SOUTH DAKOTA
Paralegal Association

sdpa

EST. 1989

REPORTER

Vol. 33
No. 4

AFFILIATED ASSOCIATION

MARCH 2023

SDParalegals.com

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The *Reporter* is published quarterly.
Submissions are due to
ReporterSubmissions@gmail.com by:

Jan. 31..... March Apr. 30..... June
July 31..... September Oct. 31..... December

ADVERTISING

Rates per issue, include sales tax:

Full Page.....$53.25 Quarter Page.....$21.30
Half Page.....$31.95 Business Card.....$15.98

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President's Message

Autumn Nelson, ACP

Happy new year everyone! I hope your holiday season was a joyous one and that the new year is treating you well. As of right now, the new committees for the 2023 year have been appointed and are in full swing planning some really fun projects for this year. If you are interested in joining a committee at any time, please let me know!

I would like to extend a special thanks to Clara Kiley, CP, who attended Belle Fourche High School's business career fair. This was a great opportunity to get information about our profession out there. If anyone else is interested in participating in this type of event, please let me know as I would like to plan to attend alongside you.

As we work our way through this very snowy winter, I wanted to put on your radar a couple of events that will be coming up. The Luncheon Committee has CLE webinars planned for late March and mid-May. Our Annual Meeting and Seminar is set for Friday, June 23, 2023, and will take place in conjunction with the South Dakota State Bar Convention in Sioux Falls at the Ramkota Exhibit Hall. The Executive Committee will host a social event the night before, and we hope to see many of you there! Christal Schreiber and Rebecca Goeken will be attending the NALA Conference and Expo in Boston this July 12-14, 2023. I understand NALA plans to offer the conference virtually again this year, which is a great educational opportunity for our members.

Please reach out to me if you have any questions. The next time I write to you, Spring will be here and hopefully all of this snow will be gone and we will be enjoying warm sunshine!

Clara Kiley, CP, and her co-workers hosted a table for SDPA and the Butte County State's Attorney's Office in Belle Fourche at the high school's Job and Career Fair on February 16, 2023. It was a great way to get students to think about a career in law. SDPA post-it notes and chapstick with SDPA stickers were available to students along with an SDPA flyer and information on legal careers, as well as the dangers of illegal drugs and rights of victims in criminal cases. Thank you, Clara!

Pictured from left to right are: Heidi Jensen, Amy Welles, and Clara Kiley, CP.

2022-2023 Executive Committee

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Mission Statement

To establish good fellowship among members, NALA, and the legal community.

To encourage a high order of ethical & professional attainment.

To further the education of members of our profession.

To cooperate with bar associations.

To support and carry out the programs, purposes, aims, and goals of NALA.

NALA Liaison's Report

Sarah Havlin, ACP

If you are interested in joining NALA's Board of Directors, you should submit a Declaration of Candidacy Form no later than March 15, 2023, to qualify. Information about the duties associated with each open position and the candidacy process can be found here.

NALA has partnered with the College of the Canyons' School of Personal & Professional Learning to offer two new online, instructor-led courses on preparing for the NALA Certified Paralegal (CP) Exam. One course will cover the Knowledge Exam, while the other covers the Skills Exam. The course is only $75 for Non-California residents. The Knowledge Exam course will consist of one two-hour session a week for ten weeks. The Skills Exam course will consist of one two-hour session a week for eight weeks. This is a great opportunity for high-quality, NALA-sanctioned CP Exam preparation. For more information and to register for the course, click here.

The 2022 NALA Conference recording bundle is now available for purchase. The bundle includes all conference sessions, which total 40.5 CLE hours, including five legal ethics courses. Session materials include the recordings and the PDFs of all PowerPoint slides. The link above includes a description of the webinars in the bundle. The rate for non-conference attendee members is $575 (the non-member rate is $628). The virtual attendee member rate is $199 (the non-member rate is $249). The bundle is free for anyone who attended in person.

Please reach out to me if you have any questions regarding the above items or the certification process. I'm happy to answer any questions or point you in the right direction.

Lastly, as a reminder, the NALA's 2023 Conference & Expo will be held in Boston, Massachusetts, July 12-14, 2023, at The Westin Copley Place. The registration link and the list of the offered sessions can be found here.

Continuing Education

MARCH

15	* Communicating in a Multigenerational Workforce	12pm
16	+ Bar Law for Lunch: Appellate Do's & Don'ts	
27	+ SD Law Review Symposium: Cybersecurity, Technology, Agricultural Law & Antitrust	
29	* Secondary Trauma in the Legal Profession	12pm
30	* Overcoming Overwhelm: A 3-Step Model for Bouncing Back	12pm

APRIL

4	SDPA CLE Lunch Webinar: Intro to Municipal Law & Zoning Appeals	12pm
5	* Ethics and Professionalism for Paralegals	12pm
12	* Real Estate III: Liens, Leases, and Easements – Others' Rights	11am

MAY

10	* Real Estate IV: Legal Descriptions and Surveys – Not Who, But What	11am
17	* 2023 Technology Rollouts	1pm
18	+ Bar Law for Lunch: 2023 Legislative Updates	
24	SDPA CLE Lunch Webinar: From Paralegal to Partner	12pm

JUNE

14	* Real Estate V: Title Insurance – Coverage and Claims	11am
21-23	SD Bar Convention *Best Western Ramkota Hotel ~ Sioux Falls*	
22	SDPA Social *Location TBD, Sioux Falls*	6:30-8pm
23	SDPA Annual Seminar & Meeting *Ramkota Hotel ~ Sioux Falls / GoToMeeting*	

JULY

12-14	NALA 2023 Conference & Expo *The Westin Copley Place ~ Boston, MA*	

SDPA Events - watch for registration openings here.

* NALA webinars: CST/CDT. Course info and registration available here.

+ SD State Bar seminars/webinars: CST/CDT.

NEW!! Register for virtual CLE opportunities provided by other NALA affiliates here!

We hope to see you in Boston at the 2023 NALA Conference. Come in early or stay after and enjoy all of the wonderful sights Boston has to offer. From Fenway Park and the JFK Museum to Boston Harbor, there's so much to see while earning top quality CLEs from experts across the country. Do not miss out!

SAVE THE DATE
JULY 12-14, 2023 - Boston, MA
CONFERENCE & EXPO

Ethics Opinion 2022-06 ~ 1.2(c) and 1.8(a)

Question Presented

May a lawyer who has and is providing legal services to a client provide non-legal services as the client's agent for compensation?

Short Answer: Yes, but the lawyer must clearly define the scope of the services as separate and distinct from the legal services, as well as the practical implications of the fact the services are not "legal," including the potential impact on the duty of loyalty, the attorney-client privilege, and how the lawyer's position as a licensed attorney may further limit what the lawyer may do in this extra-legal role. The lawyer must also comply with the rule applicable to business transactions between lawyers and their clients.

FACTS

Lawyer has two Clients whom Lawyer aided in forming an Entity, which Lawyer also represents. Clients now want Lawyer to open a bank account with a bank in the name of one of the Clients (not in the name of Lawyer or Lawyer's firm, and not a trust account), with Lawyer as an authorized agent and signer. Clients would like Lawyer to be responsible for managing the account, including keeping track of the funds deposited and making payments and disbursements to third parties as the Clients direct. Lawyer asks whether Lawyer may provide these separate services for the Clients for compensation.

ANALYSIS

Lawyer's proposed non-legal services for the Clients and Entity still implicate the Rules of Professional Conduct, because they present issues related to the scope of Lawyer's representation and Lawyer's duties concerning business transactions with clients.

Rule 1.2(c) requires that Lawyer communicate any limitations on the scope of representation and obtain the Clients' informed consent to those limitations. In this instance, the Lawyer must convey several limitations and clarifications to the Clients in writing and get the Clients' written consent.

Lawyer must communicate that in providing the agent services, Lawyer is not providing legal services and that there are several practical consequences. The Lawyer's malpractice insurance may not provide coverage for any errors or omissions the Lawyer makes in providing the agent services. The attorney-client privilege is unlikely to cover communications between the Lawyer and the Clients regarding those services. If there is a future dispute about ownership of the funds in the account, such as a claim asserted by a third-party creditor, the Lawyer's duty of loyalty as an attorney could be trumped by whatever obligation the Lawyer has as agent.

This list of practical consequences is exemplary, not exhaustive. The Lawyer should consider any other possible ways that providing non-legal services as an agent for the Clients will impact the ability of Lawyer to provide legal services to the Clients, particularly with regard to potentially conflicting duties.

In addition, because Lawyer is going to be paid for non-legal services by a Client or Clients, this constitutes a "business transaction" outside the scope of legal services and is therefore subject to Rule 1.8(a), applicable to business transactions with Clients, instead of Rule 1.5, applicable to fees for legal services. Under that Rule, Lawyer may not enter into this or any other business transaction with the Clients unless (1) the transaction and the terms of the transaction are fair and reasonable to the Clients, and fully disclosed and transmitted in writing in a manner that is reasonably understandable; (2) the Clients are advised of the desirability of seeking independent legal counsel's review of the transaction and allowed time to do so; and (3) the Clients give informed consent in writing to the essential terms of the agreement and the Lawyer's role in the arrangement.

CONCLUSION

A lawyer may provide non-legal services to a client or clients and be paid for doing so, but only if the lawyer explains in writing any limitations the lawyer's performance of those services places on the lawyer's ability to provide legal representation. The lawyer must also satisfy the Rule applicable to business transactions between lawyers and their clients including ensuring the terms of the compensation are reasonable, encouraging the clients to seek independent legal review of the transactions, and obtaining the clients' written consent.

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Ethics Opinion 2022-07 ~ 4.2, 4.3 and 4.4

Question Presented

If a lawyer is representing a client suing the client's former entity-employer, and an attorney represents the entity, may the lawyer contact another former employee of the entity-employer about the lawsuit without the consent of the entity-employer's attorney?

Short Answer: Yes, with certain caveats, such as the possibility that the other former employee possesses privileged information, is independently represented, or has obtained representation from the entity-employer's attorney.

FACTS

Lawyer's Client is suing Client's former Employer (an entity) for wrongful termination. Employer is represented by an attorney. The Lawyer and Client believe another Former Employee has information helpful to Client's claim. Former Employee was a department-head level employee of Employer, but worked in a different department and was not Client's supervisor. Lawyer would like to speak directly with the other Former Employee.

Lawyer is concerned that Rule 4.2 of the South Dakota Rules of Professional Conduct may prohibit this communication. The Rule prohibits the Lawyer from communicating about the subject matter of the representation (i.e., the facts giving rise to Client's lawsuit) with a person the Lawyer knows to be represented by another lawyer without that Lawyer's consent, and Lawyer is concerned this prohibition extends to Former Employee.

ANALYSIS

Comment [7] to South Dakota's Rule 4.2 addresses communications with former employees of represented entities and states, "[c]onsent of the organization's lawyer is not required for communication with a former constituent." SDCL Ch. 16-18, Appx. A, Rule 4.2, cmt. [7]. Even communications with current employees of an entity are only strictly proscribed when the current employee (1) supervises, directs, or regularly consults with the entity's lawyer concerning the matter; or (2) has the authority to obligate the entity concerning the matter or whose act or omission in connection with the matter may be imputed to the entity for purposes of civil liability. (*Id.*) Neither of those conditions appears to apply here. Consequently, Lawyer's proposed communication with Employer's Former Employee is not strictly prohibited. This is consistent with the approach of the ABA Committee on Ethics and Professional Responsibility in its Formal Opinion 91-359, which stated that former employees of an entity may be contacted without consulting with the entity's attorney because the former employees are no longer in positions of authority and cannot bind the entity.

However, Comment [7] also states that "[i]n communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4." (*Id.*) Rule 4.4, in turn, provides that a lawyer must not use means of obtaining evidence that violate the legal rights of a third person. SDCL Ch. 16-18, Appx. A, Rule 4.4. The comments to Rule 4.4 specifically identify "unwarranted intrusions into privileged relationships, such as the client-lawyer relationship." *Id.* at cmt. [1]. ABA Formal Opinion 91-359 indicated this means that the lawyer communicating with a former employee of a represented entity "must be careful not to seek to induce the former employee to violate the privilege attaching to attorney-client communications to the extent his or her communications as former employee with his or her former employer's counsel are protected by the privilege . . . Such an attempt could violate Rule 4.4." ABA Formal Opinion 91-359.

Consequently, if Lawyer contacts the Former Employee, Lawyer must not try to elicit information from Former Employee that would be subject to the attorney-client privilege between the Employer and its attorneys, such as communications between Former Employee and the Employer's attorneys.

Finally, even if Former Employee is not automatically "represented" by the Former Employer's attorneys, it is possible the Former Employee has sought separate representation from Former Employer's attorneys or com-

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pletely independent representation from another attorney. Comment [8] to Rule 4.2 indicates that if the Former Employee makes statements during the Lawyer's communication with Former Employee suggesting that Former Employee has independent representation, Lawyer cannot ignore these statements but instead should confirm whether the Former Employee is represented. In fact, the Committee believes that in this situation, where there is pending litigation, Lawyer should avoid any doubt by affirmatively inquiring whether Former Employee has spoken with or obtained separate representation from another attorney before having a substantive discussion with the Former Employee.

