



State Bar of South Dakota



**LAWYER
WELL-BEING
WEEK**

MAY 4-8, 2020

LAWPAY[®]

AN AFFINIPAY SOLUTION

POWERING PAYMENTS FOR THE LEGAL INDUSTRY

The easiest way to accept credit card and eCheck payments online.

Powerful Technology

Developed specifically for the legal industry to ensure comprehensive security and trust account compliance

Powering Law Firms

Plugs into law firms' existing workflows to drive cash flow, reduce collections, and make it easy for clients to pay

Powering Integrations

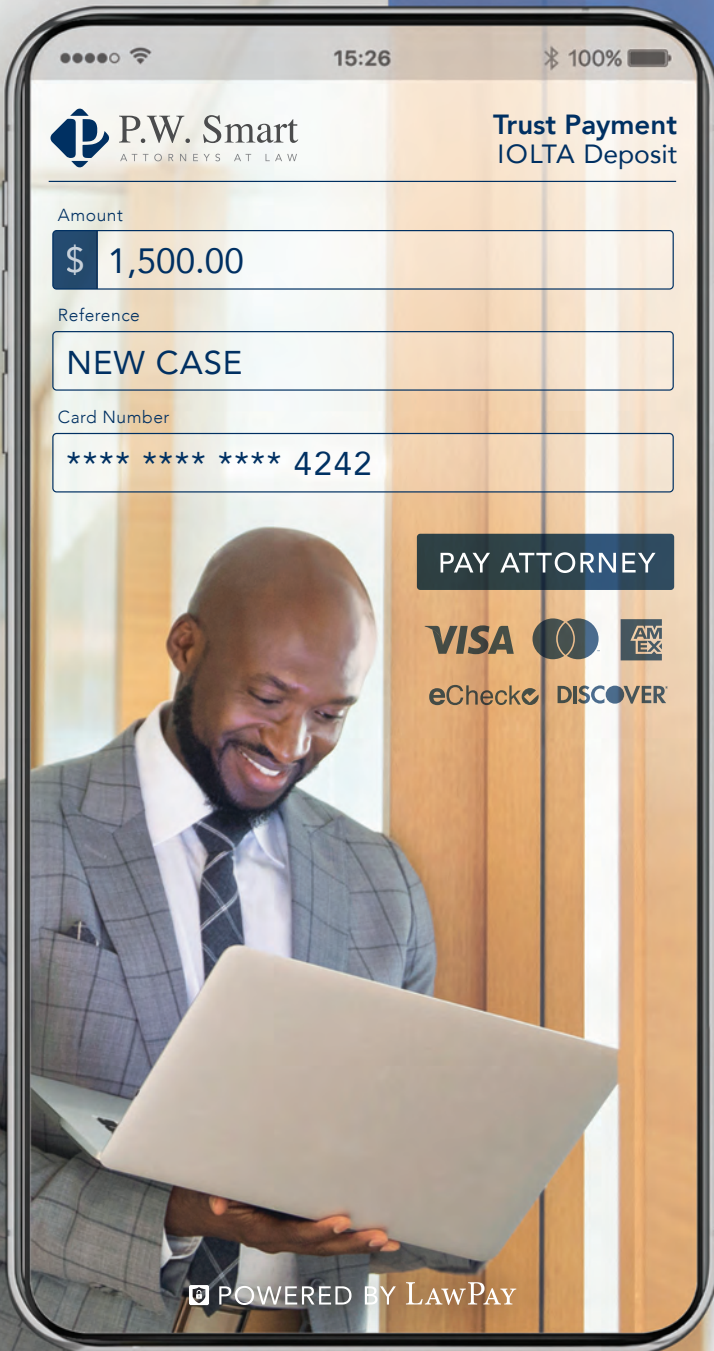
The payment technology behind the legal industry's most popular practice management tools

Powered by an Unrivaled Track Record

15 years of experience and the only payment technology vetted and approved by 110+ state, local, and specialty bars as well as the ABA



State Bar of South Dakota



ACCEPT MORE PAYMENTS WITH LAWPAY
866-251-9220 | lawpay.com/sbsd

State Bar of South Dakota

May 2020

Newsletter Issue - 5

- 4 President's Corner
Steven K. Huff
 - 6 Young Lawyers News
Nathan R. Chicoine
 - 10 Dean's List: News From the Law School
Neil Fulton
 - 14 Lawyer, Coe I. Crawford to be Honored on the Trail of Governors
Chuck Schroyer
 - 28 Remote Estate Planning FAQ
Thomas Simmons
 - 36 Can Lawyers Add Surcharges to Their Bills?
ALPS Risk Manager Mark Bassingthwaigte
 - 40 COVID-19 Ethical Considerations
State Bar Ethics Committee
-
- 8 Fellows of the South Dakota Bar Foundation
 - 12 A2J Superheroes
 - 16 General Announcements
 - 18 McKusick Call for Nominations
 - 19 USD School of Law Pass-Fail Announcement
 - 20 Diversity and Inclusion Award Nomination
 - 23 Ethics Opinion 2020-01
 - 62 In Memoriam
 - 64 Recently Adopted Supreme Court Rule 20-03
 - 82 Final Legislative Update
 - 98 Career Center



President's Corner

Steven K. Huff

A Request For Your Collective Considerations.

I realize and appreciate most, if not all of us, are past tired of the coronavirus and all it has disrupted. Many of us want to focus on a view of the world for when things get back to normal or, more appropriately, the new normal. I would like to take a minute and address a topic that will be a part of that new normal and how we, as lawyers, can step in to learn and help.

In recent dialogue with several judges and attorneys who practice agricultural, debtor/creditor, and bankruptcy law, it was clear the ag sector is, and has been, suffering substantially. Since moving to Yankton in the fall of 1999, there have been several economic cycles which have come and gone. In those same cycles, there have been numerous changes within the bankruptcy bar – trustees and practitioners retired or stopped practicing in the area and the law substantially changed in 2005 and continues to evolve. Approximately two years ago there was a resurgence of Chapter 12 filings. The numbers were trending up and continued in that direction even before the emergence of the virus upon the regional, national and international economies.

Now as we enter May of 2020, I detect a consensus among, not just the bankruptcy bar, but the litigation, business and debtor/creditor sections as well, that our farm and commercial clients are going to face greater challenges than they have ever faced before. Because of multifaceted financial stress, there will be major upswings in financial distress with a new

onslaught of bankruptcy filings across the board, whether consumer, commercial, agricultural or even governmental. With practitioners leaving the bankruptcy, debtor/creditor and litigation bars, I fear our bar association will need more training and education in these emerging areas along with lawyers to do the work. I would think that litigation related to SBA and PPP access is already seeing gains, as will litigation in insurance, medical, banking, agriculture, and other industries.

As a result, our judiciary, our law school and our bar association will be tasked with meeting these challenges head on. We will need to build partnerships. We will need to consider aggressively supporting our legal service organizations, which will be severely taxed with litigation, foreclosure, bankruptcy, and the consequences of the same.

I would ask for your help with suggestions on how we meet these challenges. I am in the process of coordinating and organizing some new CLE programming and video presentations related to opportunities in and training for our bar that will help meet these challenges. I believe this effort cannot be short-term but must be sustained, and I will therefore seek to incorporate these efforts into our Bar Strategic Plan as we transition through the coronavirus economy. I intend to ask for help not just from our law school, our judiciary, and our practitioners, but from everyone who can observe unmet need and can help.

Fred Rogers, a/k/a the Mr. Rogers, always made it a point to look for, follow, and support the helpers. We should do no less.

ATTORNEYS - OATH OF ATTORNEY

I do solemnly swear, or affirm, that:

I will support the Constitution of the United States and the Constitution of the State of South Dakota;

I will maintain the respect due to courts of justice and judicial officers;

I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with a client's business except from that client or with the client's knowledge or approval;

I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any person's cause for lucre or malice.

PANDEMIC RESOURCES BLOG

**CLICK
HERE**

**EXTRA ARTICLES
AT YOUR
FINGERTIPS**

**PLEASE SHARE
ARTICLES FOR
THE BLOG WITH
NICOLE OGAN!**



STATE BAR OF SOUTH DAKOTA YOUNG LAWYERS SECTION



by: Nathan Chicoine
YLS President

Normally, the May newsletter would be reserved for descriptions of activities at the Annual Meeting, and the Young Lawyers column would tell members where they could connect with other young lawyers over a sandwich, snack, beverage, or karaoke. This year is far from normal. With the Annual Meeting postponed and social distancing measures in place, we are forced to find other ways to connect. We currently cannot connect over a cold cut or a cup of coffee. Speed-networking by quickly moving down a line to meet as many lawyers as possible now seems reckless. Many young lawyers are teleworking and trying to keep the dog or a toddler quiet during a video conference. How have you changed the way you connect with family, friends, coworkers, and clients? Please share. I am always interested in hearing how life and practice is changing for young lawyers.

Despite the postponed Annual Meeting events, I still have some announcements to make.

Elections: This year, either at the Annual Meeting or by some alternative arrangement if necessary, we will hold elections for representatives from even-numbered judicial circuits. The 2nd circuit, 4th circuit, 6th circuit, and at-large circuit representative spots are up for election. In addition, the positions of secretary/treasurer and president-elect are open for election. The Young Lawyers Section is accepting nominations for these positions. Interested candidates should submit their name along with a brief statement of interest to me at least 30 days before the Annual Meeting. I will accept them now even if it is well in advance of the election. If you have any questions regarding the election process or the positions on the Young Lawyers Board of Directors, feel free to contact me or any member of the Board of Directors. Please send your statement of interest to: Nathan@demjen.com

Young Lawyer of the Year: The Annual Meeting's Legalpalooza also serves as the stage for the YLS to honor the Young Lawyer of the Year. We are continuing to evaluate how and when the award will be presented. In the meantime, we are still soliciting nominations for the recipient. Nominees should exemplify (1) Professional excellence; (2) Dedication to serving the legal profession and the Bar; (3) Service to their community; and (4) A reputation that advances legal ethics and professional responsibility. If you know a worthy Young Lawyer, please submit your nominations to President-Elect Carrie Srstka at Caroline.Srstka@state.sd.us. You can find more information in the newsletter.

Stay tuned for more information on our events. As always, we encourage you to reach out to any of our Board members to voice your concerns and ideas. It is important to us that we provide you with quality programming and opportunities. Young Lawyers Board of Directors are:

President: Nathan Chicoine (Rapid City)
President-Elect: Carrie Srstka (Sioux Falls)
Secretary/Treasurer: Ole Olesen (Rapid City)
1st Circuit: vacant
2nd Circuit: Anthony Sutton (Sioux Falls)
3rd Circuit: Tony Teesdale (Brookings)
4th Circuit: Mariah Bloom (Spearfish)
6th Circuit: Holly Farris (Pierre)
7th Circuit: Kelsey Weber (Rapid City)
At-Large Representative: Tyler Coverdale (Sioux Falls)
Law Student Representative: Whitney Petersen (Vermillion)



YOUNG LAWYERS SECTION STATE BAR OF SOUTH DAKOTA

PRESIDENT

NATHAN CHICOINE
P.O. Box 1820
516 Fifth Street
Rapid City, SD 57709
(605) 342-2814
Nathan@demjen.com

PRESIDENT-ELECT

CAROLINE SRSTKA
2000 52nd Street North
Sioux Falls, SD, 57104
(605) 367-5880
Caroline.Srstka@state.sd.us

SECRETARY/TREASURER

OLE OLESEN
130 Kansas City Street Ste 310
Rapid City, SD, 57701
(605) 394-2181
Ole.Olesen@pennco.org

BOARD OF DIRECTORS

1st Circuit
BERT BUCHER
Yankton

2nd Circuit
ANTHONY SUTTON
Sioux Falls

3rd Circuit
TONY TEESDALE
Brookings

4th Circuit
MARIAH BLOOM
Spearfish

5th Circuit
JENNY JORGENSON
Webster

6th Circuit
HOLLY FARRIS
Pierre

7th Circuit
KELSEY WEBER
Rapid City

At Large
TYLER COVERDALE
Sioux Falls

Law Student
WHITNEY PETERSEN
Vermillion

THE YOUNG LAWYERS SECTION SEEKS NOMINATIONS FOR THE YOUNG LAWYER OF THE YEAR AWARD

Members of the South Dakota Bar Association are invited to submit nominations for the 2020 South Dakota Young Lawyer of the Year. The Young Lawyer of the Year Award will be presented at the State Bar Convention in June. Please consider nominating a South Dakota Young Lawyer for this award.

In order to be considered for the award, the nominee must be a member of the State Bar of South Dakota in good standing and must not have (1) reached the age of 36 years by June 17, 2020, or (2) been admitted to practice in SD or any other state(s) for more than 10 years. Past recipients of the award and lawyers currently serving on the Young Lawyers Board are ineligible for consideration. Nominees should exemplify the following characteristics:

1. *Professional excellence;*
2. *Dedication to serving the legal profession and the Bar;*
3. *Service to their community; and*
4. *A reputation that advances legal ethics and professional responsibility.*

Nominating attorneys should submit a brief letter in support of their nominee to Caroline Srstka at Caroline.Srstka@state.sd.us by Friday, May 29, 2020. The letter should detail the reason(s) for the nomination and how the nominee meets the above-mentioned characteristics. We sincerely look forward to receiving your submissions. Thank you in advance.

April 30, 2020

Fellows of the South Dakota Bar Foundation

Many South Dakota lawyers have risen to the challenge of making the SD Bar Foundation a favorite charity. Such generosity deserves public acknowledgement. Therefore, the Bar Foundation Board of Directors has created a "Fellows" program to not only make such acknowledgement, but also to provide an opportunity for more of our members to participate and determine their personal level of professional philanthropy. Participation can be on an annual basis or by pledge with payments over a period of time. All contributions made to the "Fellows" program will be deposited in the Foundation's endowment account managed by the SD Community Foundation – famous for low management fees and excellent investment returns. Donations to the endowment are tax deductible and a perpetual gift to our profession and the educational and charities the Foundation supports.

Thank you!

Sustaining Life Fellow: \$50,000 plus

Cumulative, including Pledges & Testamentary Gifts

☀ Fred & Luella Cozad

Diamond Fellows: \$10,000 plus

Cumulative, including Pledges & Testamentary Gifts

💎 Thomas C. Barnett Jr. 💎 Robert E. Hayes

Platinum Fellows: \$10,000

Cumulative, including Pledges & Testamentary Gifts

🏆 Hon. Richard H. Battey 🏆 Charles L. Riter
🏆 Hon. John B. Jones 🏆 William Spiry
🏆 Scott C. Moses 🏆 Hon. Jack R. Von Wald

Fellows: \$500 per year

Hon. John Bastian
Hon. John L. Brown
Mary Jane Cleary
Edwin Evans
Andrew L. Fergel
Craig A. Kennedy
Hon. Bobbi Rank
Thomas Eugene Simmons
Jason R.F. Sutton
Barry R. Vickrey

Life Fellow: \$25,000 plus

Cumulative, including Pledges & Testamentary Gifts

🏆 Frank L. Farrar

Gold Fellows: \$5,000

Cumulative, including Pledge

★ Richard A. Cutler
★ William F. Day, Jr.
★ P. Daniel Donohue
★ Dana J. Frohling
★ Richard L. Kolker

Silver Fellows: \$1,000 per year

🏆 Kimberley A. Mortenson
🏆 William C. Garry
🏆 Timothy J. Rensch
🏆 Robert C. Riter Jr.
🏆 James E. Smith

Presidential Fellows: \$10,000

★★ John P. Blackburn ★★ Robert E. Hayes ★★ Pamela R. Reiter
★★ Richard D. Casey ★★ Terry L. Hofer ★★ Eric C. Schulte
★★ Hon. Michael Day ★★ Steven K. Huff ★★ Jeffrey T. Sveen
★★ Robert B. Frieberg ★★ Hon. Charles B. Kornmann
★★ Thomas H. Frieberg ★★ Bob Morris ★★ Charles M. Thompson
★★ David A. Gerdes ★★ Thomas J. Nicholson ★★ Richard L. Travis
★★ Hon. David R. Gienapp ★★ Gary J. Pashby ★★ Thomas J. Welk
★★ Patrick G. Goetzinger ★★ Stephanie E. Pochop
★★ G. Verne Goodsell ★★ Reed A. Rasmussen

YOU ARE INVITED TO JOIN!

