
CLE CLE CLE CLE CLE CLE CLE CLE CLE

The State Bar of South Dakota
and
The Committee on Continuing Legal Education

present

EARLY BIRD

Gregory Eiesland & Alecia Fuller, Chairs

Thursday, June 23, 2011
Washington/Roosevelt/Lincoln
Ramkota Hotel
Sioux Falls, South Dakota

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THE STATE BAR OF SOUTH DAKOTA and THE COMMITTEE ON CONTINUING LEGAL EDUCATION
PRESENT

Early Bird

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Thursday, June 23, 2011

6:30 - 7:30 am

Ramkota Hotel, Sioux Falls

- 6:00 - 6:30 am Registration: Free to Active SD Bar Members, Others: \$100
- 6:30 am Real Estate Closing and Title Insurance Problems
 - Bob Hayes ~ Davenport, Evans, Hurwitz & Smith, Sioux Falls
- 6:40 am Representing Childhood Abuse Survivors
 - Stephanie Pochop ~ Johnson Pochop Law Office, Gregory
- 6:50 am Addressing Troublesome Domestic Relations Issues
 - Melissa Neville ~ Bantz, Gosch & Cremer, Aberdeen
- 7:00 am Immigration Ramifications for your Criminal Law Client
 - John Murphy ~ Murphy Law Office, Rapid City
- 7:10 am "Heads Up" on Bills Passed in 2011 Legislature
 - David Lust ~ Gunderson, Palmer, Nelson & Ashmore, Rapid City
- 7:20 am Appellate Developments
 - Ron Parsons ~ Johnson, Heidepriem & Abdallah, Sioux Falls



If you wish to have this program submitted to a mandatory CLE jurisdiction for CLE credit,
please see DeeAnn or Nicole. Thank you.

Real Estate Closing and Title Insurance Problems

Bob Hayes

Davenport, Evans, Hurwitz & Smith
Sioux Falls

Bob is a graduate of the University of South Dakota (B.A., 1973; J.D., Sterling Honors Graduate, 1976). Bob was President of the State Bar of South Dakota for 2002-2003, and has also served as a director and President of the USD School of Law Foundation, President of the State Bar Foundation, Chairman of the South Dakota Bar Association Section of Real Property, Probate, and Trust Law, and Chairman of the Debtor-Creditor Law Committee. In 2010, he was elected as a Fellow of the American College of Real Estate Lawyers.

REAL ESTATE CLOSING PROBLEMS AND TITLE INSURANCE

I. Common Problems at Closing

A. Types of Deeds – Merger by Deed

1. Warranty – the language “grants, conveys and warrants” creates warranties of ownership in fee simple; good right to convey; freedom from encumbrances; quiet and peaceful possession; and covenant of defense of title. (SDCL 43-25-6)
2. Grant – “Grants and conveys” creates warranties that the grantor has not previously conveyed the same or any right title or interest to any person; and that the interest conveyed is free from encumbrances “done, made or suffered by the grantor, or any person claiming under him.” (SDCL 43-24-10)
3. Quitclaim – conveys only whatever right, title and interest grantor has at that time, without warranty. (SDCL 43-25-8)
4. Agents, Trustees and Personal Representative
 - a. Disclosure of representative capacity.
 - b. Warranties
 - c. Conveyance by a Trustee – the donor should be either the trust, by the trustee, or the named individual as trustee of the “fully identified” trust, depending on how title was taken.
5. Doctrine of Merger by Deed. All provisions from a contract of sale are merged into the deed, save and except those which are specifically shown to be intended to survive acceptance of the deed. *See Estate of Fisher*, 645 N.W. 2d 841 (S.D. 2002).

B. Provisions

1. Marital status/homestead language – recitals are a prima facie evidence of the truth of the recital (SDCL 43-28-19).
2. Metes and bounds descriptions – Be aware that there are instances, principally related to property within town site or municipality, or within the three mile extraterritorial jurisdiction of a municipality where metes and bounds descriptions technically cannot be used.

C. Accompanying Documents

1. Trusts – trust certificate (SDCL 55-4-51 through 51.3) *[check the pocket part]
2. Corporations – authorization resolution
3. LLCs – operating agreement/certificate
4. Partnerships – agreement/certificate

D. Foreclosure/redemption

1. Re-sale and sheriff's deeds – preparation of documents
2. Redemption periods and documents (SDCL 21-52-16 through 18)

E. Encumbrances

1. Who is getting release documents?
2. Easements – especially those without a defined, limited location

F. HUD-1 (form attached)

1. Borrower = Buyer
2. Tax prorations
3. Charges not addressed by the purchase agreement
 - a. Transfer fee
 - b. Recording fees
 - c. § 1101 et seq.

II. Title Insurance

A. Nature of Coverage

1. Indemnification against loss or damage arising from a title defect including cost of defending title.
2. Not a guarantee there will be no claims against owner, or that possession won't be disturbed.

B. Standard vs. Extended Coverage

1. In addition to specific exceptions unique to the particular property, standard exceptions from coverage are:
 - a. Defects, liens, encumbrances, adverse claims or other matters, if any created, first appearing in the public records or attaching subsequent to the effective date hereof but prior to the date the proposed Insured acquires for value of record the estate or interest or mortgage thereon covered by this commitment.

- b. Rights or claims of parties other than Insured in actual possession of any or all of the property.
 - c. Unrecorded easements, discrepancies or conflicts in boundary lines, shortage in area and encroachments which an accurate and complete survey would disclose.
 - d. Unfiled mechanics' or materialmen's liens.
 - 2. Effect of extended coverage
- C. Use of endorsements
 - 1. Condominium (ALTA §4 and 4.1)
 - 2. Manufactured Housing (ALTA §7)
 - 3. Environmental protection (ALTA §8.1 – Residential only)

**REAL ESTATE CLOSING
PROBLEMS AND TITLE
INSURANCE**

Presented by:

Robert E. Hayes

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 - 3. Environmental protection (ALTA §8.1 - Residential only)



A. Settlement Statement (HUD-1)

B. Type of Loan							
1. <input type="checkbox"/> FHA	2. <input type="checkbox"/> RHS	3. <input type="checkbox"/> Conv. Unins.	6. File Number:	7. Loan Number:	8. Mortgage Insurance Case Number:		
4. <input type="checkbox"/> VA	5. <input type="checkbox"/> Conv. Ins.						
C. Note: This form is furnished to give you a statement of actual settlement costs. Amounts paid to and by the settlement agent are shown. Items marked "(p.o.c.," were paid outside the closing; they are shown here for informational purposes and are not included in the totals.							
D. Name & Address of Borrower:			E. Name & Address of Seller:			F. Name & Address of Lender:	
G. Property Location:			H. Settlement Agent:			I. Settlement Date:	
			Place of Settlement:				

J. Summary of Borrower's Transaction

100. Gross Amount Due from Borrower	
101. Contract sales price	
102. Personal property	
103. Settlement charges to borrower (line 1400)	
104.	
105.	
Adjustment for items paid by seller in advance	
106. City/town taxes to	
107. County taxes to	
108. Assessments to	
109.	
110.	
111.	
112.	
120. Gross Amount Due from Borrower	
200. Amount Paid by or in Behalf of Borrower	
201. Deposit or earnest money	
202. Principal amount of new loan(s)	
203. Existing loan(s) taken subject to	
204.	
205.	
206.	
207.	
208.	
209.	
Adjustments for items unpaid by seller	
210. City/town taxes to	
211. County taxes to	
212. Assessments to	
213.	
214.	
215.	
216.	
217.	
218.	
219.	
220. Total Paid by/for Borrower	
300. Cash at Settlement from/to Borrower	
301. Gross amount due from borrower (line 120)	
302. Less amounts paid by/for borrower (line 220)	()
303. Cash <input type="checkbox"/> From <input type="checkbox"/> To Borrower	

K. Summary of Seller's Transaction

400. Gross Amount Due to Seller	
401. Contract sales price	
402. Personal property	
403.	
404.	
405.	
Adjustment for items paid by seller in advance	
406. City/town taxes to	
407. County taxes to	
408. Assessments to	
409.	
410.	
411.	
412.	
420. Gross Amount Due to Seller	
500. Reductions in Amount Due to seller	
501. Excess deposit (see instructions)	
502. Settlement charges to seller (line 1400)	
503. Existing loan(s) taken subject to	
504. Payoff of first mortgage loan	
505. Payoff of second mortgage loan	
506.	
507.	
508.	
509.	
Adjustments for items unpaid by seller	
510. City/town taxes to	
511. County taxes to	
512. Assessments to	
513.	
514.	
515.	
516.	
517.	
518.	
519.	
520. Total Reduction Amount Due Seller	
600. Cash at Settlement to/from Seller	
601. Gross amount due to seller (line 420)	
602. Less reductions in amounts due seller (line 520)	()
603. Cash <input type="checkbox"/> To <input type="checkbox"/> From Seller	

The Public Reporting Burden for this collection of information is estimated at 35 minutes per response for collecting, reviewing, and reporting the data. This agency may not collect this information, and you are not required to complete this form, unless it displays a currently valid OMB control number. No confidentiality is assured; this disclosure is mandatory. This is designed to provide the parties to a RESPA covered transaction with information during the settlement process.

