

**Comparison of Newly Adopted South Dakota Rules of Professional Conduct
with ABA Model Rules**

	SOUTH DAKOTA
	Rules as adopted by SD Supreme Court to be effective 1/01/04 Variations from the Model Rules are noted. Rules only; Comment comparison not included.
Preamble	do not include Preamble
Scope	do not include Scope
Rule 1.0	Identical
Rule 1.1	Identical
Rule 1.2	Identical
Rule 1.3	Identical
Rule 1.4	add as (c): If a lawyer does not have professional liability insurance with limits of at least \$100,000, or if during the course of representation, the insurance policy lapses or is terminated, a lawyer shall promptly disclose to a client by including as a component of the lawyer's letterhead, using the following specific language, either that: (1) "This lawyer is not covered by professional liability insurance;" or (2) "This firm is not covered by professional liability insurance." adds as (d): The required disclosure in 1.4(c) shall be included in every written communication with a client. add as (e): This disclosure requirement does not apply to lawyers who are members of the following classes: § 16-18-20.2(1),(3),(4) and full-time, in-house counsel or government lawyers, who do not represent clients outside their official capacity or in-house employment.
Rule 1.5	Identical
Rule 1.6	same as 2002 Model Rule (does not include Cheek amendments of 2003)
Rule 1.7	Identical
Rule 1.8	(c): adds at the end of the first sentence: and the gift is not significantly disproportionate to those given to other donees similarly related to donor.
Rule 1.9	Identical
Rule 1.10	Identical
Rule 1.11	(d)(1): adds reference to 1.13.
Rule 1.12	Identical
Rule 1.13	same as 2002 Model Rule (does not include Cheek amendments of 2003)
Rule 1.14	Identical
Rule 1.15	includes MRs (b) and (c) at the end of (a). adds as (d) and (e): (d) Preserving Identity of Funds and Property of Client. (1) All funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law

	<p>office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:</p> <p>(i) Funds reasonably sufficient to pay bank charges may be deposited therein.</p> <p>(ii) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.</p> <p>(2) A lawyer shall:</p> <p>(i) Promptly notify a client of the receipt of his funds, securities, or other properties.</p> <p>(ii) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.</p> <p>(iii) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accountings to his client regarding them.</p> <p>(iv) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.</p> <p>(3) A lawyer may elect to create and maintain an interest-bearing account for clients' funds which are nominal in amount or to be held for a short period of time in compliance with the following provisions:</p> <p>(i) No earnings from such an account shall be made available to a lawyer or firm.</p> <p>(ii) The account shall include all clients' funds which are nominal in amount or to be held for a short period of time.</p> <p>(iii) An interest-bearing trust account may be established with any bank authorized by federal or state law to do business in South Dakota and insured by the Federal Deposit Insurance Corporation. Funds in each interest-bearing trust account shall be subject to withdrawal upon request and without delay.</p> <p>(iv) The rate of interest payable on any interest-bearing trust account shall not be less than the rate paid by the depository institution to regular, nonlawyer depositors unless reduced to offset bank administrative costs. Higher rates offered by the institution to customers whose deposits exceed certain time or quantity minima, such as those offered in the form of certificates of deposit, may be obtained by a lawyer or law firm on some or all of deposit funds so long as there is no impairment of the right to withdraw or transfer principal immediately.</p> <p>(4) Lawyers or law firms electing to deposit client funds in a trust savings account shall direct the depository institution:</p> <p>(i) To remit interest or dividends, net of any service charges or fees, on the average monthly balance in the account, or as otherwise computed in</p>