Fellows of the South Dakota Bar Foundation

Foundation funds go to very important projects, including: Legal Services Programs in SD, Rural Lawyer Recruitment, SD Public Broadcasting of Legislative Sessions, SD Guardianship Program, Teen Court, Ask-A-Lawyer and Educational videos on aging, substance abuse and mental health issues.

Full Name _____

Address _____

City _____ State _____ Zip Code _____

I would like to contribute:

in Lump Sum Annually Semi-Annually Quarterly Monthly

- Life Patron Fellow – \$100,000 or more, cumulative.
- Sustaining Life Fellow – \$50,000 or more, cumulative.
- Life Fellow – \$25,000 or more, cumulative.
- Diamond Fellow – over \$10,000, cumulative.
- Platinum Fellow – \$10,000, cumulative.
- Gold Fellow – \$5,000, cumulative.
- Silver Fellow – \$1,000 per year.
- Fellow – \$500 per year.

In Memoriam

Donations in memory of a lawyer or judge may be made and will be deposited in the endowment fund. Such donations will be combined to qualify the deceased lawyer/judge as a fellow.

Today I am sending \$_____ (amount) to begin my gift.

Mail payment to:

State Bar of South Dakota
111 W Capitol Ave. #1
Pierre, SD 57501

Or you can email this form to:

tracie.bradford@sdbar.net or call 605-224-7554 to set up a payment.

Donations to the endowment are tax deductible and a perpetual gift to our profession and the education and charities the Foundation supports.

Dean's List: News from the Law School



by: *Neil Fulton*
Dean
USD School of Law

On May 8th and 9th, the USD School of Law Class of 2020 would have participated in the hooding ceremony and university commencement. COVID-19 has required that those events be postponed. Although USD will have a graduation ceremony at a later point, delaying those events took something important and special from the Class of 2020. In this month's column, I'd like to tell you a bit about the Class of 2020 and ask you to join me in wishing them well as their law school careers wrap up.

The Class of 2020 has endured dramatic uncertainty and change. They arrived on campus as the Relocation Task Force began to debate the future location, purpose, and structure of the School of Law. They saw precipitously declining bar passage rates and the Law School's corresponding increase in admission standards and realignment of curriculum and academic support programs. They lived through the transition between USD presidents and Law School deans. As their time here began to wrap up, they saw the largest class and highest entering credentials in a decade, steadily improving bar passage rates, and an expanded focus on recruiting, experiential education, and placement. In their final semester, they adjusted on the fly to remote instruction and all the other changes COVID-19 has imposed. The Class of 2020 has developed the resilience so necessary for lawyers in uniquely concrete and powerful ways.

The Class of 2020 has excelled. They have won national competitions as appellate advocates and ADR practitioners. They have competed as equals with law schools across the country, many of them

larger and "more prestigious." They have produced published legal scholarship in several journals, presented their research publicly, and hosted an innovative symposium on cyberlaw with Dakota State University. This fall they will fill almost every state judicial clerkship and several federal court clerkships as well. They have provided service to their community through pro bono hours; participation in our clinics for veterans, drafting wills for tribal members, handling low-income tax disputes; and their many placements with private practitioners. They are an excellent and accomplished group.

The Class of 2020 is fun. In my first year as Dean, I have gotten to know the members of the class in hallway conversations, moot court practice sessions, town halls, student organization meetings, and other settings. We have shared laughs, some tears, deep conversations about legal issues and the values of our profession, and learning to translate our divergent cultural references (there are law students born after *Seinfeld* ended, folks). They are young lawyers that you will all enjoy getting to know and work with. I have.

This is not the farewell that the Class of 2020 wanted, or that the Law School wanted to give them. But as the Rolling Stones said (one of those cultural references we sorted out), "you can't always get what you want, but if you try sometimes, you get what you need." So, this is the COVID-19 sendoff for the Class of 2020 that we need. Please take a minute to read the names and hometowns of the Class of 2020 below and then take a few more minutes to check out our "virtual hooding" videos on the Facebook, Twitter, and Instagram accounts for the School of Law and me.

USD Class of 2020, thank you, congratulations, good luck. USD School of Law will miss you; remember, wherever you go next, you can always come home.



USD CLASS OF 2020

<u>Name</u>	<u>Hometown</u>	<u>Name</u>	<u>Hometown</u>
Ethan Aman	Hosmer, SD	Joseph Mattson	Sioux Falls, SD
Tanner Anderson	Vermillion, SD	Mae Meierhenry	Sioux Falls, SD
Ryan Armstrong	Tulare, SD	Brian Meis	Jefferson, IA
John Barnes	Sioux Falls, SD	Skyler Mickelson	Mitchell, SD
Kyle Beauchamp	Box Elder, SD	Cody Miller	Vermillion, SD
Kylie Beck	Brandon Valley, SD	Cole Morgan	Mitchell, SD
Bijan Bewley	Lakewood, CO	Elle Onisciuc	Sioux Falls, SD
Alex Braun	Lennox, SD	Whitney Reed	Sioux Falls, SD
Jonathan Chapman	Sioux Falls, SD	Lori Rensink	Freeman, SD
Kristin Derenge	Sioux Falls, SD	Cole Romey	Oelrichs, SD
Megan Deye	Santa Cruz, CA	Austin Schaefer	Leola, SD
Caitlyn Dommer	Bruce, SD	Kelcy Schaunaman	Aberdeen, SD
Kris Duneman	Pierre, SD	Jenna Schweiss	Pierre, SD
Brianna Eaton	Sergeant Bluff, IA	Brynne Spargur	Sioux Falls, SD
James Eggert	Chuckey, TN	Beau Sullivan	Berlin, ND
Morgan Erickson	Brookings, SD	Edward Swiontek	Edgeley, SD
Stephen Gemar	Mobridge, SD	Thad Titze	Watertown, SD
Collin Geschwindt	Shoemakersville, PA	Max Walter	Logan, UT
Elisa Glab	Watertown, SD	Nolan Welker	Hamill, SD
Aidan Goetzinger	Rapid City, SD		
Brianna Haugen	Aberdeen, SD		
Isabelle Hayes	Cedar Falls, IA		
Derek Hoffman	Sioux Falls, SD		
Andrew Hurd	Rapid City, SD		
Meaghan Janousek	Kinder, LA		
Garrett Keegan	Dupree, SD		
Dylan Kirchmeier	Webster, SD		
Mitchell Koehn	Watertown, SD		
Bryce Krieger	Sioux Falls, SD		
Amanda Ludwig	Sioux City, IA		
Lydia Magaard	St. Cloud, MN		

A2J JUSTICE SQUAD

Thank you to the following attorneys for accepting a pro bono or reduced rate case from Access to Justice, Inc., this month! You are now a member of the the A2J Justice Squad - an elite group of South Dakota lawyers who accept the responsibility to defend justice, uphold their oath and provide legal representation to those who need it.

- **JOEL ARENDS**
- **DAVID BARARI**
- **HOPE MATCHAN**
- **TYLER HAIGH**
- **HEATHER LACROIX**

AND MUCH THANKS TO:

Scott Moses

Beth Baloun

Sarah Bouwman

Joseph Hogue

Kyle Krause

Margaret Bad Warrior

FOR THEIR HELP ON
SD FREE LEGAL ANSWERS!

Are you interested in becoming a legal superhero and member of the A2J Justice Squad?

PLEASE SEND A MESSAGE TO DENISE LANGLEY AT:
ACCESS.TO.JUSTICE@SDBAR.NET



“MAYBE WHO WE ARE ISN'T SO MUCH ABOUT WHAT WE DO, BUT RATHER WHAT WE'RE CAPABLE OF WHEN WE LEAST EXPECT IT.”

*JODI PICOULT,
EXCERPT FROM
MY SISTER'S
KEEPER*

TRIVIA: Jodi Picoult was born on May 19th.



HERO

a person who is admired
or idealized for courage,
outstanding achievements,
or noble qualities

Lawyer, Coe I. Crawford to be honored on the Trail of Governors

by: Chuck Schroyer

Since its creation in 2010, the Trail of Governors project in Pierre has become a principle attraction in the Capital city and is nearing completion with 25 full size bronze statues honoring South Dakota's 31 former chief executives installed to date. On June 12, 2020, three additional former Governors will be honored, including former Governor Coe I. Crawford (1907-1908).



A graduate of the University of Iowa Law School, Crawford moved to Dakota Territory in 1883, establishing a practice in Pierre. He served as Hughes County State's Attorney, State Senator and Attorney General before his election as Governor and thereafter in the

U.S. Senate before returning to establish a practice in Huron.

The statue of Governor Crawford will be among the last of the 15 lawyers who have to date served as Governor of South Dakota to be included on the Trail. As such, the State Bar and the owner of the historic Hyde Block building in which the new Bar headquarters is located, suggested that Governor Crawford's statue be placed nearby at the corner of Pierre Street and



Capitol Avenue. The building is also home to the offices of Senator Mike Rounds, the Office of the Federal Public Defender and the local office of the Gunderson, Palmer Nelson & Ashmore law firm and located in close proximity to the Capitol and the Hughes County Courthouse.

To assist in the funding of the Crawford statue, the Trail Foundation feels it would be fitting for members of the Bar to consider tax deductible donations to the Trail. Those individuals, firms or organizations contributing \$18,000 or more to the \$72,000 cost of the statue will, as Sponsors, have their names included on the accompanying bronze plaque. Contributions may be made as memorials or in honor of legacy partners. Should the collective non Sponsor contributions of State Bar members exceed the one-quarter funding level, reference to "Members of the State Bar of South Dakota" will also be included on the plaque, allowing the Bar to join the many statewide business and professional organizations as a Trail Sponsor. The generous contributions of all donors, regardless of amount, are also recognized on the Trail of Governors website.

Donations may be forwarded to the State Bar of South Dakota, 111 W Capitol Ave., #1, Pierre, SD 57501 or the South Dakota Community Foundation, 1714 N. Lincoln, Pierre, SD 57501. Please note that the donation is to "Trail of Governors/Crawford". Information about the Trail is available on the Trail website: www.TrailofGovernors.com. State Bar Members are also encouraged to attend the unveiling of the 2020 class of Governors on June 12, 2020 in the Capitol Rotunda and to visit the Trail in conjunction with the State Bar Annual Meeting in Pierre, June 17-19, 2020.

If questions or for further information please contact Pierre lawyer and Bar member, Chuck Schroyer who serves as a member of the Trail of Governors Board at (605) 280-2623.

Since announcement of the donor opportunities for State Bar Members to assist with the funding of the statue of Governor Coe Crawford to be placed near the front door of the new Bar Headquarters, the following members and friends of the Bar have contributed:

Jason Glodt and the Glodt Family will be sponsor donors of one quarter of the cost.

Bob and Kim Hayes of Sioux Falls

Ron Schmidt and Chuck Schroyer, formerly of the Firm Schmidt, Schroyer, Colwill, Zinter & Barnett, PC of Pierre, in Memory of their deceased former partners, Gary F. Colwill & Steven L. Zinter.

Several other members have indicated an interest in participation. The names of all donors will be included on the Trail of Governors website and in future editions of the Newsletter.

**T H A N K
Y O U!**

ANNOUNCEMENTS

Gunderson, Palmer, Nelson & Ashmore, LLP
is pleased to announce that

Stacy R. Hegge

has joined the firm as an Associate Attorney.

Gunderson, Palmer, Nelson & Ashmore, LLP
111 West Capitol Avenue, Suite 230
Pierre, SD 57501

Telephone: (605) 494-0105
Facsimile: (605) 342-9503

shegge@gpna.com

www.gpna.com

Frieberg, Nelson & Ask, LLP
is pleased to announce that

Samuel J. Nelson

has become a partner in the firm.

Frieberg, Nelson & Ask, LLP
PO Box 511
Beresford, SD 57004

Telephone: (605) 763-2107
Facsimile: (605) 763-2106

snelson@frieberglaw.com

www.fnalawfirm.com

Effective March 1, 2020

*Christopherson, Anderson,
Paulson & Fideler, LLP*

has moved to our new location at:

Christopherson, Anderson, Paulson & Fideler, LLP
426 East 8th Street
Sioux Falls, SD 57103-7025

Telephone: (605) 336-1030
Facsimile: (605) 336-1027

www.capflaw.com

Lynn, Jackson, Shultz & Lebrun, P.C.
is pleased to announce that

Kraig L. Kronaizl

is now a shareholder of the firm.

Lynn, Jackson, Shultz & Lebrun, P.C.
110 N. Minnesota Ave., Suite 400
Sioux Falls, SD 57104

Telephone: (605) 332-5999
Facsimile: (605) 332-4249

kkronaizl@lynnjackson.com

www.lynnjackson.com

YOU'RE INVITED

Statewide Swearing-In Ceremony

The State Bar of South Dakota Young Lawyers Section requests the honor of your presence at the Statewide Swearing-In Ceremony for new South Dakota attorneys

3:00 P.M.
Friday, October 23



Capitol Rotunda
Pierre, South Dakota

Please **RSVP** by October 9th to
Caroline.Srstka@state.sd.us
Or (605) 367-5883

Reception to
Follow

DeRouche Agricultural & Legal Consulting, LLC

Roger DeRouchey
700 Broad Street Alexandria, SD 57311
605-770-8080
Rderouchey.agconsulting@triotel.net

- 34 years Farm Business Instructor at Mitchell Tech
- 4 years of Ag Lending
- 9 years Research, Deposition, Testifying
- Expert witness on agricultural issues

www.deroucheyagriculturallegalconsulting.com



STUDENT BAR ASSOCIATION

University of South Dakota School of Law
414 East Clark St.
Vermillion, SD 57069



Members of the State Bar of South Dakota,

Marshall M. McKusick, who served the legal profession and the University of South Dakota School of Law for nearly six decades, truly made a lasting impact. The resources he has provided have been of great benefit and value to law students, past and present, and will continue to have a positive impact on those entering into the legal profession for generations to come.

Each year, in honor and celebration of Marshall McKusick's dedication and service to the legal community in South Dakota, the Student Bar Association recognizes an outstanding member of the South Dakota Bar for their contribution to the profession. The McKusick Award will be presented at the State Bar Convention this June.

Nominations are now open for the 2020 McKusick Award. Please consider submitting a nomination. Nominations can be submitted via e-mail to whitney.reed@coyotes.usd.edu, or addressed to Whitney Reed c/o Student Bar Association, University of South Dakota School of Law, 414 East Clark Street, Vermillion, South Dakota 57069.

We look forward to receiving your nominations prior to the due date of May 7, 2020.

Respectfully,

Whitney Reed
President, USD Law Student Bar Association

Northern Plains Weather Services

Dr. Matthew Bunkers of Northern Plains Weather Services is a certified consulting meteorologist (CCM) and forensic meteorologist with over 25 years of weather analysis and forecasting experience. He can provide reports, depositions, and testimony in the areas of weather and forecasting, severe summer and winter storms, rain and snow estimates, fire weather, flooding, applied climatology and meteorology, agriculture meteorology, and statistics. More information is provided at <http://npweather.com>. Contact Matt at nrnplsweather@gmail.com or 605.390.7243.





UNIVERSITY OF
SOUTH DAKOTA

CORONAVIRUS (COVID-19) INFORMATION AND RESOURCES

© CDC

In light of the unprecedented disruption that COVID-19 has caused, USD School of Law has moved all classes to pass/fail grading for the Spring 2020 semester. No response to COVID-19 is perfect, and this decision was not made lightly. Faculty debated the issue extensively, we sought input from students, and considered the experience of other law schools which have overwhelmingly made a similar choice. I want to share a bit about why we made this decision.

First, the response necessitated by COVID-19 has changed this semester, on the fly, in ways unlike any other. We have moved to remote instruction and exams, students are adjusting to managing their studies and homeschooling their children, and wrestle with the many uncertainties current events impose. Faculty and staff are not immune from these pressures. Under the circumstances, we simply were not comfortable that grades from this semester could fairly be compared to other semesters. Likewise, because student situations are very different, it was not fair to let students elect if they would have grades or not because unfair comparisons could be drawn between those who chose pass/fail and those who chose regular grades.

Second, most other law schools have made a similar decision. The Board of Regents has moved undergraduate classes to a pass/fail system. This decision keeps us in step with what most are doing

around us. That maintains a level playing field for students seeking employment.

Lastly, it was the humane thing to do. Students are disrupted, uncertain, and scared. Everyone is really. Removing the pressure of grades allows students and faculty to focus on the task of successfully mastering skills and course content. It also recognizes the need to focus on the safety and care for family at a dangerous time.

