules 706 and 707 and replaced them with rules aligned with FRE 706 (there is no FRE 707).

281. FRE 704(b) was enacted by Congress in the wake of the acquittal of John Hinckley, Jr., in the prosecution for his attempt to assassinate President Reagan. Apparently dissatisfied with the admission of psychiatric testimony on behalf of the defendant and the ensuing NGRI verdict, Congress changed the test and burden of proof for the federal insanity defense and also enacted this rule. See Insanity Defense Reform Act, 18 U.S.C. § 20 (1984). The stated purposes of the rule are to eliminate the confusion of conflicting expert testimony on the ultimate issue; to ensure the jury hears the details but not overarching conclusions of the expert dealing with insanity; and to prevent the expert from going beyond medical expertise, i.e., stating a legal rather than medical conclusion. See also David Kaye, David Bernstein & Jennifer Mnookin, The New Wigmore: Expert Evidence § 2.2.3 (2000 & 2017 Supp.) (citing S. Rep. No. 225 (1984); H.R. Rep. No. 557 (1983)). One problem is with the language of FRE 704(b): it is not written to meet the limited purposes of the rule. It is much broader and therefore encompasses the defendant’s mental state in general, not just mental diseases/defects in question with the insanity defense. See generally Mueller & Kirmpark, supra note 58, at § 7.13; Kaye, Bernstein, & Mnookin, supra, at §§ 2.2.3, 2.7.2 (2000 & 2017 Supp.) The Rule applies to any expert, whether proffered by the prosecution or defense. The practical application of the rule as explained in Mueller and Kirkpatrick’s treatise is that Rule 704(b) dictates that an expert cannot couch testimony in terms of the legal elements of the insanity defense. Mueller & Kirmpark, supra note 58, at § 7.13. The expert may, however, explain the basis of the diagnosis, describe defendant’s condition and the characteristics of the illness, and explain how the illness would affect the ordinary person’s ability to appreciate the wrongfulness of the conduct. Id. They describe this as “staying one step back,” meaning the expert can give the testimony one would ordinarily expect from an expert on the insanity defense, but the last question of the testimony that might have been permitted in some courts—whether or not the defendant was responsible for the crime—is omitted. Id. See also Kaye, et al., Expert Evidence, § 2.2.3, at 46.

282. The author testified at the hearing in opposition to the rule. (Written comments on file with the author.)

283. The Court had amended Article VII several times since its adoption. See Hutton, supra note 1, at 353 (outlining specifics regarding the amendments of Rules 704, 703, and 705).
Case Law

United States Supreme Court

Although the United States Supreme Court may cite to a rule of evidence in an opinion, it does not always offer an interpretation of the rule.284 Whole Woman's Health v. Hellerstedt285 gave minimally more analysis than a perfunctory citation, so it is included in this survey of recent cases.

One of the issues in Whole Woman's Health was the requirement imposed by the Texas Legislature that a medical facility that performs abortions must meet the "minimum standards . . . for ambulatory surgical centers."286 The district court had determined this provision was unnecessary and would not inure to the benefit of patients.287 In so deciding, the district court had relied on the testimony of a doctor about the increase in the number of abortions that certain surgical center clinics would have to provide, and that such clinics were already at full capacity.288 The Supreme Court determined that the expert's opinion was admissible under FRE 702 and that the district court was "within its legal authority" to consider it, deeming it relevant and reliable.289 The Court added that crediting the expert's testimony was "sound," especially given the lack of rebuttal to his testimony.290 As is evident, the Court's analysis of the expert testimony in this case does not break new ground and is a routine application of FRE 702, despite the Fifth Circuit's decision to the contrary.

South Dakota Supreme Court

Expert testimony is one of the recurring subjects of South Dakota Supreme Court opinions. In the time frame covered by this article, the Court decided cases on, among other issues, the necessity of qualifying a witness as an expert, the limits of differing types of expert testimony, and conflicting expert testimony. Expertise with respect to the Indian Child Welfare Act also was the subject of decision.

284. See, e.g., Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1046 (2016) (citing to FRE 401, 403, and 702 but not offering an interpretation of these rules).
286. Id. at 2314 (quoting Tex. Health and Safety Code Ann. § 245.010(a)). For an analysis of the impact of such provisions on rural women, see generally Hannah Haksgaard, Rural Women and Developments in the Undue Burden Analysis: The Effect of Whole Women's Health v. Hellerstedt, 65 Drake L. Rev. 663 (2017) (exploring the impact of minimum standards on rural women health).
288. Id. at 2316.
289. Id. at 2317.
290. Id. at 2316.
As discussed previously, the defendant in *State v. Miller* was convicted of the murder and assault of his four-month-old son.\(^{291}\) Several defense experts testified that the child's skull fracture could have been caused by a fall, and one offered an opinion that the child's bruises could be the result of emergency treatment.\(^{292}\) The State's several experts offered testimony in opposition to this, insisting that the injuries were caused by trauma and were not accidental.\(^{293}\) In affirming the conviction, the Supreme Court reiterated the general rule that the jury is the judge of credibility, and it is responsible to evaluate the expert testimony "to resolve conflicts... and sort out the truth."\(^{294}\)

Conflicting expert testimony also arose in the context of a worker's compensation case, *Hayes v. Rosenbaum Signs, Inc.*\(^{295}\) where the injuries a worker suffered were determined to be "a major contributing cause" to his need for medical treatment.\(^{296}\) Physicians for the employee and employer agreed, and the employer conceded it.\(^{297}\) Almost a year later, the employer required that the employee see another physician, who attributed the employee's back problem to a "longstanding chronic condition."\(^{298}\) The Department of Labor and circuit court agreed with the employer, but the Supreme Court reversed.\(^{299}\) In the Court's view, the employer "took inconsistent positions," and the case was not "doctors simply disagreeing."\(^{300}\) The tenor of the Court's criticism was clear:

Further, we do not feel that it is the intent of workers' compensation statutes to allow employers to retain new experts to derive new positions based on the same facts contrary to what was previously admitted and judicially accepted, and have the employee again, and continually, bear the burden of proving what was previously settled by agreement or action under SDCL 62-7-12. Yet, that is what Employer seeks here. Judicial estoppel, however, prevents Employer from intentionally asserting an inconsistent position that would pervert the judicial machinery.\(^{301}\)

It is difficult to interpret this passage in any manner other than as a warning to counsel to refrain from deviating from their posture in a case favorable to the opponent by seeking experts to support a revised theory of the case.

---

291. *See infra* notes 275-280 and accompanying text (discussing in *Miller* the use of written records to refresh a witness's memory). *See generally* *State v. Fischer*, 2011 SD 74, 805 N.W.2d 571 (exploring the use of expert testimony); *State v. Boyer*, 2007 SD 112, 741 N.W.2d 749 (same).