Assuming none of these conditions apply, the Former Employee is an unrepresented person, and the Lawyer must adhere to the requirements of Rule 4.3. That Rule, and its comment [1], indicate that a lawyer should ordinarily tell any person believed to be unrepresented who the lawyer represents, and what interest the lawyer's client has that is prompting the lawyer's contact. In this case, if Lawyer contacts Former Employee, Lawyer should tell Former Employee who Lawyer represents, and further explain the reason for the contact, i.e., the Lawyer's Client's lawsuit against Client's and Former Employee's previous employer.

CONCLUSION

A lawyer may communicate with a represented organization's former employee so long as the former employee has not obtained independent representation, either from the organization's attorneys or a different attorney and so long as the lawyer does not try to elicit privileged information from the former employee.

NALA CODE OF ETHICS AND PROFESSIONAL RESPONSIBILITY

Canon 2: A paralegal must not perform any of the duties that attorneys only may perform or take any actions that attorneys *may not* take. (*Emphasis added*).

From the Bar: *The Ethics Committee make an excellent starting place for attorneys to research an ethical question. The Committee can also steer lawyers to ethics opinions from the ABA, other states, and other ethics resources that may be helpful. Please note: The Ethics Committee is NOT the Disciplinary Board. The Ethics Committee exists not to identify and discipline ethical violations, but to confidentially assist lawyers in achieving compliance with the Rules of Professional Responsibility.*

TechTips & TRICKS

HOW TO CONVERT COLOR PDFS FILES TO BLACK & WHITE

Print it. Scan it. Replace it.

This should be your last resort, because your document loses quality, particulary when you're working with photographs, which lose even more quality once they go through Odyssey.

Print it to Adobe PDF.

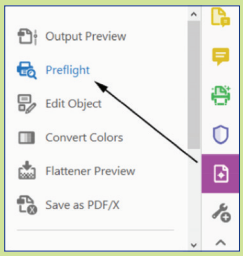
All you have to do is choose "Adobe PDF" from your dropdown print list and check the box labeled "Print in grayscale (black and white)." This method is fine as long as you're not converting a document that contains an image or a photograph - you'll lose some of the image quality. Think of this like printing a color photo on a black and white printer.

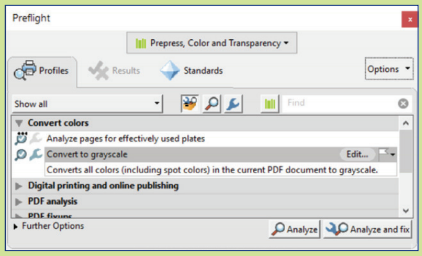
Convert it to true grayscale.

This is the best practice if the image quality is important, and you can do it with Acrobat Pro or Acrobat Pro DC using the Print Production tools.

Acrobat Pro DC (2020 edition and later)

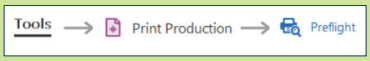
1. If you don't see the Print Production icon, go to View > Tools > Print Production.
2. Select Preflight.
3. If it's not already the default selection, choose Prepress, Color and Transparency from the drop-down menu at the top.
4. If it's not already the default tool selection, choose Convert to grayscale within the Convert colors profile.
5. Click the Analyze and fix button.
6. Save the new file.

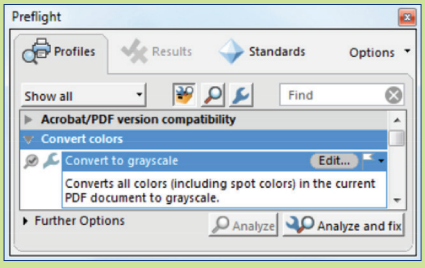




Acrobat Professional ("Pro")

1. Choose Print Production in the Tools menu. If Print Production is not visible, you may have to click that little list/triangle button to make it visible from now on.
2. Select Convert to grayscale in the Convert colors list in the Preflight panel.
3. Click the Analyze and fix button.
4. Save the new file.





HAVE A QUESTION OR TIP TO SHARE?
Contact Jessi Stucke, ACP, at JStucke@rwwsh.com.

Are you SMARTER than a 4TH GRADER?

by Karen Armstrong, PP, PLS

I was looking for a topic for this newsletter when my 4th grade grandson brought his English papers home from school. The 4th graders do a weekly review of things they have previously learned during the year. His grammar review last week looked very familiar to things I have written about in these articles the past few years. Test your knowledge to see if you are smarter than a 4th grader! The answers are on page 16.

1. Which part of speech is the underlined word:

   We saw the turkey waddling rapidly away from the farmer.

   a. noun c. adjective
   b. verb d. adverb

2. Circle the adjectives in the following sentence:

   My cranky, old neighbor yelled at
   our cute, adorable, brown puppy.

3. Replace the underlined text in the following sentence with a pronoun:

   My parents and I went to the museum this past weekend.

4. Are the following common (C) or proper (P) nouns?

   Fairbanks ____ computer ____
   daisy ____ Minnesota ____

5. Add the correct punctuation to the following sentence:

   I know said the teacher you are going to master your facts.

6. What type of sentence is this?

   Thomas Jefferson was our country's third president.

   a. declarative c. imperative
   b. interrogative d. exclamatory

7. Fragment (F) or sentence (S).

   a. The lucky duck swam. ____
   b. Troublesome toddlers. ____
   c. My dad has lots of tools. ____
   d. Mastery of multiplication tables. ____

8. Which part of speech is the underlined word:

   We are climbing up the mountain.

   a. noun c. adjective
   b. verb d. adverb

9. What type of figurative language is the following sentence?

   I'm so hungry I could eat a horse.

   a. simile c. hyperbole
   b. metaphor d. personification

10. Complete the analogy:

    Warm: Incubator
    Cold: _____

11. Which word range would you find at the top corner of the dictionary page where this word would appear: frantic

    ☐ fabulous – factual
    ☐ front – furniture
    ☐ fraction – fraternity

12. What type of sentence is this:

    What an amazing performance!

    a. declarative c. imperative
    b. interrogative d. exclamatory

13. Add the correct punctuation to the following sentence:

    My dad likes to play football basketball and golf

14. Circle the adverbs in the following sentence:

    My friendly neighbor walked quickly
    and awkwardly down the driveway.

15. The denotative meaning of a word is the dictionary definition. The connotative meaning is the positive or negative emotional meaning. Is this denotative or connotative:

    mouse – small rodent

If you have any questions or grammar subjects you would like discussed in the future, please contact Karen Armstrong, PP, PLS @ Karen@SchoenbeckLaw.com.

Do Lawyers Need to Be Concerned About DEEPFAKES?

The short answer is yes, everyone does; but the reason lawyers need to be concerned requires a longer explanation.

Mark Bassingthwaighte, Esq.

Originally published on October 18, 2022 on the ALPS Insurance Cybersecurity blog — republished with permission from the author. Blog posts are available here.

What is a deepfake?

The word "deepfake" comes from combining the words "deep learning" with the word "fake." A deepfake is digital content that can be created using powerful techniques from machine learning and artificial intelligence to manipulate existing or generate new visual and audio content that can easily deceive others who view or hear it. Deepfakes aren't by definition all bad, for example deepfake technology is used by the film industry. It's only when a bad actor creates a deepfake for use in furtherance of a cyberattack, fraud, extortion attempt, or other scam that they become a serious concern.

Isn't creating a deepfake crazy hard to do?

Not anymore. Jai Vijayan, Contributing Writer at Dark Reading recently stated: "It's time to dispel notions of deepfakes as an emergent threat. All the pieces for widespread attacks are in place and readily available to cybercriminals, even unsophisticated ones."

Researchers with the security company Trend Micro expressed similar concerns in an online post this past September with this opening statement: "The growing appearance of deepfake attacks is significantly reshaping the threat landscape. These fakes bring attacks such as business email compromise (BEC) and identity verification bypassing to new levels." They went on to say that more serious attacks will be forthcoming because of the following issues:

1. "There is enough content exposed on social media to create deepfake models for millions of people. People in every country, city, village, or particular social group have their social media exposed to the world.

2. "All the technological pillars are in place. Attack implementation does not require significant investment and attacks can be launched not just by national states and corporations but also by individuals and small criminal groups.

3. "Actors can already impersonate and steal the identities of politicians, C-level executives, and celebrities. This could significantly increase the success rate of certain attacks such as financial schemes, short-lived disinformation campaigns, public opinion manipulation, and extortion.

4. "The identities of ordinary people are available to be stolen or recreated from publicly exposed media. Cyber criminals can steal from the impersonated victims or use their identities for malicious activities.

5. "The modification of deepfake models can lead to a mass appearance of identities of people who never existed. These identities can be used in different fraud schemes. Indicators of such appearances have already been spotted in the wild."

Why do lawyers need to be concerned?

I would hope it would be self-evident. Due to the amount of other people's money law firms are responsible for coupled with the amount and variety of sensitive and confidential information lawyers maintain, law firms have been and will continue to be an attractive target for cybercriminals and scammers. The only thing that is changing is the sophistication of the attacks.

As a lawyer, you need to know that a tool that enables someone to create a deepfake of you exists. That deepfake could be used to hack your Amazon Alexa; manipulate a colleague, family member, friend, or employee into moving money; used to hijack your bank account, bypass an identity verification process, or even to plant fake evidence in an attempt to blackmail you. All that person needs is a good photo or a short voice recording. How many people do you know, including yourself, who have already posted all kinds of audio, video, and photos in the social media space? You and I both know it's practically all of us.

»

My purpose in sharing all of this is not to instill fear. Rather, it is to create awareness and an appropriate level of concern. We all need to continue to stay abreast as to how the attack vectors continue to change in order to have an opportunity to be proactive in our efforts to avoid falling prey to these ever evolving cyberattacks and scams.

What should law firms do about the deepfake threat?

As with so many cyber and scam threats, there is no one step you can take and there are going to be no guarantees that any combination of steps will successfully block this threat. All you can do is try your best. That said, the following are becoming more important than ever.

1. Use multifactor authentication on every critical or sensitive account or service. Think bank and other financial accounts, cloud-based services such as practice management programs, email accounts, remote access, and the list goes on.

2. Mandate the use of an out-of-band communication process to verify the legitimacy of every request to transfer funds, regardless of the communication channel the person making the request uses. And if you are not already aware, an out-of-band communication is a method of challenge and response to the requestor of a transfer, payment, or delivery of money using a communication method that is separate and distinct from the communication method the requestor originally used.

3. Conduct periodic mandatory training that over time covers all the various tactics utilized in social engineering attacks. Include current examples to demonstrate how these attacks "look and feel." Note that mandatory means no exceptions; all lawyers and staff must participate.

4. Encourage social media users to limit their presence on social media and to minimize the posting of high-quality personal images online.

5. Consider using biometric verification processes for access to critical accounts such as banking or other financial accounts. The reason why is biometric data typically has minimal public exposure.

6. Make all conference calls, video calls, etc. private and/or password-protected. The goal is to ensure that only trusted known individuals have the ability to participate.

About the Author

Since 1998, **Mark Bassingthwaighte, Esq.**, has been a Risk Manager with ALPS, the nation's largest direct writer of lawyers' malpractice insurance. In his tenure with the company, Mr. Bassingthwaighte has conducted over 1200 law firm risk management assessment visits, presented over 600 continuing legal education seminars throughout the United States, and written extensively on risk management, ethics, and technology. Mr. Bassingthwaighte is a member of the State Bar of Montana as well as the American Bar Association where he currently sits on the ABA Center for Professional Responsibility's Conference Planning Committee. He received his J.D. from Drake University Law School.

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DID YOU KNOW ? PROPERTY SEARCHES

If you're trying to verify information or locate a property, before you cold call the Register of Deeds, check out some of these online resources! Almost all of them are free and they'll put you in a much better position to get the records you need.

Depending on the site, you can search by landowner or taxpayer name, legal description, Parcel ID, Taxpayer ID, or address.

Library of Congress (Original plat maps)

Brown County Treasurer

Aberdeen GIS Map

Planning & Development District III GIS Maps^

First District Association of Local Governments GIS Maps*

Sioux Falls Parcel Finder

Beacon Schneider Geospatial+ (ROD records & GIS maps)

Google Earth

PLEASE NOTE: These are examples of just some of the interactive resources for South Dakota, not a comprehensive list.

* Beadle, Clark, Codington, Deuel, Edmunds, Grant, Hamlin, Hand, Kingsbury, Lake (coming soon), Lawrence, Miner, Moody, Roberts.

^ Aurora, Bennett, Bon Homme, Brule, Buffalo, Butte, Campbell, Charles Mix, Davison, Day, Douglas, Faulk, Hanson, Hutchinson, Jackson, Jerauld, Jones, Lyman, Marshall, McPherson, Mellette, Potter, Sanborn, Tripp, Todd, Ziebach (coming soon); Cemeteries: Chamberlain, Yankton.

\+ Brookings, Brown, Charles Mix, Clay, Custer, Haakon, Harding, Hughes, Hyde, Lake, Lincoln, McCook, Meade, Minnehaha, Moody, Potter, Spink, Union, Walworth, Yankton.

United States Bankruptcy Court, District of South Dakota

Honorable Laura L. Kulm Ask, Chief Judge

Laura Lynn Kulm Ask was recently appointed by the United States Court of Appeals for the Eighth Circuit as a United States Bankruptcy Judge for the District of South Dakota. Judge Kulm Ask, now Chief Judge for the Bankruptcy Court, succeeded Judge Charles L. Nail, Jr., upon his retirement. Her chambers are located in Sioux Falls, South Dakota.