This was a hard decision and faculty did hard work engaging with it. Students were thoughtful in their comments about it and professional in their response to it. It is an unprecedented response to an unprecedented time. Please get in touch if you have questions about it or any aspect of the School of Law's response to COVID-19. Be safe and well.

For more information and resources, go to:
<https://www.usd.edu/covid19>.

The deadline for the 1st annual Diversity & Inclusion award has been extended to

June 30, 2020!!

1st Annual Diversity and Inclusion Award

Sponsored by: The Lawyers Committee on Diversity and Inclusion

On behalf of the State Bar of South Dakota's Lawyer's Committee on Diversity and Inclusion (LCDI), nominations are being sought for the first annual Diversity and Inclusion Award.

Purpose

The Diversity and Inclusion Award serves to recognize members of the State Bar of South Dakota who actively promote diversity and inclusion in the legal profession. Recipients of the award contribute to and enhance the environment of inclusion in the legal profession, particularly in South Dakota.

Eligibility Criteria

To be eligible to receive the Diversity and Inclusion Award, an individual must be a member in good standing of the State Bar of South Dakota and must demonstrate an exceptional understanding of diversity and inclusion beyond the call of duty as represented by the following criteria:

- Enhances inclusion through positive communication between persons of different backgrounds
- Demonstrates a commitment to the values of diversity and inclusion through documented efforts that are above and beyond the routine expectations
- Develops innovative methods for increasing and valuing diversity through wide-ranging activities
- Demonstrates outstanding efforts to promote an environment free from bias and discrimination
- Organizes, creates, and facilitates various professional or community events promoting diversity, respect, and inclusion
- Shows efforts to recruit and retain individuals who increase the diversity of the State Bar of South Dakota
- Promotes the sponsorship of, or active participation in, programs, initiatives, or projects in the area of diversity and inclusion

Nomination Criteria

Individuals may nominate a member of the State Bar of South Dakota by submitting a Nomination Form. Completed Nomination Forms, and attachments thereto, may be emailed to access.to.justice@sdbar.net or mailed to:

Diversity & Inclusion Award Committee
C/O Access to Justice, Inc.
111 W. Capitol Ave. #1
Pierre, SD 57501

Deadline: Nominations must be received by ~~Tuesday, March 31, 2020~~ **Tuesday, June 30, 2020.**

For further information, please contact Denise Langley, Access to Justice, Inc., at access.to.justice@sdbar.net or by phone at 855-287-3510.

Nomination Process and Presentation of Award

Every year in the spring, the Lawyers Committee on Diversity and Inclusion (LCDI) will publish an invitation in the South Dakota State Bar Newsletter soliciting nominations for the Award. To be considered, nominations must be received by LCDI no later than ~~March 31~~ June 30, 2020. Each nomination should include a brief synopsis of the nominee's commitment to diversity, inclusion, and equal participation in the legal profession. Each nominee's materials will then be reviewed by a subcommittee of the LCDI. The LCDI will then, by a majority vote, select one or more recipients who best exemplify the eligibility criteria. All recipients of the Award will be notified no later than ~~May~~. ~~The Award will be presented during the State Bar annual meeting in June. The Awards will be presented by a representative of the LCDI (to be determined at a later date).~~

**2020 Diversity and Inclusion Award
Nomination Form**

1. Nominee Information

Name: _____

Address: _____

Phone: _____ Email: _____

2. Nominator's Information:

Name: _____

Address: _____

Phone: _____ Email: _____

How do you know the Nominee: _____

3. Synopsis

A one-page synopsis must be attached to this nomination form. The synopsis should clearly identify the qualifications & attributes of the nominee.

Completed nomination forms, and attachments thereto, are to be emailed to:

access.to.justice@sdbar.net

Or mailed to:

**Diversity & Inclusion Award Committee
C/O Access to Justice, Inc.
111 W. Capitol Ave. #1
Pierre, SD 57501**

Deadline: **Nominations must be received by Tuesday, June 30, 2020.**

What's Your Plan?

While it may seem near impossible to prepare for all potential threats of devastation, a few areas of focus that will not only bail you out in tough times but could also add value to your business are outlined below:

- Succession Plan- In the event of the proverbial bus hitting a key employee, having trained employees to step in could allow for business continuity.
- Operating/Shareholder Agreement- A well-executed agreement that has been thoroughly discussed by company owners could help to reduce the "what now" questions any time a major event occurs such as key employee resignation, disability, termination, or death.
- Disaster/Emergency Plan- An outline of steps to take in the event of disaster can be lifesaver if disaster strikes.

Ultimately, having thoughtful conversations and well-documented plans for potential threats are just good business, and could decrease risk and consequently increase the value of your business.




Ericka Heiser,
MBA, CVA, Director
ericka@ktllp.com


Paul Thorstenson,
CPA/ABV, CVA, Partner
paul@ktllp.com

Ketel Thorstenson, LLP

Certified Public Accountants/Business & Personal Consultants

ktllp.com

810 Quincy St. | Rapid City, SD | 605-716-8997  609 Mount Rushmore Rd. | Custer, SD | 605-673-3220

123 East Jackson Boulevard, Ste. 2 | Spearfish, SD | 605-642-7676  305 S. Garner Lake Rd., Ste. A | Gillette, WY | 307-685-4433

Issues Presented: How should a Lawyer resolve a dispute between a client and a third party regarding ownership of funds in the Lawyer's custody?

Answer: Lawyer should utilize interpleader or some other procedure to obtain a determination regarding ownership of the funds from a Court of competent jurisdiction and in any event must not resolve the issue personally.

Rules Implicated: 1.7, 1.15 1.16.

FACTS

Client retains Lawyer to represent Client in filing for Chapter 7 bankruptcy. Client's significant other (but not spouse) pays the retainer with Client's knowledge and consent. For various substantive legal reasons, Lawyer instructs Client to delay filing for bankruptcy. Client's significant other subsequently becomes "ex" significant other and demands Lawyer refund the retainer to the "ex." Client opposes this and wants Lawyer to continue to provide services paid for with the disputed funds.

DISCUSSION

Although arising in a different context, the Committee has addressed the fundamental issue(s) presented by this inquiry (i.e., a dispute between a client and a third party about funds in the Lawyer's custody) in Opinion 1998-3. The Committee addressed the issue under Rule 1.15(c) of the South Dakota Rules of Professional Conduct, which reads slightly different now, but presents the same general policies:

When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.¹

SDCL Ch. 16-18 Appx. A, Rule 1.15(c).

The Committee specifically noted and applied a comment to Rule 1.15, now found in Comment [4], which is worded differently now but, again, presents the same general principles as before;

"third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such a third-party claims [*sic*] against wrongful interference by the client. In such cases,

¹ The version of Rule 1.15(c) then in effect stated "[w]hen in the course of representation, a lawyer is possession of property in which both the lawyer and another person claim interest, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved."

when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.²

SCL Ch. 16-18 Appx. A, Rule 1.15(c) cmt. [4].

The Committee then noted that whether a client or third party is entitled to funds in the Lawyer's custody is a matter of substantive law outside the Committee's purview. Based on this, the Committee stated that if the lawyer in that fact pattern thought a genuine dispute might exist between the client and third party regarding proper disposition of the proceeds, the Lawyer had to retain possession of the funds until that issue was resolved, and then cited a New York state law case discussing the "hazards inherent in unilaterally resolving a 'dispute.'" (Opinion 1998-3 (citing *Leon v. Martinez*, 638 N.E.2d 511 (N.Y. 1994).)

The Committee believes that the rationale of Opinion 1998-3, given revised Comment [4] to Rule 1.15, resolves this inquiry, notwithstanding somewhat different facts. In any dispute between a client and a third party regarding ownership of funds in the Lawyer's possession, Lawyer may have formulated a legal opinion regarding which party is correct. But this is a matter of substantive law on which the Committee cannot opine. More important, Lawyer is not authorized to make or act on that determination either. Rule 1.15(c) clearly states the disputed "property shall be kept separate by the lawyer until the dispute is resolved," and the relevant comment states the Lawyer should not arbitrate the dispute personally. Given the statement in Comment [4] to Rule 1.15 that Lawyer may file an action to have a court resolve the dispute, the Committee's opinion is that filing an interpleader or other action seeking a court's resolution of this matter would be most appropriate if the third party and Client cannot otherwise agree.

Lawyer should also consider other Rules implicated by this situation. To the extent Lawyer seeks court resolution of the dispute and the Client objects or demands the Lawyer act otherwise, the Lawyer may have to terminate representation because of a "material limitation" present conflict under Rule 1.7(a)(2), (which is potentially unwaivable under Rule 1.7(b)(1)), and Rule 1.16(a)(1) (representation will cause violation of the Rules).

² In 1998, the relevant comment read "[t]hird parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and third party."

It is notable, for reasons discussed in more detail below, that the phrase "the lawyer may file an action to have a court resolve the dispute" did not appear in the Comments to Rule 1.15 at the time the Committee issued Opinion 1998-3.

CONCLUSION

In conclusion, if there is a dispute between a third party and a client regarding the proper disposition of funds in the Lawyer's possession, the Lawyer may, and should, ask a Court to resolve the dispute, such as by filing an interpleader action as contemplated by SDCL § 15-6-22 and, in any event, may not resolve that dispute personally.



From Legal Settlements to Financial Strategies

Life Altering Circumstances

- A unique partnership to strategize

An Independent Resource

- Knowledge of the concepts

Your Local Trusted Advocate

- For both the attorney and the client.

Morgan Stanley

How We Work With Legal Professionals

- Mediation Assistance
- Illustrations
- Settlement Documents

909 St Joseph St
6th Fl
Rapid City, SD 57701

Vicki Direct: 605-399-3120

Vicki A. Schilling
First Vice President
Senior Portfolio Manager
Financial Advisor
NMLS # 1507454

Morgan Stanley Smith Barney LLC ("Morgan Stanley"), its affiliates and Morgan Stanley Financial Advisors or Private Wealth Advisors do not provide tax or legal advice. Clients should consult their tax advisor for matters involving taxation and tax planning and their attorney for matters involving trust and estate planning and other legal matters.
Morgan Stanley Smith Barney LLC. Member SIPC. CRC2509327 04/19

A WORLD OF DIFFERENCE

Law Street Media
Legal News



Fastcase
Legal Research



AI Sandbox
Legal Data Analysis



Full Court Press
Expert Treatises



Docket Alarm
Pleadings + Analytics



NextChapter
Bankruptcy Petitions + Filing



START YOUR JOURNEY

Fastcase is one of the planet's most innovative legal research services, and it's available free to Dakotadisc subscribers.

LEARN MORE AT

www.statebarofsouthdakota.com

DOWNLOAD TODAY



Remote Execution of Wills and Living Wills Under the Supreme Court’s Emergency Order

Thomas E. Simmons*

On April 14, 2020, the South Dakota Supreme Court issued another emergency order in response to the ongoing COVID-19 outbreak, the “Amended Emergency Order Regarding Court Reporters, Witnesses and Notarization in Midst of the COVID-19 Pandemic.”

This emergency order followed the South Dakota Supreme Court’s [declaration](#) of a judicial emergency on March 13, 2020. The authority for the court’s declaration can be found in [SDCL 16-3-11 et seq.](#)

The April 14 amended emergency order includes new rules which affect remote depositions, the takings of oaths, and child support modification petitions. The order’s impact on the execution of wills and living wills is explained below.

Wills

What was wrong with the existing will execution requirements?

Under [SDCL § 29A-2-502](#), a non-holographic will must be “[s]igned in the conscious presence of the testator by two or more individuals who, in the conscious presence of the testator, witnessed either the signing of the will or the testator’s acknowledgment of that signature.” In view of the current uncertainty surrounding the pandemic, the risks of infection may outweigh a client’s desire to sign their will, especially if the client is frail or has chronic health conditions, even with social distancing rules in place.

Does the emergency order permit wills to be executed remotely?

Yes. Arguably, “conscious presence” as required by the probate code would extend to witnesses who are aware of the testator by means of communication technology, but case law typically requires close *physical* proximity to witness a testator’s signature. The order confirms that the conscious presence requirement is satisfied when “the witnesses and the testator could communicate with each other simultaneously by sight and sound by means of an electronic device or process” which permits simultaneous sight/sound communication.

What – if anything – was wrong with the notarization requirements for a will?

Attested wills are typically notarized. See [SDCL § 29A-2-504](#). In 2019, the South Dakota legislature adopted portions of the Uniform Law Commission’s Law on Notarial Acts. The legislature permitted remote notarizations but did not approve electronic signatures or non-tangible medium signatures. (Nor does the emergency order; no “e-signatures” are recognized.)

* Professor, University of South Dakota School of Law. Thank you to Andrew Knutson, managing attorney of Thompson Law, Prof. LLC in Sioux Falls for his insightful and intelligent comments and suggestions. All errors are my own.

The new notary law required that any notary public notarizing a signature by means of communication technology possess “personal knowledge of the identity of a person through dealings sufficient to provide reasonable certainty that the person has the identity being claimed.” [SDCL § 18-1-11.1\(1\)](#). This identification requirement arguably requires a higher level of verification than a notarization in the physical presence of the individual.

While the statute does not necessarily preclude the ability of a notary public to verify a person’s identity when the notary has only interacted with the person by means of communication technology, the “dealings” requirement is unclear. The requisite knowledge of an individual’s identity “through dealings sufficient to provide reasonable certainty” about that identity suggests that a notary might not be permitted to notarize the signature of an individual with whom the notary had no prior *in-person* “dealings.” Some attorneys believe that “dealings” can be satisfied if the notary has *remote* interactions with the individual which are sufficient to provide reasonable certainty as to the individual’s identity. Other attorneys take a narrower view of what constitutes “dealings” as that word is employed in the statute.

Does the order make accommodations for remote notarization?

Yes. The emergency order clarifies that when notarizing by means of communication technology, the notary need only be able to “positively identify the witness.” Presumably, this same requirement also applies to testators.

Are there any unique requirements associated with remote notarization?

Yes, there are. The additional requirements to any remote notarization found are within [SDCL § 18-18-11.1](#). The notarial certificate must recite that the notarial act involved a signature by a person who was not in the physical presence of the notary but instead appeared by means of communication technology and also indicate the remote location of that person.

Of course, the notary must also affix his or her signature (and seal and expiration date) to the will in question. In the event that a page is returned to the notary who notarizes that page sometime after the signature has been observed by the notary, the notary must be “able reasonably to confirm that the document before the notarial officer is the same document ... on which the person executed a signature.”

Be especially vigilant about your notarial act procedures – or those of the associates or paralegals you supervise – many malpractice insurance policies contain exclusions for misdeeds connected with notaries.

What might the self-proving affidavit of a remotely-executed will look like?

The following form language, taken from [SDCL § 29A-2-502\(a\)](#), contains underlined language to reflect the remote locations of the testator and witnesses (presuming that both witnesses and the testator are in three separate remote locations from the notary):

electronic device or process that allows a notarial officer and a person not in the physical presence of the notarial officer to communicate with each other simultaneously by sight and sound.” [SDCL § 18-1-1.1\(2\)](#).

If the attorney also wishes to incorporate a reference to the emergency order, additional language such as the following might be considered: *“This Will was executed in conformity with the Supreme Court of the State of South Dakota’s Emergency Order Regarding Court Reporters, Witnesses and Notarization in the Midst of the COVID-19 Pandemic dated April 9, 2020, which was in effect as of the date hereof.”*

What about codicils?

The same rules also apply to codicils.

Are there any other requirements?

Yes. The amended emergency order also specifies that the witnesses are required to promptly mail the pages they signed to the testator or the testator’s attorney.

Living Wills

What is a living will?

A living will is an instrument which is signed before two witnesses and articulates the declarant's preferences as to the withholding or withdrawal of artificial means of life-sustaining treatment in the event of a terminal illness or persistent vegetative state in which the declarant has lost the ability to communicate about his or her medical care.

A living will is sometimes referred to as an "advance directive" or simply a "declaration."

What was wrong with the existing living will execution requirements?

Although [SDCL § 34-12D-2](#) requires only that a living will (also known as a "declaration" or an "advance directive") be "witnessed by two adult individuals, [SDCL § 34-12D-3](#) contains a helpful sample form for living wills and within the form, reference is made to the witnesses having witnessed the declarant's signature in the declarant's "presence." This may or may not preclude remote execution of a living will.

Does the emergency order permit living wills to be executed remotely?