293. *Id.* ¶¶ 19-22, 851 N.W.2d at 707-08.

294. *Id.* ¶ 27, 851 N.W.2d at 709.

295. 2014 SD 64, 853 N.W.2d 878.

296. *Id.* ¶ 3, 853 N.W.2d at 880.

297. *Id.*

298. *Id.* ¶ 4, 853 N.W.2d at 880.

299. *Id.* ¶ 1, 853 N.W.2d at 880.

300. *Id.* ¶¶ 16, 18-19, 853 N.W.2d at 883.

301. *Id.* ¶ 20, 853 N.W.2d at 883.
In the context of child sexual abuse, the Court addressed in *State v. Johnson* a topic frequently raised in similar sex offense cases. The defendant was convicted of rape and related offenses in connection with sexual assaults of his stepdaughter. The expert testified that he did not know the specifics of the case at bar, but he did offer background information to educate the jury. The Court stated the general rules that expert testimony must address a subject that assists the factfinder, be reliable, apply to the case at issue, and be given by someone qualified. In this case, the expert was qualified and his testimony was pertinent in discussing "delayed reporting, 'grooming,' and the psychological effects of sexual abuse."

A less typical problem arose in *State v. Janis*, where the defendant was convicted of rape of a person too intoxicated to consent. After the latter testified on cross-examination that she waited to report the crime and was "frozen" during the assault, the prosecution called as a witness the Certified Nurse Practitioner ("CNP") who had supervised the sexual assault examination. That witness was asked about the "frozen" comment, and the defense successfully objected. The prosecution then endeavored to qualify the witness as an expert, but the defense successfully objected because of the failure to provide notice. The witness was then permitted to testify that she had "heard" of people "freezing" in this situation and that the young woman in this case had told her that she froze. On appeal, defendant challenged the admission of this testimony, arguing it was expert testimony subject to disclosure requirements prior to trial.

In a ruling with the potential to alter the interpretation of Article VII substantially, the Supreme Court determined that "liberal" construction of the rules on opinion testimony led to the conclusion the CNP's testimony was lay opinion testimony under Rule 701, and thus, pretrial disclosure was not mandated. The Court characterized the witness’s testimony as reflecting "[her] personal perceptions, throughout her career, of rape victims freezing, a response that did not require any specific or specialized knowledge." The Court undercut
this holding, however, by stating it did not "endorse" what the prosecutor did because he apparently "was knowingly attempting to elicit expert testimony without prior disclosure." His approach, therefore, "was inappropriate" but was not deemed reversible error. The Court's unease with the prosecutor's effort to circumvent Rule 702 is evident, but declining to reverse might well encourage counsel to not just practice "close to the line" but to cross it with impunity.

A CNP's testimony was also at issue in a case where ultimate issue, qualification of an expert, and waiver of objections were concatenated. In State v. Greenwood, defendant was convicted of aggravated assault of an acquaintance. A CNP who treated the victim testified about his injuries. She testified as an expert and offered the opinion that the victim's injuries "absolutely" amounted to "serious bodily injury." Absent objection by the defense at the time, the Court's review was for plain error. The Court cited to precedent in reiterating that an expert cannot usurp the jury's power by giving an opinion that a legal definition has been satisfied. In this case, however, the witness gave her own opinion and was not stating that the victim's injuries satisfied the legal definition.

In a related issue, Black v. DCI tackled the question of whether expert testimony is necessary in defining "conduct unbecoming" an officer. The Court ruled expert testimony was not necessary, explaining such evidence is required when helpful to the understanding of the trier of fact but it "must offer more than something jurors can infer for themselves." The witnesses who were called to describe the plaintiff's conduct could do so without implicating any expertise.

The opposite result was mandated by the Court in Nationwide Mutual Insurance Co. v. Barton Solvents Inc., where plaintiff reimbursed the insured after an explosion at his beeswax processing plant and then sued the supplier of the solvent for subrogation. The Supreme Court ultimately affirmed the trial court's grant of summary judgment and, in the course of the opinion, addressed the defendant's contention that plaintiff was required to introduce expert testimony to support its claim of inadequate warnings. The Court agreed expert testimony is required in a products liability case based on the claim of inadequate warnings, stating "both causation and inadequate warnings are separate but

315. Id. ¶16, 880 N.W.2d at 81.
316. Id.
317. State v. Greenwood, 2016 SD 81, 887 N.W.2d 726.
318. Id. ¶10, 887 N.W.2d at 728.
319. Id. ¶¶17, 20, 887 N.W.2d at 729-30.
320. Id. ¶16, 887 N.W.2d at 729.
321. Id. ¶18, 887 N.W.2d at 730 (citing State v. Lybarger, 497 N.W.2d 102, 103 (S.D. 1993)).
322. Id. ¶19, 887 N.W.2d at 730. See generally SALTZBURG, ET. AL, supra note 245, at §701.02[6]-[7] (discussing expert testimony and its boundaries).
323. 2016 SD 82, 887 N.W.2d 731.
324. Id. ¶21, 887 N.W.2d at 737.
325. Id. ¶23, 887 N.W.2d at 737 (quoting State v. Guthrie, 2001 SD 61, ¶32, 627 N.W.2d 401, 415).
326. Id.
327. 2014 SD 70, 855 N.W.2d 145.
328. Id. ¶¶1, 11, 15, 855 N.W.2d at 147, 149-50.
necessary elements of negligence and strict liability,” and plaintiff was required “to provide ‘an evidentiary basis’ for both elements.”329 The Court summarized by stating that expert testimony “is generally necessary to establish elements of negligence and strict liability.”330

The quality and pertinence of expert testimony were addressed by the Supreme Court in the context of a marital estate and the parties’ separate property in Charlson v. Charlson.331 The circuit court had approved of the expert’s “tracing” and “marital loan” analysis of the assets, and the Supreme Court concluded the analysis was consistent with the premarital agreement.332 Thus, the conclusions the expert reached rested on adequate foundation.333

Expert testimony was crucial in the case of People in Interest of A.B.,334 where the State sought to terminate the parental rights of mother, a member of the Northern Arapaho Tribe. Custody was to be given to father, a member of the Cheyenne River Sioux Tribe.335 The State’s expert witness was a member of the Rosebud Sioux Tribe and testified to familiarity with the childrearing practices of the parents’ tribes.336 The court qualified him as an expert and he offered his opinion that it would be “injurious” for the child to be in the mother’s custody.337 The Supreme Court affirmed, laying out guidance from the Bureau of Indian Affairs Guidelines338 and acknowledging the purpose of ICWA was to correct “the failure of welfare workers to understand Indian culture and practices concerning the raising of children.”339 The Court added that an ICWA expert “should have expertise in and substantial knowledge of, Native American families and their childrearing practices.”340 Satisfied that the witness met that standard, the Court rejected defendant’s claim that the State had not provided sufficient foundation for the witness’s specialized knowledge.341