Prior to taking the bench, Laura was a partner at the law firm of Gerry & Kulm Ask, Prof. LLC, in Sioux Falls, where she practiced in the areas of bankruptcy, debtor-creditor rights, corporate law, and estate planning.

Judge Kulm Ask practiced bankruptcy law for almost twenty years. She served on multiple committees including the District of South Dakota's Federal Practice Committee, the South Dakota Local Bankruptcy Rules Committee, and the South Dakota State Bar Debtor/Creditor Committee. She wrote articles that were published in South Dakota State Bar newsletters on bankruptcy changes and she sat on sub-committees that reviewed statutes and proposed legislation to recommend revisions or changes. Judge Kulm Ask participated in creating the South Dakota State Bar's "Bankruptcy Matters" video, which was circulated by the bar to entice young practitioners to start a career in bankruptcy law, and she presented on multiple platforms at several continuing legal education seminars on bankruptcy topics and changes over the years. Judge Kulm Ask volunteered at legal clinics for veterans, provided pro bono or reduced rate legal services independently and through Access to Justice and East River Legal Services, and volunteered numerous hours to other charities and organizations.

Judge Kulm Ask was born and raised on her family's farm near Selby, which is still owned by her parents, Ralph and Patricia Kulm. She received her Bachelor of Science degree from the University of South Dakota and her Juris Doctorate degree from the University of South Dakota School of Law. She and her husband, LeRoy, and their three children, Ashley, Hayden, and Julia, live on an acreage near Brandon.

U.S. DISTRICT COURT UPDATES

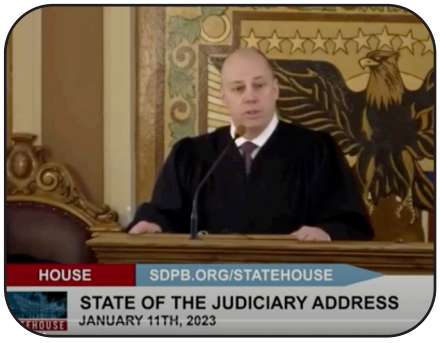
If you receive email notifications for materials filed in CM-ECF, you should be receiving the attorney newsletters as well. Usually once a month, the Clerk sends newsletters regarding various updates to local rules, rates, trial procedures, and more. If you don't receive these emails or would like to look at previous newsletters, they are always available here. The most recent newsletter was sent January 13, 2023.

ODYSSEY UPDATES

Odyssey users automatically receive emails regarding changes that affect attorneys and e-filers. The most recent updates were published in December:

- Email/Firm Changes - Where/How to Update
- Rejected Filings - How to Refile
- Updated Guidelines - Dec. 2022

2023 State of the Judiciary Message
Chief Justice Steven R. Jensen



@SDUJS
January 11, 2023

Chief Justice Jensen presents third State of the Judiciary message to Governor Kristi Noem and a joint session of the legislature

Chief Justice Jensen presented his third and the 2023 State of the Judiciary message to Governor Kristi Noem and a joint session of the South Dakota Legislature on January 11, 2023.

You can watch the recording online @SDUJS, the official YouTube channel for the South Dakota Unified Judicial System. Among other videos, the channel hosts recordings of judiciary messages going back to 2003. You can also download the State of the Judiciary Message booklets or just the messages themselves from the UJS website, including for previous years going back to 1998, here.

Committee Reports

AUDIT

Chair: Tasha Altmann, ACP
Tasha.Altmann@mrEnergy.com
EC Liaison: Autumn Nelson, ACP
Member: Vicki Blake, ACP

No report.

CLE LUNCHEON

Chair: Jessi Stucke, ACP
JStucke@rwwsh.com
Members: Vicki Blake, ACP
Jennifer Frederick, CP
Jessica Huyck, ACP
Janet Miller, ACP
Rebecca Goeken
Rebekah M. Mattern

The committee has arranged presenters for the first two CLE webinars this year. The first will be in late March/early April, and the second will be in late May. The President will be emailing details to everyone in the near future. If you have ideas for topics, or can recommend a presenter, please contact Jessi.

EDUCATION

Co-Chairs: Rebecca Goeken
GoekenR@GoosmannLaw.com
Co-Chairs: Heidi Anderson
Heidi.Anderson@WoodsFuller.com
EC Liaison: Christal Schreiber
Members: Amanda Anderson
Stephanie Bentzen
Courtney Vanden Berg, CP

No report.

ETHICS

Chair: Jennifer Frederick, CP
Jen@SchoenbeckLaw.com
EC Liaison: Autumn Nelson, ACP
Member: Dixie A. Bader, CP
Vikki Kelner, ACP
Janet Miller, ACP

Nothing to report.

FINANCE

Clara Kiley, CP
PCKiley@msn.com

In February, we transferred $1,000 from the checking account to the savings account to avoid a dormant account fee. SDPA's checking account balance reflected receipt of 67 membership renewals as of the end of January. If you did not renew your membership by March 1, you will need to re-apply for membership. You can apply online and pay through the website, or you can mail a check to me and send your paper application to the Membership Committee.

JOB BANK

Chair: Laura Stewart
LStewart@FullerAndWilliamson.com
EC Liaison: Christal Schreiber
Members: Kayne Larimer, ACP
Ashly Luke
Jackie Schad, ACP

Open positions are listed on page 15. The job information is available on our website here. If you are an employer or know of an employer seeking legal staff, please contact Laura.

LIBRARIAN

Courtney Vanden Berg, CP
Courtney@StrangeLaw.com

The library now has the October 2022 Semi-Annual Seminar available to check out for all those who were unable to attend. If you or someone you know is in need of CLE credits please keep in mind we have the library catalog available online at https://www.sdparalegals.com/news-resources, and material can be checked out through the website store. Please take a moment to review the catalog and if there are any recommendations for additional resources, please let me know.

As a reminder, recordings of previous seminars can be checked out by SDPA members for $45 or $60 for nonmembers (postage included). Let me know what seminars you were not able to attend but would like to view, and I can get the DVDs out to you.

The library also has two copies of the NALA Certified Paralegal Exam Fundamentals manual available for members to check out if you are thinking now is the time to get certified. Members are allowed to use the manual for three months to study for the exam after paying a $100 deposit. The manual is an excellent resource for anyone studying for the CP exam.

MEMBERSHIP

Co-Chairs: Autumn Nelson, ACP
NelsonA@GoosmannLaw.com
Jessi Stucke, ACP
JStucke@rwwsh.com
EC Liaison: Christal Schreiber
Members: Amanda Anderson

As of March 1, 2023, we have 79 members. If you work with or know any paralegals or legal assistants who are interested in joining SPDA, please have them contact Autumn or Jessi. Also, please remember to update any changes in your employment, home or work contact information and email address so that you receive timely notices, newsletters, and other important emails. All changes can be sent to Jessi. We are hoping to coordinate some fun membership mixers in 2023 and always welcome any suggestions from our members for activities they would like to see.

NEWSLETTER

Chair: Jessi Stucke, ACP
JStucke@rwwsh.com
EC Liaison: Michelle Tyndall, ACP
Members: Karen Armstrong, PP, PLS
Amanda Bain, CP
Jennifer Frederick, CP
Jessica Huyck, ACP

We hope you enjoyed this edition of SDPA's *Reporter*. If you are interested in contributing information or articles for future issues, please contact us! We welcomes tips and suggestions so that we can continue to provide you information to help you in your daily work and for your career.

NOMINATIONS & ELECTIONS

Chair: Carrie Reider, CP
cjReider@fnbsf.com
Members: Dixie Bader, CP
Vicki Blake, ACP
Jessi Stucke, ACP

The 2nd Vice President position has become vacant. Pursuant to the Bylaws, the Executive Committee will appoint a member to fulfill this term. The Nominations & Elections Committee will recommend someone to take the former 2nd Vice President's place as 1st Vice President for the 2023-2024 year, continuing into the President role in 2024-2025.

PROFESSIONAL DEVELOPMENT

Chair: Rebekah M. Mattern
RMattern@LynnJackson.com
EC Liaison: Vacant
Members: Lauren Collins
Jessica Huyck, ACP
Carrie Reider, CP

No report.

PUBLIC RELATIONS

Chair: Vicki Blake, ACP
Vicki@ddLawSD.com
Members: Dixie Bader, CP
Jennifer Frederick, CP
Lauren Collins

No report.

WEBSITE

Chair: Jessica Huyck, ACP
Jessica.Huyck@SDstate.edu
Members: Carrie Reider, CP
Jessi Stucke, ACP

The committee has continued to update SDPA's website with job openings, upcoming events, and information for new and existing members. The website's "Store" tab provides options for online processing of membership, library rentals, and CLE opportunities. Be sure to check out this tab if you have not already done so. If you have an event or news item you would like shared on the website, please contact our committee for assistance.

Preparing the Appendix in FEDERAL APPEALS

Tim Kowal, Esq.
Thomas Vogele & Associates, APC
Costa Mesa, CA

This article originally appeared in the National Association of Legal Assistants' (NALA) Q3 2022 issue of *Facts & Findings*. Republished with permission.

If you are reading this article, you are probably an occasional practitioner in federal appeals or the paralegal for an occasional practitioner in federal appeals. You probably have worked on a few federal appeals in the past. You probably spent a lot of time figuring out all the steps required to prepare the appellate record and appendix. You probably have forgotten some of the steps – maybe most of the steps (possibly all of them). But certainly, you remember this: preparing the record and appendix was a confusing process.

If that is you, then bookmark this article. It will take you through the steps to prepare the appellate record and appendix for a federal appeal.

Some Ground Rules

This article will cover how to designate the record for your appeal, and how to prepare the appendix. (The Fifth and Ninth Circuits use "excerpts of record" for the same concept. Unless otherwise specified, references to "appendix" in this article also refer to the excerpts of record.) This article will assume that you have timely and appropriately taken your appeal. This article will not cover special procedures or idiosyncratic local rules of particular circuits. There is no substitute for reading the applicable rules. (But for a good jump start, consider calling the help desk at your Court of Appeals. They are extremely helpful.)

Here is what this article will cover:

- The differences between the record and the appendix (or excerpts of record)
- How to order transcripts to complete the appellate record;
- Whether you need to prepare a statement of issues;
- What documents must be included in the appendix, what should be included, and what must not be included;
- A step-by-step list for preparing the appendix (or excerpts of record);
- Avoiding sanctions for an improper appendix.

What Is the "Record"?

The first step is to complete the appellate record. And before we do that, we need to understand what exactly we mean by the "record." The "record" is the only reliable information about a case that the appellate court will ever have. "We use the word 'record' to mean the court's entire file, including all filings, the audio recordings from the hearings, and all other documents in the court's file, such as the court's log notes and orders."[1]

That is why attorneys so frequently reference the record. They say things like: "I need to make the record," "let the record reflect," "the record is clear," "let us go off the record," "for the good of the record," "put this on the record," "is this in the record?" and so on. The point of everything a trial attorney does is to make the record.

So how do things get in the record? Making the record is, in large part, automatic. For example, everything filed in the CM/ECF system is in the record, including pleadings, motions, and orders. When it comes to trial, however, the attorney must take great care to make the record by raising all theories of the case, offering exhibits into evidence, and putting objections on the record. And as to critical witness testimony, that testimony becomes part of the record only if the transcripts are ordered. (More on that in a moment.)

What is the Appendix?

The record is everything that was ever filed in the district court. But appellate judges do not want to scour the entire record. Enter the appendix, whose "essential characteristics" are that it does not reproduce the entire record and that it includes just the parts of the record necessary to determine the issues presented by the appeal.[2]

What about the matters not included in the appendix? Do not worry: the record itself is always available to supply inadvertent omissions from the appendix.[3]

Think of the record as a buffet. The record has everything you could ever want (but mostly stuff you do not). The appendix is the respectable portion you bring back to your table. Like a buffet, when designating the record your goal is to satisfy every desire. Like the meal you plate for the table, when preparing the appendix your goal is portion control and to avoid indigestion.

How to Complete the Record

Assuming the trial attorney has gotten the evidence into the record at trial, the appellate record already exists, except for one thing: the reporter's transcripts. So the first thing to do is order the reporter's transcripts.

To do this, use the Transcript Order Form from www.uscourts.gov (Form AO 435). The order form must be filed within 14 days after filing the notice of appeal.[4] (Caution: In some circuits, it is 10 days!)

>>

This is for the record – the buffet – so be over-inclusive in order to satisfy every desire. Designate all hearings (unless you are really sure they are not necessary). Especially designate any hearings where the court announced its decision.

If you do not order all the reporter's transcripts, then you have to file a Statement of Issues with your transcript order form.[5] There is no form for this. The purpose of the statement of issues is to give the appellees a fair opportunity to order any transcripts they deem necessary to respond to your arguments. Thus, the down-side to having to prepare a statement of issues is that it limits the arguments you can raise in your appeal and tips your hand to your opponents. All the more reason to order all transcripts.