Yes. Although the "presence" of living will witnesses arguably required by [SDCL § 34-12D-3](#) might already extend to witnesses who are aware of the declarant by means of communication technology, the amended emergency order provides clarification. It expressly permits living wills to be witnessed through the use of communication technology. Communication technology, in this context, means that the witnesses and the declarant "could communicate with each other simultaneously by sight and sound by means of an electronic device or process" which permits simultaneous sight/sound communication.

What – if anything – was wrong with the notarization requirements for living wills?

Living wills are not required to be notarized. See [SDCL § 34-12D-2](#) (providing: "The signing *may* be in the presence of a notary public" (emphasis supplied). Two witnesses are required; the notary is optional. Many attorneys prefer to have their clients' living wills notarized, however.

As also explained above, the South Dakota legislature adopted portions of the Uniform Law Commission's Law on Notarial Acts in 2019. As part of the bill, the legislature permitted remote notarizations. But the legislature did not approve electronic signatures or non-tangible medium signatures. (Nor does the emergency order; no "e-signatures" are recognized.)

The new law requires that notary publics who notarize a signature by means of communication technology possess "personal knowledge of the identity of a person through dealings sufficient to provide reasonable certainty that the person has the identity being claimed." [SDCL § 18-1-11.1\(1\)](#). The statute does not necessarily preclude a notarial act resting on identity verification by mean of communication technology. However, as the statute states, knowledge of an individual's identity must come "through dealings sufficient to provide reasonable certainty," This suggests

to some lawyers that a notary cannot notarize the signature of an individual with whom the notary had no prior traditional “dealings” (such as an individual the notary has only met via communication technology).

Does the order make accommodations for remote notarization?

Yes, it does. The emergency order clarifies that when notarizing by means of communication technology, the notary need only be able to “positively identify the witness.” Presumably, this same requirement also applies to living will declarants.

There are additional requirements to any remote notarization found within [SDCL § 18-18-11.1](#), however: The notarial certificate must recite that the notarial act involved a signature by a person who was not in the physical presence of the notary but instead appeared by means of communication technology and also indicate the remote location of that person. Of course, the notary must also affix his or her signature (and seal and expiration date) to the tangible document in question. In the event that a page is returned to the notary who notarizes that page some time after the signature has been observed by the notary, the notary must be “able reasonably to confirm that the document before the notarial officer is the same document ... on which the person executed a signature.”

What about healthcare powers of attorney?

The emergency order does not alter any of the laws relating to healthcare powers of attorney. Healthcare powers of attorney appoint an agent to make healthcare decisions for a principal who has become unable to communicate regarding their healthcare. See [SDCL § 59-7-2.5](#). Thus, it contains a broader scope of authority than the relatively narrow parameters of a living will, although it may also address end-of-life care preferences.

A healthcare power of attorney may be either notarized or witnessed by two competent adults. See [SDCL § 59-7-2.1](#). (Some attorneys utilize both a notary and witnesses; some attorneys combine a living will form with a healthcare power of attorney form.) There is not any explicit “conscious presence” requirement to witnessing a healthcare power of attorney. But remote notarization of a healthcare power of attorney must conform to [SDCL § 18-18-1.11](#) as modified by the emergency order as outlined above.

Are there any other requirements?

Yes. The emergency order also specifies that the witnesses are required to promptly mail the pages they signed to the declarant or the declarant’s attorney.

What might a remote notarization clause in a living will look like?

The remote notarization clause for a living will executed pursuant to the emergency order might look like this:

State of South Dakota)
)SS.
County of Minnehaha)

On this the ____ day of _____, 2020, [Declarant’s name] with a remote location of [City/State], [Witness 1’s name] with a remote location of [City/State] , and [Witness 2’s name] with a remote location of [City/State], each whom I positively identified, appeared before me not in my physical presence but by means of communication technology and signed this living will.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Notary Public, South Dakota
My commission expires:

[SEAL]

Of course, if witnesses are not utilized for the living will, modification of this language would be required.

If the witnesses also witnessed a declarant’s signature remotely (i.e., the witnesses were not in the same room as the notary public or the declarant), best practices would suggest that the witnesses’ statements also reflect this fact. The form language provided by [SDCL § 34-12D-3](#) suggests this statement by the witnesses: “The declarant voluntarily signed this document in my presence.” That could be replaced with something such as: “The declared voluntarily signed this document not in my physical presence but by means of communication technology.”

If the notary public is notarizing a document some period after having observed the person or persons made their signatures to it, the notary public must also certify: “I am able reasonably to confirm that the document before me is the same document in which the person(s) executed his/her/their signature(s).”

The notary public is not required to specify the particular means of communication technology utilized, but some attorneys may prefer to include this information as a way of establishing on the face of the instrument that the communication technology utilized amounted to “an electronic device or process that allows a notarial officer and a person not in the physical presence of the notarial officer to communicate with each other simultaneously by sight and sound.” [SDCL § 18-1-1.1\(2\)](#).

If the attorney also wishes to incorporate a reference to the emergency order, additional language to the notary’s certificate such as the following might be considered: “*This Living Will was executed in conformity with the Supreme Court of the State of South Dakota’s Emergency Order Regarding Court Reporters, Witnesses and Notarization in the Midst of the COVID-19 Pandemic dated April 9, 2020, which was in effect as of the date hereof.*”

How long will this emergency order be in effect?

The amended emergency order remains in effect until repealed or modified by the South Dakota Supreme Court. Wills and living wills which are executed while the emergency order is in effect will be governed by its modifications and clarifications of existing law.

Can Lawyers Add Surcharges to Their Bills?

Mark Bassingthwaighe, Esq.
Risk Manager, ALPS
mbass@alpsnet.com

Two quick stories. Years ago, I had a plumbing emergency. The short version is I discovered a broken water line in my kitchen on a Thanksgiving eve. That line needed to be repaired immediately or Thanksgiving was going to be a bust. Trust me, that service call cost me. My second story is about packages. Now that all of our kids are grown and living throughout the US, my wife sends more packages than she used to. I'm often tasked with the responsibility of boxing things up and getting them shipped off. Unfortunately, I'm not always as prompt with that as I should be, which means I sometimes must pay a premium to make sure those packages get to wherever they're going on time. Heaven forbid something arrives a day or so late.

These two stories describe common situations where we all know going in that we're going to have to pay a little more than we would under normal circumstances. A plumber's rates are higher for holiday emergencies and shipping rates are higher for expedited service. That's just the way it is. Given this reality, I'm led to ask this question. Is it ethically permissible for a lawyer to add a surcharge to a client bill for having to respond to an emergency or agreeing to provide an expedited legal service? As with so many things in life, the answer is it depends.

To understand why, we need to start by looking at ABA Model Rule 1.5 Fees. Most lawyers know that, in general, this rule states a lawyer's fee is to be reasonable and the basis or rate of the fee and expenses are to be communicated to the client. So, if you tell your clients in advance that your practice is to add a 10% surcharge to your fee for work you have to do on weekends, is that reasonable? Perhaps; but here's the problem. Where's the line? If 10% is reasonable, is 50%? How about 200%?

Rule 1.5 also sets forth factors a lawyer is to consider when trying to determine whether a particular fee

is reasonable. Take note that section (a)(5) under Rule 1.5 states that "the time limitations imposed by the client or by the circumstances" is one of the factors set forth. Given this language it would appear that a surcharge might be appropriate in certain circumstances, as long as the other seven factors listed aren't overlooked, which leads me to another story.

From time to time I still come across situations where lawyers have played fast and loose with Rule 1.5. One memorable story concerns a lawyer who apparently found the idea of surcharges as an opportunity not to be missed. Unfortunately for her, she took it the extreme. She decided to let all her clients know she surcharged for time spent working evenings and on weekends and then she made sure the evenings and weekends were the only time she worked!

Don't go there. Just because you have a day that spins out of control or agreed to take on more work than you can handle between the hours of 8 and 5 doesn't mean you get to surcharge a client whose work you couldn't get to until the weekend. Stated another way, a surcharge for an emergency that was of your own making is an unreasonable surcharge. Long days come with a decision to practice law. This too is just the way it is.

Of course, if a current or new client comes to you with a true legal emergency that requires you to drop everything and this client understands that he is asking for expedited and prioritized service, well that's a different matter entirely. Here a surcharge may very well be reasonable and appropriate. Sometimes clients truly do have a need to be moved to the front of the line and they are willing to pay for the service. Does this mean the surcharge can be whatever you can get the client to agree to and the sky's the limit? Absolutely not! Again, remember that Rule 1.5 (a) sets forth a total of eight factors to be considered in the determination of what reasonable is and none of them say anything along the lines of if some fool agrees to a ridiculously high fee, that fact alone will make the fee reasonable. Think about it. If your fees are ever questioned, discipline counsel is going to review your fee practices from his or her objective belief as to what the eight factors of reasonableness means. Consider yourself forewarned.

Here's where I come out on this topic. It would seem it is reasonable for a lawyer to add a surcharge to a fee if the client is made aware of the circumstances that could or already has given rise to the need for a surcharge and the client agrees to the surcharge in advance. Further, the circumstances giving rise to the surcharge must be something beyond the circumstances that ordinarily come into play in any type of legal matter, and nothing about these circumstances can be of the lawyers own making. Finally, I have no idea where to draw the line in terms of saying a 20% surcharge is reasonable, but a 200% surcharge isn't. All I can say is there may be a circumstance where 20% isn't and a different circumstance where 200% is.

Now, one last item. If any of you happen to know a good plumber who charges a reasonable rate for after-

hours work, can you let me know? I'd sure appreciate it because the guy who helped me out that Thanksgiving years ago was a real piece of work. He even left with a few of my own tools and I'm not kidding.

Hopefully you get this last takeaway. Client memories can be long and they often share their stories, just like I have here, only they will name names. You really don't want to be known as that lawyer who always tries to take his clients to the cleaners. Here's a thought. A good business practice might be to always keep the eight factors of Rule 1.5 in mind whenever you are reviewing and setting fees for any and all clients. Seems like a no brainer if you ask me.

GOOD COVERAGE. REASONABLE RATES.

“ Long history of providing good coverage with reasonable rates and experienced claims handlers who are all lawyers. ”

▶ Thomas J. Welk, Boyce Law Firm, Sioux Falls, SD

South Dakota law firms can connect directly with ALPS at learnmore@alpsinsurance.com or by calling (800) 367-2577.

Learn more about how ALPS can benefit your firm at

www.alpsinsurance.com/sdlawyer

Endorsed by



THE NATION'S LARGEST DIRECT WRITER OF LAWYERS' MALPRACTICE INSURANCE

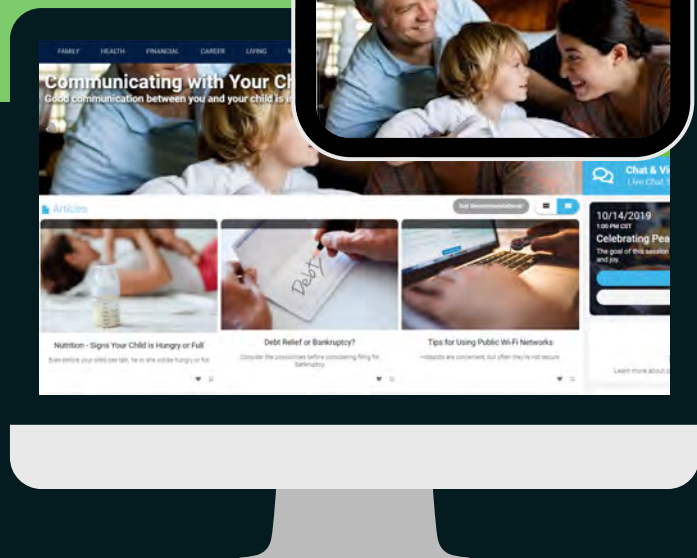




SAND CREEK EAP PRESENTS:

MY LIFE EXPERT

CHANGING THE
GAME IN
EMPLOYEE
WELLNESS





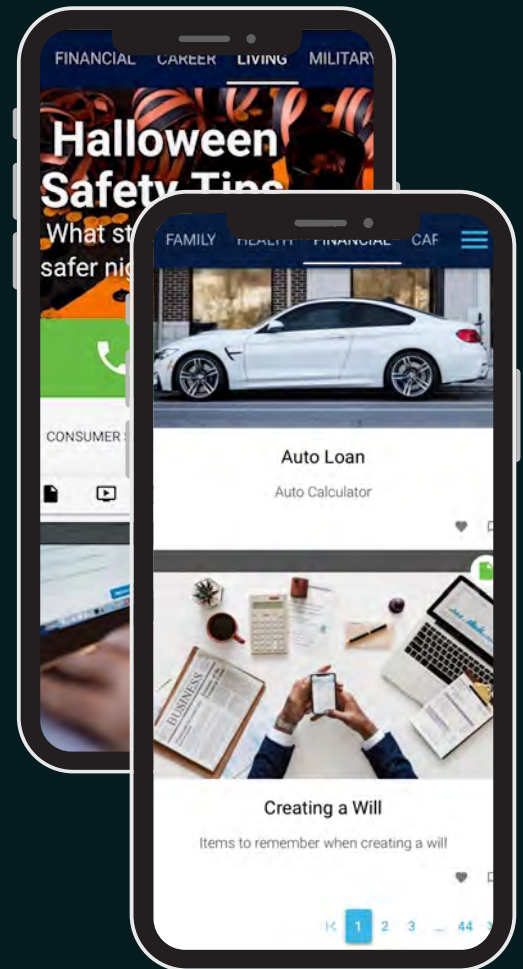
WORK/LIFE BALANCE AT YOUR FINGERTIPS

MY LIFE EXPERT ALLOWS YOU ACCESS TO:

- THOUSANDS of articles, videos, and worksheets
- Quick Health and Lifestyle assessments and surveys
- Interactive checklists
- Events Calendar for the latest webinars and online training sessions
- Your company's HR info and company-wide alerts
- Build your own Employee Profile
- 24/7 instant, confidential support

To Log In, Use Company Code:

sbsd1



ACCESS YOUR FULL EAP BY CALLING:

1-888-243-5744,

DOWNLOADING THE APP BY

VISITING: WWW.MYLIFEEXPERT.COM

OR

SIMPLY SCAN THIS QR CODE

SANDCREEK EAP
An AllOne Health Company

NEWSLETTER SUPPLEMENT

COVID-19

ETHICAL CONSIDERATIONS

FROM THE STATE BAR OF SOUTH DAKOTA
ETHICS COMMITTEE



TABLE OF CONTENTS

01 RULE 1.1 - COMPETENCE

02 RULE 1.3 - DILIGENCE

03 RULE 1.4 - COMMUNICATION

04 RULE 1.5 - FEES

05 RULE 1.6 - CONFIDENTIALITY

06 RULES 5.1,2,3 - SUPERVISION

The South Dakota State Bar Ethics Committee has been asked to provide thoughts about ethics issues arising from the COVID-19 pandemic. This is the first in a series of brief articles about some of the Rules of Professional Conduct potentially implicated, which can be found in SDCL Chapter 16-18 at Appendix A. These articles aren't intended to impose a set of "COVID-19 Rules," but instead to provoke thought and questions.

We encourage lawyers to start with Dean Neil Fulton's article from the March 2019 SD State Bar Newsletter about preparing for and dealing with the practice of law in a disaster situation. It provides great points of discussion.¹

Rule 1.1—Competence

After the definitions in Rule 1.0, the first Rule in the "book" is Rule 1.1 regarding "competence"

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Well, that seems obvious, but what does it mean under the current circumstances? Actually, it means the same thing it has always meant, but lawyers need to guard against doing things differently just because there is a crisis or emergency.

The Comments to Rule 1.1 provide some insight. Comments [1], [2] and [4] flesh out the concept that how much "knowledge" and "skill" a lawyer must have depends on a variety of factors including the complexity of the matter and whether the lawyer has sufficient time to get "up to speed" under the circumstances. They clarify that even a "novice" lawyer can potentially be "competent" to deal with complex matters, but also remind lawyers that familiar and more experienced lawyers are a good resource the lawyer should consider recommending to a client, if needed. Comments [5] and [6] clarify that the preparation required in a matter is obviously greater when the matter is complex or the client has more at stake; and that a lawyer has to stay "up to date" on changes in the law and the practice of law.

Comment [3] is particularly relevant here. In an emergency, where client access to more experienced counsel may be limited or not practical, a lawyer lacking ordinary skill in an area can represent a client. But the lawyer should do so only on a limited "triage" basis, if possible, and must guard against "ill-considered action" by the client.