Procedural issues concerning expert testimony were addressed in several recent cases. In Gibson v. Gibson Family Ltd.,342 “a limited partner sued the limited partnership and general partner” by alleging breach of fiduciary duty.343

329. Id. ¶ 17, 855 N.W.2d at 151.
331. 2017 SD 11, 892 N.W.2d 903.
332. Id. ¶¶ 11-13, 892 N.W.2d at 908.
333. Id. ¶ 32, 892 N.W.2d at 912.
334. 2016 SD 44, 880 N.W.2d 95.
335. Id. ¶ 4, 880 N.W.2d at 98.
336. Id. ¶¶ 12-13, 880 N.W.2d at 99-100.
337. Id. ¶ 13, 880 N.W.2d at 100.
338. Id. ¶ 18, 880 N.W.2d at 101.
339. Id. ¶ 19, 880 N.W.2d at 102 (quoting People ex rel. M.H., 2005 SD 4, ¶ 10, 691 N.W.2d 622, 625). See also People ex rel. T.I., 2005 SD 125, 707 N.W.2d 826; People ex rel. O.S., 2005 SD 86, 701 N.W.2d 421. See generally LARSON & HUTTON, supra note 1, § 702.3[n], at 434 (outlining the admissibility of expert opinions).
341. Id.
342. 2016 SD 26, 877 N.W.2d 597.
343. Id. ¶ 1, 877 N.W.2d at 598.
One issue involved the testimony of an attorney for the partnership that he had drafted leases and a contract for deed that were "consistent with South Dakota law, were authorized under the [family's] limited partnership agreement, and were reasonable." \(^{344}\) The Court rejected plaintiff's argument that the testimony was an improper expert opinion because the testimony helped the trier of fact determine the question of legality and did not "merely tell [the] jury what result to reach." \(^{345}\)

A different procedural question arose in a worker’s compensation case, Sorensen v. Harbor Bar, LLC, \(^{346}\) where the employer challenged admission of rebuttal testimony by plaintiff’s doctor. \(^{347}\) The Court noted that disclosure of rebuttal witnesses is not required, and that in the case at bar it was properly admitted. \(^{348}\) The Court concluded there was no bad faith, there may have been a misunderstanding about whether disclosure was required, and the “truth-finding process” would be enhanced by allowing the testimony. \(^{349}\)

Undisclosed expert opinion was one problem in Casper Lodging, LLC v. Akers, \(^{350}\) involving an alleged breach of contract in connection with the construction and sale of a Holiday Inn. \(^{351}\) Several experts testified about the condition of the property. \(^{352}\) After the testimony by one expert, the defendant moved for a mistrial because of previously undisclosed expert opinion; defendant also challenged certain rebuttal expert testimony. \(^{353}\) The Court denied relief on the undisclosed expert opinion issue, determining the trial court had instructed the jury to disregard and it was “firm, clear, and accomplished without delay.” \(^{354}\) There was no apparent misconduct, as the opinion had been formed while hearing another person testify. \(^{355}\) Further, the exclusion of the rebuttal testimony also was proper because counsel had not supplemented the witness’s deposition testimony and had other means of presenting its evidence. \(^{356}\)

In State ex rel. Department of Transportation v. Miller, \(^{357}\) a complicated condemnation action, experts battled over the uses and valuation of land taken for highway improvements. \(^{358}\) The case involved an expert’s proposed testimony on the use of the land which contradicted the trial court’s ruling in a pretrial
motion. The Supreme Court reversed, stating the trial court had erred in including five lots as the size of the parcel, instead of four as claimed by the State. Therefore, it also was error to exclude expert testimony on the issue.

Substantive questions were involved in two additional cases dealing with expert testimony. In St. John v. Peterson, plaintiff alleged medical malpractice, and the court excluded testimony of an expert regarding a physician’s duty to inform a patient that a certain procedure was not her specialty and other doctors were specialists. The Supreme Court parsed the offer of proof and concluded its substance was that defendant had breached the standard of care in failing to inform plaintiff that the procedure at issue was not her specialty, but did not address the separate issue of negligence in failure to refer to a specialist. Therefore, exclusion of the evidence was not error.

Bees, legal malpractice, and expert testimony converged in Hamilton v. Sommers. In that case, the Supreme Court decided by a vote of 4-1 that in legal malpractice cases, the standard of care is the national, rather than locality, standard—unless locality “unique to the jurisdiction had any impact on the standard of care” in the case. The issue arose in the context of expert testimony on attorneys’ conflicts of interest, which the circuit court struck because the witness used the national standard of care. In dissent, the Chief Justice strenuously disagreed and would have held locality is an important factor in judging the standard of care. Furthermore, because of its relevance to “expert qualification,” the Chief Justice contended that locality is a “necessary consideration” when an expert is proffered.

H. ARTICLE VIII—HEARSAY

Code Provisions

As noted previously, the South Dakota Bar Evidence Committee reviewed stylistic changes to the Rules that were incorporated into the FRE in December 2011. Subsequently, the United States Supreme Court adopted substantive changes effective in December 2014 to the following Rules: FRE 801(d)(1)(B),

359. Id. ¶ 17, 889 N.W.2d at 148.
360. Id. ¶ 29, 889 N.W.2d at 151.
361. Id. ¶ 30, 889 N.W.2d at 151.
362. St. John v. Peterson, 2015 SD 41, ¶ 23, 865 N.W.2d 125, 132. See supra notes 138-141 and accompanying text (analyzing the applicability of Rules 401, 403, and 404(b) to the facts of this case).
363. Id. ¶ 24, 865 N.W.2d at 132.
364. Id. ¶ 25, 865 N.W.2d at 132.
365. 2014 SD 76, 855 N.W.2d 855.
366. Id. ¶¶ 30-31, 855 N.W.2d at 865-66.
367. Id. ¶ 13, 855 N.W.2d at 860.
368. Id. ¶ 55, 855 N.W.2d at 869-70 (Gilbertson, C.J., dissenting).
369. Id. ¶ 58, 855 N.W.2d at 871.
370. Use of prior consistent statement to rehabilitate for memory.
The South Dakota Bar Commissioners approved adding these four substantive amendments to the package of Rules revisions to be submitted to the South Dakota Supreme Court, and the Supreme Court subsequently approved all of the proposed revisions to Article VIII.

An additional matter was whether to adopt a state equivalent to FRE 804(b)(6), Forfeiture by Misconduct. The South Dakota Bar Evidence Committee did not recommend doing so because that would amount to a substantive change in the Rules. The Supreme Court included the adoption of Rule 804(b)(6) in its Notice for Hearing on September 1, 2015, and subsequently adopted the Rule as proposed.