Compiling the Appendix, Step-by-Step

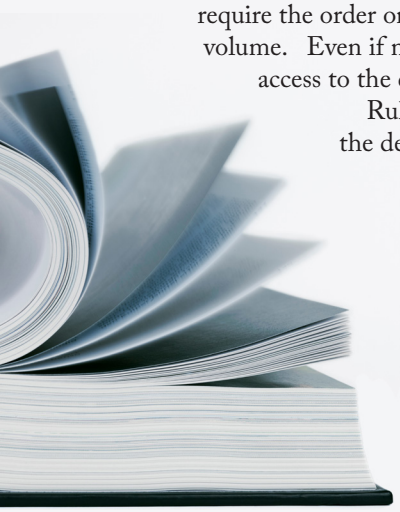
Now that you have completed the record, it is time to compile the appendix. Here are the steps:

1. Choose what documents go into the appendix. It is appellant's burden to make certain that the appendix includes all of the transcripts and file documents necessary to demonstrate the error claimed.[6] Appellant's failure to provide an adequate record may result in dismissal or affirmance. You must include the judgment or order; the operative pleadings; the district court's findings, ruling, or opinion; and the notice of appeal. You also must include the "relevant docket entries" and the other parts of the record "to which the parties wish to direct the court's attention." Do not include legal briefs (unless necessary to establish or defeat waiver). And most importantly, do not include the entire record.

2. Compile the documents. Make sure they are the filed versions with the CM/ECF stamps. And be sure to include reporter's transcripts.

3. Check that the documents are text-searchable, bookmarked, and do not contain private or privileged matter (such as social security numbers, bank accounts, etc.).

4. Organize the documents. Each volume must be no more than 300 pages, including the cover and index. Some circuits require the order on appeal to be included in the first volume. Even if not required, judges appreciate easy access to the decision on appeal. If your Circuit Rule 28 permits it, consider attaching the decision to the brief. Note that trial exhibits may be included in a separate volume.[7] Consider this if you think you might need to add more trial exhibits later. If you need to add more trial exhibits and you are using a separate volume, you will avoid disturbing the pagination in the rest of your appendix. Your reporter's transcript and trial exhibits should be arranged consecutively.



5. Prepare the covers and indexes. The excerpts must begin with an index organized in the order the documents are presented. The index should describe the documents, exhibits, and portions of the reporter's transcript contained in the excerpts; state the location where each item can be found in the district court record; and state the page or tab number where each item may be found in the excerpts. Note that the index will only be a placeholder at this point. You are not ready yet to include page numbers.

6. Before proceeding, check if there are any additional documents that were omitted in Step 1.

7. Paginate the appendix consecutively. The idea here is that if volume one ends on page 300, the next page is the cover of volume two, followed by the next page of your appendix at page 302.

8. Now that you have paginated the appendix, you can finalize the covers and indexes.

9. Now that your appendix is complete, you can insert record citations into the brief.

10. File the appendix simultaneously with the brief.

Avoiding Sanctions

The court has authority to sanction attorneys "who unreasonably and vexatiously increase litigation costs by including unnecessary material in the appendix."[8] Bear this in mind if you are ever tempted to "throw the kitchen sink" into your appendix.

But do not be underinclusive either. The appendix must include everything necessary to fully analyze the issues in the appeal. Consider drafting the brief before compiling the appendix. This will make it easy to know what to include. When in doubt, err in favor of being overinclusive – just do not overdo it.

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[1] United States v. Index Newspapers LLC, 766 F3d 1072, 1080, fn. 2 (9th Cir. 2014).

[2] Adv. Comm. Notes to FRAP 30.

[3] Id.

[4] FRAP 10(b).

[5] FRAP 30(b)(1).

[6] FRAP 11(a).

[7] FRAP 30(e).

[8] FRAP 30(b)(2).

About the Author

Tim Kowal, Esq. is an appellate specialist certified by the California State Bar Board of Legal Specialization. Tim helps trial attorneys and clients win their cases and avoid error on appeal. He co-hosts the California Appellate Law Podcast at www.CALpodcast.com and publishes a newsletter of appellate tips for trial attorneys at tvalaw.com/articles.

Email: TKowal@tvaLaw.com

From the Attorney General:

South Dakota's First-Ever Missing & Murdered Indigenous Persons Coordinator to work with South Dakota's New Human Trafficking Coordinator

News story courtesy of Joe Sneve, *The Dakota Scout*

Allison Morrisette is South Dakota's first-ever Missing and Murdered Indigenous Persons (MMIP) Coordinator.

More Native American women and girls go missing in South Dakota than almost anywhere else in the country. And tribal and nontribal law enforcement often struggle to locate them and bring their abductors, traffickers and murderers to justice.

South Dakota is among 10 U.S. states that had the highest number of missing and murdered cases involving Indigenous people in 2021, according to the National Criminal Justice Training Center. That's in part why the Attorney General's Office this week hired the state's first-ever missing and murdered Indigenous persons coordinator, Allison Morrisette.

Morrisette's upbringing in the Oglala Lakota Sioux Tribe, her ties to the state's Native American community and years of experience in the criminal justice arena give her a unique perspective. She expects it will lend itself well to helping South Dakota and its nine Indian tribes get a handle on a backlog of unsolved missing and murdered cases. "I do have a younger sister who is 19, and I do fear her going missing," Morrisette told The Dakota Scout ahead of a formal announcement of her hiring. "I want to ensure that my relatives here in South Dakota will feel safe and know that the state of South Dakota will do everything we can do to find the missing and murdered."

Morrisette, 28, officially assumed her duties in the Attorney General's Office on Monday after earning the position following a months-long hiring search conducted by Attorney General Mark Vargo. She comes to state government after most recently serving as the adult diversion coordinator for the Pennington County State's Attorney Office, where she worked under Vargo.

She'll work closely with tribal and nontribal law enforcement agencies to ensure open cases involving missing and murdered people remain active. She'll also be working alongside South Dakota's new Human Trafficking Coordinator – Mary Beth Holzwarth.

Mary Beth Holzwarth, 39, has spent the past 13 years as the CEO of Endeavor 52, a grassroots organization dedicated to child sexual assault prevention, work that she began after learning two of her children had been sexually assaulted by a family member.

That personal experience and the work that followed, she said, gave her a deep understanding of the challenges that face sexual assault victims. That will aid her in helping the Attorney General's Office combat sex trafficking.

"When we began to see how prevalent child sexual assault was, my second son said 'You've got to do something, mom.' So I began working to figure out what exactly I could do while helping my children navigate and heal from this," she said. "It was just a natural step to move into human trafficking because so many of the children that are trafficked or the adults that are trafficked, they have experienced tremendous amounts of trauma."

While Vargo is responsible for making the hires, Attorney General-elect Marty Jackley echoed Vargo's praise of Morrisette and Holzwarth, noting their backgrounds and life experiences make them powerful resources for the office to combat some of the most egregious crimes that take place in South Dakota.

"Allison Morrisette's proven ability to work with different law enforcement agencies and Native communities will be a powerful asset furthering our commitment to serving all South Dakotans," he said. "Mary Beth Holzwarth's long track record of advocating for children will be a needed and powerful tool in our fight against human trafficking."

Resources

>> SD Missing Persons Clearinghouse: MissingPersons.SD.gov

>> SD Attorney General's Resources for Families: Click here.

>> South Dakota Sex Offender Registry: sor.sd.gov

Careers

Position details are on our website. If you are aware of open positions, please contact Laura Stewart, Job Bank Chair, at LStewart@FullerAndWilliamson.com

Paralegal/Legal Assistant
RAPID CITY, SD
Gunderson, Palmer, Nelson & Ashmore
3-2-2023

Legal Secretary
RAPID CITY, SD
Pennington County State's Attorney's Office
3-1-2023

Paralegal
SIOUX FALLS, SD
Goosmann Law Firm
2-24-2023

Public Safety Legal Specialist
SIOUX FALLS, SD
The City of Sioux Falls
2-24-2023

Legal Administrative Specialist
SIOUX FALLS, SD
U.S. Attorney's Office for the District of South Dakota
1-30-2023

Legal Assistant
RAPID CITY, SD
Black Hills Energy
1-19-2023

Senior Contract Specialist
SIOUX FALLS, SD
Raven Industries
1-13-2023

Equal Opportunity Specialist (EOS)
KANSAS CITY, MO
U.S. Department of Education
12-28-2022

Legal Assistant
PIERRE, SD
The Federal Public Defender for the Districts of South Dakota and North Dakota
12-20-2022

Legal Assistant/Paralegal
RAPID CITY, SD
Goodsell Oviatt Law Firm
7-20-2022

CPCM
KNOW | RESPOND | PREVENT
CENTER FOR THE PREVENTION OF CHILD MALTREATMENT

Court Improvement Program Training

TRAUMA-INFORMED COURT SYSTEM
The Center for the Prevention of Child Maltreatment and the South Dakota Unified Judicial System are hosting monthly trainings on best practices and unique approaches to working with children and families for attorneys, judges, and other multidisciplinary professionals.

These trainings are supported by the UJS Court Improvement Program which assesses and improves handling of court proceedings related to child abuse and neglect in South Dakota.

LEARNING MORE CAN KEEP KIDS SAFE
Trainings are held the last Wednesday of the month, with some variation based on holidays and other events, from 12-1 CST via Zoom.

UPCOMING TRAININGS
Wed Feb 22: Independent Living & Young Voices
Wed March 29: Situational Awareness
Wed Apr 26: Civil vs Criminal Child Abuse & Neglect Cases training in conjunction with the State Bar
Wed May 31: Appellate Review of Child Sex Crimes
Wed June 28: 2023 Legislative Update

For more information or to suggest future training topics, email cpcm@usd.edu or visit www.sdcpcm.com/ciptraining

Sheet Pan Supper

from the Kitchen of Jen Frederick, CP

Ingredients

- Polish sausage, chopped (can substitute w/chicken or pork)
- 1 onion, chopped
- mushrooms, sliced
- 1-2 garlic cloves, chopped
- 1 bell pepper, chopped
- 1-2 vegetables, chopped (ie. broccoli, zucchini, potatos, carrots)

Seasonings

- Olive oil
- Salt/pepper
- Rosemary

Directions

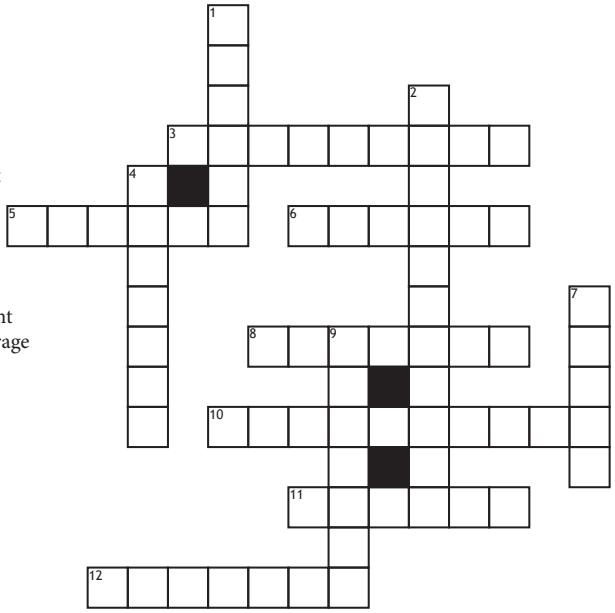
1. Put first six ingredients in a large bowl.
2. Drizzle with olive oil to coat.
3. Add in seasonings and mix.
4. Spread out on large sheet pan.
5. Bake at 375° for 20-30 minutes.

DID YOU KNOW ? ATTORNEY GENERAL OPINIONS

The Attorney General issues Official Opinions, which are memorandums of legal advice that are not confidential or otherwise privileged, and are considered to have a statewide impact or other significance.

This section of the Attorney General's website hosts all of the opinions issued since 1968, and explains the guidelines for issuing opinions and the subject matters permitted.

CROSSWORD: *The World's Wierdest Laws*



ACROSS

3. Chewing gum was banned in 1992 in this southeast asian country. Officials didn't want cities to look dirty from gum marks on the street or wads all over hand surfaces.

5. In this southern European country, high-heeled shoes are not permitted on ancient monument sites, because they cause above average wear and tear on walking surfaces.

6. Operating a cow whilst intoxicated is illegal in this kingdom.

8. In this southern state, one city banned citizens from throwing confetti or spraying silly string. There is a public safety concern that confetti can be inhaled and silly string can cause distress.

10. One city in this state prohibits the wearing of cowboy boots unless you own at least two cows.

11. In this eastern European country, Winnie the Pooh is banned from all playgrounds and other children's areas. He has been deemed an inappropriate hermaphrodite because he doesn't wear pants and has non-gender specific genitalia.

12. Why did the chicken cross a road in this southern peach state? Because the owner violated a city ordinance requiring him to maintain control of the chicken at all times!

DOWN

1. You'll be fined 250 Euros if you build a sandcastle in this city of love and canals.

2. In this state, farmers can't use fireworks to disperse flocks of birds, who are invading sunflower fields and devouring the seeds.

4. Beyonce wouldn't have been able to name her daughter Blue Ivy if they had been citizens of this northern European nation. Citizens need permission from the government to opt out of the 7,000 preapproved names.

7. As of 2009, it is illegal to be clinically obese in this east asian island nation.

9. In this southwestern state, cutting down a saguaro cactus can result in a prison sentence of up to 25 years!

GRAMMAR CHECK Answers: Are You Smarter Than a 4th Grader?