L Settlement Charges				Paid From Borrower's Funds at Settlement	Paid From Seller's Funds at Settlement
700. Total Real Estate Broker Fees					
Division of commission (line 700) as follows:					
701. \$	to				
702. \$	to				
703. Commission paid at settlement					
704.					
800. Items Payable in Connection with Loan					
801. Our origination charge	\$	(from GFE #1)			
802. Your credit or charge (points) for the specific interest rate chosen	\$	(from GFE #2)			
803. Your adjusted origination charges		(from GFE #A)			
804. Appraisal fee to		(from GFE #3)			
805. Credit report to		(from GFE #3)			
806. Tax service to		(from GFE #3)			
807. Flood certification to		(from GFE #3)			
808.					
809.					
810.					
811.					
900. Items Required by Lender to be Paid in Advance					
901. Daily interest charges from	to	@ \$	/day	(from GFE #10)	
902. Mortgage insurance premium for	months to			(from GFE #3)	
903. Homeowner's insurance for	years to			(from GFE #11)	
904.					
1000. Reserves Deposited with Lender					
1001. Initial deposit for your escrow account				(from GFE #9)	
1002. Homeowner's insurance	months @ \$		per month \$		
1003. Mortgage insurance	months @ \$		per month \$		
1004. Property Taxes	months @ \$		per month \$		
1005.	months @ \$		per month \$		
1006.	months @ \$		per month \$		
1007. Aggregate Adjustment					
1100. Title Charges					
1101. Title services and lender's title insurance				(from GFE #4)	
1102. Settlement or closing fee	\$				
1103. Owner's title insurance				(from GFE #5)	
1104. Lender's title insurance	\$				
1105. Lender's title policy limit \$					
1106. Owner's title policy limit \$					
1107. Agent's portion of the total title insurance premium to	\$				
1108. Underwriter's portion of the total title insurance premium to	\$				
1109.					
1110.					
1111.					
1200. Government Recording and Transfer Charges					
1201. Government recording charges				(from GFE #7)	
1202. Deed \$	Mortgage \$		Release \$		
1203. Transfer taxes				(from GFE #8)	
1204. City/County tax/stamps	Deed \$		Mortgage \$		
1205. State tax/stamps	Deed \$		Mortgage \$		
1206.					
1300. Additional Settlement Charges					
1301. Required services that you can shop for				(from GFE #6)	
1302.	\$				
1303.	\$				
1304.					
1305.					
1400. Total Settlement Charges (enter on lines 103, Section J and 502, Section K)					

Comparison of Good Faith Estimate (GFE) and HUD-1 Charges		Good Faith Estimate	HUD-1
Charges That Cannot Increase			
	HUD-1 Line Number		
Our origination charge	# 801		
Your credit or charge (points) for the specific interest rate chosen	# 802		
Your adjusted origination charges	# 803		
Transfer taxes	# 1203		

Charges That In Total Cannot Increase More Than 10%		Good Faith Estimate	HUD-1
Government recording charges	# 12D1		
	#		
	#		
	#		
	#		
	#		
	#		
	#		
	#		
	#		
	Total		
Increase between GFE and HUD-1 Charges		\$	or %

Charges That Can Change		Good Faith Estimate	HUD-1
Initial deposit for your escrow account	# 1001		
Daily interest charges \$ /day	# 901		
Homeowner's insurance	# 903		
	#		
	#		
	#		

Loan Terms

Your initial loan amount is	\$
Your loan term is	years
Your initial interest rate is	%
Your initial monthly amount owed for principal, interest, and any mortgage insurance is	\$ includes <input type="checkbox"/> Principal <input type="checkbox"/> Interest <input type="checkbox"/> Mortgage Insurance
Can your interest rate rise?	<input type="checkbox"/> No <input type="checkbox"/> Yes, it can rise to a maximum of % . The first change will be on and can change again every after . Every change date, your interest rate can increase or decrease by % . Over the life of the loan, your interest rate is guaranteed to never be lower than % or higher than % .
Even if you make payments on time, can your loan balance rise?	<input type="checkbox"/> No <input type="checkbox"/> Yes, it can rise to a maximum of \$
Even if you make payments on time, can your monthly amount owed for principal, interest, and mortgage insurance rise?	<input type="checkbox"/> No <input type="checkbox"/> Yes, the first increase can be on and the monthly amount owed can rise to \$. The maximum it can ever rise to is \$
Does your loan have a prepayment penalty?	<input type="checkbox"/> No <input type="checkbox"/> Yes, your maximum prepayment penalty is \$
Does your loan have a balloon payment?	<input type="checkbox"/> No <input type="checkbox"/> Yes, you have a balloon payment of \$ due in years on
Total monthly amount owed including escrow account payments	<input type="checkbox"/> You do not have a monthly escrow payment for items, such as property taxes and homeowner's insurance. You must pay these items directly yourself. <input type="checkbox"/> You have an additional monthly escrow payment of \$ that results in a total initial monthly amount owed of \$. This includes principal, interest, any mortgage insurance and any items checked below: <input type="checkbox"/> Property taxes <input type="checkbox"/> Homeowner's insurance <input type="checkbox"/> Flood insurance <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>

Note: If you have any questions about the Settlement Charges and Loan Terms listed on this form, please contact your lender.

Representing Childhood Abuse Survivors

Stephanie Pochop
Johnson Pochop Law Office
Gregory

Stephanie E. Pochop is a partner at Johnson Pochop Law Office in Gregory. She is a 1988 graduate of the University of South Dakota and received her JD degree from the University of South Dakota School of Law in 1991. The focus of Pochop's practice is on civil litigation, with an emphasis on personal injury and employment discrimination matters.

Pochop is a past-president and active member in the famed Rosebud Bar Association and has served as a Bar Commission and committee chair for the South Dakota State Bar. Pochop has been a member of the AAJ and the SDTLA throughout her career and has previously served several terms as a member of the SDTLA Board of Governors. Pochop is also a member of South Dakota's ABOTA chapter. She is a past-president of the SD Mediocre Trial Lawyer's Association and has frequent reminders that she still qualifies for membership.

Pochop has been privileged to represent a number of survivors of abuse. She is profoundly grateful to have witnessed the courage of these clients as they have worked to a positive change in their own lives and in the lives of others. Representing abuse survivors in the civil litigation setting offers lawyers a unique chance not only to help their clients but to protect children by raising awareness about abuse and abuse prevention.

Improving Your Representation of the Abuse Survivor Client

Several highly publicized accounts of cases involving childhood sexual abuse in church and school settings have definitely raised public awareness about the frequency of abuse. The publicity has also increased the numbers of civil claims filed by abuse survivors across the nation, creating a rather specialized area of practice. However, the publicity about the horrors of abuse, about scandalous efforts to cover it up and about big number settlement outcomes rarely includes mention of the many challenges that individual survivors can face when they choose to litigate.

Representing a survivor on claims directly related to the abuse, such as assault claims against the perpetrator or institutional negligence claims against the perpetrator's employer, will (or rather, should) naturally educate and heighten an attorney's sensitivity toward survivorship issues. Survivorship issues can also show up as issues in other types of litigation including sexual harassment, retaliation and other employment law claims, divorce litigation and even personal injury claims where "loss of enjoyment of life" damages are at issue. Survivors of abuse are clients who deserve special attention and care in the attorney/client relationship in order to have the best outcome from the justice system. Following are five tips that I have learned – some the hard way – about representing abuse survivors in the litigation setting.

1. "'Survivor' versus 'victim'... the title does matter." One common misperception about survivorship is that survivors are fragile. Admittedly, this stereotype is not entirely unfounded: some survivors deal with the trauma of abuse by self-destructive behavior (most commonly identifiable via a medical and/or criminal record of self-medicating with alcohol or drugs). Clients who present with this sort of history of poor coping skills can obviously make for some very difficult issues in the attorney/client relationship not to mention in the damage analysis of your case. Natural instincts can make it tempting for the lawyer to push past protective and enter into patronizing territory for this type of client. The overly-protective approach can make it possible for the client to participate in a large portion of the litigation without getting a good grip on the very real risks of loss that can occur in the courtroom, whether by motions hearing or by jury decision. To put it simply: no patronizing.

Indeed, most studies will bear out that abuse survivors tend to be incredibly resilient, highly productive and insightful people. After all, your client is a person has braved and made it through a horrifying violation and still has enough courage to step forward ask for your help. The person who has enough courage to come to your office to seek justice, knowing that a painful part of his or her life will be exposed to others, is not a victim. I do not represent victims: I represent survivors.