**Case Law**

**United States Supreme Court**

Important clarification of Confrontation Clause doctrine appeared in *Ohio v. Clark*, where the defendant was convicted on multiple counts of assault, endangering children, and domestic violence. Defendant was watching his girlfriend’s children—L.P. and A.T.—after sending her to work as a prostitute. Later, L.P.’s school teacher noticed his eye was bloodshot and asked what happened. After further examination, the teachers discovered additional marks and injuries. When asked who did this to him, L.P. responded “Dee Dee.” “Dee” is defendant’s nickname. The next day, a social worker found the children at defendant’s mother’s house and had them examined, finding multiple marks on both children.

At trial in state court, L.P. did not testify, but the teachers testified that L.P. “said something like Dee Dee” and that “Dee is big.” The trial court denied defendant’s motion to exclude the testimony under the Confrontation Clause. The court of appeals reversed, and the Ohio Supreme Court affirmed, holding the

---

371. Placing the burden on the opponent to show lack of trustworthiness of a business record.
372. Placing the burden on the opponent to show lack of trustworthiness in the absence of a business record.
373. Placing the burden on the opponent to show lack of trustworthiness in the absence of a public record.
374. S.D. Bar Comm’n meeting of October 9, 2014.
375. The author testified at the hearing on the proposed rule, noting certain issues left open by its language. (Written comments on file with the author.).
377. *Id.* at 2177.
378. *Id.* at 2178.
379. *Id.*
380. *Id.*
381. *Id.* at 2177.
382. *Id.* at 2178.
383. *Id.* at 2177-78.
384. *Id.* at 2178.
statements were obtained with the primary purpose to gather evidence for prosecution. 385

The Court reversed and remanded, using the opportunity to expand on its interpretation of the Confrontation Clause. 386 The Court explained that whether a statement is subject to the Confrontation Clause depends on whether it is testimonial, i.e., the circumstances indicate the objective primary purpose of the statements was to create out-of-court substitutes for trial testimony. 387 A factor for determination of the primary purpose of a conversation is its formality, as informal questioning is not as likely to have a purpose of obtaining testimonial evidence. 388 The Court reasoned that L.P.'s statements were not made with the primary purpose of being used against defendant. 389 The teachers elicited the statements to address an emergency of child abuse, as they needed to know whether to return L.P. to defendant and whether other children were at risk. 390 Their purpose was identifying and ending a threat, regardless if that meant some action would be taken against the abuser. 391

The Court further held that statements by young children are seldom considered testimonial, as children do not understand the criminal justice system and thus would not have the purpose of creating trial testimony. 392 Similar statements were admissible at common law. 393 The Court qualified, however, that this did not mean a statement made to any individuals who are not law enforcement would not violate the Confrontation Clause. 394 Rather, courts must consider the individual's identity, as statements made to those who do not have a duty to collect evidence are less likely to be testimonial. 395

In concurrence, Justice Scalia commented that all that is needed to decide this case is that: (i) this child could not have intended his statements to be testimonial due to his age, (ii) such statements were frequently admissible at the common law,

385. Id.
387. Clark, 135 S. Ct. at 2180.
388. Id.
389. Id. at 2181.
390. Id.
391. Id.
392. Id. at 2182.
393. Id.
394. Id.
395. Id.
and (iii) the teachers did not have the primary purpose of collecting evidence for prosecution.\textsuperscript{396} He added that the Court's dicta further weaken Crawford by holding the primary purpose test is only one factor in determining whether statements are testimonial and by shifting the burden of producing evidence of common law admissibility to the defendant.\textsuperscript{397} Justice Thomas adhered to his usual approach to confrontation, maintaining that the analysis of statements of private persons for confrontation purposes should be the same as that of statements made to law enforcement: whether the statements bear sufficient indicia of solemnity.\textsuperscript{398}

\textbf{South Dakota Supreme Court}

A variety of hearsay issues have arisen in recent criminal cases, and in some, constitutional issues, such as the Confrontation Clause\textsuperscript{399} and/or Miranda warnings, were also implicated. Few of the cases involved routine application of the rules governing hearsay; most were a tangle of difficult issues.\textsuperscript{400} The discussion that follows addresses general hearsay issues first, followed by a review of cases raising Miranda issues.

\textbf{a. General hearsay issues}

Hearsay objections under the business records exception were resolved in two recent cases. In State v. Stokes, the defendant was convicted of simple assault and intentional damage to property in connection with an incident with his ex-girlfriend.\textsuperscript{401} He denied involvement and claimed he was at home ill, texting friends at the time it was alleged to have occurred.\textsuperscript{402} On cross-examination, the prosecutor questioned him about a Verizon log indicating no texting at the time, and then tried to use him to lay the foundation for the document as a business record.\textsuperscript{403} The Supreme Court reversed on this issue, citing the provisions of Rule 803(6) that the foundation for a record may be established by the custodian or other qualified witness or by written certification.\textsuperscript{404} The defendant did not qualify to lay the foundation.\textsuperscript{405}

\textsuperscript{396} Id. at 2183-84 (Scalia, J., concurring).

\textsuperscript{397} Id. at 2185.

\textsuperscript{398} See id. at 2186 (Thomas, J., concurring) (noting that under his test, the proper factors to consider would be the formality of the statements, such as if they are: contained in court documents or prior testimony; obtained after warnings such as Miranda warnings; made in police custody; or elicited in a way to avoid confrontation).

\textsuperscript{399} See supra Part VI and Part VII (discussing witnesses and opinion/expert testimony, respectively).

\textsuperscript{400} But see State v. Stokes, 2017 SD 21, 895 N.W.2d 351 (involving routine application of the rules governing hearsay); State v. Reinhardt, 2016 SD 11, 875 N.W.2d 25 (same).

\textsuperscript{401} Stokes, 2017 SD 21, ¶ 11, 895 N.W.2d at 354.

\textsuperscript{402} Id. ¶ 6, 895 N.W.2d at 353.

\textsuperscript{403} Id. ¶¶ 8-10, 895 N.W.2d at 353-54.

\textsuperscript{404} Id. ¶¶ 13, 23, 895 N.W.2d at 355, 358.

\textsuperscript{405} Id. ¶ 15, 895 N.W.2d at 355.
The Court also discussed authentication, in particular Rules 901(b)(1) and 901(b)(6). It explained that authentication under Rule 901 is not the same as foundation under Rule 803(6), and that the latter requires additional evidence that the record was “kept and prepared in the course of a regularly conducted business activity.” Because the cell phone record was a “significant piece of evidence in a closely contested case,” its admission was prejudicial error requiring reversal.