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	<p>accordance with an institution's standard accounting practice, at least quarterly, to the South Dakota Bar Foundation;</p> <p>(ii) To transmit with each remittance to the Foundation a statement showing the name of the lawyer or law firm for whom the remittance is sent and the rate of interest applied; and</p> <p>(iii) To transmit to the depositing lawyer or law firm at the same time a report showing the amount paid to the Foundation, the rate of interest applied, and the average account balance of the period for which the report is made.</p> <p>(e) Considerations</p> <p>(1) This is a voluntary program based upon the willing participation by attorneys and law firms, whether proprietorships, partnerships or professional corporations.</p> <p>(2) The program shall apply to all clients of the electing, participating attorneys or firms whose funds on deposit are either nominal in amount or to be held for a short period of time.</p> <p>(3) The following principles shall apply to clients' funds which are held by attorneys and firms who elect to participate in the program:</p> <p>(i) No earnings from the funds may be made available to any attorney or law firm.</p> <p>(ii) Upon request of the client, earnings may be made available to the client whenever possible upon deposited funds which are neither nominal in amount nor are to be held for a short period of time; however, traditional attorney-client relationships do not compel attorneys to either invest clients' funds or to advise clients to make their funds productive.</p> <p>(iii) Clients' funds which are nominal in amount or to be held for a short period of time shall be retained in an interest-bearing checking or savings trust account, with the interest (net of any service charge or fees) made payable to the South Dakota Bar Foundation.</p> <p>(iv) The determination of whether clients' funds are nominal in amount or to be held for a short period of time rests in the sound judgment of each attorney or law firm. Such judgment is not subject to review.</p> <p>(v) Notification of clients whose funds are nominal in amount or to be held for a short period of time is unnecessary for those attorneys and firms who choose to participate in the program. This is not to suggest that many attorneys will not want to notify their clients of their participation in the program in some fashion. There is no impropriety in an attorney or firm advising all clients of their willingness to advance the administration of justice in South Dakota beyond their individual abilities in conjunction with other public-spirited members of their profession. Participation in the program will involve no more than a firm desire to participate, coupled with the attorney's or firm's communication of that desire to an authorized financial institution. That communication should contain only an expression of the attorney's or firm's desire to participate in the program and, if the institution has not already received appropriate notification, advice regarding the Internal Revenue Service's approval of the taxability of earned</p>
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	<p>interest or dividends to the Foundation.</p> <p>(4) The following principles shall apply to those clients' funds held in trust accounts by attorneys or firms who elect NOT to participate in the program:</p> <p>(i) No earnings from the funds may be made available to any attorney or firm.</p> <p>(ii) Upon request of a client, earnings may be made available to client whenever possible on deposited funds which are neither nominal in amount nor to be held for a short period of time; however, traditional attorney-client relationships do not compel attorneys either to invest clients' funds or to advise clients to make their funds productive.</p> <p>(iii) Clients' funds which are nominal in amount or to be held for short periods of time, and for which individual income generation and allocation is not arranged with a financial institution, must be retained in a noninterest-bearing, demand trust account.</p> <p>(iv) The determination of whether clients' funds are nominal in amount or to be held for a short period of time rests in the sound judgment of each attorney or law firm.</p> <p>(5) Interest paid to the South Dakota Bar Foundation will be used for the following purposes:</p> <p>(i) To help prevent crime;</p> <p>(ii) To facilitate and improve the delivery of civil and criminal legal services and the administration of justice;</p> <p>(iii) To encourage law-related education in the schools (K-12);</p> <p>(iv) To encourage law-related education of adults including seminars and programs for charitable, civic and senior citizens groups;</p> <p>(v) To give the general public information about how the courts and lawyers function; and</p> <p>(vi) To issue publications educating the public about the United States legal system.</p>
Rule 1.16	
Rule 1.17	(a): The agreement shall be in writing and may contain restrictions on the practice of law by the seller, and the seller may be the estate of a deceased lawyer.