Using language designed to encourage clients to feel empowered by their choice to speak out against abuse is an important element in helping clients to understand both the possibilities and the limits of litigation.

2. “Empower, empower, empower.” Perpetrators steal, often by force, all control and choice from the person being victimized. Some survivors stay quiet out of shame; others are made to feel complicit in the abuse; and yet others are lead to believe that they have no credibility. For a person with that sort of personal history, even telling the story to a lawyer in the privacy of the lawyer’s office can feel like a breath-taking dive into uncharted white water, risking both rejection and humiliation. This type of client can be difficult to convince that you believe him or her. In fact, many survivors describe that the decision to speak out about abuse after years of silence was motivated not by compensation or closure but by fear: as in, “I don’t want him to be able to abuse her the way he abused me.”

Especially for the client who is revealing a devastating personal history in order to protect others, conducting client meetings and correspondence in a way that empowers the client and includes him or her in the decision-making process is particularly important. Empowering this type of client takes more than just using the “survivor versus victim” phrasing: it requires a diligent effort to keep the client engaged and informed. There are many things that you and your client can not control in the litigation setting, but you should determine early on whether your client will benefit from being directly involved in the things that you can control: for example, will the client can benefit from being directly included in such things as scheduling dates for depositions or even setting the place where depositions will occur? If your answer is even remotely or possibly “yes”, make the call to the client before scheduling. Likewise do not bypass a mediation opportunity, even if settlement seems remote, if it can provide the client with an opportunity to can make a written or oral presentation to the defendants in a non-adversarial setting. Many survivors long for this opportunity.

Each time you include your client in the decision-making process about the litigation, you are handing the client back some control over what happens to the abuser -- and for more many survivors, that is the first time he or she has ever had that feeling in decades. Keep in mind that to the client, feeling respected and listened to during the case can be as important as the outcome.

3. “Exposing perpetrators and enablers helps stop others from being abused.” Effective perps become masters at manipulating their targets’ stigmatizing shame into a level of secret-keeping that perpetuates abuse. One honed, this evil sensitivity is how is a single abuser can hurt over a 100 children. In some cases, the perp’s employer, spouse or family will also have an interest – different but equally intense -- in preventing exposure of the truth. Unfortunately, despite all the publicity about abuse, reinforced secrecy about the occurrence of remains one of the most consistent factors in cases involving serial abusers.

There is one guaranteed way to protect children from abuse: put the risk and shame back on the perpetrator by making information about abusers public. Shout out the perp. Publically identify policies that enable abuse or shelter abusers. Raising awareness about dangerous people and policies is the equivalent of putting a warning label on poison.

Therefore, speaking out about abuse by naming the perpetrator and identifying policies that protect them doesn't just empower your client, it helps prevent abuse. We can not guarantee an outcome in any case, but making sure that your client knows why and how speaking out about abuse is important to help protect others is an important way to empower your client and encourage healing. My dad used to say that when clients say that it is not about the money, you know it is about the money. Survivor clients are different that way. In my experience with survivors, it often really isn't about the money: it is about making their family, their friends and your children safer. As lawyers we can assist them by helping them expose the truth in a dignified way and in an important forum.

4. "The cure should not be worse than the disease." By the time they make the decision sit down and tell you what happened, most survivors have developed a steely determination to deal with the emotional upheaval that sharing their story can cause. Yet not all survivors who are strong enough to come into a law office and share their most personal history with a lawyer are healed up or tough enough to handle litigation. Litigation on abuse-related issues will usually require repeated exposure of your client's personal history, and some clients simply haven't prepared for what that can be like: you can not overstate the potentially re-victimizing aspect of litigation. Your client needs to know, from the start, that at the depositions, at an adverse psychological evaluation, at a mediation and in front of a jury, your client will have to repeat his or her most personal experience in front of complete strangers – and will be asked pointed questions about it. Depending on the client, even a very good case may not be suited to proceed. Helping the client make this difficult determination can be a tough call for the lawyer involved.

In most cases, a trusted therapist should be involved with the client at each phase of the litigation – including the initial determination of whether the litigation will help the client. If your client doesn't have an established therapist, make it a priority to have the client find a therapist as soon as possible. You can help clients find one by suggesting several reputable professionals who have prior positive experience with survivorship issues so the client has some options: other lawyers, especially prosecutors, and local domestic violence groups are excellent resources for referrals. Keep in mind that while a therapist can be of great assistance to the lawyer, the therapist is there to assist the client first: for this reason the client should select someone that he or she trusts, not necessarily someone that you think is a great witness.

Jane or John Doe status is another option to help clients take this step forward. Notably, many clients want this status not because they want to protect

themselves from public exposure but because they want to protect their parents or children. I am always fearful for clients who want John or Jane Doe status in order to protect their own identity: this is a red flag, in my book, that the client may simply not be well-suited to the degree of exposure that litigation (even in pseudonym standing) will require. This type of client definitely should have the input of his or her therapist before proceeding with litigation.

For clients who live in rural communities or lack the means to obtain quality therapeutic care, keep in mind that there are many good resources available online for survivors. Clients who are pursuing litigation in order to protect others from abuse often find great advocacy information online, such as how to establish a local support group. These sites can also serve as a resource for non-economic settlement options when mediation is involved. However, there are some seriously depressing, angry survivor sites as well – and you certainly don't want your client to start their own facebook page in this tone. You should encourage your client to carefully consider the mission statement of any online survivor network: for example, SNAPnetwork.org is a reputable site run by survivors, for survivors, but it does have a special focus for survivors of abuse in the church setting. Bishopsaccountability.org has an even more specialized focus. My favorite internet resource for survivors (and their lawyers) is the National Association to Prevent Sexual Abuse of Children ("NAPSAC") site at www.napsac.us. NAPSAC has a survivor-gearred site that promotes a realistic mission to end childhood sexual abuse within three generations through awareness, education and advocacy of children's rights. Because it is intended for survivors, this site tends to be education and legislation focused, though it does include some helpful information about litigation and litigation resources from lawyers too.

4. "Trust me, I'm a Lawyer...." Abuse often not only inflicts physical injury and pain, it can leave a permanent scar across the survivor's ability to trust. Survivors – especially those abused by perps who have a family, educational or religious tie to the survivor – often have a very difficult time really trusting anyone to do the right thing. Remember that the survivor client doesn't necessarily trust you just because he or she shared what happened with you and signed your fee agreement. Developing a true trust relationship with this type of client can take extra work.

Yet for all its pitfalls and uncertainties that litigation cause a survivor, the attorney/client relationship you build during litigation can be used to help the client heal: arguably, the lawyer who uses every obligation to the client as an active opportunity to build that client's trust has just helped the client regardless of the outcome of the case. Many survivor clients come into a law office at the very beginning of the process of rebuilding the ability to trust. If your clients admits that he or she has not shared the history of abuse with parents, the spouse, the treating doctor or the therapist, you need to be keenly concerned about this client's ability to have a real trust relationship with you. Finding out what this client needs most – often an apology, an opportunity to confront the perp and/or a change of policy is

what the survivor needs more than compensation in order to move on -- can be the biggest challenge for the lawyer in that circumstance. The client's therapist can be the best resource for establishing the necessary rapport with the client. Be sure to ask both the client and the therapist what the client needs to build trust.

As a final note, the facts in many of these cases tend to be so outrageous and offensive that you can get entirely involved with how wrong the defendants were. This is good summary judgment and sound "rules of the road" trial strategy; however, too much focus on the defendant during client meetings can make your client feel less important in the litigation than the perp. Fortunately there are two easy fixes that will not only help this client but improve the quality of your entire practice: communicate and do what you tell the client you would do. Easy, no?

5. "Never guess." Any number of reported decisions dealing with various statute of limitation issues from around the country confirm that many survivors do not reveal their past to their close friends or family members for decades. These are not repressed memory cases – which are their own special breed of cat – these are people who have decided it was too dangerous or painful to tell. This CIA-level of secret-keeping is usually a survival or coping mechanism for the survivor. Unfortunately, it can have more than just a statute of limitations downside for the particular case: the epidemic of secret-keeping about abuse has effectively prevented accurate statistics about the numbers of survivors in any given group or area. Chances are there are people here today whose lives have been impacted by abuse, whether as a survivor, a parent, a sibling or a spouse. Most of us will never know who that is, among this relatively small circle of lawyers.

The point? If you are going to have a jury trial in a case where abuse is at issue, do not forget to consider the other survivors in the room. Even with inaccurate statistics, we can accurately predict that a jury panel of 18 randomly selected citizens will include people who are or are close to survivors – or who are or are close to perpetrators. Indeed, the stigma attached to perpetration is even greater than that of survivorship and is even more difficult to ascertain in a public setting. But you will need to know. Hopefully, you will take my advice and use a sensitive approach, as the last thing that your client will want to do is force exposure of this information from someone who is not ready. Juror questionnaires to prepare jurors about the nature of the case and individualized voir dire in chambers are two effective and reasonable ways to help you identify which potential jurors may have an incredibly difficult internal struggle if they are chosen as a decision-maker in your case. Lawyers who have tried a number of these cases are usually happy to share their questionnaires so you don't have to recreate the wheel – and there are lawyers who have a number of trials in this type of case out there, such as Jeff Anderson from Minneapolis. A sensitive, encouraging approach toward survivors (and to those who are related to a perpetrator) on the jury not only helps you pick the best jury for your client's case, it might just encourage someone else who has been suffering in silence to speak out and get help too.