In another case involving records, State v. Reinhardt, the Court noted the trial court had admitted fingerprint cards to establish prior convictions pursuant to Rule 803(6), the business records exception. The Supreme Court rejected the defendant’s Confrontation Clause argument, stating the cards were not “a solemn declaration or affirmation made for the purpose of establishing or proving some fact.” Rather, they were “physical evidence generated primarily as an administrative step in the booking process.”

The Confrontation Clause was seriously in issue in two other cases. In State v. Spaniol, the Court dealt with the problem of a five-year-old, developmentally disabled child testifying in a case alleging sexual assault by her father. The trial court determined she was competent and available, and the Supreme Court affirmed. The defendant had an opportunity to cross-examine her and to establish contradictions and memory problems with her testimony. Significantly, the Court cited to authority that indicates the child’s merely appearing at trial and listening to the defense counsel’s questions means the Confrontation Clause would not preclude use of her prior statements. The statement appears overly broad and was not necessary to the decision, however, so it should not be interpreted to minimize the requirement that the defendant be given the “opportunity for effective cross-examination.”

A Confrontation Clause violation created reversible error in State v. Vargas, where the defendant was convicted of attempted fetal homicide by giving his
pregnant girlfriend a drink that would cause a miscarriage. The defendant’s wife, meanwhile, agreed with police to record a phone call in which she was able to have defendant make incriminating statements. She did not appear at trial and had not been cross-examined. The Court viewed her statements as testimonial because they were necessary to provide context and meaning to defendant’s statements. The error in admitting the evidence was prejudicial, requiring reversal.

The Court rejected a Confrontation Clause challenge arising in a distinctive context in *State v. Stanley.* The defendant was convicted of possession of cocaine based in part on statements made by defendant and her companion indicating they were engaged in a drug transaction in a portable toilet at the Sturgis Motorcycle Rally. The State introduced the companion’s statements over a challenge by defendant that they were inadmissible hearsay. The Court rejected that contention, viewing the statements as nonhearsay offered to give context. More importantly, the Court analyzed the statements for a possible Confrontation Clause violation, despite that not having been the basis of the defendant’s objection. The Court distinguished the facts from those of *Bruton v. United States* and found no Confrontation Clause violation. The reasoning was that defendant and her companion were not co-defendants in a joint trial and the statements were not facially incriminating.

Application of the hearsay rule and its exceptions was a problem in *State v. Hatchett,* where defendant was convicted of burglary and related offenses. After the incident, he wrote to the victims to apologize, but he also described his criminal history and offered tattoo work if the victims would refuse to testify. The trial court ruled the State could introduce the letter with the latter two matters redacted, but ultimately the State did not do so. The defendant endeavored to

419. State v. Vargas, 2015 SD 72, ¶ 1-3, 869 N.W.2d 150, 152-53.
420. Id. ¶ 18, 869 N.W.2d at 157.
421. Id. ¶ 26, 869 N.W.2d at 160.
422. Id. ¶ 27, 869 N.W.2d at 160.
423. Id. ¶ 28, 869 N.W.2d at 160.
424. See supra notes 185-188 and accompanying text (scrutinizing statements not offered to prove the truth of the matter asserted).
426. Id. ¶ 24, 896 N.W.2d at 678.
427. Id. ¶ 25, 896 N.W.2d at 678. See BROWN, supra note 262, ¶ 249, at 191-95 (considering the interplay of hearsay and the Confrontation Clause).
428. Id. ¶¶ 26-27, 896 N.W.2d at 678-79.
430. Stanley, 2017 SD 32, ¶ 29, 896 N.W.2d at 679. See generally Bruton, 391 U.S. 123 (1968) (finding a Confrontation Clause violation when, in a joint trial, one defendant’s confession was introduced against him, under the rationale that a jury would be unable to follow an instruction to use it only against the confessing defendant).
432. 2014 SD 13, 844 N.W.2d 610.
433. Id. ¶ 1, 844 N.W.2d at 612.
434. Id. ¶ 6, 844 N.W.2d at 613.
435. Id. ¶¶ 6-7, 844 N.W.2d at 613.
have the victim read the redacted letter but the court ruled it was hearsay. The Supreme Court affirmed, classifying the statement as hearsay under the definition in Rule 801(c) and finding no exception authorizing admission.

A unique issue was presented to the Court in *State v. Plastow*, where the problem under consideration was the *corpus delicti* rule. The defendant was charged with the rape of a three-year-old girl, and he made admissions about his conduct to a detective. Based on the evidentiary posture of the case, the trial court determined the *corpus delicti* had not been established independently of defendant’s statements. The Supreme Court affirmed, but it changed the interpretation of the *corpus delicti* rule for future cases.

The Court stated that the existing rule required corroboration by independent evidence of defendant’s extrajudicial statements if those statements were to be admitted. The Court then canvassed cases from the United States Supreme Court and other jurisdictions which have adopted a “trustworthiness” standard to supplant the traditional *corpus delicti* rule. In the Court’s view, new rules of constitutional criminal procedure and evidence offer protections to the defendant that were lacking in the past, so the strict *corpus delicti* rule is unnecessary. Therefore, the standard adopted now is that the government must “introduce substantial independent evidence which would tend to establish the trustworthiness of the statement.” The Court added, “[t]he independent evidence is sufficient if it supports the essential facts admitted sufficiently to justify a jury inference of their truth.”

Finally, several cases involving nonhearsay uses of out-of-court statements were resolved recently. In *State v. Whitfield*, the defendant was convicted of possession of a controlled substance and related charges. While officers were engaging in a consensual search of his cell phone, two messages appeared inquiring whether defendant had drugs. The Supreme Court affirmed their

---

436. Id. ¶ 7, 844 N.W.2d at 613.
437. See id. ¶ 31, 844 N.W.2d at 618 (acknowledging the document would have been admissible under Rule 801(d)(2)(A) as a statement of a party opponent if the government had offered it).
438. 2015 SD 100, 873 N.W.2d 222.
439. Id. ¶ 1, 873 N.W.2d at 223.
440. Id. ¶ 2-5, 873 N.W.2d at 223-25.
441. Id. ¶ 9, 873 N.W.2d at 224-25 (explaining there was no physical evidence, and neither the child, the father, nor Child’s Voice would testify).
442. Id. ¶¶ 26-27, 873 N.W.2d at 231.
443. Id. ¶ 12, 873 N.W.2d at 225.
444. Id. ¶ 16, 873 N.W.2d at 227 (citing Smith v. United States, 348 U.S. 147 (1954); Opper v. United States, 348 U.S. 84 (1954)).
445. Id. ¶ 17, 873 N.W.2d at 228.
446. Id. ¶ 16, 873 N.W.2d at 227 (quoting Opper, 348 U.S. at 93).
447. Id. (quoting Opper, 348 U.S. at 93).
448. See State v. Stanley, 2017 SD 32, 896 N.W.2d 669. See also supra notes 185-188 and accompanying text.
449. 2015 SD 17, 862 N.W.2d 133.
450. Id. ¶ 1, 862 N.W.2d at 135.
451. Id.
admission, not as hearsay, but for the nonhearsay purpose of establishing defendant’s knowledge of the nature of the cocaine he possessed.452