Rule 1.18	Identical
Rule 2.1	Identical
Rule 2.2	Identical
Rule 2.3	Identical
Rule 2.4	Identical
Rule 3.1	Identical
Rule 3.2	Identical
Rule 3.3	<p>(a)(3): adds at the end: However, in a criminal matter, the lawyer shall not participate with the client in the presentation of the client's testimony which the lawyer knows to be false.</p> <p>(d): adds after "an ex parte proceeding," "except grand juries and</p>

	applications for search warrants,”
Rule 3.4	Identical
Rule 3.5	(b): adds after “communicate ex parte,” “on the merits”
Rule 3.6	Identical
Rule 3.7	adds (a)(4): except as otherwise provided by statute
Rule 3.8	(d): replaces “tends to negate the guilt” with “tends to exculpate”; deletes “or mitigates the offense”; replaces “mitigating information” with “exculpatory information”
Rule 3.9	Identical
Rule 4.1	Identical
Rule 4.2	Identical
Rule 4.3	Identical
Rule 4.4	(b): adds at the end: “and or sender’s lawyer if sender is represented.”
Rule 5.1	Identical
Rule 5.2	Identical
Rule 5.3	Identical
Rule 5.4	adds (a)(2): a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer;
Rule 5.5	adds as (c)(5): in all cases, the lawyer obtains a South Dakota sales tax license and tenders the applicable taxes pursuant to Chapter 10-45. adds at the end of (d)(2): , provided that the lawyer obtains a South Dakota sales tax license and tenders the applicable taxes pursuant to Chapter 10-45.
Rule 5.6	Identical
Rule 5.7	Identical
Rule 6.1	A lawyer should render public interest legal service. A lawyer may discharge this responsibility by: (a) providing professional-services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations; or (b) by service without compensation in public interest activities that improve the law, the legal system or the legal profession; or (c) by financial support for organizations that provide legal services to persons of limited means.
Rule 6.2	Identical
Rule 6.3	Identical
Rule 6.4	Identical
Rule 6.5	Identical
Rule 7.1	Rule 7.1. Communications Concerning a Lawyer’s Services. (a) Definitions. For the purpose of this Rule 7.1, the following terms shall have the

	<p>following meanings:</p> <ol style="list-style-type: none">(1) “communication” means any message or offer made by or on behalf of a lawyer concerning the availability of the lawyer for professional employment which is directed to any former, present, or prospective client, including, but not limited to, the following:<ol style="list-style-type: none">(i) any use of firm name, trade name, fictitious name, or other professional designation of such lawyer;(ii) any stationery, letterhead, business card, sign, brochure, or other comparable written material describing such lawyer;(iii) any advertisement, regardless of medium, of such lawyer, directed to the general public or any significant portion thereof; or(iv) any unsolicited correspondence from a lawyer directed to any person or entity; and(2) “lawyer” means an individual lawyer and any association of lawyers for the practice of law, including a partnership, a professional corporation, limited liability company or any other association. <p>(b) Purpose of Communications. All communications shall be predominantly informational. As used in this Rule 7.1, “predominantly informational” means that, in both quantity and quality, the communication of factual information rationally related to the need for and selection of a lawyer predominates and that the communication includes only a minimal amount of content designed to attract attention to and create interest in the communication.</p> <p>(c) False or Misleading Communications. A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it:</p> <ol style="list-style-type: none">(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the communication considered as a whole not materially misleading;(2) contains a prediction, warranty or guarantee regarding the future success of representation by the lawyer or is likely to create an unjustified expectation about results the lawyer can achieve;(3) contains an opinion, representation, implication or self-laudatory statement regarding the quality of the lawyer’s legal services which is not susceptible of reasonable verification by the public;(4) contains information based on the lawyer’s past success without a disclaimer that past success cannot be an assurance of future success because each case must be decided on its own merits;(5) compares the lawyer’s services with other lawyers’ services, unless the comparison can be factually substantiated;