There are several excellent resources around the web and elsewhere already illuminating these comments in relation to COVID-19 in two ways: "legal competence" and "*practice* competence."

In the "legal competence" area, a great distillation of what Comment [3] means "right now" comes from www.jdsupra.com (emphasis in the original):

¹ <http://www.statebarofsouthdakota.com/p/do/sd/sid=968>

This best practice standard is even more important to follow with clients facing emergent issues with their lives and businesses. *You must resist the temptation, however, to provide quick, off-the-cuff, legal advices, let alone best guesses.* If you need to look into a legal issue or read a document more carefully (which should not be done on your phone), *tell the client you need to get back to them.*²

Great advice for all lawyers in all situations. Even (maybe especially) when things are hectic, SLOW DOWN. Don't be afraid to say "I Don't Know—Yet." Right now, clients may be calling with "emergency" questions about developments like the Paycheck Protection Program loan applications and other issues arising from the CARES Act, and several other problems. Timely and diligent responses are as important as ever (more on "diligence" under Rule 1.3 later), but providing "the" answer that will actually help a worried client is the mark of competence, not giving just "any" answer that will placate the client, even if it takes a little more time to find it.

And, as noted above, if a lawyer is familiar or practices with another lawyer who has special skill in a given area, getting that lawyer's perspective or even referring the client might be the best choice of all.

In the "practice competence" area, South Dakota (unlike some other states) hasn't added a specific "technological competence" requirement or comment to Rule 1.1.³ South Dakota's Comment [6] does say, however, that lawyers must "keep abreast of changes in the law *and its practice*" which seems to implicitly require lawyers to be up to speed on at least some technology. (We will discuss some of those issues in relation to communication and confidentiality under Rules 1.4 and 1.6). Some lawyers, depending upon their practices, may have an obligation to either learn how to use video chat and other remote officing technology⁴ and do so in a way that protects client confidentiality⁵ or have assistance from someone who can.

However, regarding COVID-19, malpractice and ethics experts have noted lawyers need not be tech-savvy to avoid major "practice competence" missteps. Instead, they need to fall back on strict compliance with existing standard procedures, particularly when a crisis might encourage them to do otherwise:

[W]ith the coronavirus forcing people around the country to break their daily routines and cancel plans, the risk that distracted lawyers and staff will overlook a court alert email or forget to put an entry into calendaring software is high.

² <https://www.jdsupra.com/legalnews/attorney-ethics-considerations-in-the-10733/> (emphasis added)

³ <https://www.ktlitsmart.com/blog/what-you-don%E2%80%99t-know-will-hurt-you-technology-competence-timecovid-19>

⁴ <https://onward.justia.com/2020/03/19/legal-ethics-and-coronavirus-tech-solutions-for-health-safety-and-efficiency/>

⁵ <https://www.wyomingbar.org/practicing-ethically-age-covid-19-guidelines/>

With all the other things on their minds, lawyers should make time to double check that routine calendaring tasks and email checks are getting done on time and with the same level of attention.⁶

After “substantive errors” about the law, the ABA’s research suggests administrative errors (missing deadlines, losing documents, failing to file documents, and the like) and failing to properly address conflicts issues are two of the biggest sources of ethics and malpractice complaints.⁷

So the best and simplest things lawyers can do to provide “competent” representation in the face of COVID-19 are ones that require no special training or skill. Take the time needed to provide accurate advice to clients, even when they (and the lawyer) are in a hurry and under stress, and admit when the problem requires another lawyer’s perspective or skill. Don’t forsake consistent compliance with the procedures the lawyer or the lawyer’s firm have developed over the years to deal with the biggest sources of potential mistakes.

In short—no shortcuts. Next, Rule 1.3--Diligence

⁶ <https://www.jdsupra.com/legalnews/attorney-ethics-considerations-in-the-10733/>

⁷ https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2011/march/the_biggest_malpractice_claim_risks/

Rule 1.3—Diligence

Our first article was on Rule 1.1 regarding “Competence,” one of the shorter rules. Rule 1.3 is even shorter:

A lawyer shall act with reasonable diligence and promptness in representing a client.

As with Rule 1.1, this rule seems to state the obvious without precisely defining what “reasonable diligence” is. (Now you know why people send questions to the Committee). But the comments to Rule 1.3 are helpful and rather blunt.

Comment [3] states “*Perhaps no professional shortcoming is more widely resented than procrastination.*” This appears to be one of the more negative statements in all of comments to the Rules. But this is because “[n]eglect of a client’s matter is one of the most common reasons for complaints to lawyer discipline agencies;” a lack of diligence can be premised on something other than missing a formal deadline—simply taking too long to attend to a matter can suffice.⁸

But how about during a pandemic or other crisis; do the rules cut lawyers any slack?

No. Comment [1] provides that a lawyer must zealously assist clients even in the face of “opposition, obstruction or personal inconvenience to the lawyer.” As one bar association has recently stated, “the fundamental ‘prime directive’ remains: thou shalt protect thy client. Your ethical obligations do not change, regardless of whether you are ill, your client is sick, or the courthouse is closed.”⁹

Relatedly, Comment [5] is particularly relevant now, requiring lawyers, especially solo practitioners, to have a succession or contingency plan in place including other lawyers willing and able to take over the lawyer’s files if the lawyer becomes incapacitated due to illness or death.

Heartless or not, the comments to Rule 1.3 reflect simple reality. Clients and client representatives dealing with their own personal and professional crises may be less efficient and productive in their own work. But they will still rightfully expect timely and diligent legal representation, and aren’t obligated to consider whether the lawyer is experiencing similar issues. This is simply part of the “deal” lawyers make when they take their oath.

However, as noted in the article on Rule 1.1 (Competence), there are uncomplicated ways that lawyers can be diligent in the face of crisis, many of which have been addressed in jurisdictions where COVID-19 spread earlier.¹⁰

⁸ ABA/BNA Lawyers’ Manual on Professional Conduct Section 31:401.

⁹ <https://www.dcbart.org/about-the-bar/news/Legal-Ethics-in-the-Age-of-the-Coronavirus.cfm>

¹⁰

<https://www.osbar.org/docs/resources/CoronavirusEthicsFAQ.pdf><https://www.theindianalawyer.com/articles/disciplinary-commission-offers-attorneys-ethical-tips-during-covid-19-crisis><https://www.dcbart.org/about-the-bar/news/Legal-Ethics-in-the-Age-of-the->

Lawyers can start by doing what the reader is doing i.e., staying up to date on recommendations from public health authorities, orders from the court system, and practice resources from the state bar.¹¹ For example, the CDC has provided guidance for businesses and employers about how to respond to the COVID-19 outbreak, which firms likely have an obligation to be familiar with to benefit their employees and clients.¹² More locally, the South Dakota Supreme Court and Circuit Courts have issued statewide and circuit-specific orders, which are available via links at the State Bar Website.¹³ At the same site, lawyers can find links to public health information, employment and firm-related information, information about remote officing, and American Bar Association COVID-19 resources. In short, a big part of “diligence” in a crisis is gathering, reading, and implementing information about how to deal with the crisis, much of which can be obtained from competent sources that have been through that crisis.

Lawyers also must be proactive about caseload management and engage in some self-reflection¹⁴ on that point, particularly if they are practicing remotely and experiencing a decrease in efficiency. Comment [2] to Rule 1.3 clarifies that lawyers must manage caseload to ensure maximum effectiveness. So if Lawyers or members of their household become ill, or they are otherwise inhibited from effectively representing clients, they must ask themselves, “Am I still able to provide competent representation under these circumstances?”¹⁵ And they need to have other lawyers ready to assist if the answer to the preceding question is “no.”¹⁶

Finally, as noted in the last discussion on “Competence” under Rule 1.1, Lawyers can guard against delay and lack of diligence by making sure standard procedures regarding receiving, opening, and reviewing mail, email, and other communications, calendaring matters, scheduling matters, and responding to clients are being followed strictly.¹⁷ Although it falls within the discussion about Rule 1.4 on communication, comment [4] to Rule 1.4 also speaks to diligence, stating “regular communications with clients will minimize the occasions on which a client will need to request information concerning the representation.” In other words, one of the best ways

<https://burnswite.com/coronavirus-ethics-tips-for-pennsylvania-lawyers/>
<https://www.utahbar.org/wp-content/uploads/2020/03/Utah-Bar-Coronavirus-Response-Ethics-Hotline.pdf>

<https://www.michbar.org/opinions/ethics/COVID-19>

¹¹ <https://www.osbar.org/docs/resources/CoronavirusEthicsFAQ.pdf>

¹² <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html>

¹³ <http://www.statebarofsouthdakota.com/page/covid19>

¹⁴ <https://www.michbar.org/opinions/ethics/COVID-19>

¹⁵ *Id.*

¹⁶ <https://www.osbar.org/docs/resources/CoronavirusEthicsFAQ.pdf>

<https://www.dcbbar.org/about-the-bar/news/Legal-Ethics-in-the-Age-of-the-Coronavirus.cfm>

<https://burnswite.com/coronavirus-ethics-tips-for-pennsylvania-lawyers/>

¹⁷ <https://www.osbar.org/docs/resources/CoronavirusEthicsFAQ.pdf>

to show diligence in a crisis is by simply contacting clients without prompting so they feel valued and that their lawyer is available to help.

Rule 3.2 regarding “expediting litigation” is related:

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

The Comment to Rule 3.2 is also blunt, stating that unreasonable delays “bring the administration of justice into disrepute.” Lawyers can seek good-faith reasonable extensions and postponements, but must not “fail to expedite litigation solely for the convenience of the advocates.” COVID-19 can’t be an excuse for allowing a case to languish.

However, diligence and speed aren’t synonymous. As noted in the previous article on Rule 1.1, competence includes taking the time to provide the client with the right answer, not a fast answer. The same holds true with Rule 3.2. The Rule articulates a “reasonableness” standard, and the Comment provides relief: “[t]he question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay.” If a lawyer has a good-faith client-approved reason for delay, the lawyer is likely being reasonable.

For example, some circuit courts are stating that hearings need to be telephonic/livestreamed or continued. And remote depositions by livestream are being encouraged. Sometimes, however, a client is best served by a live hearing (especially an evidentiary one) or in-person deposition (especially if there are many exhibits). Although lawyers have an obligation to expedite litigation, they should not do so for expediency’s sake alone if they (and their client) believe the client is better served by waiting for the opportunity to proceed in person.

Rule 3.2. is typically thought of as an “anti-delay” rule; but some bar associations have suggested that “unreasonable” conduct need not be delay, especially now:

In light of the unprecedented risks associated with the novel Coronavirus, we urge all lawyers to liberally exercise every professional courtesy and/or discretionary authority vested in them to avoid placing parties, counsel, witnesses, judges or court personnel under undue or avoidable stresses, or health risk. . . Given the current circumstances, attorneys should be prepared to agree to reasonable extensions and continuances as may be necessary or advisable to avoid in-person meetings, hearings or deposition obligations.¹⁸

Or as more briefly stated recently by a federal judge in Chicago:

¹⁸ <https://minnlawyer.com/2020/03/30/quandaries-and-quagmires-legal-ethics-risk-management-in-pandemic/>

If there's ever a time when emergency motions should be limited to genuine emergencies, now's the time...[a]bout half the practice of a decent lawyer is telling would-be clients that they are damned fools and should stop.¹⁹

So--be diligent, but be good (or at least reasonable) to each other.

¹⁹ *Id.* (citing *Art Ask Agency v. The Individuals, Corporations, Limited Liability Companies, Partnerships, and Unincorporated Associations Identified on Schedule A Hereto*, N.D. Ill. No. 1:20-cv-01666, 3/18/20)

Rule 1.4—Communication

Rule 1.4(a) and (b) provide:

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Rule 1.4 governing Communication is an important “glue” rule that helps make the others work, because the concept of “informed consent” is used throughout the rules.²⁰ Consequently, it appears the vast majority of ethical complaints based on Rule 1.4 also involve other ethical rules, typically regarding something the lawyer failed to tell the client.²¹ “Informed Consent” under Rule 1.0 contemplates the lawyer will communicate “adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” More specifically, Comment [1] to Rule 1.4 states that attorney-client communication is essential to the relationship. Comments [2] and [3] reinforce that lawyers must consult with clients about decisions related to their matter or case, including taking affirmative steps to provide periodic updates to clients so the clients can keep making informed choices and asking informed questions. Comment [5] drives home that informed consent means providing genuine meaningful and timely details to clients about their matter.

Finally, as noted in a previous article, Comment [4] suggests the simple act of staying in touch with a client can minimize client anxiety and frustrations.

²⁰ See Rule 1.2(c) (limiting scope of representation); Rule 1.6(a) (disclosing confidential information); Rule 1.7(b)(4) (consent to concurrent conflict); Rule 1.8(a)(3) (consent to transaction where lawyer has an interest); 1.8(b) (use of client information to disadvantage of client); Rule 1.8(f)(1) (accepting compensation from third-party for representation); Rule 1.8(g) (consent to aggregate settlement of claims of 2 or more clients); Rule 1.9(a) (consent to conflict regarding past representation); Rule 1.11 (consent to conflict arising from former public service); Rule 1.11(d)(2)(i) (consent to conflict arising from past representation of client by attorney who is now government officer or employee); Rule 1.12(a) (conflict arising from past participation as judge, arbitrator, mediator, etc.); Rule 1.18(d) (conflicts arising from prospective client communications); Rule 2.3(b) (consent to providing evaluation to third party).

²¹ ABA/BNA Lawyers' Manual on Professional Conduct Section 31:504 (collecting cases).

Right now, client anxiety is likely high, but lawyers can do several things to provide reassurance.²² Lawyers and firms should let as many of their clients as possible know whether they are open, open but seeing clients by appointment only, or closed and working remotely, and about any changes in standard office hours, such as on their websites, outward-facing communications, by email blast to emailing lists, etc.²³ Likewise, as individual lawyers interact with clients, and as situations change, they should update clients on the best way to contact the lawyer, and obtain updates from the client on the same issue.²⁴ This also makes business sense, because it communicates that the lawyer or the lawyer’s firm is “on the job” despite adversity.²⁵

If lawyers, especially solo practitioners, have a succession or other contingency plan in place, as suggested by Comment [5] to Rule 1.3, they should consider telling clients what to expect if the lawyer becomes ill, including who will be stepping into the gap.²⁶

Relatedly, lawyers should also try to anticipate how to react if and when clients become ill. Clients should be encouraged to notify the lawyer if health problems arise so the lawyer can obtain extensions and continuances as needed.²⁷ Also, if a client is already ill and there is a concern about potential temporary incapacity, the lawyer should find out if the client has someone with a power of attorney or other authorization to act on the client’s behalf; and make sure that the client’s permission to work with that person is well-documented.²⁸

Remotely-operating lawyers should be proactive with their clients in explaining they are doing so; that way, clients can provide any special instructions about treatment of their confidential information, as specifically contemplated by Comment [16] to Rule 1.6. (“A client may require the lawyer to implement special security measures not required by this Rule.”)

Litigation lawyers should not assume clients will know about all of the court orders that might affect their case. Instead, they have an obligation to “initiate and maintain the consultative and decision-making process even when clients fail to do so.”²⁹ Lawyers should proactively explain to clients how court orders might affect near-term events, like hearings and depositions, and long-term plans, such as discovery deadlines and trial dates.³⁰ Even if nothing is immediately pressing, the client will appreciate knowing the case isn’t being neglected.³¹

²² <https://www.americanbar.org/groups/litigation/committees/ethics-professionalism/articles/2020/five-pointers-for-practicing-in-a-pandemic/>

²³ <https://nclawyersweekly.com/2020/04/14/state-bar-issues-guidance-professional-responsibility-in-a-pandemic/>

²⁴ <https://www.michbar.org/opinions/ethics/COVID-19>

²⁵ <https://www.pullcom.com/newsroom-publications-Lawyer-Obligations-During-COVID-19>

²⁶ <https://www.michbar.org/opinions/ethics/COVID-19>

²⁷ <https://www.dcbart.org/about-the-bar/news/Legal-Ethics-in-the-Age-of-the-Coronavirus.cfm>

²⁸ <https://www.michbar.org/opinions/ethics/COVID-19>

²⁹ <https://www.dcbart.org/about-the-bar/news/Legal-Ethics-in-the-Age-of-the-Coronavirus.cfm>

³⁰ <https://www.theindianalawyer.com/articles/disciplinary-commission-offers-attorneys-ethical-tips-during-covid-19-crisis>

³¹ <https://nclawyersweekly.com/2020/04/14/state-bar-issues-guidance-professional-responsibility-in-a-pandemic/>

Lawyers also should confer with clients about how societal, health, and economic issues arising from coronavirus-related circumstances may affect their litigation, estate planning, or business strategies.³² Those issues may make mediation or settlement of litigation, completing a will or other estate planning documents, or closing a contract negotiation that much more urgent.³³

Ultimately, however, these are only examples of issues lawyers should remember regarding their obligation to communication with clients. As with any of the Rules, a lawyer's best approach is to minimize client anxiety and consequences by communicating with clients at least as much, if not more, than ever before.