In State v. Martin,453 defendant was convicted of murder for the beating death of a man at whom he was angry.454 Defendant’s own admissions were permissible, as were statements in the 911 call by a witness.455 The latter were not offered to prove the truth of what they asserted, but were offered to show what happened and why.456

Finally, in State v. Craig,457 defendant was convicted of rape of his granddaughter and related offenses.458 Among other evidentiary claims, he argued the circuit court erred in excluding evidence the child’s brother had made to a forensic interviewer.459 The Supreme Court affirmed the conviction, and on this evidence point, characterized the statements as nonhearsay offered to show alleged coaching and not to prove what they asserted.460 The trial court did not abuse discretion in concluding the statements were not relevant and would be unfairly prejudicial.461

b. Miranda issues with confessions

Five major cases dealing with confessions were decided by the Court recently. In State v. Diaz,462 the Court affirmed the murder and kidnapping conviction of the defendant, then a teenager, in connection with the abduction and murder of another teenager by the defendant and her boyfriend.463 The case had previously been before the Court, which had reversed the trial court’s suppression of the defendant’s statements to law enforcement.464 The Court in Diaz II

452. Id. ¶ 13, 862 N.W.2d at 138.
453. 2015 SD 2, 859 N.W.2d 600.
454. Id. ¶¶ 1-5, 859 N.W.2d at 602.
455. Id. ¶ 11, 859 N.W.2d at 605.
456. Id.
457. 2014 SD 43, 850 N.W.2d 828.
458. Id. ¶ 1, 850 N.W.2d at 832.
459. Id. ¶ 10, 850 N.W.2d at 833.
460. Id. ¶ 43, 850 N.W.2d at 839.
461. Id.
462. 2016 SD 78, 887 N.W.2d 751 [hereinafter “Diaz II”].
463. Id. ¶¶ 2-30, 887 N.W.2d at 754-60 (outlining the complex factual background of the case).
464. State v. Diaz, 2014 SD 27, ¶ 61, 847 N.W.2d 144, 165 [hereinafter “Diaz I”]. Fifteen-year-old Diaz admitted to participating in a murder. She lied about her identity during the initial investigation, but later, she agreed to go to the police station for a follow-up interview. She eventually gave the detective her mother’s correct name and phone number, and the mother informed the detective Diaz was a runaway child who may have been the subject of sexual abuse. The mother gave police permission to interrogate her. The detective told Diaz they had permission from her mother to question her, there was a “protocol” he had to go through, and that it was “not a big deal.” He gave Diaz her Miranda warnings in English, and Diaz stated she did not understand because of her limited English. She requested the warnings be given in Spanish so she would not be confused. An interpreter read her the warnings in Spanish one by one, and she indicated she understood each one. The detective then questioned her, and a confession was obtained after an hour and a half. Diaz moved to suppress her confession, arguing she did not voluntarily, knowingly, and intelligently waive her Miranda rights. The trial court granted the motion. The state filed an intermediate appeal and the Supreme Court reversed. See generally Ashley Blake, Casenote, “I Don’t
concluded that reconsideration was not warranted because *Diaz I* had been rendered with the understanding that a child needs more protection of her rights than an adult, and it had examined her confession with “special care.”

In the course of that examination, the Court pinpointed a number of considerations concluding the confession was admissible, including the following: Diaz’s attempts to deceive law enforcement indicated she was of average intelligence and understood the situation; the warnings were given to her twice, Diaz said she understood those rights, and she was given the opportunity to speak with her mother; there was no misconduct in telling the mother Diaz may have been a witness because the detectives at the time had not concluded whether Diaz participated in the murder; Diaz impliedly waived her rights by asking if the questioning would be about the victim, reflecting that she understood the situation and nature of the questioning; and the parent was given notice and Diaz was given the opportunity to speak with her mother. *Diaz I* yielded a stinging dissent from Justice Konenkamp, disturbed about the trickery used to deceive the defendant.

In several cases, the question was whether the government had complied with *Miranda v. Arizona* in conducting the interrogations of individuals who asserted they were in custody but had not been given warnings. The fact that four such cases reached the Supreme Court recently, and that all had the same outcome, is remarkable. It also gives pause as the criminal justice system reflects on how the protections offered by *Miranda* are implemented on a daily basis.

In connection with allegations of sexual abuse of his four-year-old daughter, the specific problem in *State v. Spaniol* was whether defendant was in custody at

---


465. *Diaz II*, 2016 SD 78, ¶ 40, 887 N.W.2d at 763.

466. *Id.* (referencing *Diaz I*, 2014 SD 27, ¶ 23, 847 N.W.2d at 144, where the Supreme Court had acknowledged that a court must look at several factors when determining the validity of a juvenile’s waiver of *Miranda* rights, including age, intelligence, level of maturity, capacity to understand the warnings, misrepresentation used by law enforcement, whether the juvenile was warned he or she may be tried as an adult, whether the parent or guardian was given notice, and whether the juvenile was given the opportunity to talk with his or her parent or guardian).

467. *Diaz II*, 2016 SD 78, ¶ 40, 887 N.W.2d at 763.

468. *Diaz I*, 2014 SD 27, ¶ 42, 847 N.W.2d at 159.

469. *Id.* ¶ 37, 40, 847 N.W.2d at 158-59.

470. *Id.* ¶ 36, 847 N.W.2d at 158.

471. *Id.* ¶ 48, 847 N.W.2d at 161.

472. *Id.* ¶ 40, 847 N.W.2d at 159.