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	<ul style="list-style-type: none">(6) states or implies that the lawyer actually represents clients in a particular area of practice when the lawyer refers a significant number of such clients to other lawyers for representation with respect to all or a significant aspect of the particular practice area;(7) states or implies that the lawyer is experienced in a particular area of practice unless significant experience in such practice area can be factually substantiated;(8) states or implies that the lawyer is in a position to improperly influence any court or other public body or office;(9) states or implies the existence of a relationship between the lawyer and a government agency or instrumentality;(10) states or implies that a lawyer has a relationship to any other lawyer unless such relationship in fact exists and is close, personal, continuous and regular;(11) fails to contain the name and address by city or town of the lawyer whose services are described in the communication;(12) contains a testimonial about or endorsement of the lawyer, unless the lawyer can factually substantiate the claims made in the testimonial or endorsement and unless such communication also contains an express disclaimer substantively similar to the following: "This testimonial or endorsement does not constitute a guaranty, warranty, or prediction regarding the outcome of your legal matter";(13) contains a testimonial or endorsement about the lawyer for which the lawyer has directly or indirectly given or exchanged anything of value to or with the person making the testimonial or giving the endorsement, unless the communication conspicuously discloses that the lawyer has given or exchanged something of value to or with the person making the testimonial or giving the endorsement;(14) contains a testimonial or endorsement which is not made by an actual client of the lawyer, unless that fact is conspicuously disclosed in the communication;(15) contains any impersonation, dramatization, or simulation which is not predominantly informational and without conspicuously disclosing in the communication the fact that it is an impersonation, dramatization, or simulation;(16) fails to contain disclaimers or disclosures required by this Rule 7.1 or the other Rules of Professional Conduct;(17) contains any other material statement or claim that cannot be factually substantiated. <p>(d) Lawyers Responsible for Communication. Every lawyer associated in the practice of law with or employed by the lawyer which causes or makes a communication in violation of this rule may be subject to discipline for the failure of the</p>
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	communication to comply with the requirements of this rule.
Rule 7.2	<p>Rule 7.2. Advertising.</p> <p>(a) Definition. “Lawyer” is defined in Rule 7.1(a)(2).</p> <p>(b) Permitted Advertising. Subject to the requirements of Rules 7.1 and 7.3, 7.4 and 7.5, a lawyer may advertise legal services through written, recorded, internet, computer, e-mail or other electronic communication, including public media, such as a telephone directory, legal directory, newspapers or other periodicals, billboards and other signs, radio, television and other electronic media, and recorded messages the public may access by dialing a telephone number, or through other written or recorded communication. This rule shall not apply to any advertisement which is broadcast or disseminated in another jurisdiction in which the advertising lawyer is admitted if such advertisement complies with the rules governing lawyer advertising in that jurisdiction and is reasonably expected by the lawyer not to be received or disseminated in the State of South Dakota.</p> <p>(c) Record of Advertising. A copy or recording of an advertisement shall be kept by the advertising lawyer for two years after its last dissemination along with a record of when and where it was used.</p> <p>(d) Prohibited Payments. Except as provided in Rule 1.17 and except as provided in subparagraph (c)(13) of Rule 7.1, a lawyer shall not give anything of value to a person for recommending the lawyer’s services, except that a lawyer may:</p> <ol style="list-style-type: none">(1) pay the reasonable costs of advertisements or communications permitted by this Rule and may pay the usual charges of a not-for-profit legal service organization;(2) pay the usual charges of a not-for-profit 501(c)(3) or 501(c)(6) qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;(3) pay for a law practice in accordance with Rule 1.17. <p>Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.</p> <p>(e) Prohibited Cost Sharing. No lawyer shall, directly or indirectly, pay all or part of the cost of an advertisement by another lawyer with whom the nonadvertising lawyer is not associated in a partnership, professional corporation or limited liability company for the practice of law, unless the advertisement conspicuously discloses the name and address of the nonadvertising lawyer, and conspicuously discloses whether the</p>