1. (d) adverb
2. cranky, old, cute, adorable, brown
3. We
4. Fairbanks (P) daisy (C) computer (C) Minnesota (P)
5. "I know," said the teacher. "You are going to master your facts."
6. (a) declarative
7. (a) sentence (c) sentence (b) fragment (d) fragment
8. (b) verb
9. (c) hyperbole
10. refrigerator
11. fraction - fraternity
12. (d) exclamatory
13. My dad likes to play football, basketball, and golf.
14. quickly, awkwardly
15. denotative

CROSSWORD ANSWERS: 1. Venice 2. South Dakota 3. Singapore 4. Denmark 5. Greece 6. United 7. Japan 8. Alabama 9. Arizona 10. California 11. Poland 12. Georgia

www.SDParalegal.ByQQP.com

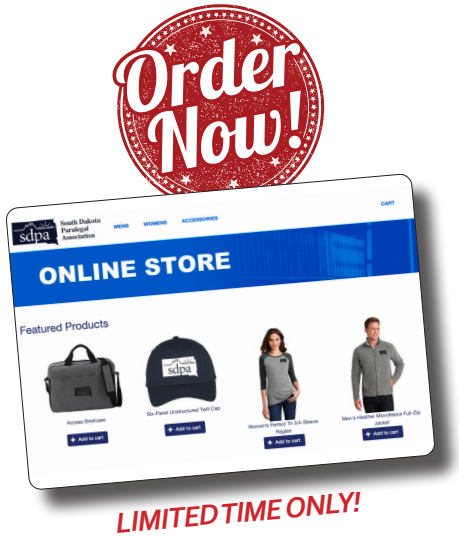
sdpa

Apparel & Accessories!

This is a pop-up store just for SDPA, and your order will ship directly to you!

SDPA will earn a portion of the proceeds, which is all the more reason to promote SDPA and our profession!

Here are a few examples -- we have 14 Women's styles, 6 Men's styles, and 11 different accessories available!



LIMITED TIME ONLY!

Q&A

If you would like to submit a question to our members on a legal or administrative issue, please email it to the President. The President will email your question to the Membership and ask that members respond directly to you. If anyone else would like to get a copy of any information received, please contact the person who posed the question. Q&A emails go to all members. You can opt out or opt in again at any time by emailing the President.

CP® Certified Paralegal

CLICK HERE for COMPLETE INFORMATION

Part 1	KNOWLEDGE Exam
Available year-round at PSI testing centers. Contact your chosen testing center for availability.	

- Administered on-demand, year-round at testing centers with preliminary results upon completion.
- 120* multiple-choice questions covering the topics listed in Appendix A online. *Only 100 questions will be scored.*
- Subjects addressed:
  - **Corporate/Commercial Law**
  - **Criminal Law & Procedure**
  - **Estate Planning & Probate**
  - **Real Estate & Property**
  - **Professional & Ethical Responsibility**
  - **U.S. Legal System**
  - **Civil Litigation**
  - **Contract Law**
  - **Torts**

Candidates must successfully complete the Knowledge Exam in order to be eligible to take the Skills Exam.

- Candidates must wait at least two weeks after passing the Knowledge Exam to take the Skills Exam.

Part 2	SKILLS Exam
Candidates are eligible two weeks after passing the Knowledge Exam.	

- Administered four times each year: February, April, July, and October.
- Written assignment (see Appendix A online).
- Written submissions will be evaluated according to the following criteria:

WRITING
- Grammar, Spelling & Punctuation
- Clarity of Expression

CRITICAL THINKING
- Reading Comprehension
- Analysis of Information
- Decision Making

Re-Testing

Candidates who do not pass the Knowledge Exam must wait 90 days before re-taking it. Candidates must pass each exam within the first three attempts at each exam during a 365-day period or wait 365 days before trying again.

ACP Advanced Certified Paralegal

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STATE v. ALVAREZ

2022 S.D. 66 – November 3, 2022

100-year sentence upon guilty plea to one count of first-degree rape affirmed

Defendant, less than proficient in English, pled guilty to one count of first-degree rape of victim less than 13 years old. Thereafter Defendant sought to withdraw his guilty plea and requested substitute counsel. The trial court, after denying both requests, sentenced Defendant to 100 years in prison, with 15 years suspended. On this direct appeal, Defendant asserts error in 1) the trial court's denial of his request to withdraw his guilty plea and 2) ineffective assistance of counsel. The SD Supreme Court affirmed the trial court, holding that the trial court acted within its discretion in refusing the request to withdraw the guilty plea. As to the assertion of ineffective assistance of counsel, the Court declined the opportunity to review its merits, holding that Defendant's assertion of error would be more appropriately considered "within the context of a habeas corpus action where the parties may develop the factual record." This decision is unanimous with opinion authored by Justice Salter.

STATE v. HANKINS

2022 S.D. 67 – November 3, 2022

Criminal convictions and sentences for first-degree rape upheld

This decision affirms the criminal convictions and sentences of 50 years on each of two counts, with 25 years suspended for each count, and with the sentences to run consecutively. The facts and issues on appeal are set forth in the opening paragraph of the Court's opinion:

[¶1.] A Lawrence County grand jury indicted Nathan Hankins on two counts of first-degree rape and two alternative counts of sexual contact with a minor under 16 with his half-sister, R.H. A jury convicted Hankins of two counts of first-degree rape. Hankins appeals, asserting that his due process rights were violated due to an insufficient arraignment, that the court abused its discretion in admitting testimony from certain witnesses, and that the State engaged in prosecutorial misconduct. We affirm.

The Court's decision is unanimous; opinion authored by Justice Myren.

J. CLANCY, INC. v. KHAN COMFORT, LLC

2022 S.D. 68 – November 10, 2022

Defendant won; reversed and remanded; Plaintiff won; affirmed

Plaintiff sued for money due on a contract for work done in renovating a Spearfish hotel. Defendant counterclaimed for overpayment, arguing that Plaintiff failed to complete certain "implied-in-fact" contracts. The trial court agreed with Defendant, awarding damages to Defendant. This was appealed to the SD Supreme Court and reversed on the basis that the matter should be resolved on the basis of the express contract originally entered into between the parties. On remand, the trial court found for Plaintiff on the basis of the original record, awarding damages "for breach of contract and foreclosure of the mechanic's liens in the amount of $105,135.33, plus prejudgment interest and attorney fees and costs." Defendant appealed. The SD Supreme Court affirmed the trial court. The Court's decision is unanimous with opinion authored by Chief Justice Jensen.

STATE v. MCDERMOTT

2022 S.D. 69 – November 17, 2022

Third-degree rape conviction upheld

Defendant drove to Vermillion from Sioux City and met the Victim at McDonalds, shortly after 2 AM, after visiting a local bar in Vermillion – a bar which the Victim had also visited that evening. Subsequent consensual encounters with the Victim resulted in an overnight stay in Victim's dorm room and this charge being filed as a result of non-consensual activity in dorm room. Defendant was found guilty of 3rd degree rape by jury. Trial court sentenced Defendant to 10 years in prison, with 8 years suspended. This appeal is summarized in the opening paragraph of the Court's opinion:

[¶1.] Defendant appeals his jury conviction of third-degree rape. He contends that the evidence was insufficient to sustain the conviction because "[t]he DNA evidence raised significant doubt that penetration could have occurred." He thus requests that this Court reverse the circuit court's denial of his motion for judgment of acquittal. Because there is sufficient evidence in the record, including the testimony from the victim and the doctor that examined her after the rape, we affirm.

The decision is unanimous; opinion authored by Justice DeVaney.

STATE v. GUZMAN

2022 S.D. 70 – November 17, 2022

Multiple consecutive life sentences in first-degree rape convictions upheld

At the first trial on these rape and sexual contact charges, the jury was hung. A mistrial was declared. The 2nd trial resulted in the Defendant being found guilty on 3 counts of 1st degree rape and an additional charge of sexual contact. The trial court sentenced Defendant to life imprisonment on each of the 3 counts and an additional 15 years in prison, with all sentences to run consecutively. The trial court also ordered Defendant to pay costs of prosecution ($13,390.66) to Pennington County for the State's expert witness fees. Defendant's testimony in the 1st trial was utilized as evidence by the State in the 2nd trial, with Defendant choosing not to testify in the 2nd trial. The gist of this appeal is summarized in the opening paragraph of the Court's opinion:

[¶1.] Theodore Guzman appeals his convictions of first-degree rape and sexual contact stemming from incidents involving two of his children and one of his children's friends. Guzman asserts that the circuit court erred by excluding witness testimony and evidence offered in his case-in-chief; by allowing the State to admit a trial transcript of his testimony from his first trial; by allowing the State to admit other act evidence and expert testimony; and by ordering him to pay certain costs of prosecution.

The SD Supreme Court rejected all of Defendant's arguments on appeal, affirming the lower court. The Court's opinion is authored by Justice

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DeVaney and is unanimous in result on all issues. The Court's opinion is unanimous as to reasoning for all issues, except the assessment of costs of $13,390.66 to Defendant. Chief Justice Jensen filed a concurring opinion as to the matter of costs, having agreed with the result.

GOENS v. FDT, LLC

2022 S.D. 71 – November 23, 2022

Appeal from summary judgment dismissed

Plaintiffs sued two Defendants. Defendant #1 filed Answer. Defendant 2 filed an Answer and Counterclaim. Trial court granted Summary Judgment for Defendant 1. Plaintiff appealed. The SD Supreme Court dismissed the appeal, noting that there was no certification under SDCL 15-6-54(b) which is required for the rendering of an appealable final judgment, stating:

[¶5.] ... [T]his interlocutory judgment "is not a final judgment under SDCL 15-6-54(b) and is not appealable." Because active claims remained in this action at the time of appeal and no Rule 54(b) certification was made, we dismiss for lack of appellate jurisdiction under SDCL 15-26A-3.

The Court's ruling is unanimous with opinion authored by Justice Myren.

MATTER OF PETERSEN TRUSTS

2022 S.D. 72 – November 23, 2022

Attorney fees regarding trust supervision litigation addressed

This litigation involves two trusts. Daughter Sally filed suit seeking reformation of one of the trusts. Daughter Mindy opposed Sally's suit and also filed suit seeking clarification and other relief. The trial court ruled against Mindy, but ruled in favor of Sally and granted reformation. Also, the trial court denied Sally and her husband's request for attorney fees and expenses, "concluding the trust did not receive an economic benefit from the litigation, which, the court determined, was required to justify reimbursement from the trust." Sally appeals. The sole issue on the appeal relates to the trial court's ruling on attorney fee and expenses. Sally and her husband also request an award appellate attorney fees. The SD Supreme Court denied appellate attorney fees but otherwise reversed and remanded the issue of attorney fees as handled by the trial court. The Court took provided a more liberal interpretation of the attorney fee statute than did the trial court, stating:

[¶42.] Attorney fees are authorized in trust supervision proceedings under SDCL 15-17-38 where the litigation has been beneficial to the trust estate. Though the benefit will often be expressed in terms of an economic benefit, the concept is broader than that and can include instances, such as this one, where a beneficiary's litigation was necessary to uphold the settlor's universally acknowledged intent. In those cases where the benefit asserted by an attorney fees applicant is economic, the applicant must show that the litigation produced a benefit beyond that which the trust estate would have otherwise realized.

[¶43.] Here, then, attorney fees are authorized for Sally's efforts to vindicate her father's intent. Short of litigation, there was no other means for her to do so. We reverse the circuit court's denial of attorney fees for Sally's litigation efforts to obtain the homestead. However, the circuit court correctly determined that attorney fees were not authorized for Mike and Sally's efforts to resist Mindy's attempt to reform the Land Trust and retire the mortgage debt sooner, and we affirm this determination.

[¶44.] Finally, the plain fact that fees are authorized does not make a fee award a fait accompli. See Ctr. of Life Church v. Nelson, 2018 S.D. 42, ¶ 34, 913 W.2d 105, 114 (holding the fact that a court was authorized to exercise its discretion and award attorney fees did not obligate it to do so). Whether to exercise its discretion to award attorney fees and, if so, in what amount are beyond the issues presented here, and we remand the case for the court to consider these questions.

The Court's decision is unanimous; opinion authored by Justice Salter.

UNITED STATES v. KIRBESHA BAILEY

USCA 21-3896 & 21-3928 – December 6, 2022

D.S.D. Western Division

Clerk Summary: Criminal case – Criminal law. The evidence was sufficient to supported defendants' convictions for conspiracy to distribute methamphetamine.

ESTATE OF HUBERT

2022 S.D. 73 – December 7, 2022

Administration of inmate's holographic will upheld

Inmate at SD's women's penitentiary left holographic will which the SD Supreme Court previously examined in Estate of Hubert, 2016 S.D. 74 (Hubert I). The dispute in this case is between the long-time friends and the inmate's brother. The inmate's will gave her long-time friends basically everything, subject to three conditions, and appointed the friends as personal representatives. The will disinherits all of testator's family except for a discretionary portion to be allocated to her brother. Inmate's will also provides for the care of the testator's pet bird Cocky and purports to allocate money to the ACLU for the purpose of funding litigation "to correct injustices at SDWP [South Dakota Women's Penitentiary] in Pierre." On remand from Hubert I, the trial court ultimately approved the proposed disposition set forth by the inmate's long-time friends and ruled against the inmate's brother on his assertions. The SD Supreme Court affirmed in a unanimous ruling with opinion authored by Chief Justice Jensen. Circuit Judge Klinger sat on this case in lieu of Justice Myren.