473. *Diaz I*, 2014 SD 27, ¶¶ 68-85, 847 N.W.2d at 166-71 (Konenkamp, J., dissenting) (expressing his opinion as follows: the Court upholds law enforcement tactics that mislead children into believing that *Miranda* rights are “not a big deal” and deceiving parents about why police are questioning their children. Courts must assure that a juvenile’s waiver of *Miranda* rights is not “the product of ignorance of rights or of adolescent fantasy, fright, or despair.” Law enforcement could not have believed Diaz was simply a witness after she lied about her identity and was one of the last people seen with the victim. They failed to inform the mother Diaz was suspected of murder, and the mother’s consent was used to trick Diaz into thinking it was all right to talk. It is not acceptable to use trickery with children, especially in the context of constitutional rights).

the time he made his statements without *Miranda* warnings having been given.\(^{475}\)

A second issue was whether defendant’s confession was involuntary.\(^{476}\) The Court determined defendant was not in custody: he had come to the police station at an officer’s request; he was told he was not under arrest, nor in custody; and he was free to leave at any time.\(^{477}\) The locked door and intense questioning of the first two interrogations did not transform the situation into custody.\(^{478}\) The officer did read the *Miranda* warnings before the third phase of the interrogation, and the defendant waived his rights.\(^{479}\)

The Supreme Court rejected the claim that use of this strategy was akin to the deliberate by-pass of *Miranda* which the United State Supreme Court confronted in *Missouri v. Seibert*.\(^{480}\) There was no willful conduct by the officers, and because the first phases of questioning were not custodial or coercive, the defendant’s waiver of his rights was effective under the Fifth Amendment.\(^{481}\) The factors leading to the conclusion the interrogation was not custodial also resolved defendant’s claim of involuntariness against him.\(^{482}\)

A related issue arose in *McDonough v. Weber*,\(^{483}\) where defendant pleaded guilty to first-degree manslaughter.\(^{484}\) He threw a beer bottle through the victim’s window, and two days later the body was discovered at the victim’s home with stab wounds.\(^{485}\) An agent briefly interviewed defendant at the scene and at the station, and defendant denied any involvement.\(^{486}\) In a subsequent station-house interview, the door was unlocked; the detective did not initially give *Miranda* warnings but did tell defendant he was free to leave at any time and that he would be taken home; the detective did not promise the defendant that he would never be arrested.\(^{487}\) The detective told him it was his choice whether to have an attorney.\(^{488}\)

Defendant provided two different versions of what happened. In an interview of about ninety minutes.\(^{489}\) The detective administered *Miranda* warnings after defendant gave the second version of events, after which he acknowledged his rights and gave a written statement.\(^{490}\) He was interviewed the next day and gave

\(^{475}\) State v. Spaniol, 2017 SD 20, ¶ 35, 895 N.W.2d 329, 342. *See supra* notes 260-269 and accompanying text (evaluating the competency of a child witness in this child sexual abuse case).

\(^{476}\) *Spaniol*, 2017 SD 20, ¶ 45, 895 N.W.2d at 344.

\(^{477}\) *Id.* ¶¶ 36-42, 895 N.W.2d at 342-44.

\(^{478}\) *Id.* ¶ 42, 895 N.W.2d at 343.

\(^{479}\) *Id.* ¶ 43, 895 N.W.2d at 344.

\(^{480}\) *Id.* (quoting *Missouri v. Seibert*, 542 U.S. 600 (2004)).

\(^{481}\) *Id.* ¶ 44, 895 N.W.2d at 344.

\(^{482}\) *Id.* ¶¶ 45-47, 895 N.W.2d at 344-45. *See also id.* ¶¶ 5, 47, 895 N.W.2d at 334, 345 (including the detective’s erroneous assertion that the defendant had tested positive for gonorrhea; the test of the child was positive for the disease).

\(^{483}\) 2015 SD 1, 859 N.W.2d 26.

\(^{484}\) *Id.* ¶ 1, 859 N.W.2d at 30.

\(^{485}\) *Id.* ¶ 2, 859 N.W.2d at 30.

\(^{486}\) *Id.*

\(^{487}\) *Id.* ¶ 4, 859 N.W.2d at 31.

\(^{488}\) *Id.*

\(^{489}\) *Id.* ¶¶ 5, 7, 859 N.W.2d at 31-32.

\(^{490}\) *Id.* ¶ 7, 859 N.W.2d at 32.
another version indicating he was the aggressor. At his plea hearing, he gave a fourth version, claiming the victim triggered his PTSD caused by abuse as a child.

The Supreme Court affirmed the trial court’s denial of habeas relief for ineffective counsel based in part on the *Miranda* issue. Due to the relaxed nature of the interview and that defendant was informed he could leave at any time, he made a calculated choice in cooperating with law enforcement and chose to submit to an interview. Thus, he was not in custody. Further, the statements were not involuntary. Defendant was twenty years old at the time and of ordinary intelligence; he continued to cooperate after receiving the warnings; he had a previous experience with law enforcement where he refused to speak after being given the warnings; and the interview was relaxed and short. Thus, the statements were given voluntarily.

Whether the defendant was in custody also was at issue in *State v. McCahren*, where defendant was convicted of second-degree murder of another teenager. One of the teenagers present called 911 to report the shooting, and police responded within two minutes. In response to the officer’s question, the defendant identified himself as the shooter and answered questions about “what happened” after getting into the police car as directed. The Court determined that defendant was not in custody and the parental notification statute did not apply. The officer was trying to determine what had occurred and whether it amounted to a crime, not trying to elicit a confession. Defendant was not restrained, he was allowed to make calls, and the officer was engaged in “general, on-the-scene questioning.” This did not constitute custody for purposes of *Miranda*.

Likewise, in *State v. Deal*, where defendant was convicted of first-degree rape and sexual contact with a child under 16, he alleged he was in custody when interrogated. The defendant had been found at the bottom of a river bluff with

---

491. *Id.* ¶ 8, 859 N.W.2d at 32.
492. *Id.* ¶ 9, 859 N.W.2d at 32.
493. *Id.* ¶¶ 26-28, 859 N.W.2d at 38-39.
494. *Id.* ¶¶ 25-26, 859 N.W.2d at 38.
495. *Id.*
496. *Id.*
497. *Id.* ¶¶ 30-32, 859 N.W.2d at 40.
498. *Id.*
501. *Id.* ¶¶ 29, 32, 878 N.W.2d at 598-600.
502. *Id.*
503. *Id.* ¶ 31, 878 N.W.2d at 599.
504. *Id.* ¶¶ 31-32, 878 N.W.2d at 599-600.
505. *Id.* ¶ 32, 878 N.W.2d at 600.
506. 2015 SD 51, 866 N.W.2d 141.
507. *Id.* ¶ 1, 866 N.W.2d at 143.
various injuries and he may have attempted suicide. A grand jury indicted him for first-degree rape while he was in the hospital. After he was released, an officer drove to his home and spoke with him outside and then in his patrol car. The officer questioned defendant about his well-being, his hospital stay, and the circumstances resulting in his hospitalization. He then read defendant his Miranda warnings, asked if defendant waived his rights, and defendant replied, “I guess so.” At trial, the officer testified that defendant was nervous, shaking, and tearing up during the interview. defendant moved unsuccessfully to suppress, arguing he was in custody and did not waive his Miranda rights.