	<p>advertising lawyer contemplates referring all or any part of the representation of a client obtained through the advertisement to the nonadvertising lawyer.</p> <p>(f) Permissible Content.</p> <p>The following information in advertisements and written communications shall be presumed not to violate the provisions of this Rule 7.2:</p> <ol style="list-style-type: none">(1) Subject to the requirements of Rule 7.5, the name of the lawyer, a listing of lawyers associated with the lawyer for the practice of law, office addresses and telephone numbers, office and telephone service hours, and a designation such as “lawyer,” “attorney,” “law firm,” “partnership” or “professional corporation,” or “limited liability company.”(2) Date of admission to the South Dakota bar and any other bar association and a listing of federal courts and jurisdictions where the lawyer is licensed to practice.(3) Technical and professional licenses granted by the State of South Dakota or other recognized licensing authorities.(4) Foreign language ability.(5) Fields of law in which the lawyer is certified subject to the requirements of Rule 7.4.(6) Prepaid or group legal service plans in which the lawyer participates.(7) Acceptance of credit cards.(8) Information concerning fees and costs, or the availability of such information on request, subject to the requirements of this Rule 7.2 and the other Rules of Professional Conduct.(9) A listing of the name and geographic location of a lawyer as a sponsor of a public service announcement or charitable, civic or community program or event. Such listings shall not exceed the traditional description of sponsors of or contributors to the charitable, civic or community program or event or public service announcement, and such listing must comply with the provisions of this rule and the other Rules of Professional Conduct.(10) Schools attended, with dates of graduation, degree and other scholastic distinctions.(11) Public or quasi-public offices.(12) Military service.(13) Legal authorships.(14) Legal teaching positions.(15) Memberships, offices and committee assignments in bar associations.(16) Memberships and offices in legal fraternities and legal societies.(17) Memberships in scientific, technical and professional associations and societies.
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	<p>(18) Names and addresses of bank references.</p> <p>(19) With their written consent, names of clients regularly represented.</p> <p>(20) Office and telephone answering service hours.</p> <p>(g) Permissible Fee Information.</p> <p>(1) Advertisements permitted under this Rule 7.2 may contain information about fees for services as follows:</p> <ul style="list-style-type: none">(i) the fee charged for an initial consultation;(ii) availability upon request of a written schedule of fees or an estimate of fees to be charged for specific legal services;(iii) that the charging of a fee is contingent on outcome or that the fee will be a percentage of the recovery, provided that the advertisement conspicuously discloses whether percentages are computed before or after deduction of costs, and only if it specifically and conspicuously states that the client will bear the expenses incurred in the client's representation, regardless of outcome, except as permitted by Rule 1.8(e);(iv) the range of fees for services, provided that the advertisement conspicuously discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client, that the quoted fee will be available only to clients whose legal representation is within the services described in the advertisement, and the client is entitled without obligation to an estimate of the fee within the range likely to be charged;(v) the hourly rate, provided that the advertisement conspicuously discloses that the total fee charge will depend upon the number of hours which must be devoted to the particular matter to be handled for each client, and that the client is entitled without obligation to an estimate of the fee likely to be charged;(vi) fixed fees for specific legal services, provided that the advertisement conspicuously discloses that the quoted fee will be available only to a client seeking the specific services described. <p>(2) A lawyer who advertises a specific fee, range of fees or hourly rate for a particular service shall honor the advertised fee or rate for at least ninety (90) days unless the advertisement conspicuously specifies a shorter period; provided, for advertisements in the yellow pages of telephone directories or other media not published more frequently than annually, the advertised fee or range of fees shall be honored for no less than one year following publication.</p>