Texts, Checks, and Guidelines: Addressing Troublesome Domestic Relations Issues

Melissa E. Neville

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Melissa E. Neville received a Bachelor of Science degree in Biology in 1995 from South Dakota State University and her Juris Doctor from University of South Dakota School of Law in 2001. After graduating, she served as a law clerk to the Honorable David Gilbertson, Chief Justice of the South Dakota Supreme Court. In 2002, she joined the firm of Bantz, Gosch & Cremer, LLC, where she has practiced for nine years. Melissa is admitted to practice in the United States Supreme Court, Eighth Circuit Court of Appeals, Federal District Court of South Dakota, as well as South Dakota state court. She practices in the areas of civil litigation, administrative law, worker's compensation, Social Security, criminal law and appeals, but the bulk of her practice is in family law.

I. TECHNOLOGY

A. Subpoenaing Cell Phone Records - 18 USC § 2701 et seq.

1. Content - actual text message words

- (a) Usually kept 3-7 days
- (b) Exceptions:
AT&T, Boost and T-Mobile - no retention
Sprint SMS content - 12 days
- (c) Once "deleted" by the user - deleted from carrier's server
- (d) Consider *both* sender's and receiver's carriers, as well as the phones themselves, as options

2. Transmission Data - data indicating message was sent/received and tower information

- (a) Usually kept 45-60 days
- (b) Exception: Verizon - call detail report available 1 year; bills available 7-10 years

3. Specific Examples

- (a) **Alltel** - acquired by Verizon and they claim it will be 6 months for the record retention procedure to transition

- (b) **AT&T** - 1000 per day; Fax Subpoenas to:

AT&T National Compliance Center
11760 US Highway 1
Suite 600
North Palm Beach, FL 33408
Fax: (888) 938-4715

- (c) **Verizon** - www.verizon.net/policies/civil_subpoena.asp

* Fax request to "preserve content" (text messages), with phone number and the dates you want preserved (5 days maximum) to (888) 667-0026.

* Call to confirm they received your fax. (800) 451-5242.
Select option 3. Wait at least 20 minutes to call after faxing.

* Once request is logged, they will assign a case number and fax you a confirmation & consent. Thereafter, you, again, need a court order accompanying the subpoena.

* Cost = \$40 per IP record; \$22+ for FedEx; \$.25/copy

Phone (888) 483-2600

Fax (325) 949-6916

Verizon Legal Compliance

Custodian of Record

PO Box 1001

San Angelo, TX 76902

Note: Verizon does NOT notify subscriber if request is sent by law enforcement, but if it is a civil case, subscriber is notified and has 14-16 days to move to quash.

B. Using Text Messages as Evidence in Court

1. Client can **email** the messages to himself

(a) “SMS to Text” - client will be able to export all saved text messages to her memory card, provided she has one in her phone. Info includes: date, time, originating phone number and the text sent/received. Connect cell phone to computer and download to view and print.

(b) Authenticity/Foundation —match this document with the monthly phone record and client's testimony.

2. **Low-tech options**

(a) photos of the screens

(b) video of the phone and series of messages

(c) the phone itself

C. e-Texting clients who do not have voice mail or email

1. Text to a mobile phone from your PC using the "Send a Text" option from the menu within your service provider (i.e. Verizon).
2. Text to mobile phone from E-mail by addressing the email to your 10 digit mobile number, number@vtext.com, or your custom nickname@vtext.com.

**** Beware of ethical implications in communicating with your clients in this fashion.**

Rule 1.4(d) - is this a written communication?

Rule 1.6 - Confidentiality - substantive communication should be limited and consent of client is recommended, just as with email, particularly if cell phone belongs to someone else's plan (i.e. another has access) or an employer

II. CHILD SUPPORT

A. Abatement, Offset, and Cross Credit

SDCL 25-7-6.14, SDCL 25-7-6.23, SDCL 25-7-6.27

1. **Spread Sheets** - standard support; split custody; shared parenting

<http://dss.sd.gov/childsupport/services/obligationsdetermined.asp>

2. **Watch out for:**

(a) **Cap on Health Insurance Cost** - a party can only be required to carry health insurance if there are findings that it is both accessible and reasonable. SDCL 25-7-6.16 says "cost attributable to the child is equal to or less than eight percent of the parent's net income . . . "

Problem - doesn't say *which* parent's net income; assume obligor

(b) **Cap on Retirement Contribution** - "not exceeding ten percent of gross income"

* SDCL 25-7-6.7

* Must come from the employee's pocket, not employer's

B. Finding Income for Self-Employed Obligor

1. Failure to provide evidence of income - imputed with state average SDCL 25-7-6.26; currently \$30,922

https://dir.sd.gov/lmic/menu_annual_pay.aspx and click on "statewide"

2. Tax Returns
 - * How to treat depreciation
3. Financial Statements & Loan Applications

C. Deviating From Schedule for Underemployment

1. Has to be voluntary *AND* unreasonable - *Gisi v. Gisi*, 2007 SD 39, 731 NW2d 223
2. Be aware of presumption that obligor is *capable* of earning minimum wage - SDCL 25-7-6.4

III. WHICH GUIDELINES APPLY?

A. Parenting Guidelines - currently on UJS Website but not formally adopted yet

B. Visitation Guidelines

1. SDCL Chapter 25-4A - Version 3, January 1, 2002
2. Changes will be discussed at Rules hearing on 08/24/2011 at 11am in Pierre. Notice will be posted in July newsletter. Suggestions can be sent to Family Law Committee or presented at hearing.

Immigration Ramifications for your Criminal Law Client

John Murphy
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John R. Murphy is the principle attorney at Murphy Law Office, P.C., a two attorney firm in Rapid City. Murphy Law Office, P.C., only handles criminal and quasi-criminal cases (habeas corpus actions, juvenile delinquencies, abuse and neglect cases, protection order defense). Mr. Murphy received his undergraduate degree in political philosophy from Syracuse University in 1986. After college, he was a Peace Corps volunteer in Micronesia for two years. He received his law degree from Georgetown University in 1992. He came to South Dakota to clerk for the Honorable Donald J. Porter, United States District Court Judge. After clerking for Judge Porter, he was awarded a Skadden Foundation fellowship and, as such, became the director of the Indian Law Project at Black Hills Legal Services. Since 1996 he has been in private practice.

COLLATERAL DAMAGE:
THE IMMIGRATION RELATED CONSEQUENCES OF
A CRIMINAL CONVICTION

1. *Padilla v. Kentucky*, __ U.S. __, 130 S.Ct. 1473 (2010):
 - a. Creating the duty to know and advise
 - b. Expanding defense counsel's role to "collateral" matters
 - c. Eliminating silence as an option
 - d. Deeming mis-advice on deportation matters as ineffective and prejudicial

2. *Padilla* is important to South Dakota practitioners
 - a. Ethical and professional considerations:
 1. Duty to help those in need and to help the court system by accepting court appointments
 2. Duty to only represent clients if we can do so competently
 3. Recognition that this may mean delving into areas where we have little to no experience or expertise

 - b. Our changing population:
 1. Hispanic population in South Dakota has increased by 102.87% in the past 10 years (121% increase in Sioux Falls, 70% increase in Rapid City)
 2. Immigrants dramatically outnumber native born South Dakotans in regard to percentage of population increase
 3. Canadians and Mexicans account for the largest share of immigrants to South Dakota

- c. Signals an expansion of our roles as criminal defense attorneys
 - 1. Federal reentry crimes
 - 2. Civil commitment
 - 3. Travel restrictions (applies to immigrant and non-immigrant populations)
 - d. Raises the bar high: duty to investigate and stay current
3. Who can help you properly advise your immigrant clients:
- a. Immigration attorneys
 - b. Federal Defenders Office
 - c. National Association of Criminal Defense Lawyers
4. Resources available to defense attorneys:
- a. NACDL amicus briefs
 - b. FDO white papers
 - c. www.murphylawoffice.org

“Heads Up” on Bills Passed in 2011 Legislature

David Lust

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David Lust is a partner at Gunderson, Palmer, Nelson & Ashmore, LLP, in Rapid City where he specializes in commercial transactions, real property and business litigation. He is currently the House Majority Leader and is in his third term in the State Legislature. He humbly asks that other members of the bar join him in the Legislature.