The Supreme Court affirmed, holding defendant was not in custody during the interview, and thus Miranda warnings were not required. To determine whether the questioning was custodial, a court must look at the surrounding circumstances, whether a reasonable person would feel free to leave, and whether there was a formal arrest or restraint of movement similar to a formal arrest. Here, the questioning began at defendant’s home. Noticing defendant was cold, the officer offered to continue the questioning in his car where it would be warmer. Defendant agreed. A reasonable person would not view this as a coercive tactic to restrict his or her freedom to leave. The officer did not indicate defendant was not free to leave or restrain him from leaving. Thus, defendant was not in custody during the interview.

Miranda warnings were also at issue in State v. Rogers, where defendant was convicted of the first-degree murder of his girlfriend. Police had received a tip that an individual had been asked to assist in the disposing of a body, and further investigation led them to the defendant at his apartment. When confronted by police, defendant said “he did something very wrong” and told them where the victim’s body was. The Supreme Court rejected the theory that defendant was in custody for the purposes of Miranda, and it denominated the officers’ questions as “general on-the-scene” in nature. Even if the statements

508. Id. ¶ 5-6, 866 N.W.2d at 144.
509. Id. ¶ 7, 866 N.W.2d at 144.
510. Id.
511. Id. ¶ 8, 866 N.W.2d at 144.
512. Id. ¶ 8, 866 N.W.2d at 145.
513. Id. ¶ 9, 866 N.W.2d at 145.
514. Id. ¶ 12, 866 N.W.2d at 145.
515. Id. ¶ 18, 866 N.W.2d at 147.
516. Id. ¶ 13, 866 N.W.2d at 146.
517. Id. ¶ 7, 866 N.W.2d at 144.
518. Id.
519. Id.
520. Id. ¶ 18, 866 N.W.2d at 147.
521. Id.
522. Id.
523. 2016 SD 83, 887 N.W.2d 720.
524. Id. ¶ 1-2, 887 N.W.2d at 721.
525. Id. ¶ 3, 887 N.W.2d at 722.
526. Id. ¶ 17, 887 N.W.2d at 725.
527. Id. ¶ 18, 887 N.W.2d at 725.
were admitted erroneously, any error was harmless given the defendant's additional confessions and the physical evidence in the case.\textsuperscript{528}

I. ARTICLE IX—AUTHENTICATION AND IDENTIFICATION

\textit{Code Provisions}

The South Dakota Bar Evidence Committee recommended incorporating the stylistic changes proposed for Article IX, and it also noted two substantive changes that it supported. Both changes are to Rule 902, addressing self-authenticating documents. Proposed Rule 902(11)\textsuperscript{529} dovetails with Rules 803(6)(A)-(C), the business records rule, and it provides that a certification of that record by the custodian can qualify the record as self-authenticating.\textsuperscript{530} Notice must be given before the trial or hearing by the proponent to permit challenges.\textsuperscript{531} Rule 902(12) is the equivalent for foreign business records, with the modification that the certificate must be such that the signer would be subject to criminal penalty in the jurisdiction where made if it is false.\textsuperscript{532}

The Supreme Court noticed both rules for hearing on September 1, 2015. Subsequently, the Court adopted the rules.

\textit{Case Law}

In \textit{State v. Stokes}, the Supreme Court addressed foundation and authentication of a business record.\textsuperscript{533} Charged with offenses against his ex-girlfriend, defendant claimed he was at home ill and texting on his phone at the time she was assaulted.\textsuperscript{534} The State endeavored to introduce Verizon's call log for defendant's phone during his cross-examination by having him lay the foundation.\textsuperscript{535} The Supreme Court commented that the testimony of the custodian or a certification is required to comply with Rule 803(6), the business records hearsay rule.\textsuperscript{536} Rule 902(11) allows for a certificate in lieu of a custodian testifying at trial, but the foundation still must be laid by a person with knowledge.\textsuperscript{537} In this case, defendant was not a person with knowledge and could

\begin{thebibliography}{99}
\item[528.] \textit{Id.} ¶ 19, 887 N.W.2d at 725.
\item[530.] See S.D.C.L. § 19-19-803 (2016) (codifying the business record rule).
\item[531.] S.D.C.L. § 19-19-902(11).
\item[532.] \textit{Id.} at § 19-19-902(12).
\item[533.] \textit{State v. Stokes}, 2017 SD 21, ¶¶ 17-19, 895 N.W.2d 351, 356-58. \textit{See supra} notes 401-409 and accompanying text (surveying general hearsay issues within the facts of this case).
\item[534.] \textit{Stokes}, 2017 SD 21, ¶¶ 4-6, 895 N.W.2d at 353.
\item[535.] \textit{Id.} ¶¶ 8-9, 895 N.W.2d at 353-54.
\item[536.] \textit{Id.} ¶¶ 13-16, 895 N.W.2d at 355-56.
\item[537.] \textit{Id.} ¶ 14, 895 N.W.2d at 355. \textit{See also} S.D.C.L. § 19-19-803(6)(A)-(C) (2016) (excepting a properly prepared business record from the rule against hearsay).
\end{thebibliography}
not supply the foundation.\textsuperscript{538} The error was prejudicial, given its significance in the case.\textsuperscript{539}

J. ARTICLE X—CONTENTS OF WRITINGS, RECORDINGS AND PHOTOGRAPHS

\textit{Code Provisions}

The South Dakota Bar Evidence Committee recommended that the Supreme Court adopt the stylistic changes to the Rule while maintaining the state-rule references to “TDD” and “TTY” communications which appear at S.D.C.L. § 19-19-1001(f).\textsuperscript{540} The Supreme Court adopted the recommendation.

K. ARTICLE XI—MISCELLANEOUS RULES

The South Dakota Bar Evidence Committee did not recommend any changes to the Article, which consists of Rule 1101, setting forth the applicability of the chapter,\textsuperscript{541} and Rule 1102, stating the title.\textsuperscript{542} The Supreme Court retained the substance of the rules while aligning the sections to the current code citations.

\begin{itemize}
\item \textsuperscript{538} \textit{Stokes}, 2017 SD 21, ¶¶ 18-19, 895 N.W.2d at 356-57.
\item \textsuperscript{539} \textit{Id. ¶¶} 20-23, 895 N.W.2d at 357-58.
\item \textsuperscript{540} \textit{See} S.D.C.L. § 19-19-1001 (2016) (defining “TDD,” “TTY,” and other aids and services which allow reception or transmission of aurally-delivered communication).
\item \textsuperscript{541} \textit{See} S.D.C.L. § 19-19-1101 (2016) (codifying the applicability of the chapters to actions and proceedings in courts of the state of South Dakota, noting exceptions).
\item \textsuperscript{542} \textit{See} S.D.C.L. § 19-19-1102 (2016) (codifying the title of the South Dakota Rules of Evidence).
\end{itemize}