COOK v. COOK

2022 S.D. 74 – December 7, 2022

Military retirement pay, including disability benefits, adjudicated in divorce proceeding –substantial relief accorded to green beret husband on Pearl Harbor Day decision

The trial court adjudicated a divorce proceeding between H & W, ages 79 & 78 at the time of trial. This was "lengthy marriage," with H having acquired military retirement pay which included disability payments -- as a result of his service as a Green Beret in the U.S. Army Special Forces. H appeals the trial court's ruling which ordered him to pay W $1,500 per month permanent alimony and which ordered him to pay W cash of $201,130 which payment was designed to equalize assets and which would compensate W for assets which H allegedly "had dissipated in violation of SDCL 25-4-33.1," during the pendency of the proceeding. The SD Supreme Court reversed and remanded, awarding H substantial relief on appeal. A major part of this decision involves treatment of military retirement pay which includes a portion for disability benefits. The Court holds that the trial court inappropriately treated $117,405 as marital property because this amount was clearly shown to be allocat-

ed to H as disability payments which are, as a matter of federal law, separate property. The Court also holds that the trial court's handling of the remaining portion of H's military retirement pay was not in accordance with the principles established in SD law. Additionally, the Court reverses and remands the issue of alimony because of the impact to be realized after "division of property" is accomplished. As to the assertion that H dissipated assets, the Court finds that the lower court's ruling is "clearly erroneous." Requests for appellate attorney fees, made by both H & W, were denied. The Court's ruling is unanimous with opinion authored by Chief Justice Jensen.

UNITED STATES v. MITCHELL

USCA 21-3890 – December 13, 2022
D.S.D. Southern Division

Clerk Summary: Criminal case – Criminal law. The district court did not err in determining, based on the police officers' testimony, that the owner of the home consented to the police officers' warrantless entry in his home; the magistrate judge's credibility determination after personally hearing and observing the witnesses is virtually unassailable on appeal.

SUVADA v. MULLER

2022 S.D. 75 – December 15, 2022
Contractor loses dispute with Owners

This is a dispute between a contractor and the owners of a cabin to be renovated. The issues and resolution at the trial level are set forth in the opening paragraph of the opinion and in ¶17, as follows:

[¶1.] Ed Suvada commenced this action to foreclose a materialmen's lien to recover for material and labor he expended in renovating a cabin for George (Jack) and Christine Muller. Suvada also sought damages for breach of contract. The Mullers counterclaimed for breach of contract and fraud. The jury found in favor of Suvada on his materialmen's lien, awarding him damages. The jury also found in favor of the Mullers on both of their claims but only awarded damages on the breach of contract claim. Suvada appeals, raising multiple issues.

[¶17.] The jury awarded Suvada $8,049.99 for his claims. The jury also awarded the Mullers $28,505.22 for their breach of contract claim. Although the jury found Suvada committed fraud, the jury declined to award the Mullers any damages on the fraud claim. The circuit court denied both parties' requests for attorney fees and costs. The circuit court also set off the verdicts resulting in a judgment for the Mullers for $20,455.23, prejudgment interest in the stipulated amount of $4,129.80, and post-judgment interest.

The Court affirmed the victory for the Owners in a unanimous ruling with opinion authored by Justice Myren. The Court also denied the appellant/contractor's request for appellate attorney fees.

STATE v. ROSA

2022 S.D. 76 – December 15, 2022
Juvenile's tip about Mother's possible drunk driving upheld as basis for DUI arrest, by 4-1 vote

Fourteen-year-old juvenile (in detention) phoned law enforcement authorities to report that she had been talking with her mother on the phone and that her mother "sounded drunk" and that she had a history of drinking and driving. Mother was located and arrested for DUI and open container. Trial court denied Mother's Motion to Suppress and found her guilty of DUI and Open Container, giving Mother a Suspended Imposition of Sentence. The SD Supreme Court affirmed in a 4-1 split decision. The Court's opinion is authored by Chief Justice Jensen. Justice Myren filed a dissenting opinion in which he stated, in part:

[¶33.] I respectfully dissent. Law enforcement did not have reasonable suspicion of criminal activity to justify the stop of Rosa.

[¶34.] Both officers testified that they stopped Rosa solely based on A.R.'s report that her mother sounded intoxicated over the phone and had a history of drinking and disappearing. Neither officer testified that they saw any erratic driving, traffic violations, or indication of intoxication. "Even a reliable tip will justify an investigative stop only if it creates reasonable suspicion that 'criminal activity may be afoot.'" Navarette, 572 U.S. at 401, 134 S. Ct. at 1690 (quoting Terry v. Ohio, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884, 20 L. Ed. 2d 889 (1968)).

POWERS v. TURNER COUNTY BOARD OF ADJUSTMENT

2022 S.D. 77 – December 22, 2022
CAFO conditional use permit upheld with attorney fees denied

This dispute evolves from an application for a large concentrated animal feed operation (CAFO) in Turner County. The facts and history are set forth in the opening paragraph of the Court's opinion:

[¶1.] The Turner County Board of Adjustment (Board) granted Steve and Ethan Schmeichel and Norway Pork Op, LLC (Intervenors) a conditional use permit (CUP) for a large concentrated animal feed operation (CAFO). Nearby landowners Jeffrey K. Powers and Vicky Urban-Reasonover (Petitioners) petitioned the circuit court pursuant to SDCL 11-2-61 for a writ of certiorari challenging the legality of the CUP. Over the objections of the Board and Intervenors, the circuit court determined Petitioners had standing to challenge the conditional use permit but denied the writ of certiorari. Petitioners appeal the circuit court's denial of the writ of certiorari. By notice of review, the Board and Intervenors appeal the issues of standing and the circuit court's refusal to impose attorney fees on Petitioners under SDCL 11-2-65.

The SD Supreme Court affirmed in a 5-0 decision, with opinion authored by Chief Justice Jensen. As to the issue of attorney fees requested by the prevailing parties but denied by the circuit court, the Supreme Court – while acknowledging that there is statutory authority for such an award – states in surely-to-be-quoted language in ¶34, "[W]hen the Legislature uses the word 'may,' fee awards are discretionary." And, in furtherance of the example set by the trial court, the SD Supreme Court also declined to award appellate attorney fees.

ESTATE OF EICHSTADT

2022 S.D. 78 – December 22, 2022
Pre-marital agreement set aside because not signed voluntarily

W signed a premarital agreement which became the subject of litigation when H died. The resolution of this dispute is governed by the South Dakota's 1989 adoption of the Uniform Premarital Agreement Act (UPAA), found in SDCL 25-2-16 thru -25. The trial court held the agreement was not enforceable for two reasons: 1st, because W did not

voluntarily sign it and, 2nd, because the agreement was unconscionable. The SD Supreme Court affirmed the lower court's holding that W did not voluntarily sign the agreement, thereby rendering it unenforceable. As to the issue of unconscionability, the Court held that the lower court erred in finding the agreement was unconscionable. The Court's decision is a 3-1-1 ruling, with opinion authored by Justice DeVaney. Both Justice Kern and Justice Salter filed separate opinions in which both express the view that the trial court's decision was wrong altogether in holding that the agreement was unenforceable.

SHECK MULBAH v. CODY JANSEN

USCA 22-1618 – December 22, 2022
D.S.D. Southern Division

Clerk Summary: Civil case – Civil rights. Defendant state trooper's appeal of an order denying his motion for summary judgment based on qualified immunity on claims arising out a traffic stop dismissed for lack of jurisdiction as the factual record on the key facts is unsettled and disputed.

NEWS AMERICA MARKETING v. SCHOON

2022 S.D. 79 – December 29, 2022
Employee prevails with testimony of treating physicians

Employee injured neck and shoulder while working on the job. Work comp insurer accepted claim initially but subsequently denied request for surgery and additional benefits. DOL approved request for additional benefits. The Circuit affirmed. The SD Supreme Court also affirmed in a unanimous ruling with opinion authored by Justice Chief Justice Jensen. The SD Supreme Court, ruling consistent with the rulings of the DOL and the lower court, rejected the Work Comp Insurer's argument that its non-treating physician's opinion was "more persuasive" that the opinions of the employee's treating physicians.

ENDRES v. ENDRES

2022 S.D. 80 – December 29, 2022
Attorney fee denial reversed and remanded

Terry, one of seven children, filed a lawsuit contesting the handling of an irrevocable trust with assets valued in excess of $10 million. "Several additional lawsuits" and claims were filed by Terry and the other children. All parties agreed to a consolidation of claims and subsequently reached a "global settlement" which resolved all claims except for Terry's request for attorney fees. Terry requested an award of attorney fees in the amount of $389,121.12 ($343,474.20 in attorney fees, expenses, and applicable sales tax, along with interest in the amount of $45,646.92.). The trial court denied Terry's request entirely. The SD Supreme Court reversed and remanded, holding that Terry is entitled to an attorney fee award pursual to SDCL 55-3-13, in an amount to determined on remand. Because of the Court's ruling vis-a-vis SDCL 55-3-13, it did not address the possibility of an award under SDCL 15-17-38. The concluding paragraph of the Court's opinion states:

[¶55.] Terry is entitled to attorney fees under SDCL 55-3-13 for his actions as a co-trustee which were productive of actual benefit to the Trust. The circuit court shall determine on remand, in a manner consistent with this opinion, the amount of attorney fees Terry may recover.

This decision is unanimous with opinion authored by Justice Kern. Circuit Judge Gering sat on this case in lieu of Justice Myren (trial judge).

CITY OF SIOUX FALLS v. STRIZHEUS

2022 S.D 81 – December 29, 2022
Demolition of partially-completed new home ordered

Owners obtained permit to build single-family home in Sioux Falls in 2013. Their intention was to build a multi-million-dollar house. Construction stalled in 2015 due to, inter alia, lack of finances. City of Sioux Falls determined the structure was unsafe in 2016 and sought demolition, in accordance with City Ordinance. Trial court ordered demolition. The SD Supreme Court affirmed. This ruling is unanimous, with opinion authored by Chief Justice Jensen. Circuit Judge Gering sat on this case, in lieu of Justice Salter.

UNITED STATES v. RANSON LONG PUMPKIN

USCA 20-2743 & 20-2770 – December 30, 2022
D.S.D. Western Division

Two criminal defendants were "convicted of committing a carjacking resulting in serious bodily injury." (Events occurred in Rapid City area.) The Government's case was significantly supported by the testimony of two eyewitnesses; but the trial court did not permit the Defendants to cross-examine these two witnesses as to their drug use at the time of the event. According to the dissent, the trial court, "barred defense counsel from 'inquiring in any way' into Maho's and High Pipe's use of drugs before, during, or after 'the events on trial.' " The 8th Circuit affirmed in a 2-1 decision. The majority opinion upheld the rationale of the trial judge that inquiry into the drug use by the witnesses would likely cause the witnesses to invoke their 5th amendment right against self-incrimination. The dissenting opinion by Judge Kelly expresses her view that the trial court's restriction on cross examination was a "limitation on cross-examination [which] violates a criminal defendant's right to confrontation under the Sixth Amendment."

Clerk Summary: Criminal case – Criminal law. The district court did not violate defendants' Sixth Amendment rights by not permitting them to cross-examine two government witnesses regarding their drug use after it determined they would likely invoke the Fifth Amendment during their cross-examination; the evidence was sufficient to support defendants' convictions for carjacking resulting in serious bodily injury; there was no error in giving an instruction of aiding and abetting the use and discharge of a firearm in relation to a crime of violence; while the evidence in the case supports the defendants' conviction for the basic Sec. 924(c) offense of using a firearm, the evidence fell short of establishing that they discharged a firearm in relationship to the carjacking as the offense was necessarily ended before the firearms were discharged; as a result their conviction for the greater offense of discharging a firearm under Sec. 924(C)(1)(A)(iii) must be vacated and reduced to convictions for using a firearm under Sec. 924(c)(1)(a)(i). Judge Kelly, dissenting.

STATE v. AT THE STRAIGHT

2023 S.D. 1 – January 5, 2023
Criminal sentence and order of restitution upheld

Defendant was found guilty by jury of attempted 1st degree murder, 4 counts of aggravated assault, commission of a felony with a firearm, and of being a habitual offender. The trial court sentenced Defendant to 25 years, 15 years, and another 25 years, all to be served consecutively. (No sentences were imposed on 3 charges.) The trial court also ordered Defendant to pay restitution of $403,058.48. Defendant's appeal is

predicated solely (apparently) upon the assertion that the trial court erred in not granting his motions for acquittal. The SD Supreme Court affirmed in a unanimous ruling, with opinion authored by Justice Myren.

ESTATE OF THACKER v. TIMM

2023 S.D. 2 – January 5, 2023

Romantic relationship ends in litigation

There is a seemingly endless set of facts in this dispute which runs some eight pages, (¶¶2 - ¶19 of the opinion). The plaintiff is the estate of the Man who entered into a long-term romantic relationship with the Woman, beginning in the 1980s. No children were born of this relationship, but each had children from a prior marriage. This action was commenced against the Woman, by the Man's daughters (serving as co-guardians and co-conservators of his estate) in 2019, with the Estate being substituted as party plaintiff after his death in 2020. The trial court denied the Estate's claims. The SD Supreme Court affirmed in a unanimous ruling, with opinion authored by Justice Myren.