2011 South Dakota Legislative Session Summary of Practitioner-Related Bills

House Bills Signed by the Governor (Effective July 1, 2011):

- **HB 1038 (Chief Justice Bill):** An Act to revise certain provisions concerning certain fees for the electronic transmission of court records.
 - The charge for electronic mailing of court records is set, similar to a facsimile transmission, at one dollar per page with a five dollar minimum. Electronic mailing language has been added.
 - Formerly SDCL § 16-2-29(8) stated for a facsimile transmission of any opinion, record, or paper from an active or inactive file in the clerk's custody, one dollar per page, but the minimum charge is five dollars. Fees collected pursuant to this subdivision shall be deposited into the unified judicial system court automation fund.

- **HB 1040 (Chief Justice Bill):** An Act to provide jurisdiction for clerk magistrates to accept certain penalties.
 - Expands jurisdiction of magistrate judges in certain criminal matters.
 - Formerly SDCL § 16-12C-11 (4) did not have the following included: "A magistrate court with a clerk magistrate presiding has concurrent jurisdiction with the circuit courts for any penalty imposed pursuant to § 32-22-55, notwithstanding the amount of the penalty, if the penalty is paid in full at the time of the acceptance of the plea."

- **HB 1041 (Chief Justice Bill):** An Act to revise the statutory duties of the presiding judge of each judicial circuit.
 - Provides flexibility to presiding circuit court judge regarding scheduling in each county. Minimum requirement of two days each month per county is removed.
 - Formerly SDCL § 16-2-21 (10) read: "To assure the availability of circuit judges in all areas of the state, the presiding judge shall arrange, so that in each county of that circuit, there shall be available a circuit judge to hold court in the county seat of each such county on at least two days each month if there are matters that warrant the presence of a judge."

- **HB 1043 (Chief Justice Bill):** An act to clarify the jurisdictional amount in a small claims court proceeding.
 - Clarifies that the \$12,000 small claims limit is exclusive of cost and attorney fees.
 - Formerly SDCL § 15-39, Small Claims Proceedings, did not have this section concerning costs and attorneys fees.

- **HB 1062 (Civil):** An Act to adopt the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.
 - Clarifies the jurisdictional issues associated with adult guardianships involving multiple states.
 - The Uniform Adult Guardianship and Protection Proceedings Jurisdiction Act is organized into five sections. Section one contains definitions and provisions designed to facilitate cooperation between courts in the different states. Section two is the heart of the Act, specifying which court has jurisdiction to appoint a guardian or conservator. Its overall objective is to locate jurisdiction in one and only one state except in cases of emergency or in situations where the individual owns property located in multiple states. Section three specifies a procedure for transferring a guardianship or conservatorship proceedings from one state to another. Section four deals with enforcement of guardianship and protective orders in other states. Lastly, Section five contains boilerplate provisions common to all uniform acts.

http://www.guardianship.org/spotlight/UAGPPJA_Summary.pdf

- **HB 1067 (Criminal):** An Act to revise the look-back period for the enhancement of penalties for multiple assaults and violations of protection orders.
 - Expands the look back period for enhancement of penalties for assaults and violations of protective orders from five years to ten years in SDCL § 22-18-1 and SDCL § 25-10-13.

- **HB 1087 (Civil):** An Act to address comprehensibly the liability relationship between a trespasser and a person with a possessory interest in land.
 - Changes the liability exposure for landowners vis-a-vis trespassers.
 - Amended to read: “No person with a possessory interest in land owes a duty of care to a trespasser nor is subject to liability except as provided in this Act.”

- **HB 1145 (Civil):** An Act to provide for the identification of the law applicable to certain claims for damages.
 - Provides that the state where an injury occurs has jurisdiction and defines where the injury occurred for jurisdictional purposes.

- **HB 1155 (Civil):** An Act to revise various trust provisions.
 - Revises the trust code as recommended by the Governor’s Trust Task Force.

- **HB 1219 (Civil):** An Act to extend certain protections against precipitous eviction to certain long-term tenants at will.
 - SDCL § 43-8-8 amended to require landlords to provide two months notice, instead of one month, to at-will tenants who are active military or related to active military and sets forth exceptions.

- **HB 1233 (Civil):** An Act to limit liability from damages caused by certain aviation products.
 - Limits liability for certain manufacturers of airplanes and aviation parts.

Senate Bills Signed by the Governor (Effective July 1, 2011).

- **SB 13 (Criminal):** An Act to revise certain evidentiary rules relating to the statements of children.
 - Makes admissible out of court statements, not otherwise admissible by statute or rule of evidence, of minors who are thirteen years of age or older by amending SDCL § 19-16-39, which formerly was ten years of age or older.
- **SB 20 (Criminal):** An Act to remove the requirement of a prior felony conviction for fourth and subsequent DUI offenses.
 - SDCL § 32-23-4.6 and SDCL § 32-23-4.7 formerly included “and the person has previously been convicted of a felony under § 32-23-4.” This language has been stricken.
- **SB 32 (Criminal):** An Act to revise the time period to update certain sex offender registration information and to require the collection of passport and professional license information for such registration purposes.
 - SDCL § 22-24B-12 formerly included a five-day period to inform a law enforcement agency with whom the person last registered. This language has been changed to “within three business days.”
 - SDCL § 22-24B-21 formerly included a five-day period to update sex offender registration information on the internet site. This language has been changed to “within three business days.”
 - SDCL § 22-24B-24 amended to include:
 - (19) Passport and any document establishing immigration status, including the document type and number; and
 - (20) Any professional, occupational, business or trade license from any jurisdiction.
- **SB 33 (Criminal):** An Act to revise certain provisions regarding the 24/7 sobriety program, to authorize the collection of certain fees, and to authorize the use of ignition interlock devices.

- **SB 34 (Criminal):** An Act to create the crime of possessing, selling, or distributing certain substances intended for the purpose of intoxication.
 - Revises the elements of the crime of distribution of illegal substances.
 - Formerly Chapter 22-42 did not have this section concerning the elements that give rise to distribution of illegal substances.
 - Any person who possesses, possesses with intent to distribute, sells, or distributes a substance knowing that it is to be used in violation of § 22-42-15 is guilty of a Class 1 misdemeanor.

- **SB 35 (Criminal):** An Act to revise certain provisions regarding the crime of taking or disseminating pictures without consent and to provide for a felony penalty under certain circumstances.
 - Amends SDCL § 22-21-4 requirements for crimes involving dissemination of lewd pictures without consent and adds additional penalty of a Class 6 felony if the victim is seventeen years of age or younger and the perpetrator is at least twenty-one years old.

- **SB 80 (Civil):** An Act to apply certain provisions concerning actions for recovery of damages for personal injury or death to municipal officers, employees, and volunteers.
 - Clarifies SDCL § 9-24-5 that claims can be brought against municipalities or their employees, elected and appointed officials and volunteers authorized by the municipality.
 - SDCL § 9-24-5 is amended to included “whether such person is classified, unclassified, licensed, certified, permanent, temporary, compensated, or not compensated.”

- **SB 110 (Civil):** An Act to revise certain provisions relating to collateral real estate mortgages.
 - Softens repercussions for failure to file an addendum to a collateral real estate mortgage.
 - SDCL § 44-8-26 formerly read “upon the timely filing of such an addendum to a collateral real estate mortgage, the effectiveness of the collateral real estate mortgage will be continued for five years.... The following language has been added “after the stated maturity date in those instances where the original collateral real estate mortgage provided a maturity date or for five years after the expiration of the five-year period whereupon it shall lapse in the same manner as provided above unless another addendum to the collateral real estate mortgage continuing the effectiveness of its lien is filed prior to such lapse.”

- **SB 114 (Civil- Family Law):** An Act to provide that parties to a divorce or separate maintenance action be restrained from making changes to insurance coverage.
 - Prohibits changing of insurance policies without mutual consent or court order during pendency of divorce proceedings except in certain circumstances.
 - Amends SDCL § 25-4-33.1 to include: “restraining both parties from making any changes to any insurance coverage for the parties or any child of the parties without the written consent of the other party or an order of the court unless the change under the applicable insurance coverage increases the benefits, adds additional property, persons, or perils to be covered, or is required by the insurer.”

- **SB 173 (Criminal):** An Act to allow specific details of alleged sex crimes against minors is suppressed under certain conditions.
 - Amends SDCL § 23A-6-22 to allow for suppression of more than the name of the minor if the court finds a compelling interest after considering the provided factors.
 - Amends SDCL § 23A-35-4.1 and SDCL 23A-2-2 with the addition of the following language “In cases of alleged rape, incest, or sexual contact, if the victim is a minor, the court may limit access to an affidavit pursuant to § 23A-6-22.1.”

- **SB 176 (Criminal):** An Act to provide for the crime of human trafficking, to establish the elements and degrees of the crime, and to provide penalties for the violation thereof.