As a final note, many of the Rules are commands or prohibitions. Regarding communication, though, Rule 2.1 ("Advisor") blends instruction with aspiration:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

Comment [1] stresses that candid communication often requires delivering a client bad news or unwelcome advice—but that it still has to be delivered. More aspirationally, Comment [2] indicates:

Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

Or, as one ethics expert once noted:

Lawyers must often be more than lawyers. As they have for centuries, lawyers face clients' family problems, business problems, and life problems, which lead lawyers at times to go beyond the legal issues and counsel clients on the moral, economic, and other nonlegal factors affecting their situations. In addition, the practice of law today is becoming more competitive, complex, and intertwined with other substantive disciplines. Lawyers therefore are increasingly called upon to advise clients on issues that would not be deemed purely "legal" by traditional standards.³⁴

South Dakota remains a state where pure legal "specialists" are the exception, not the rule, and where lawyers are often still viewed as a client's trusted advisor on a variety of subjects. A

³² <https://www.americanbar.org/groups/litigation/committees/ethics-professionalism/articles/2020/five-pointers-for-practicing-in-a-pandemic/>

³³ *Id.*

³⁴ Gantt, Larry O. Natt, More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations, 18 *Geo. J. Legal Ethics* 365 (2004-2005).

client's lawyer may have drafted the client's will, set up an LLC for the client's family business, helped with the adoption of a child, reviewed or drafted virtually all of the client's business contracts over the years, and annually prepared the client's taxes. They also may have been invited to weddings, funerals, anniversaries, birthdays and other events for the client or the client's family because of the relationship between the lawyer and the client. In the process, the lawyer has become a "voice" to be trusted in challenging times.

Regardless whether this is true for all South Dakota lawyers, and although lawyers must certainly know their limitations, they should consider, especially now, they likely possess knowledge, skills, experience, and education on a variety of subjects, other than the law, that can help their clients.³⁵ Rule 2.1 doesn't command it, but providing advice and assurance in those areas, or referring the client to another professional who can better assist them, (see Comment [4]), may make all of the difference in the world to a client anxious about the future.

³⁵ <https://www.sdcba.org/index.cfm?pg=BusinessandCorporate201705>

Rule 1.5 – Fees

There has been little discussion or direction from state bars or the ABA regarding fee-related issues specific to the COVID-19 situation. However, the rules are worth considering, particularly now, where many clients may be (or soon will be) facing tough choices on which bills to pay and when; and where lawyers may be feeling “light” in the work they have to do.

Under Rule 1.5(a), lawyers have an ethical obligation to “not make an agreement for, charge, or collect an unreasonable amount for fees or expenses” subject to analysis under a non-exclusive list of eight factors. Comment [1] notes that Rule 1.5 “requires that lawyers charge fees that are reasonable under the circumstances.”

Under the current circumstances, lawyers and clients are living with and working during a pandemic. The news is regularly filled with stories about how COVID-19 is affecting every aspect of people's lives, not only socially but economically. Businesses are facing the possibility of failing and never reopening, and employees are being furloughed or laid off. Law firms and their clients may eventually struggle (if they aren't already doing so) with cash flow and lack of work.

This leads to at least a couple of issues regarding the reasonableness of fees, and the collection of fees, that are worth remembering.

However, before addressing those general issues, Rule 1.5(e) gives rise to a specific duty that might arise here. As noted in earlier articles, lawyers, solo practitioners especially, need to have contingency plans in place to deal with their illness and incapacity, including having lawyers, even lawyers from other firms, waiting in the wings to assist. Rule 1.5(e) provides that a lawyer may not share fees with a lawyer from another firm without ensuring (1) the fees apportioned to each lawyer are commensurate with the respective share(s) of the work the lawyers did; (2) the overall fee is reasonable; and (3) the client has agreed to the arrangement and the shares in writing. Lawyers may need to navigate this rule in working together due to one lawyer's illness.

More generally, current *circumstances* obviously warrant some *reconsideration* of what is reasonable in billing, and collecting, remembering that clients will be examining their bills at least as closely as ever if not more so (and rightfully so) to ensure they are being treated fairly and reasonably. For example:

- Lawyers will need to guard against Parkinson's law, i.e., “work expands so as to fill the time available for its completion.”³⁶ The ABA addressed hourly billing ethics some time ago, and noted that “churning” and “make work” practices are inappropriate, as is billing clients for overhead expenses.³⁷ The number of ethics complaints, ethics opinions, and

³⁶ https://en.wikipedia.org/wiki/Parkinson%27s_law; <https://www.economist.com/news/1955/11/19/parkinsons-law>.

³⁷ See Formal Ethics Opinion 93-379 and 1996 ABA Task Force on Lawyer Business Ethics

other publications discussing the impropriety of “filling up available time with the available work” are easily found, and need not be cited serially here. Suffice to say, lawyers or firms with less work now or in the future, because of COVID-related slowdowns cannot address that issue by having lawyers or associates spend longer than necessary on various tasks; and also cannot pass along the costs they may be incurring to practice law remotely.

- As noted in the previous article on Rule 1.4, lawyers will want, more than ever, to be having frank but realistic conversations with clients and determine together how fees will be paid, when fees will be paid, or perhaps develop a realistic payment plan. This will also help both the lawyer and the client have a better outlook of his/her own financial situation.
- When taking on new clients, lawyers should also deploy Rule 1.4’s commands by heeding the suggestion in Rule 1.5, Comment [2] to “furnish the client with at least a simple memorandum or copy” of his/her customary fee arrangements, setting out the basis, rate, or total amount of the fee. “A written statement concerning the terms of the engagement reduces the possibility of misunderstanding” and helps the lawyer and the client plan during current circumstances.
- During these uncertain times, when utility companies, landlords, and cities are suspending collections and evictions, lawyers will want to be particularly careful and sensitive of client expectations, given that aggressive collection of attorney fees from clients has long been a source of ethics complaints and litigation even in the best of economic times.³⁸

In short, clients are all facing uncertainty and having to make difficult economic calls. They will be expecting lawyers to be fair and reasonable in their billing practices.

³⁸ See ABA/BNA Lawyer’s Manual on Professional Conduct at 41:2005 (citing Anthony Davis and Michael Downey, *Exercise Care when Suing for Unpaid Fees*, Paragon Int’l Ins. Brokers (March 2012).)

Rule 1.6—Confidentiality

Rule 1.6 regarding lawyers' obligations of confidentiality is one of the most cited and most important. Comments [2] and [3] note that, for an attorney to provide competent representation there must be unqualified, prompt, and candid communication with the client. These communications are protected by a statutory privilege against disclosure, which belongs to the client. In short, one of a lawyer's most important duties is preserving and protecting as private and confidential all information relating to the representation.

In the current environment, Rule 1.6(c) is particularly relevant:

A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Of the ethical issues presented by the COVID-19 pandemic, it would be difficult to find one more critical or difficult to navigate than the challenge of preserving client confidentiality while working remotely. With an increasing number of law firms and attorneys shifting towards a “work from home” or “virtual law firm” business model it is important for attorneys to remember the importance of Rule 1.6 and, especially, subpart (c)

Long before COVID-19, ABA Formal Opinion 477 generally guided lawyers regarding the security of client communication and data in a modern practice and its principles are especially helpful now.³⁹ Important questions lawyers need to ask themselves include:

How sensitive is the information the lawyer is communicating or securing?
How is client information transmitted, stored, and accessed by the lawyer or firm?
What security measures are available to protect the client information?
What standard procedures can the lawyer follow to ensure client information is protected?
What protocols are available to treat more-sensitive information with higher diligence?
These questions lead to many more inquiries regarding (1) attorneys working remotely; and (2) non-attorney staff communicating with those attorneys or working remotely themselves.

1. Attorneys Working From Home.

Under Rule 1.6(c), lawyers working remotely must take reasonable steps to ensure that client information remains confidential. There are four general areas to keep in mind: (1) location/environment; (2) communications; (3) computers; and (4) paper files.⁴⁰

A. Workspace

Lawyers should consider how their selection of a workspace can help them keep personal and professional activities separate and distinct.⁴¹ This will in turn help the lawyer avoid blurring the

³⁹ <https://www.americanbar.org/content/dam/aba/images/abanews/FormalOpinion477.pdf>

⁴⁰ <http://www.pabar.org/site/Portals/0/Ethics%20Opinions/Formal/F2020-300.pdf?ver=2020-04-13-090814-560>

⁴¹ <https://www.floridabar.org/the-florida-bar-news/ethics-during-covid-19/4>

lines when it comes to client privacy and confidentiality, and can promote better personal balance and emotional well-being. (It also helps avoid having the lawyer's family members walking through the background of a Zoom meeting.)

As with other ethical issues, there are very basic, practical steps lawyers should consider:

- A. Have a separate, private work area away from other family members;⁴²
- B. Consider designating certain times of the day for private client calls or communications;⁴³
- C. Use a dedicated phone number and other security procedures for all work-related telephone communications;⁴⁴ and
- D. Clearly communicate to clients the lawyer is working from home and ask that they notify the lawyer of any concerns, questions, etc., regarding confidentiality and privacy of their information and the lawyer's communications with them.⁴⁵

Lawyers should also strongly consider having conversations with clients only in locations away from their Amazon Alexa or Google voice assistants.⁴⁶

B. Secure Communications

Lawyers should consider the various security measures that are available for each type of electronic communication.

For emails, is the system the lawyers use to send and receive emails just as secure as their office systems? If not, what should they do to correct this?⁴⁷ Are they especially avoiding using personal email accounts to send client information?⁴⁸

Some lawyers text with their clients, and some state bars and the ABA have either explicitly or implicitly condoned the practice.⁴⁹ This Committee hasn't ever been asked to opine about it but, assuming South Dakota lawyers will continue to do so, they should avoid communicating with clients about substantive matters via text message⁵⁰ or, at the very least, should ensure texting is more secure, such as through an end-to-end encryption application like WhatsApp and Signal.⁵¹ They should also clearly notify clients that texting is not necessarily private and, therefore, they should treat text messages the same as a public verbal conversation.⁵²

⁴² <https://harrityllp.com/5-tips-for-working-from-home-during-covid/>

⁴³ <https://www.floridabar.org/the-florida-bar-news/ethics-during-covid-19/>

⁴⁴ <http://www.pabar.org/site/Portals/0/Ethics%20Opinions/Formal/F2020-300.pdf?ver=2020-04-13-090814-560>

⁴⁵ <https://www.floridabar.org/the-florida-bar-news/ethics-during-covid-19/>

⁴⁶ <https://www.lawsitesblog.com/wp-content/uploads/sites/509/2020/04/PBA-Formal-Opinion-2020-300-Ethical-Considerations-for-Attorneys-Working-Remotely.pdf> at 8.

⁴⁷ <https://nclawyersweekly.com/2020/04/14/state-bar-issues-guidance-professional-responsibility-in-a-pandemic/>

⁴⁸ <https://www.heplerbroom.com/blog/maintaining-legal-ethics-global-pandemic/>

⁴⁹ <https://abovethelaw.com/2019/02/to-text-or-not-to-text-clients-an-ethical-question-for-a-technological-time/>

⁴⁹ <https://www.floridabar.org/the-florida-bar-news/ethics-during-covid-19/4>

⁵⁰ <https://abovethelaw.com/2019/02/to-text-or-not-to-text-clients-an-ethical-question-for-a-technological-time/>

⁵¹ *Id.*

⁵² <https://www.americanbar.org/news/abanews/publications/youraba/2018/june-2018/5-tips-for-using-text-messaging-for-client-communications/>

Using video conferencing has become ubiquitous and necessary. But with that extensive usage, security concerns surrounding even the most widely used video conference applications have been discovered. Providers of conferencing applications likely meet the definition of “vendors” providing “nonlegal services” discussed in ABA Opinion 477.⁵³ Under that Opinion, lawyers should conduct due diligence on the service provider, determine and vet the provider’s security policies and protocols, and determine whether the service provides a legal forum for relief if the vendor breaches its agreement. Lawyers working on especially sensitive matters where confidentiality is vital should consider software programs that provide a heightened guarantee of security and privacy, as opposed to a “free” version of an application that may be less robust. They also should consider (1) requiring a password to access the meeting; (2) sharing links only by direct secure communications with invitees; and (3) enabling “host only” control of screen sharing, if available.⁵⁴

C. Computer and system security.

As noted in earlier articles, Rule 1.1 requires lawyers working from home to possess a minimal level of competence to safely and effectively use computer technology in their practice without compromising client confidentiality. This includes knowing how to safely and securely communicate with clients via e-mail, process and save electronically-transmitted documents, record time, and schedule appointments.

However, there are several other questions beyond these basic issues lawyers should ask themselves. Do the lawyer’s home computer, Wi-Fi or other network, and other remote-enabling systems all have the latest security patches?⁵⁵ Does the lawyer have firewall, anti-virus and anti-malware software installed on the home systems?⁵⁶ Are the systems password protected?⁵⁷ If they are, is “two factor” or “multi factor” protection available?⁵⁸ Is the computer restricted solely to work purposes?⁵⁹ If the lawyer is connecting remotely with the office’s or firm’s server, is that remote connection a secure one, such as a VPN network that creates an additional secured and encrypted connection, and shields online activity from hackers?⁶⁰ Is the lawyer able to backup work at home or, better still, back it up to the office’s or firm’s server?⁶¹ As noted in the links below, the Pennsylvania State Bar has issued a fairly comprehensive discussion on these

⁵³ <https://www.americanbar.org/content/dam/aba/images/abanews/FormalOpinion477.pdf> at 9-10.

⁵⁴ <https://www.lawsitesblog.com/wp-content/uploads/sites/509/2020/04/PBA-Formal-Opinion-2020-300-Ethical-Considerations-for-Attorneys-Working-Remotely.pdf> at 12.

⁵⁵ <https://nclawyersweekly.com/2020/04/14/state-bar-issues-guidance-professional-responsibility-in-a-pandemic/>

⁵⁶ <https://www.lawsitesblog.com/wp-content/uploads/sites/509/2020/04/PBA-Formal-Opinion-2020-300-Ethical-Considerations-for-Attorneys-Working-Remotely.pdf> at 13.

⁵⁷ *Id.* at 11-12.

⁵⁸ <https://www.lawsitesblog.com/wp-content/uploads/sites/509/2020/04/PBA-Formal-Opinion-2020-300-Ethical-Considerations-for-Attorneys-Working-Remotely.pdf> at 11.

⁵⁹ <https://nclawyersweekly.com/2020/04/14/state-bar-issues-guidance-professional-responsibility-in-a-pandemic/>

⁶⁰ <https://www.lawsitesblog.com/wp-content/uploads/sites/509/2020/04/PBA-Formal-Opinion-2020-300-Ethical-Considerations-for-Attorneys-Working-Remotely.pdf> at 11.

⁶¹ *Id.* at 12.

topics.⁶² The Texas State Bar has provided a similar discussion from more of a “how-to” standpoint with specific software and other system recommendations.⁶³

D. Paper Files

Paper files are unavoidable and, for many lawyers, strongly preferred to the more sterile, less fungible, electronic version of a document. There are also cases where large document collections are simply easier to review in hard copy such as in notebooks. Regardless whether a pandemic is occurring, lawyers must always exercise caution in taking any paper materials or files outside of the office.

There appears to be little specific guidance from bar associations about taking paper files home. However, there is a wealth of useful legal guidance lawyers are providing to companies possessing trade secrets and other confidential information in paper files that might prompt lawyers to consider similar solutions.⁶⁴ Lawyers should consider whether they can avoid taking documents home at all. They should consider avoiding printing out hardcopies of documents while working from home⁶⁵ or adhering to a strict shredding protocol if they do⁶⁶ and, in any event, should ensure that clients have approved the lawyers’ doing so. Lawyers should also consider keeping a written record or “check out” system for each file identifying the materials taken home, when they were removed, and where they are located.⁶⁷ These steps help to ensure that no client papers, documents, or files end up missing or lost. Finally, all client papers should be kept in a secure and inaccessible location within the home, preferably a locked file cabinet or storage closet.⁶⁸

2. Non-Attorney Support Staff Working from Home.

A future article will address the general supervisory duties and responsibilities for overseeing the actions of subordinate lawyers and non-attorney support staff under Rules 5.1 through 5.3. Virtually all of the available guidance regarding lawyer support staff has assumed staff can work remotely as well with no separate ethical analysis, and the Ethics Committee is certainly not weighing in to the contrary here.