FUOSS v. DAHLKE FAMILY LIMITED PARTNERSHIP

2023 S.D. 3 – January 5, 2023

Ownership by "adverse possession" claim reversed in 3-2 decision

This is a dispute between neighboring landowner. The trial court ruled in favor of Plaintiff in his lawsuit claiming ownership of land by adverse possession, as well as ownership of an accompanying easement. The SD Supreme Court reversed and remanded, in 3-2 ruling, in favor of Defendants. The Court's decision rejects Plaintiff's claim and remand for resolution of one of the Defendants' counterclaim. The Majority opinion, authored by Justice Salter concludes as follows:

[¶61.] We conclude that the circuit court erred when it determined that Fuoss acquired title to the Disputed Area by adverse possession. The court incorrectly applied the doctrine of acquiescence to the facts here and further committed clear error by rejecting uncontroverted evidence of permissive use by Fuoss's predecessors in interest. For much the same reasons, we further hold that the court erred by granting Fuoss a prescriptive easement allowing access to his land through the Partnership Property. The access easement is also not authorized as an easement implied by prior use or necessity. We reverse and remand for the court's consideration of Mann's counterclaim for fencing, which the court did not previously address given its adverse possession and easement rulings.

Both Justices Kern and Devaney dissent in part, with views expressed in an opinion authored by Justice DeVaney.

DAVID FINNEMAN v. WALTER LAIDLAW

USCA 21-3452 – January 10, 2023

D.S.D. Western Division

The 8th Circuit affirmed the dismissal of a civil case, Finneman v. Laidlaw, on the basis of "lack of standing, res judicata preclusion, and failure to plead fraud with particularity." The 8th Circuit affirmed in a three-panel ruling, with opinion by Judge Benton. Judge Kelly filed a brief concurring opinion in which she stated her belief that plaintiffs had standing, but nonetheless agrees that dismissal was proper for the other reasons given by the trial judge, Honorable Lawrence L. Piersol. This case involves real estate which had been the subject of substantial state court litigation (adverse to Plaintiffs) in South Dakota, including 4 published opinions by the SD Supreme Court.

Clerk Summary: Civil case. The district court did not err in determining plaintiffs did not have standing to bring this suit for fraud, conversion, and breach of contract as they had no interest in the properties in question and thus cannot show an injury in fact that would likely be addressed by judicial relief. Judge Kelly, concurring.

UNITED STATES v. CHANDLER

USCA 22-2365 – January 10, 2023

D.S.D. Northern Division

The trial court, Honorable Charles B. Kornmann, revoked Defendant's probation and sentenced Defendant to 8 months. The 8th Circuit affirmed, notwithstanding the fact the original sentencing court had made a technical error in misstating the range of punishment as 30-37 months.

Clerk Summary: Criminal case – Sentencing. While the district court plainly erred in stating the incorrect advisory range at defendant's revocation proceeding, the error did not affect the fairness, integrity, or public reputation of the proceedings as the sentence the district court imposed was significantly below the range, and there is no reasonable probability that the court would have imposed a lesser sentence but for the error; the sentence was based on a careful weighing of the 3553(a) factors, and it was not substantively unreasonable.

LONNIE TWO EAGLE, SR. v. UNITED STATES

USCA 22-1683 – January 11, 2023

D.S.D. Western Division

Employee of Indian Health Service for Rosebud Sioux tribe was involved in a motor vehicle accident which caused severe injuries to Plaintiff who filed suit against the U.S. under the Federal Tort Claims Act. The employee suffered a seizure on his way to the Hospital while driving, lost control and ran into Plaintiff who was operating a riding lawnmower near the entrance to the Hospital. Employee had suffered prior seizures and was told not to drive until he was seizure free for 6 months. The Trial Court (Honorable Jeffrey L. Viken, adopting the report and recommendation of the Honorable Veronica L. Duffy) dismissed the action on the basis of lack of subject matter jurisdiction, holding that sovereign immunity was applicable under these facts. The 8th Circuit Affirmed.

Clerk Summary: Civil case – Federal Tort Claims Act. The government employee was not acting within the scope of his employment when he struck plaintiff with his auto; under South Dakota's "coming and going" rule for determining an employer's liability for accidents involving a commuting employee, the government had no control over the employee as he drove back to work from his lunch break; the premises exception to the rule does not apply as the accident did not occur on the government's property; with respect to whether the employee's supervisor knew about the employee's seizures and should have ensured he was not driving before being cleared by his doctor, the claim is precluded by the discretionary function exception to government liability; the doctor who gave permission for the employee to drive was an independent contractor rather than an employee of the federal government and FTCA liability did not attach to his actions.

SCHUPP v. DIVISION OF INSURANCE

2023 S.D. 4 – January 12, 2023

Division upheld in its denial of Captive Insurance Company records regarding request made by consumer advocacy group

Person located in Maryland requested information from the SD Division of Insurance in regard to the "captive insurers" regulated by the Division. The Division of Insurance denied the request. The Office of Hearing Examiners agreed with the Division of Insurance. The Circuit Court affirmed. The SD Supreme Court also affirmed. The Court observed in footnote 1 of the opinion:

The underlying purpose for which Schupp requested the records is not developed in the record. [H]is email address suggests he may be affiliated with a consumer advocacy group.

The Court's decision is unanimous; opinion authored by Justice Salter.

PARKER v. PARKER

2023 S.D. 5 – January 19, 2023

Handling of military retirement pay for reserve member of national guard reversed and remanded

The sole issue on is the trial court's handling of military retirement pay. This case is somewhat unique in that it deals with the prospective retirement of H who is a "reserve" member of the National Guard. The trial court determined H's "monthly pay base" to be $1,500.94. The SD Supreme Court reversed and remanded, finding that the trial court committed "a legal error in the application of federal law to determine [H's] high-3 amount." This ruling is unanimous with opinion authored by Justice Salter. Although requested by both sides, the Court declined to award either side appellate attorney fees.

A practice pointer for attorneys doing appellate work: the Court expresses displeasure at how the parties created the record on appeal. The second paragraph of the opinion explains:

[¶2.] This case comes before us with a rather sparse record. Missing are transcripts from the four-day divorce trial, and nearly all of the information relating to the property division issue presented here was not included in the record, but simply attached to the appellate briefs. See Batchelder v. Batchelder, 2021 S.D. 60, ¶ 5 n.2, 965 N.W.2d 880, 882 n.2 (holding that the practice of attaching material not included in the record to briefs "does not comply with our rules for preparing appendices"); Klutman v. Sioux Falls Storm, 2009 S.D. 55, ¶ 37, 769 N.W.2d 440, 454 ("Documents in the appendix must be included within, and should be cross-referenced to, the settled record.") (citing SDCL 15-26A-60(8)).

UNITED STATES v. SOTO

USCA 21-3091 – January 24, 2023

D.S.D. Western Division

This is an appeal from conviction and sentencing for 15 child porn offenses. The convictions are affirmed but the case is remanded in regard to sentencing. The trial court ran afoul of Apprendi v. New Jersey, 530 U.S. 466 (2000), as explained in the opinion as follows:

Under Apprendi, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. A defendant convicted for possession of child pornography "shall be . . . imprisoned not more than 10 years . . . but, if any image . . . involved in the offense involved a prepubescent minor or a minor who had not attained 12 years of age, such person shall be . . . imprisoned for not more than 20 years . . ." 18 U.S.C. § 2252A(a)(5)(B), (b)(2). Here, the jury made no finding of a qualifying minor victim, so the statutory maximum sentence the district court can impose is 10 years. Because the district court's sentence on the possession conviction runs afoul of Apprendi, we vacate the sentence and remand for resentencing.

Clerk Summary: Criminal case – Criminal Law and Sentencing. The evidence was sufficient to support defendant's child pornography, enticement, and sexual exploitation convictions; considering the evidence submitted in the case, defendant could be convicted for both receipt and possession of child pornography without violating double jeopardy; the jury did not make a finding of a qualifying minor victim, so the statutory maximum under 18 U.S.C. Sec. 2252A(a)(5)(B) was 10 years, and defendant's twenty-year sentence for possession of child pornography is vacated, and the matter is remanded for resentencing.

STATE v. MALCOLM

2023 S.D. 6 – January 26, 2023

Rape convictions upheld; evidence of "advanced consent" and prior sexual history properly excluded at trial

Defendant was convicted by a jury of 9 counts of 3rd degree rape and sentenced to 50 years in prison by the trial court, with 15 years suspended. Defendant and Victim had been living together and Victim died after the encounter in question. The cause of death for the Victim was determined to be, "fatal combination of Baclofen and Hydroxyzine toxicity, an apparent overdose for which police officers determined [Defendant] was not responsible." On appeal Defendant asserts five points of error including the argument that the trial court wrongly denied him the opportunity to present evidence of "advanced consent" by the victim before she passed out, consistent with their prior sexual history (evidence of which was also denied). The SD Supreme Court affirmed, agreeing with the trial court that advanced consent is not a valid defense in a situation where the Victim is not capable of withdrawing consent when she is passed out. The Court's decision is unanimous with opinion authored by Justice Salter.

The Court also rejected Defendant's other assertions of error, with the exception of his "ineffective assistance of counsel" claim. The Court declined to consider on this issue on direct appeal, "leav[ing Defendant's] ineffective assistance claims for further development should he pursue a habeas corpus action."

TIMOTHY BROWN v. CONTINENTAL RESOURCES, INC.

USCA 22-1230 – January 27, 2023

D.S.D. Western Division

This decision relates to an appeal from D.S.D. This is an "oil and gas" case arising out of the operation of a well in Harding County, South Dakota. The Lessors/Landowners sued for alleged damage to the surface of their land. The trial court granted summary judgment for the Lessee (Oklahoma Corporation). The 8th Circuit affirmed. Below is the Clerk's summary. To access the full opinion, simply click on the blue link.

Clerk Summary: Civil case – Oil and Gas. The Drilling and Pipeline Agreements between the parties released defendants from liability

for surface damage plaintiffs allege was caused by defendant trucking water to the well site; the trucks were operated in connection with input and oil recovery operations and the agreements contemplated such activities and released defendant from any and all surface damages flowing from the operations; South Dakota law does not recognize a claim for lost use and the district court did not err in granting defendant summary judgment on plaintiff's claim for compensation for lost use of pore space.

TERESA THOMPSON v. WILLIAM HARRIE

USCA 22-1058 – February 3, 2023
D.S.D. Southern Division

The trial court, Hon. Karen E. Schreier, dismissed this legal malpractice claim. This action had been filed in SD State Court, but removed to federal court. The 8th Circuit affirmed the dismissal. Both the trial court and the 8th Circuit predicted that the SD Supreme Court would prohibit the assignment of a legal malpractice claim. (The malpractice claim had been assigned to the tort plaintiff who had secured a default judgment against the attorney's client.)

Clerk Summary: Civil case – Legal Malpractice. The district court did not err in dismissing plaintiff's legal malpractice claim based on its determination that the claim was not assignable and could not be asserted by plaintiff; the district court did not err in dismissing plaintiff's fraud and deceit claims as the complaint failed to plead such claims with the required degree of particularity required under South Dakota law.

STATE v. MANNING

2023 S.D. 7 – February 2, 2023
Consecutive sentences of 60 years upheld

Defendant was convicted by jury of two counts of first-degree rape and two counts of sexual contact with child under 16. The trial court sentenced Defendant to two 60-year terms in prison, to run consecutively. The SD Supreme Court affirmed in a unanimous ruling, with opinion authored by Justice Kern. Circuit Judge Rasmussen sat on this case, in lieu of Justice Myren.

Each of the following issues were addressed and resolved adversely to the Defendant:

1. Whether the circuit court erred by denying Manning's motion for judgment of acquittal on the two rape charges.
2. Whether the circuit court erred by denying Manning's motion for judgment of acquittal on the two sexual contact charges in violation of the constitutional prohibition against double jeopardy.
3. Whether there was improper bolstering of witnesses at trial by the circuit court and the prosecution.
4. Whether the circuit court improperly closed the courtroom during the jury selection phase of Manning's trial.
5. Whether Manning's sentence violates the Eighth Amendment or constitutes an abuse of discretion.
6. Whether Manning received ineffective assistance of counsel.
7. Whether Manning was deprived of a fair trial by the cumulative effect of the alleged errors.

UNITED STATES v. JOHN WINER

USCA 22-1869 – February 9, 2023
D.S.D. Southern Division

This opinion, which consists of one paragraph, affirms criminal convictions for wire-fraud, money- laundering and conspiracy sustained in the lower court (Hon. Karen E. Schreier). The 8th Circuit states that the Defendant, "scammed investors out of millions of dollars" and that, "He asks us to reverse his convictions, but his arguments are conclusory and discuss no legal authority."

Clerk Summary: Criminal case – Criminal law. Appellant's arguments were conclusory and discussed no legal authority and would not be considered; defendant's convictions for wire fraud, conspiracy and money-laundering are affirmed.