- **SB 178 (Civil- Family Law):** An Act to revise certain provisions relating to the rights and duties of joint legal custodians.
 - Amends SDCL § 25-5-7.1 to include joint legal custody parents to confer on and participate in matters involving child care, extracurricular activities, religious instruction, and child’s use of motor vehicles.

Significant Bills That Did Not Pass:

- **HB 1184 (Civil):** An Act to limit the subrogation of certain insurers unless and until the insured is fully compensated.
 - Revised laws regarding subrogation to permit injured party to recover before insurance companies in certain instances. This is often referred to as the “make whole” doctrine.
 - Was to amend Chapter 58-11: Insurance, Form and Contents of Insurance Policies, to include the following new section:
 - No insurer under this chapter is entitled to participate in any recovery from any tortfeasor on account of bodily injury or death or damage to property unless and until its insured has first been fully compensated as provided in § 21-3-1. The provisions of this Act do not apply to any worker’s compensation insurer.

- **HB 1255 (Civil- Family Law):** An Act to provide for the award of joint physical custody of children under certain circumstances.
 - Was to amend Chapter 25-5: Domestic Relations, Parent and Child, to include a new section regarding joint legal custody. If joint legal custody is awarded there was a presumption of joint physical custody with the burden resting on the challenging parent.

If you are interested in looking further into these bills, or any others addressed in the 2011 Legislative Session, the South Dakota Legislative Research Council’s web site is <http://legis.state.sd.us>. Follow the links to identify a specific bill.

David Lust is a partner at Gunderson, Palmer, Nelson & Ashmore, LLP, in Rapid City where he specializes in commercial transactions, real property and business litigation. He is currently the House Majority Leader and is in his third term in the State Legislature. He humbly asks that other members of the bar join him in the Legislature.

Appellate Developments (2010-11)

*A review of South Dakota Supreme Court decisions from the previous year
appearing to have changed or developed the law*

Ron Parsons

Johnson, Heidepriem & Abdallah

Sioux Falls

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1. Civil Procedure

- a.** *Raven Industries, Inc. v. Lee*, 2010 SD 49, 783 N.W.2d 844

When a circuit court denies a motion for summary judgment, there is no requirement to raise the same issue at trial in order to preserve it for appeal.

- b.** *Arnoldy v. Mahoney*, 2010 SD 89, 791 N.W.2d 645

A circuit court should not enter “findings of fact and conclusions of law” when resolving a summary judgment motion. If it does, they are considered a procedural nullity that do no more than explain the rationale of the circuit court in reaching its decision.

When a court is ordering counsel to produce files for in camera review, it must provide counsel the specific reason for the order so that counsel may form a specific objection.

- c.** *Spiska Engineering, Inc. v. SPM Thermo-Shield, Inc.*, 2011 SD 23

Circuit court did not have power to enter injunctive relief against a non-party to the action before it because it had no *in personam* jurisdiction over him. Mailing a copy of the notice of hearing on the motion was not sufficient to commence an action against the non-party, and further, the non-party did not waive objections to personal jurisdiction or insufficiency of process by appearing at the hearing to object or by failing to file a Rule 12 motion because no valid “pleading” was filed against him to which a responsive motion or pleading was permitted.

- d.** *Buffalo Ridge Corp. v. Lamar Advertising of South Dakota*, 2011 SD 4, 793 N.W.2d 809

By entering into stipulations, parties may bind themselves on all matters other than those affecting jurisdiction and prerogatives of the court. Here, even though the circuit court found that an option had been exercised on a particular date, it was nonetheless bound by the parties’ earlier stipulation that it had been exercised on a different date.

- e.** *Carmon v. Rose*, 2011 SD 18

A general assertion of a meritorious defense and claim of lack of notice was insufficient evidence of “good cause” to set aside a default judgment where the party commencing an action using substitute service demonstrated that the statutes were followed and the service was valid.

f. *Jacquot v. Rozum*, 2010 SD 84, 790 N.W.2d 498

The trial court abused its discretion by certifying an order granting all defendants summary judgment on a punitive damages claim as a final order appealable under SDCL 15-6-54(b) because it merely recited the statutory language and did not provide a reasoned statement supporting its certification. Even so, the 30-day period for the plaintiffs to appeal from that order still commenced when the order was certified as final. Because the plaintiffs did not appeal from the improperly certified final order within 30 days, they could not challenge the propriety of the certification on appeal or the order granting summary judgment on their punitive damages claim.

g. *Anson v. Star Brite Inn Motel*, 2010 SD 73, 788 N.W.2d 822

Even if the doctrine of equitable tolling of a statute of limitations exists in South Dakota, the plaintiff did not meet its requirements where she did not exhibit reasonable good faith conduct after she learned that the statute of limitations had expired.

2. Evidence

a. *Johnson v. O'Farrell*, 2010 SD 68, 787 N.W.2d 307

A police report regarding an assault that was the subject of a civil action against a bar was admissible under the business records exception to the hearsay rule to prove that the deputy sheriff recorded statements from the bar owner and employee, and the statements by the owner and employee contained in the report that the employee threw the plaintiff against the wall were admissible as non-hearsay party admissions.

3. Torts / Negligence

a. *Cooper v. Rang*, 2011 SD 6, 794 N.W.2d 757

Where the defendant driver knew that the roads were slippery and saw the plaintiff's vehicle, but did not apply her brake in time to prevent her car from slipping into the rear of the plaintiff's vehicle, there was no issue of contributory negligence and no claim of legal excuse for failure to stop. The circuit court therefore erred in denying the plaintiff's motion for judgment as a matter of law on the defendant's negligence.

b. *Brown v. Hanson*, 2011 SD 21

A cause of action for slander of title may be maintained for the filing of a letter containing false statements regarding the validity of an easement with the register of deeds, extending the application of the tort in *Gregory's, Inc. v. Haan*, 1996 SD 35, 545 N.W.2d 488 (recognizing slander of title cause of action for filing of false mechanic's lien). The Supreme Court adopted and applied the Restatement (Second) of Torts, §§ 623A and 624.

In addition, although attorney fees were not authorized by contract or statute, the Supreme Court held that plaintiffs were nonetheless entitled to their attorney fees as "special damages," adopting the Restatement (Second) of Torts, § 633(1)(b), which includes the expense of measures "reasonably necessary to counteract" the publication of an injurious falsehood within the "pecuniary loss" that is recoverable, and the majority rule adopted by jurisdictions addressing this question holding that attorney fees flowing directly from a disparagement of title are recoverable as damages in a slander of title action.

c. *Western Consolidated Coop. v. Pew*, 2011 SD 9, 795 N.W.2d 390

The use of the word "wrongful" in SDCL 21-3-3, which provides how damages for conversion are calculated, does not add an element to the tort or an additional element that must be satisfied in order to calculate damages once a defendant has been found liable for conversion. It is the act of conversion itself that is the wrong.

d. *Schmiedt v. Loewen*, 2010 SD 76, 789 N.W.2d 312

In a medical negligence case involving a foreign object improperly left in the body, under the "continuing tort" doctrine the continuing wrong terminates and the statute of limitations begins to run when the foreign object is removed *or* the patient learns of its existence, whichever is first.

e. *Selle v. Tozser*, 2010 SD 64, 786 N.W.2d 748

A civil conspiracy claim is not an independent action, but rather a method of establishing joint liability for the damages caused by the underlying tort.

4. Contracts / UCC

- a. *Johnson v. Sellers*, 2011 SD 24

Although the statute of frauds prohibits the oral alteration of a written contract for the sale of land, it does not prohibit a waiver of the time for performance of the sale, because such a waiver is not an alteration of the written contract, but rather is simply a temporary suspension of its enforcement, extending the holding in *Endres v. Warriner*, 307 N.W.2d 146 (S.D. 1981) (involving an extension of the time for payment in a statute of frauds case).

- b. *Heartland State Bank v. American Bank & Trust*, 2010 SD 83, 791 N.W.2d 638

Under the Uniform Commercial Code, a paying bank “receives” a check for purposes of the check processing rules in SDCL 57A-4-104(a)(10) when it is received at a location to which delivery is requested by the paying bank.

5. Insurance

- a. *Bertelsen v. Allstate Ins. Co.*, 2011 SD 13, 796 N.W.2d 685

An automobile insurer’s duty to pay medical benefits under SDCL 62-1-1.3 as soon as an insured’s worker’s compensation claim is denied does not defeat its duty to investigate a claim. But at the point that worker’s compensation coverage is denied, and an insurer has completed its investigation of the claim, it has a duty to pay medical benefits immediately.

An insurer may be found to have waived the right to subrogation or be estopped from asserting it when it has unreasonably delayed the payment of benefits.