However, the short version is that non-attorney support staff who work from home are subject to all of the considerations discussed above regarding workspace location, adequacy of computer and other system resources and connections, communications, and treatment of physical files. And the lawyers and firms who employ them are the ones who are “on the hook” for their

⁶² <https://www.lawsitesblog.com/wp-content/uploads/sites/509/2020/04/PBA-Formal-Opinion-2020-300-Ethical-Considerations-for-Attorneys-Working-Remotely.pdf>

⁶³ <https://blog.texasbar.com/2020/03/articles/law-firms-and-legal-departments/law-firms-working-remotely-during-the-coronavirus-shutdown/>

⁶⁴ <https://www.huntonak.com/en/insights/keeping-your-trade-secrets-secret-during-a-time-of-increased-remote-work-due-to-covid-19.html>

⁶⁵ <https://www.laboremploymentlawblog.com/2020/03/articles/coronavirus/covid-19-wfh/>

⁶⁶ *Id.*

⁶⁷ <http://www.mondaq.com/unitedstates/trade-secrets/913474/covid-19-and-trade-secrets-is-your-business-prepared-to-protect-its-trade-secrets-while-your-employees-work-from-home>

⁶⁸ *Id.*

compliance with the rules. This means lawyers must consider being perhaps even more diligent with confidentiality where their employees are concerned. Here, again, the Pennsylvania State Bar has provided an excellent “checklist” of procedures that, although not being a “required” set of steps, are offered up as being good ways to discharge supervisory responsibility, including providing a written policy for remote employees; limiting the information staff can handle remotely to only essential data; verifying the identity of staff accessing data from remote locations; requiring the use of a Virtual Private Network or similar encrypted connection; verifying the security of employee Wi-Fi and other systems; use of multi-factor authentication; supplying or requiring employees to use work-exclusive and secure computers; saving data only on the office network not home devices; obtaining written agreements from employees that they will adhere to firm policy; and other reasonable measures.⁶⁹

It might be easy when working in a “civilian” environment, instead of at the office, to relax standards, particularly where confidentiality is concerned. Adhering to ethical and professional standards while working from home is complex, and also potentially increases operational expenses in having to obtain additional computers and the specialized software programs needed to comply with ethical rules. But the clients are entitled to the effort and compliance.

⁶⁹ <https://www.lawsitesblog.com/wp-content/uploads/sites/509/2020/04/PBA-Formal-Opinion-2020-300-Ethical-Considerations-for-Attorneys-Working-Remotely.pdf> at 7-8

Rules 5.1, 5.2, and 5.3 – Supervision

This is the last in the Committee’s series of COVID-19 articles, and it is the shortest, because it mostly contemplates review of the other rules discussed. Rules 5.1, 5.2 and 5.3 are more about apportionment of responsibility for compliance with the rules than separate rules in their own right. Rule 5.1 primarily governs managing and supervising lawyers in a law firm:

- (a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct.
- (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct.
- (c) A lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if:
 - (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Rule 5.3 is nearly identical, except that it provides the same edicts regarding lawyers supervising nonlawyers, and therefore, applies not only to law firms, but to any lawyer who employs or retains services of non-lawyers. And Rule 5.2 clarifies that lawyers are “bound by the rules” even when they act at a supervising lawyer’s direction, although subordinate lawyers don’t violate the rules if they act “in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty” such as when a subordinate lawyer seeks an ethics opinion from a firm’s ethics committee as contemplated by Rule 5.1’s Comment [3].

As discussed briefly in earlier articles, lawyers (and supervising or managing lawyers in firms) have an obligation to ensure subordinate lawyers and staff are complying with the rules, including, as needed, establishing and communicating policies and procedures to help them do so.⁷⁰ This applies, even when the subordinates and staff are working remotely, and may be more difficult to monitor.⁷¹ And with nonlawyer staff, discussed in Rule 5.3 Comment [1], lawyers must account for the fact that these employees “do not have legal training and are not subject to professional discipline.”

⁷⁰ <https://nclawyersweekly.com/2020/04/14/state-bar-issues-guidance-professional-responsibility-in-a-pandemic/>.

⁷¹ <https://www.michbar.org/opinions/ethics/COVID-19>

Although this can seem daunting, the same tools available to help connect with clients are there for lawyers to utilize with subordinate attorneys and staff.⁷² Senior attorneys can call firm-wide video or teleconferences to keep everyone connected and up to date on compliance.⁷³

Consequently, all of the information that's been provided in earlier articles applies with full force to subordinate attorneys and staff. Senior lawyers need to make sure these lawyers and staff are still communicating appropriately with clients, and observing firm policies and procedures designed to prevent common pitfalls. Indeed, Comment [2] to Rule 5.1 specifically provides that lawyers with "managerial authority in a firm must:

make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

In addition to subordinates and staff, because Comment [1] to Rule 5.3 discusses nonlawyer "independent contractors," lawyers must consider that they are potentially responsible for vetting all of their vendors and any other entity to which they have outsourced tasks or from whom they've acquired nonlegal assistance (i.e., IT companies, providers of remote access applications; document processing and management companies; delivery services; investigators etc.)⁷⁴ So if a lawyer or firm decides to start using new applications to make remote access easier, such as videoconferencing, encryption technology, and the like, the lawyers have to make sure those applications are safe, secure, and protect the client's information.

Lawyers, particularly senior lawyers in a firm environment, have a unique obligation to make sure the things discussed in earlier articles are at least considered by all lawyers and staff. They also can lead by example, and set the tone for everyone else.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ <https://www.americanbar.org/content/dam/aba/images/abanews/FormalOpinion477.pdf>

In Memoriam



Gregg Allan Schochenmaier
January 12, 1960 ~
December 16, 2019

Gregg Allan, the son of Herman and Frances Mauree (Kalkowski) Schochenmaier, was on January 12, 1960, in Gregory, South Dakota.

Gregg grew up on his parent's farm near Bonesteel, South Dakota. He graduated from Bonesteel High School in the Class of 1978. While in high school, Gregg played football and basketball, and held several state sprint track records; some of which he still retains to this day. He then enlisted in the U. S. Marine Corps. Following an honorable discharge, Gregg enrolled at the University of South Dakota where he earned an undergraduate degree in Geology in 1984 and a Juris Doctorate degree in 1988.

During law school, he entered Officer Candidate School with the U.S. Army, earned a commission, and served as an Artillery Officer. Upon completion of law school, he entered the U.S. Air Force and served honorably across three branches of the armed forces for nearly 30-years and was deployed to multiple international theatres and stateside incidents in combat and peacekeeping operations. Some of his highly deserved honors include the Meritorious Service Medal, Air Force Commendation Medal, Air Force Achievement Medal, and the Legion of Merit.

Gregg met Janine Denise Becker on his 21st birthday and they were married on Nov 27, 1982, at St. Mary's Catholic Church in Alton, Iowa. Gregg and Janine were blessed with four children: Kyle, Tyler, Emily, and Katlyn. Gregg's military career took the family to Alabama, England, and Georgia, before finally settling in Norwalk, Iowa.

He enjoyed fishing, hunting, racing, reading, cooking, and history. Gregg loved the Iowa Hawkeyes and always made time to watch them on the weekend. He had a strong work ethic and loved working outside.

Gregg was an excellent coach, mentor, and supporter of his children in their many sports and school activities. After the children were grown, Gregg continued to support and encourage them in their many life adventures and always valued his time with them. He was also an active member of the veteran community.



James Edwin Moore
January 04, 1925 -
April 01, 2020

Jim was born January 4, 1925 in Stanton, Nebraska to Frank Emery and Florian Alice (Dana) Moore. The fourth of six children, he grew up on farms near DeSmet and Humboldt, South Dakota, where he attended elementary and high school. At the age of 17, Jim enlisted in the U.S. Navy where he served as a signalman during World War II, from September 24, 1942 until January 4, 1946. He traveled the world, seeing the south Pacific, the Mediterranean, and India. He made the dangerous trip to Murmansk and Archangel. Although he left the Navy after the war to continue his education, he maintained a love of ships and the sea, collecting a substantial number of model ships over the course of his life. Jim also continued his service in the U.S. military through the U.S. Army Reserve. He received his commission in 1948, retiring at the rank of Colonel in 1978.

After the war, he attended South Dakota State University for two years before enrolling in law school at the University of South Dakota, where he earned a

J.D. degree in 1950. In 1952, he earned an LLM in tax at New York University School of Law. Jim practiced law in Sioux Falls in the area of tax, trusts, and estates, starting with the firm of Dana, Golden, Moore & Rasmussen. He retired from practice with the firm of Moore, Rasmussen, Kading & Kunstle on May 1, 2011 after 61 years, at the age of 86. During that time, he was a frequent lecturer; an adjunct professor at the University of South Dakota School of Law in 1977, where he taught federal income tax; president of the Minnehaha County Bar Association; Chair of the Real Property, Probate, and Trust Committee of the State Bar; and Liaison for the State Bar with the Internal Revenue Service. He became a fellow of the American College of Trust and Estate Counsel in 1961, and was a charter member and the first president of the Sioux Falls Estate Planning Council.

In 1962, he married Elaine Ellis with whom he had three children. In his leisure time, he enjoyed listening to music; reading; playing pitch; and watching football. He was a formidable ping pong and pool player who rarely lost regardless of the age of his opponent. An avid learner his entire life, he also loved to engage anyone who would listen in lengthy discussions about math, science, and astronomy. The hobby that Jim enjoyed most, however, was golf. He played weekly into his early 90s, almost always walking and carrying a handful of clubs.

He was a life member of the Veterans of Foreign Wars and Sioux Falls Post No. 15 of the American Legion, where he served as Judge Advocate in 1958 and 1967-1973. He was a director of the DAR Foundation in Sioux Falls from 1985-1991, and president of the board in 1990-91. He was a member of Minnehaha Country Club and First Lutheran Church in Sioux Falls.

Grateful to have shared his life and unconditional love are his three children and their families: Rebecca Moore and daughter Meghan; James Moore, his wife Mindy, and their three sons, Andrew, Ethan, and Eli; and Meredith Moore and her husband Eric Hilmoe. Jim is also survived by his sister Dorothy Spielmann with whom he remained close, and numerous nieces and nephews.

NOTE TO SELF



#LawyerWellbeingWeek

particular needs and, more importantly, the needs of their children. It is recommended that an annual calendar be prepared so that the parents and the children are aware of the parenting schedule. If the parents are unable to agree on their own Parenting Plan, however, these Guidelines become mandatory and will be used as their Parenting Plan and are enforceable as a court order. SDCL 25-4A-10, 25-4A-11. In the event a parent's time with the children becomes an issue in court, the judge will set whatever Parenting Plan best meets the needs of the children.

GUIDELINE 1. GENERAL RULES

A parent must always avoid speaking negatively about the other parent and must firmly discourage such conduct by relatives or friends. Each parent should speak in positive terms about the other parent in the presence of the children. Each parent must encourage the children to respect the other parent. Children should never be used by one parent to spy or report on the other parent. The basic rules of conduct and discipline established by the custodial parent should be the baseline standard for both parents and any step-parents, and consistently enforced by all caregivers, so that the children do not receive mixed messages.

Children will benefit from continued contact with all relatives and friends on both sides of the family for whom they feel affection. Such relationships must be protected and encouraged. But relatives, like parents, need to avoid being critical of either parent in front of the children. Parents should have their children maintain ties with both the maternal and paternal relatives. Usually the children will visit the paternal relatives during times when the children are with their father and the maternal relatives during times when they are with their mother.

In cases where both parents reside in the same community at the time of separation, and then one parent leaves the area, thus changing the Parenting Plan, the court will consider imposing on the parent who moved the travel costs for the children necessary to facilitate future time with the children; however, the court will also consider other factors such as the economic circumstances of the parents and the reasons prompting the move. Before relocating the children, the

custodial parent is required to comply with South Dakota's statutory forty-five-day written notice requirements. SDCL 25-4A-17.

1.1. Parental Communication. Parents must always keep each other advised of their home and work addresses and telephone numbers. Whenever feasible, all communication concerning the children must be conducted directly between the parents in person, or by telephone, or at their residences, or via email or text message. Absent an emergency, communication should not occur at a parent's place of employment.

1.2. Grade Reports and Medical Information. The custodial parent must provide the noncustodial parent with the name, address, and telephone number of the school where any child attends and must authorize the noncustodial parent to communicate concerning the child directly with the school and with the child's doctors and other professionals, outside the presence of the custodial parent. The noncustodial parent also has an obligation to contact the school to ensure receipt of school report cards, notices, etc., so that he/she can remain involved with their child's education. Both parents will be listed on all of the child's records. Each parent must immediately notify the other parent of any medical emergencies or serious illnesses of a child. Access to records and information pertaining to a minor child, including, but not limited to, medical, dental, orthodontia and similar health care, and school records must be made equally available to both parents. Counseling, psychiatric, psychotherapy, and other records subject to confidentiality or privilege must only be released in accordance with state and federal law; but, if available to one parent, must be available to both. The parents must make reasonable efforts to ensure that the name and address of the other parent is listed on all such records. If the child is taking medications, the custodial parent must provide a sufficient amount and appropriate instructions. If either parent enrolls the child in any social, beneficent, religious, or peer group activity, service, benefit, or program for which written application is required, the enrolling parent must provide the name and address of the other parent on, or supplementary to, the application. [This provision does not apply to insurance or annuities.] The parent enrolling the child shall advise the other parent of the name of the coach, director, and organization providing the activity along with their contact information. The custodial parent must notify

the noncustodial parent of all school or other events (for example, church and sports) involving parental participation. The noncustodial parent also has an obligation to contact the activity director to ensure receipt of information such as practice schedules, games, etc.

Attendance at academic or disciplinary meetings pertaining to the minor child shall be limited to the parents and the respective school professional(s). Others shall not attend such meetings without advance mutual parental agreement or court order.

1.3. Clothing. The custodial parent will send an appropriate supply of children's clothing with the children, which must be returned clean (when reasonably possible) with the children by the noncustodial parent. The noncustodial parent must advise, as far in advance as possible, of any special activities so that appropriate clothing belonging to the children may be sent. It is recommended that the noncustodial parent have some basic clothing available in his/her home to ensure that all of the children's basic needs are met.

1.4. Withholding Support or Time with the Children. Neither time with the children nor child support is to be withheld because of either parent's failure to comply with a court order. Only the court may enter sanctions for non-compliance. Children have a right both to support and, absent abuse or other safety concerns, time with the noncustodial parent, neither of which is dependent upon the other. In other words, no support does not mean the children will spend no time with the noncustodial parent, and no time with the noncustodial parent does not mean no support needs to be paid to the custodial parent. If there is a violation of either the parenting order or a support order, the exclusive remedy is to apply to the court for appropriate sanctions.

1.5. Adjustments in Parenting Plan. Although this is a specific schedule, the parents are expected to fairly modify the Parenting Plan when family necessities, illnesses, or commitments reasonably so require. The requesting parent must act in good faith and give as much notice as circumstances permit.

~~**1.6. Parent's Vacation with Children.** Unless otherwise specified in a court order or agreed upon by the parents, each parent is entitled to a vacation with the children for a reasonable period of time, usually equal. The custodial parent~~

~~should plan a vacation during the time when the other parent is not scheduled to spend time with the children. Parents are encouraged to coordinate vacation plans.~~

1.76. Insurance Forms. The parent who has medical insurance coverage on the children must supply to the other parent an insurance card and, as applicable, insurance forms and a list of insurer-approved or HMO-qualified health care providers in the area where the other parent is residing. Except in emergencies, the parent taking the children to a doctor, dentist, or other provider not so approved or qualified may be required to pay the additional cost thus created. However, when there is a change in insurance, which requires a change in medical care providers and a child has a chronic illness, thoughtful consideration should be given by the parents to what is more important, i.e., allowing the child to remain with the original provider or the economic consequences of changing carriers. When there is an obligation to pay medical expenses, the parent responsible for paying must be promptly furnished with the bill, and where applicable, the explanation of benefits, by the other parent. The parents must cooperate in submitting bills to the appropriate insurance carrier. Thereafter, the parent responsible for paying the balance of the bill must make arrangements directly with the health care provider and will inform the other parent of such arrangements unless previously paid by the other parent. Insurance refunds must be promptly turned over to the parent who paid the bill for which the refund was received.