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	<p>(h) Electronic Media. Advertisements by electronic media, such as television and radio, may contain the same information as permitted in advertisements by print media, subject to the following requirements:</p> <ol style="list-style-type: none">(1) if a lawyer advertises by electronic media and a person appears in the advertisement purporting to be a lawyer, such person shall in fact be the advertising lawyer or a lawyer employed full-time by the advertising lawyer; and(2) if a lawyer advertises a particular legal service by electronic media, and a person appears in the advertisement purporting to be or implying that the person is the lawyer who will render the legal service, the person appearing in the advertisement shall be the lawyer who will actually perform the legal service advertised unless the advertisement conspicuously discloses that the person appearing in the advertisement is not the person who will perform the legal service advertised.(3) Advertisements disseminated by electronic media shall be prerecorded and the prerecorded communication shall be reviewed and approved by the lawyer before it is broadcast. <p>(i) Law Directories. Nothing in this Rule 7.2 prohibits a lawyer from permitting the inclusion in reputable directories intended primarily for the use of the legal profession or institutional consumers of legal services and contains such information as has traditionally been included in such publications.</p> <p>(j) Acceptance of Employment. A lawyer shall not accept employment when he knows or should know that the person who seeks his services does so as a result of conduct prohibited under this Rule 7.2.</p> <p>(k) Lawyers Responsible for Advertising. Every lawyer associated in the practice of law with or employed by the lawyer which causes or makes an advertising in violation of this rule may be subject to discipline for the failure of the advertisement to comply with the requirements of this rule.</p> <p>(l) Mandatory Disclosure. Every lawyer shall, in any written or media advertisements, disclose the absence of professional liability insurance if the lawyer does not have professional liability insurance having limits of at least \$100,000, using the specific language required in Rule 1.4(c)(1) or (2).</p>
Rule 7.3	<p>(d): adds at the end: Where the communication is written, the label shall appear in a minimum 18-point type or in type as large as the largest type otherwise used in the written communication, whichever is larger. This labeling requirement shall not apply to mailings of announcements of changes in address, firm structure or personnel, nor to mailings of firm brochures to persons selected on a basis other than prospective employment.</p>

Rule 7.4	<p>Replaces MR (a) with an introductory section. The first sentence of the introduction is the same as MR (a). It then adds: If a lawyer practices only in certain fields, or will not accept matters except in such fields, the lawyer is permitted so to indicate. A lawyer shall not state or imply that the lawyer is a specialist except as follows:</p> <p>(a) is the same as MR (b)</p> <p>(b) is the same as MR (c)</p> <p>adds as (c): If a lawyer or firm practices in only certain fields and desires to advertise such limitations in the yellow pages of the telephone directory any such advertising must be accompanied by the following disclaimer appearing in a prominent and conspicuous manner in such advertising or on the same page as the advertising:</p> <p>(1) Such certification is granted by an organization which has been approved by the appropriate regulatory authority to grant such certification; or</p> <p>(2) Such certification is granted by an organization that has not yet been approved by, or has been denied the approval available from the appropriate regulatory authority, and the absence or denial of approval is clearly stated in the communication, and in any advertising subject to Rule 7.2, such statement appears in the same sentence that communicates the certification.</p> <p>adds as (d): Pursuant to subsection (c)(1), the South Dakota Supreme Court hereby designates the American Bar Association as the appropriate regulatory authority to accredit specialty certification programs according to such standards and criteria as the American Bar Association may from time to time establish for accreditation of specialty programs.</p> <p>(e) is the same as MR (d)</p>
Rule 7.5	<p>adds as (e): The disclosure required in Rule 1.4(c)(1) or (2) shall be in black ink with type no smaller than the type used for showing the individual lawyer's names.</p>
Rule 7.6	<p>do not include this rule</p>
Rule 8.1	<p>Identical</p>
Rule 8.2	<p>Identical</p>
Rule 8.3	<p>(a) and (b): use "having knowledge" rather than "knows"</p> <p>add as (d): The names, identities, and treatment of persons seeking assistance of the South Dakota Lawyers Concerned for Lawyers, Inc., or an approved lawyers assistance program, relating to alcohol abuse or chemical dependency shall be kept confidential by members of South Dakota Lawyers Concerned for Lawyers, Inc., who are so contacted.</p>
Rule 8.4	<p>Identical</p>
Rule 8.5	<p>Identical</p>

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