In an insurance bad faith case, the analysis for determining whether an insurance company has impliedly waived the attorney-client privilege by asserting an “advice of counsel” defense should begin with a presumption in favor of preserving the privilege. An insurance company only waives the privilege by expressly or impliedly injecting its attorney’s advice into the case. A denial of bad faith or an assertion of good faith alone is not an implied waiver of the privilege. Rather, the issue is whether the insurer, in attempting to demonstrate that it acted in good faith, actually injected its reliance upon such advice into the litigation. The key factor is reliance of the client upon the

advice of its attorney. Finally, a client only waives the privilege to the extent necessary to reveal the advice of counsel that it placed at issue.

b. *Zoo Properties, LLP v. Midwest Family Mut. Ins. Co.*, 2011 SD 11

On a question of first impression, when interpreting a policy covering damage due to “risks of direct physical loss involving collapse of a building,” South Dakota will follow the approach interpreting collapse to include not only actual collapse, but also “imminent” collapse. An “imminent” collapse is one “likely to happen without delay; impending or threatening; and requires a showing of more than substantial impairment.”

c. *State Farm Auto. Ins. Co. v. Bottger*, 2011 SD 2, 793 N.W.2d 389

For purposes of a “permissive use” insurance coverage clause, which provides coverage to those using a covered vehicle with permission or consent, proof that permission to drive a vehicle has been revoked is viewed from the owner’s perspective and requires the same level of proof as proving that express permission to drive a vehicle: it must be clearly expressed by word or actions.

For the purpose of an “entitlement” insurance coverage exclusion, which excludes coverage for any person lacking a reasonable belief that they are entitled to use any particular vehicle, the inquiry is viewed from the driver’s perspective and courts should apply the subjective/objective test to determine whether the driver had a reasonable belief that he or she was entitled to drive the owner’s vehicle at the time of the accident.

d. *Western National Mut. Ins. Co. v. Decker*, 2010 SD 93, 791 N.W.2d 799

A babysitter paid to provide child care services out of her home as a part of a continuing arrangement constituted a “business” under a homeowner’s insurance policy that excluded coverage for activities related to the operation of a business.

e. *American Family Ins. Group v. Robnik*, 2010 SD 69, 787 N.W.2d 768

An insured’s negligent misrepresentations to buyer of insured’s home that the sewer line was not defective were not “accidents” within the meaning of the homeowner’s policy providing coverage for accidents resulting in property damage.

The finding in the underlying suit that the insured’s misrepresentations were negligent rather than intentional did not, under the doctrine of collateral

estoppel, preclude an independent determination, in a subsequent declaratory judgment action by the insurer who defended the action, whether misrepresentations were “accidental” and therefore covered under the policy.

6. Property

- a.** *DRD Enterprises, LLC v. Flickema*, 2010 SD 88, 791 N.W.2d 180

The instrument conveying an easement must either describe the servient tenement with certainty or make reference to something else that makes the servient tenement identifiable with certainty. It was insufficient for an instrument to simply convey an easement through “the grantor’s land.”

- b.** *Advanced Recycling Systems, LLC v. Southeast Properties Limited Partnership*, 2010 SD 70, 787 N.W.2d 778

In an issue of first impression, where a tenant holds a right of first refusal to purchase the leased premises, that right is not triggered where the landlord sells a larger development that includes the leased premises.

- c.** *Lawrence County v. Miller*, 2010 SD 60, 786 N.W.2d 360

Res judicata does not bar or preclude a future takings claim based upon the disruption of airspace over private property where the government institutes new restrictions or introduces additional uses that cause further disruption.

- d.** *State v. Clark*, 2011 SD 20

In an eminent domain proceeding, SDCL 21-35-23 allows attorney and expert witness fees to the citizen when the final judgment is at least twenty percent greater than the government’s final offer for the property. For the purpose of making this determination the “final judgment” is not limited to the jury’s verdict, but rather includes any award of prejudgment interest awarded as part of the final judgment.

- e.** *Nattymac Capital LLC v. Pesek*, 2010 SD 51, 784 N.W.2d 156

A mortgage is extinguished by the payment of the debt and the mortgagee has no property in such mortgage after such payment, notwithstanding the subsequent failure to comply with recording statute formalities.

7. **Trusts and Wills**

- a. *Stockwell v. Stockwell*, 2010 SD 79, 790 N.W.2d 52

Testamentary capacity and undue influence are mixed questions of law and fact and require a compound inquiry. The trial court's findings of historical fact concerning these issues are reviewed under the clearly erroneous standard. The Supreme Court's standard of review for the trial court's findings on those issues that involve the application of the law to the facts depends upon the nature of the inquiry. If the application of the rule of law to the facts requires an inquiry that is essentially factual – one that is founded on the application of the trial court's experience to the “mainsprings of human conduct” – the question is essentially one of fact and the standard of review is clearly erroneous. But if the question requires the appellate court to consider legal concepts in the mix of fact and law and to “exercise judgment about the values that animate legal principles,” then the question is essentially one of law and the standard of review is de novo.

- b. *Estate of Berg*, 2010 SD 48, 783 N.W.2d 831

An imaginary father, or other fictitious relative does not qualify as the natural object of a testator's bounty. Therefore, although the testator was suffering under the insane delusion that an imaginary German man was his father, the fact that he did not name this imaginary father in his will did not render the will invalid.

8. **Family Law**

- a. *In the matter of B.C. and I.C.*, 2010 SD 59, 786 N.W.2d 350

The failure of parents appealing the termination of their parental rights to serve notices of appeal on Indian Tribes that had intervened in the termination proceedings pursuant to the Indian Child Welfare Act was jurisdictionally fatal and required dismissal of the appeals.

- b. *In the Matter of D.W.*, 2011 SD 8, 795 N.W.2d 39

As an issue of first impression, the proper standard of review in an appeal from a circuit court's finding of good cause to deviate from the child placement preferences established by the Indian Child Welfare Act is the abuse of discretion standard.

As another issue of first impression, the burden of proof in such a case is that deviations from the ICWA placement preferences require a showing of good cause by clear and convincing evidence.

9. Workers Compensation / Administrative Law

- a. *Stuckey v. Sturgis Pizza Ranch*, 2011 SD 1, 793 N.W.2d 378

The use of the term “life care plan” in workers’ compensation proceedings adds unnecessary confusion and is discouraged. Here, although the Department approved a life care plan” for the claimant, the record revealed that it properly did not award a lump sum for future medical expenses, but rather only approved a course of treatment as medically necessary.

- b. *Thurman v. Zandstra Construction*, 2010 SD 46, 785 N.W.2d 268

When an employer sends a denial letter after the three-year period of limitations in SDCL 62-7-35.1 has expired, the letter does not start the running of a new two-year period of limitations under SDCL 62-7-35.

10. Constitutional Law (Non-Criminal)

- a. *Feist v. Lemieux-Feist*, 2010 SD 104, 793 N.W.2d 57

South Dakota statutes governing third-party custody and visitation do not violate a parent’s fundamental right to the care and custody of his or her child by failing to require an explicit finding of parental unfitness. Rather, the statutes can be construed constitutionally because the statutory proofs necessary to overcome the presumption in favor of the parent implicitly require such a finding.

- b. *Hutterville Hutterian Brethren, Inc. v. Waldner*, 2010 SD 86, 791 N.W.2d 169

The First Amendment precluded state courts from exercising jurisdiction over a governance dispute between two factions of a religious colony where the adjudication of the issues was dependent upon the resolution of religious disputes and could not be decided without extensive inquiry into religious doctrine and belief.

- c. *Mundhenke v. Holm*, 2010 SD 67, 787 N.W.2d 302

The “incidental claim” rule, under which the dismissal of legal claims did not violate a party’s right to a jury trial when the disposition of equitable claims resolved any other legal claims as a matter of law, has been abrogated in South Dakota. Therefore a defendant in an action seeking an accounting, disassociation, and dissolution of an alleged partnership was entitled to a jury trial on the existence of the partnership, even though the action was equitable in nature.

- d. *South Dakota State Fed. of Labor AFL-CIO*, 2010 SD 62, 786 N.W.2d 372

Questions regarding the constitutionality of proposed constitutional amendments are left for such time as they are enacted and properly brought before a court to determine the issue.

Whether the Attorney General must include a statement of the likelihood of exposure of the state to liability when writing a ballot statement for a proposed amendment to the State Constitution is initially the discretionary determination of the Attorney General. The exercise of the Attorney General’s independent judgment in this regard will not be reversed by the Supreme Court in the absence of an abuse of that discretion.

- e. *Hubbard v. City of Pierre*, 2010 SD 55, 784 N.W.2d 499

If a local public improvement confers a special benefit upon private property, a special assessment can be constitutionally imposed under the Fifth Amendment and the South Dakota Constitution if the assessment does not exceed the benefit received.

- f. *State v. Fifteen Impounded Cats*, 2010 SD 50, 785 N.W.2d 272

An objectively reasonable officer could determine that “exigent circumstances” existed under SDCL 40-1-5 and 40-1-2.4 allowing the immediate impoundment of animals without a warrant where the cats were obstructing driver’s view of the road, in their cramped and squalid accommodations, were subjected to mistreatment and neglect, and their immediate safety was in jeopardy.