UNITED STATES v. SKYE NELSON

USCA 22-2466 – February 9, 2023
D.S.D. Southern Division

Defendant, upon a guilty plea failing to register as a sex offender was sentenced to 13 months in prison and, upon release was subsequently sentenced to 11 months for violating the conditions of release. (Defendant's conditional release behavior is described as follows: "He became 'aggressive' at his first halfway house and was discharged 'almost immediately after' he arrived. He was 'disrespectful to staff' at the second halfway house and was asked to leave. At a hotel paid for with probation office 'second-chance funds,' he violated curfew, had unauthorized guests, perhaps allowed a drug deal in the room, and failed to wear his electronic monitor.") The 8th Circuit affirmed the lower court (Hon. Karen E. Schreier).

Clerk Summary: Criminal case – Sentencing. The sentence imposed upon the revocation of defendant's supervised release was not substantively unreasonable or an abuse of the district court's discretion.

UNITED STATES v. CHRISTOPHER PLENTY CHIEF

USCA 22-2229 – February 15, 2023
D.S.D. Northern Division

This criminal defendant pled guilty to assault of a spouse or intimate partner and was sentenced to 24 months in prison, with a three-year supervised release. Three revocation proceedings were brought against the Defendant in 2019, 2021, and 2022. The final revocation resulted in the trial court (Hon. Charles B. Kornmann) imposing the 24-month sentence with no supervision. The 8th Circuit affirmed in a per curiam opinion.

Clerk Summary: Criminal case – Sentencing. The district court relied on permissible factors in determining defendant's revocation sentence, did not abuse its discretion in weighing the facts; the court did not impose a substantively unreasonable sentence.

PLAINS COMMERCE BANK, INC. v. BECK, ET. AL.

2023 S.D. 8 – February 16, 2023
Mortgage dispute resolved

This appeal is characterized as an appeal relating to the actions of two trial judges: Myren and Sommers. As explained in footnote 5:

The Honorable Scott P. Myren was appointed to the South Dakota Supreme Court on October 28, 2020, and assumed office on January 5, 2021. Prior to his change in judicial duties, he exercised his authority as

presiding judge for the Fifth Judicial Circuit to appoint the Honorable Richard Sommers to serve as the judge for the case.

As a result of Justice Myren's participation in the proceedings below, Retired Circuit Judge Zell sat on this appeal. This decision consists of majority opinions authored by two different Justices: Justice Kern and Justice Salter. Justice Kern dissents on one issue (attorney fees). Judge Zell dissents on the four remaining issues. The underlying dispute and its resolution is set forth as follows:

[¶3.] Gary and Betty Beck created B&B Farms Trust as an irrevocable spendthrift trust in 1999, naming their three children as secondary beneficiaries and themselves as primary beneficiaries. Matthew Beck, their youngest child, served as Trustee. In 2015, Matthew took out a large personal loan with Plains Commerce Bank and granted a mortgage to Plains Commerce on $800,000-worth of Trust real estate as partial collateral. All beneficiaries of the Trust signed a consent to mortgage the Trust real estate prepared by their family attorney at the request of Plains Commerce. Matthew defaulted on the loan, and Plains Commerce commenced a foreclosure action against Matthew in his capacity as Trustee for B&B Farms Trust. Jamie Moeckly intervened in the action on behalf of the Trust and the parties filed cross-motions for summary judgment on whether Plains Commerce can foreclose on the Trust real estate. The circuit court granted Jamie's motion for summary judgment and denied Plains Commerce's. The court concluded that Matthew's mortgage on Trust real estate was void and unenforceable. The circuit court subsequently awarded attorney fees to Jamie Moeckly. Plains Commerce appeals the court's order granting Jamie summary judgment and her motion for attorney fees. We affirm in part and reverse in part.

SD VOICE v. KRISTI NOEM

USCA 21-3195 & 21-3197 – February 17, 2023
D.S.D. Northern Division

The 8th Circuit has ruled on the constitutional challenges to SD's regulations regarding the opportunity to initiate new statutes and to initiate constitutional amendments. The trial court had held that the provisions of SDCL § 2-1-1.2 (initiation of new statutes) were too restrictive and in violation of the 1st Amendment. With respect to SDCL § 2-1-1.1 (amending the state constitution), the trial court upheld its provisions. The 8th Circuit, considering cross-appeals, upheld the trial court's ruling as to unconstitutionality of SDCL § 2-1-1.2 (initiation of new statutes), but reversed as to SDCL § 2-1-1.1 (amending the state constitution). As per this decision, the 8th Circuit holds that both SDCL § 2-1-1.2 (initiation of new statutes) and SDCL § 2-1-1.1 (amending the state constitution) are unconstitutional, in violation of the 1st Amendment. The 8th Circuit further held that the trial court's creation of a "a new deadline of six months before the general election" for SDCL § 2-1-1.2 was inappropriate and remanded for its removal.

Clerk Summary: Civil case – Ballot Initiatives. The District Court found that South Dakota's deadline to submit petitions to initiate state statutes violates the First Amendment but that the deadline to submit petitions to amend the state constitution does not. Both plaintiffs and the state appeal. South Dakota's petition filing deadline under South Dakota Codified Law Sec. 2-1-1.2 implicates plaintiffs' First Amendment rights; the court need not reach the question of whether the district court erred in applying an exacting scrutiny standard to the statute as it failed lesser scrutiny standards, as well, and the district court did not err in concluding that the filing deadline was unconstitutional under the First Amendment; the district court erred in determining that the deadline for petitions to amend the state constitution survived strict scrutiny as there is no legal basis for distinguishing the two types of initiatives, and the filing deadline under South Dakota Codified Laws Sec. 2.1-1.1 is unconstitutional under the First Amendment; the district court erred in creating a new filing deadline for Sec. 2-1-1.2, and the district court is directed to modify the permanent injunction and remove the new filing deadline.

STATE v. VANDYKE

2023 S.D. 9 – February 23, 2023
Intentional property damage conviction reversed

New wife and former wife had an unpleasant encounter in process of transferring minor children from one to the other. Former wife (mother of children) pounded her fist on windshield of new wife's car, causing damage. State filed charge of intentional property damage. Trial was to the Court, without jury. Trial judge found former wife guilty. The SD Supreme Court reversed and remanded, stating:

[¶26.] Intentional damage to property, as described in SDCL 22-34-1, requires the State to prove that the defendant acted with the specific intent to cause damage to the affected property. It is not a strict liability offense for which a defendant who caused damage is necessarily guilty, and all appearances suggest that the circuit court erroneously accepted the State's argument that it was. This error likely affected the outcome of this case by compelling a conviction solely as a consequence of the damage [former wife] caused. We reverse her conviction and remand the case for a new trial.

The Court's ruling is unanimous with opinion authored by Justice Salter.

LAMB v. WINKLER

2023 S.D. 10 – March 2, 2023
Tort judgment enhanced by $700

Plaintiffs brought tort action for damages to the person of H and to their tractor as a result of decedent rear-ending H when he was driving the tractor. (Decedent died as a result of this collision.) Trial was to the Court, not by jury. Trial court awarded total damages of $36,498.80. The SD Supreme Court remanded, directing the trial court to increase the award by $700 to cover the cost of a new batter for the tractor. This decision is unanimous with opinion authored by Justice Kern.

HUSSEIN v. SHOWPLACE WOOD PRODUCTS INC.

2023 S.D. 11 – March 2, 2023
Work Comp appeal fails due to failure to notify DOL

This is a Work Comp claim. The Administrative Law Judge granted summary judgment to employer and employer's insurer. The trial court dismissed the employee's appeal because Notice of Appeal had not been served on the Dept. of Labor. The SD Supreme Court affirmed, stating:

[¶19.] Because Hussein did not serve his notice of appeal to the circuit court on the Department within 30 days after the ALJ served notice of its amended letter decision, the circuit court properly dismissed Hussein's administrative appeal. Further, because the circuit court was without subject matter jurisdiction, this Court likewise lacks jurisdiction over

the merits of Hussein's appeal. See Cable v. Union Cnty. Bd. of Cnty. Comm'rs, 2009 S.D. 59, ¶ 52, 769 N.W.2d 817, 833.

This decision is unanimous with opinion authored by Justice DeVaney.

JOHNSON v. B.T.

2023 S.D. 12 – March 2, 2023

HSC permitted to administer psychotropic medication to patient involuntarily committed

Involuntary commitment patient at Human Services Center (HSC) appeals the trial court's ruling permitting HSC "to administer psychotropic medication to B.T. for up to one year." The Court affirmed in a unanimous opinion authored by Justice Salter.

UNITED STATES v. BENNETT BELT

USCA 22-1390 – March 3, 2023

D.S.D. Central Division

Clerk Summary: Criminal case – Criminal law. Even if it was error to admit testimony about the percentage of children who suffer sexual abuse, the error was not plain; this court has allowed testimony in child abuse cases about "delayed reporting" by child victims, and the district court did not commit plain error in admitting it.

UNITED STATES v. ERIC LADEAUX

USCA 22-1623 – March 3, 2023

D.S.D. Western Division

Clerk Summary: Criminal case – Criminal law. Applying a plain error analysis, two South Dakota District Court Standing Orders (19-03 and 16-04) concerning a confined defendant's access and retention of sealed documents do not require reversal as the general purpose of the rules - safety of inmates and integrity of ongoing investigations - provide the good cause required under Federal Rule of Criminal Procedure 16(d); the evidence did not support defendant's request for a jury instruction on duress and coercion in this firearm possession prosecution; the evidence was sufficient to show defendant knowingly possessed a sawed-off shotgun; an argument raised for the first time in a reply brief is waived.

UNITED STATES V. JAMES RUTLEDGE

USCA 22-1708 – March 3, 2023

D.S.D. Central Division

Clerk Summary: Criminal case – Criminal law. The officers had an objectively reasonable basis to make a traffic stop after defendant failed to make a complete stop at a stop sign; the state trooper's conclusion that the relevant South Dakota statute required drivers to make a complete stop at two stop signs controlling different portions of a complex highway interchange was not unreasonable; the traffic stop was not unlawfully prolonged to permit a drug dog sniff.

UNITED STATES V. D. B.

USCA 22-2005 – March 6, 2023

D.S.D. Western Division

Upon plea of guilty to first-degree burglary, this juvenile Defendant (member of Oglala Sioux Tribe) was sentenced to 12 months detention, followed by 3 years of supervision as a juvenile delinquent. The burglary resulted in a brutal assault by another juvenile who accompanied Defendant. The 8th Circuit affirmed, rejecting arguments related to speedy trial and unreasonableness of sentence.

Clerk Summary: Criminal case – Criminal law and Sentencing. Defendant waived his right to appeal any Federal Juvenile Delinquency Act speedy trial violation as part of his plea agreement; a district court enjoys broad discretion when sentencing a juvenile offender, and the sentence imposed by the district court is not plainly unreasonable.

UNITED STATES V. VINCENT PEREZ

USCA 22-1740 – March 7, 2023

D.S.D. Northern Division

Defendant was found guilty by jury of one count of "receipt and distribution" of child porn and 1 count of "transportation" of child porn. The trial judge applied a level 5 enhancement and sentenced Defendant to 262 months on each count (to run concurrently), followed by 10 years supervised release. The 8th Circuit vacated the sentence and remanded for resentencing, holding:

Guidelines § 4B1.5(b)(1) imposes a 5-level enhancement if "the defendant's instant offense of conviction is a covered sex crime," and the defendant "engaged in a pattern of activity involving prohibited sexual conduct." "[C]overed sex crime[s]" include certain offenses "perpetrated against a minor," but do not include"trafficking in, receipt of, or possession of, child pornography, or a recordkeeping offense." USSG § 4B1.5, comment. (n.2). Perez was convicted on one count of receipt and distribution of child pornography, and one count of transportation of child pornography, offenses that are expressly excluded from the definition of "covered sex crime" under the Guidelines. See id.; see also United States v. Horn, 187 F.3d 781, 790 (8th Cir. 1999) ("[T]rafficking . . . include[s] receiving, transporting, shipping, advertising, or possessing material involving the sexual exploitation of a minor . . . ." (citation omitted)). It was, therefore, plain error to impose an enhancement under § 4B1.5(b)(1). See, e.g., United States v. Wikkerink, 841 F.3d 327, 336 n.6 (5th Cir. 2016) (finding that the district court committed a "clear and obvious error" when it applied the § 4B1.5(a) enhancement to a receipt of child pornography offense).

With the 5-level enhancement, Perez's advisory Guidelines range was 262 to 327 months of imprisonment; without it, the range would be 180 to 188 months. Under these circumstances, Perez has shown "a reasonable probability that but for the error he would have received a more favorable sentence." United States v. Harrell, 982 F.3d 1137, 1140 (8th Cir. 2020) (quoting United States v. Bonnell, 932 F.3d 1080, 1083 (8th Cir. 2019) (per curiam)). We vacate Perez's sentence and remand to the district court for resentencing without the application of the enhancement. The Court also held that it was not error to allow social media evidence related to Defendant.

Clerk Summary: Criminal case – Criminal law and Sentencing. Records from the social media network MeWe were properly authenticated, and it was not error to admit them and let the jury decide whether the account belonged to defendant; the evidence was sufficient to support defendant's child pornography convictions; defendant's offenses are expressly excluded from the definition of "covered sex crime" for purposes of Guidelines Sec. 4B1.5(a), and the district court erred in imposing a five-level enhancement under the section; defendant's sentence is vacated, and the matter is remanded for resentencing.