11. Local Government

- a. *Grant County Concerned Citizens v. Grant County Board of Comm'rs*, 2011 SD 5, 794 N.W.2d 462

A vote by a county board of commissioners to reject a proposed amendment to their zoning ordinances is not a “legislative decision” by the board under SDCL 7-18A-15.1 that can be referred for a referendum election. Only a decision that produces some change to the status quo constitutes a referable decision. A failure to enact a proposed change is not a referable decision because it enacts nothing.

- b. *M.G. Oil Co. v. City of Rapid City*, 2011 SD 3, 793 N.W.2d 816

A petition for a writ of mandamus is an appropriate remedy for challenging a city council’s denial of a conditional use permit.

- c. *Salzer v. Barff*, 2010 SD 96, 792 N.W.2d 177

A claim against a city police officer for injuries resulting from an on-duty automobile accident is *not* governed by the two-year statute of limitations governing negligence claims against a municipality.

- d. *State v. City of Colman*, 2010 SD 81, 790 N.W.2d 491

State law preempted a city’s speed limit ordinance for a state trunk highway.

- e. *In the matter of B.Y. Development*, 2010 SD 57, 785 N.W.2d 296

A statute permitting municipalities to enact ordinances allowing historic preservation commissions to review undertakings that will encroach upon, damage, or destroy “any historic property,” does not encompass historic districts, but rather refers only to specific properties officially designated as historic.

12. Criminal Law / Habeas practice

- a. *State v. Herren*, 2010 SD 101, 792 N.W.2d 551

A brief, delayed stop at an intersection, standing alone, does not constitute reasonable suspicion of criminal activity necessary under the Fourth Amendment to support an investigatory stop of a vehicle.

b. *State v. Wright*, 2010 SD 91, 791 N.W.2d 791

A police officer's mistake of law in believing that a motorist violated a traffic law by failing to disengage his high beam headlights when being passed by the officer's vehicle was not objectively reasonable under the Fourth Amendment. As a result, the motion to suppress the evidence discovered during the stop should have been granted.

c. *State v. Overbey*, 2010 SD 78, 790 N.W.2d 35

Once probable cause exists for the search of a vehicle, it enables a search of the entire vehicle. For purposes of probable cause under the Fourth Amendment, a tractor-trailer, or a camper hitched to a vehicle, constitutes one unit, and a drug dog's alert to one part of the vehicle is a reliable indication that illegal narcotics may be present in either or both parts.

d. *State v. Klager*, 2011 SD 12

Because participants in a closely regulated business (in this case, taxidermy) have a reduced expectation of privacy in their business records, a warrantless administrative inspection of those records is reasonable under the Fourth Amendment where (1) there is a substantial government interest that informs the regulatory scheme under which the inspection is made; (2) the warrantless inspection is necessary to further the regulatory scheme; and (3) the statutory inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant.

e. *State v. Thomas*, 2011 SD 15, 796 N.W.2d 706

The failure of the defendant's trial counsel to request a cautionary instruction concerning accomplice testimony – where the trial centered on a credibility dispute regarding the testimony of the defendant's alleged "accomplices" who entered into pleas – was so ineffective and prejudicial as to represent a manifest usurpation of the defendant's constitutional rights, demonstrating a rare instance in which the Supreme Court reversed a conviction on direct appeal for ineffective assistance of counsel.

f. *State v. Shumaker*, 2010 SD 95, 792 N.W.2d 174

If a trial court accepts a binding plea agreement, it is bound to honor its promise to sentence the defendant within the strict bounds of the agreement. A sentence of five years with a conditional suspension of two years violated a plea agreement that capped prison time at three years.

g. *State v. Gutnik*, 2010 SD 82, 790 N.W.2d 495

A defendant's misidentification of his convicted charge in his notice of appeal from his conviction in magistrate court did not deprive the circuit court of appellate jurisdiction.

h. *State v. Reed*, 2010 SD 66, 787 N.W.2d 1

Under South Dakota law, evidence of a verbal agreement to purchase illegal drugs in the future was insufficient to support a conviction for attempted possession of a controlled substance, where there was no evidence shown of any direct act to execute the purchase and the conversations constituted only negotiations for a potential future transaction at some unspecified time.

i. *State v. Huber*, 2010 SD 63, 789 N.W.2d 283

Testimony by defendant's firearms expert that well-trained law enforcement officers can unintentionally discharge their firearms had a sufficient fit to the facts of a murder case in which a sheriff asserted that the shooting of his wife was accidental, and also the rebutted testimony of the State's expert that such officers do not ever unintentionally discharge their firearms. Therefore, the proffered expert testimony was relevant and admissible and its exclusion on relevance grounds was prejudicial error.

j. *State v. Rondell*, 2010 SD 87, 791 N.W.2d 641

South Dakota law does not provide for "conditional guilty pleas" and the trial court therefore lacked jurisdiction to accept such a plea, rendering it void.

k. *State v. Danielson*, 2010 SD 58, 786 N.W.2d 354

An acquittal of a crime does not constitute an automatic bar from subsequently prosecuting the acquitted defendant for perjury for false testimony provided on his own behalf at the trial. Only an unequivocal showing that the jury definitely and necessarily decided the issue sought to be foreclosed by the defendant will prohibit the prosecution from relitigating that issue in a second trial.

l. *State v. Bruce*, 2011 SD 14, 796 N.W.2d 397

Sentences of ten years imprisonment on each of 55 counts of knowing possession of child pornography, with 45 sentences suspended, but the sentences on the remaining ten counts to be served consecutively, was grossly

disproportionate to the particulars of the offense and the offender and violated the Eighth Amendment.

The Supreme Court has adopted Justice Konenkamp's recommendation in *State v. Blair*, 2006 SD 75, 721 N.W.2d 55, that courts look at two additional determinants when assessing the seriousness of a child pornography offense: (1) the specific nature of the material; and (2) the extent to which the offender is involved in the material.

m. *State v. Corean*, 2010 SD 85, 791 N.W.2d 44

A mandatory life sentence for aiding and abetting an aggravated kidnapping is not cruel and unusual punishment under the Eighth Amendment.

n. *State v. Semrad*, 2011 SD 7, 794 N.W.2d 760

A sentencing court's advisement regarding a defendant's parole eligibility is not part of the sentence and accordingly is not binding.

o. *West v. Dooley*, 2020 SD 102, 792 N.W.2d 925

The statute governing calculation of good time credits for a defendant serving consecutive sentences requires calculation of good time credits for each sentence separately, rather than aggregately.

p. *State v. Reed*, 2010 SD 105, 793 N.W.2d 63

For purposes of the statute requiring a circuit court to appoint counsel for an indigent prisoner upon an application for writ of habeas corpus "made in good faith," the term "good faith" is defined objectively and necessarily includes a determination that the issues raised in the petition are not frivolous.

The Supreme Court reviews a habeas court's denial of appointed counsel, including the determination of frivolity, for an abuse of discretion.

13. Juveniles

a. *In the interest of K.K.*, 2010 SD 98, 793 N.W.2d 24

Statutes and case law governing restitution to victims in criminal cases where the defendant is an adult do not apply to juveniles. The plain meaning of the juvenile restitution statutes does not require the same strict causal connection

between the victim's damages and the juvenile's criminal activities as the adult restitution statute, but rather is guided by the best interests of the child.

14. Corporations/Tax

- a.** *Link v. L.S.I., Inc.*, 2010 SD 103, 793 N.W.2d 44

In a dissolution action, South Dakota statutes do not create a presumption that a lump sum payment is necessary in ordering payment of fair value of the shareholder's shares, but rather permit a circuit court, in its discretion, to allow such payments in installments if necessary in the interests of equity.

- b.** *TRM ATM Corp. v. South Dakota Dep't of Rev. & Reg.*, 2010 SD 90, 793 N.W.2d 1

For purposes of the sales tax statutes, work performed by a company that leased and serviced ATMs constituted a "service" and company was required to pay sales tax on all gross receipts, even though it was contractually obligated to pay some of the fees that it received to third-party merchants.

Program Evaluation

Early Bird, June 2011

Please rate the following on a scale of one to five. Five being Excellent, and one being Poor.

1. Overall the program was: 5 4 3 2 1

2. Program Evaluation:

Hayes – Real Estate Closing and Title Insurance Problems 5 4 3 2 1

Pochop – Representing Childhood Abuse Survivors 5 4 3 2 1

Neville – Addressing Troublesome Domestic Relations Issues 5 4 3 2 1

Murphy – Immigration Ramifications for your Criminal Law Client 5 4 3 2 1

Lust – “Heads Up” on Bills Passed in 2011 Legislature 5 4 3 2 1

Parsons – Appellate Developments 5 4 3 2 1

3. Program Materials: 5 4 3 2 1

Comments:

4. Facility: 5 4 3 2 1

Comments:

5. Any other comments about programming, scheduling, etc?