1.87. Child Support Abatement. Unless a court order otherwise provides, child support will not abate during any period when the children are with the noncustodial parent. South Dakota law allows for child support abatements and offsets under certain circumstances. See generally SDCL 25-7. However, no abatement or offset may be taken unless there is a court order authorizing it.

1.98. Noncustodial Parent's Missed Time with the Children. When scheduled time with the children cannot occur due to events beyond either parent's control, such as illness of the parent exercising time with the children, then a mutually agreeable substituted date will be arranged, as quickly as possible. Each parent must timely advise the other parent when scheduled time with the children cannot be exercised. Missed time with the children must not be unreasonably accumulated.

1.109. Children of Different Ages. Except with very young children and adolescents, it usually makes sense for all the children to share the same schedule of parenting time with the noncustodial parent. Having brothers or sisters along can be an important support for children. Infants have special needs that may well prevent a parent from being with both the infant and the older children at the same time. Teenagers' special needs for peer involvement and for some control of their own lives may place them on different schedules from their younger brothers and sisters. Because it is intended that the noncustodial parent's time with the children be a shared experience between siblings and, unless these guidelines, a court order, or circumstances such as age, illness, or a particular event suggests otherwise, all the children should participate together in spending time with the noncustodial parent.

1.110. Communication with Children. Either parent may call, text, email, or Skype (or use similar technology) to communicate with the children at reasonable times and with reasonable frequency during those periods the children are with the other parent. The children may, of course, call, text, email, or Skype (or use similar technology) to communicate with either parent, at reasonable hours and with reasonable frequencies. Parents are cautioned that communication between the parent and the children should not be so excessive as to interfere with the other parent's time, nor used to undermine the other parent's authority. During long vacations, the parent with whom the children are on vacation is required to make the children available for telephone calls with the other parent at least every three days. At all other times, the parent the children are with must not refuse to answer the other parent's telephone calls or turn off the telephone in order to deny the other parent telephone contact. If a parent uses an answering machine or cell phone voicemail, messages left should be returned by a telephone call to that parent as soon as possible. Parents should agree on a specified time for calls to the children so that the children will be made available no less than three days per week. ~~A-Either parent may wish to provide an older a child with a cell phone to facilitate these communications.~~ In such instances, it is not appropriate for a parent to use restrictions from talking to the other parent on that cell phone as a means of punishing the child subject to a parent's ability to set reasonable restrictions on cell phone use while the child is present in that parent's home. Communication between a parent and child must not be censored, recorded, or monitored, absent a court

order. With older children, establishing an email account for communication with the other parent is recommended and should likewise not be read or monitored by the other parent without court permission. Email communication or text messaging between parents is also helpful in keeping the other parent informed about the children. Abuse, neglect, criminal activity, or protection orders may impact access to information regarding the custodial parent or the children.

1.1211. Other Contact. Parents have an unrestricted right to send cards, letters, packages, audio and video cassettes, CDs, or similar items, to their children. Children also have the same right to send items to their parents. Neither parent will interfere with this right. A parent may wish to provide the children with self-addressed, stamped envelopes for the children's use in corresponding with that parent.

1.12. Social Media. Parents shall be entitled to the username and passwords to all social media accounts of the minor children. Each parent shall have unfettered full access to the social media accounts of the minor children with the exception of private communications between the other parent and children.

1.13. Privacy of Residence. A parent may not enter the residence of the other parent except by express invitation of the resident parent, regardless of whether a parent retains a property interest in the residence. The children must be picked up at and returned to the front entrance of the other parent's residence. The parent dropping off the children must not leave until the children are safely inside the other parent's residence. Parents must refrain from surprise visits to the other parent's home. A parent's time with the children is his/her own, and the children's time with the other parent is equally private.

1.14. Parenting Time Refusal. Parents should always encourage the children to attend parenting time with the other parent absent circumstances outlined in 1.17. Parents shall not deny parenting time with the other parent solely based on the refusal of the children.

1.1415. Special Considerations for Adolescents. While children never get to choose where they live, within reason, the parents should honestly and fairly consider their teenager's wishes on time with a parent. Neither parent should attempt to pressure their teenager to make a decision on time with a parent

adverse to the other parent. Teenagers should explain the reasons for their wishes directly to the affected parent, without intervention by the other parent.

1.1516. Day Care Providers. When parents reside in the same community, they should use the same day care provider. To the extent feasible, the parents should rely on each other to care for the children when the other parent is unavailable.

1.1617. Special Circumstances:

- A. **Child Abuse.** When child abuse has been established and a continuing danger is shown to exist, all time with the abusive parent must cease or only be allowed under supervision, depending on the circumstances. Court intervention is usually required in child abuse cases.
- B. **Domestic Abuse.** Witnessing domestic abuse has long-term, emotionally detrimental effects on children. A person who loses control and acts impulsively with the other parent may be capable of doing so with children as well. Depending on the nature of the spousal abuse and when it occurred, the court may require an abusive parent to successfully complete appropriate counseling before being permitted unsupervised time with the children.
- C. **Substance Abuse.** Time with the children must not occur when a parent is abusing substances.
- D. **Long Interruption of Contact.** In those situations where the noncustodial parent has not had an ongoing relationship with the children for an extended period, time with the children should begin with brief parenting time and a gradual transition to the Parenting Plan in these guidelines.
- E. **Abduction Threats.** Noncustodial parents who have threatened to abduct or hide the children will have either no time with the children or only supervised time.
- F. **Breastfeeding Child.** Parents must be sensitive to the special needs of breastfeeding children. A child's basic sleep, feeding, and waking cycles should be maintained to limit disruption in the child's routine. Forcibly changing these routines due to the upheaval of parental disagreement is detrimental to the physical health and emotional well-

being of the child. On the other hand, it is important that the child be able to bond with both parents.

(a) For children being exclusively breastfed, the nursing child can still have frequent parenting time with the father. The amount of time will be dictated by the infant's feeding schedule, progressing to more time as the child grows older. Yet where both parents have been engaged in an ongoing caregiving routine with a nursing child, the same caregiving arrangement should be continued as much as possible to maintain stability for the child. If the father has been caring for the child overnight or for twenty-four hour periods while the nursing mother sleeps or works, then these guidelines encourage that arrangement to continue.

(b) A mother may not use breastfeeding as a means to deprive the father of time with the child. If, for example, a nursing mother uses day care or a babysitter for the child, the same accommodations (i.e., bottle feeding with breast milk or formula, or increased time between breast feeding sessions) used with the day care provider or babysitter will be used with the father, if the father is capable of personally providing the same caregiving.

G. **A Parent's New Relationship.** Parents should be sensitive to the danger of exposing the children too quickly to new relationships while they are still adjusting to the trauma of their parents' separation and/or divorce.

H. **Religious Holidays and Native American Ceremonies.** Parents must respect their children's needs to be raised in their faith and to maintain their cultural heritage and must cooperate with each other to achieve these goals. However, religious holidays and Native American ceremonies should not be used to unreasonably deprive the noncustodial parent of time with the children.

I. **Other.** The court will limit or deny time with the children to parents who show neglectful, impulsive, immoral,

criminal, assaultive, or other risk-taking behavior with or in the presence of the children.

1.18. Additional Time with the Noncustodial Parent. The children's time with the noncustodial parent should be liberal and flexible. For many parents, these guidelines should be considered only a minimum direction for interaction with the children. These guidelines are not meant to foreclose the parents from agreeing to modify the Parenting Plan as they find reasonable and in the best interests of their children at any given time.

GUIDELINE 2. NONCUSTODIAL PARENTING TIME WITH CHILDREN UNDER AGE FIVE

2.1. Children Under Age Five Generally. Newborns (birth to three months) and infants (three to six months) have a great need for continuous contact with their primary caregiver, but also frequent contact with both parents who provide a sense of security, nurturing, and predictability. Generally, overnights for a very young child is not recommended unless the noncustodial parent is very closely attached to the child and is able personally to provide primary care, the child is adaptable, and the parents are cooperative. Older children are able to tolerate more and longer separations from one parent or the other. The following guidelines for children under age five are designed to take into account childhood developmental milestones. Since children mature at different rates, these may need to be adjusted to fit a child's individual circumstances. These guidelines will not apply in those instances where the parents are truly sharing equally all the caregiving responsibilities for the children and the children are equally attached to both parents. In those situations where the custodial parent has been the primary caregiver and the noncustodial parent has maintained a continuous relationship with the children, but has not shared equally in child caregiving, the following guidelines generally apply.

2.2. Newborns - Birth ~~to~~ until Three Months. Three, two-hour custodial periods per week and one weekend custodial period for six hours at the custodial parent's residence or another agreed location. No overnights, except in circumstances described in 1.4617 F(a) and (b) (noncustodial parent caring for infant in accord with previous arrangements). Breastfeeding must be accommodated, but the parents must cooperate in working out alternatives. See Paragraph 1.4617 F (breastfeeding).

2.3. Infants - Three ~~to~~ until Six Months. Alternative Parenting Plans: (1) Three, three-hour custodial periods per week, ~~with and~~ one weekend day for six hours. Breast feeding must be accommodated, but the parents must cooperate in working out alternatives. Or (2) Three, three-hour custodial periods per week, ~~with and~~ one overnight on a weekend not to exceed for no longer than a twelve ~~eighteen~~-hours period, if the child is not breastfeeding and the noncustodial parent is capable of personally providing primary care. See exceptions in Paragraph 1. ~~1617~~ F (a) and (b) (breastfeeding).

2.4. Babies - Six ~~to~~ until Twelve Months. Alternative Parenting Plans: (1) Three, four-hour custodial periods per week ~~of up to four hours each with and~~ one weekend day for six hours; or (2) Three, four-hour custodial periods per week ~~of up to four hours each with and~~ one weekend day for six hours, ~~but with one~~ overnight on a weekend not to exceed ~~twelve~~ eighteen hours, if the child is not breastfeeding, and the noncustodial parent is capable of providing personal primary care; or (3) Child spends time in alternate homes, but spends significantly more time in one parent's home and no more than one to two overnights spaced regularly throughout the week at the other parent's home, if the child is not breastfeeding. As to arrangements (1), (2), and (3), see exceptions in Paragraph 1. ~~1617~~ F(a) and (b). Arrangement (3) ~~should be considered only for mature, requires~~ an adaptable children and cooperative parents.

2.5. Toddlers - Twelve ~~to~~ until Thirty-six Months. Alternative Parenting Plans: (1) Three, eight-hour custodial periods per week ~~of up to eight hours each on a predictable~~ schedule; or (2) Three, eight-hour custodial periods per week ~~of up to eight hours each on a predictable schedule in addition to~~ and one overnight per week not to exceed eighteen hours; or (3) Child spends time in alternate homes, but with significantly more time in one parent's home with one or two overnights spaced regularly throughout the week. Arrangement (3) requires an ~~adaptable child and cooperative parents.~~

2.6. Preschoolers - Three ~~to~~ until Five Years. Alternative Parenting Plans: (1) One overnight custodial period not to exceed eighteen hours and ~~one two~~ additional eight-hour parenting periods each week, separate from the overnight custodial period, midweek custodial period with the child returning to the custodial parent's home at least one hour before bedtime; or (2) Two or three nights at one home, spaced throughout the week, the remaining time at the other parent's

home. Arrangement (2) requires an adaptable child-and cooperative parents.

If parents cannot agree on which provision shall apply in sections 2.2 through 2.6, the parties shall use option 1 until further order of the court.

~~In addition, a vacation of no longer than two weeks with the noncustodial parent.~~

2.7. Children in Day Care. In families where a child has been in day care before the parental separation, the child may be able to tolerate more time with the noncustodial parent earlier because the child is more accustomed to separations from both parents. The noncustodial parent of a child under age five should not during his/her time place the child with a babysitter or day care provider. If the noncustodial parent cannot be with the child personally, the child should be returned to the custodial parent. Allowing the child to visit with relatives for short periods of time may be appropriate, if the relatives are not merely serving as babysitters. While a child is in day care, the noncustodial parent may remove the child to have parenting time, provided that suitable prior arrangements are made with both the custodial parent and the day care provider. This parenting time must also not jeopardize the provision of the day care by that provider. The noncustodial parent must be available to provide direct care and at least one day's notice is given to the custodial parent. The parent removing the child is either to take the child to the other parent at the regular pick up time, or see that the child is returned to day care prior to the pick up time. Parental responsibility for day care costs will remain the same.

2.8. ~~Holidays and Summer.~~ For toddlers and preschool-age children, when the parents celebrate the holiday in the same or a nearby community, the parents will alternate Easter, Memorial Day, 4th of July, Labor Day, Thanksgiving, Christmas Eve and Christmas Day each year so that the children spend equal time with each parent during this holiday period. Prior to a child's 5th birthday, holiday parenting time shall be consistent with the longest period of parenting time currently being exercised by the noncustodial parent starting on the day of the holiday. ~~Other major holidays should also be divided between the parents. With children ages three to five, a vacation of up to two weeks of uninterrupted time in the summer upon thirty days advance written notice (by mail, email, or text message) is reasonable. Parents are encouraged to coordinate vacation plans.~~

2.9. Mother's Day - Father's Day. The children shall be with their mother each Mother's Day and with their father each Father's Day. Prior to a child's 5th birthday, this parenting time shall be consistent with the longest period of parenting time currently being exercised by the noncustodial parent.

2.10. Vacation for Children Three until Five Years Old. Upon thirty days advance written notice (by mail, email, or text message), each parent is entitled to a vacation of up to two separate one-week periods of uninterrupted time with children each year, not to conflict with the other parent's holiday parenting time. Parents are encouraged to coordinate vacation plans.

GUIDELINE 3. NONCUSTODIAL PARENTING TIME FOR CHILDREN OVER AGE FIVE AND OLDER WHEN THERE IS SOLE CUSTODY OR PRIMARY PHYSICAL CUSTODY AND THE PARENTS RESIDE NO MORE THAN 200 MILES APART

3.1. Weekends. Parenting time will consist of alternate weekends from Friday at 5:30 p.m. to Sunday at 7:00 p.m., or an equivalent period of time if the noncustodial parent is unavailable on weekends and the children do not miss school. The starting and ending times may change to fit the parents' schedules. In addition, if time and distance allow, the noncustodial parent may spend time on a regular schedule with the children once or twice per week for two or three hours, or have one midweek overnight time. In most cases, it is a positive experience for the children to have the noncustodial parent involved in taking the children to and from school, and it is recommended that the noncustodial parent extend the alternating weekends by picking up the children from school on Friday and taking the children to school on Monday. All transportation for the midweek custodial periods is the responsibility of the parent exercising them.

3.2. Mother's Day - Father's Day. The children shall be with their mother each Mother's Day and with their father each Father's Day from 9:00 a.m. to 8:00 p.m. ~~Conflicts between these special days and regular parenting time will be resolved under Paragraph 1.9.~~

3.3. Summer Vacation. The children will be with each parent for one-half of the school summer vacation. Summer vacation begins the day after school is released and ends the day before

school commences. The custodial parent may elect to have the child the week before school resumes as part of their summer vacation to allow the child to be well prepared to recommence school. At the option of the noncustodial parent, the time may be consecutive or it may be split into two or more blocks of time. If the children go to summer school and it is impossible for the noncustodial parent to schedule this time other than during summer school, the noncustodial parent may elect to take the time when the children are in summer school and transport the children to the summer school sessions at the children's school or an equivalent summer school session in the noncustodial parent's community.

3.4. Winter (Christmas) Vacation. The children will spend with each parent one-half of the school winter vacation, a period that begins ~~the evening when~~ the children are released from school and continues to the morning evening of the day ~~before the children will return to school.~~ If the parents cannot agree on the division of this period, the noncustodial parent will have the first half in even-numbered years. If there are an odd number of days during winter vacation, the noncustodial parent shall get the extra day. Holidays, such as Christmas, are extremely important times of shared enjoyment, family tradition, and meaning. Families living in the same or nearby communities must work out ways for the children to spend part of each important holiday at both homes. If the parents are unable to work out a shared arrangement for the Christmas/New Year holiday and they celebrate the holidays in the same or a nearby community, in those years when Christmas does not fall in a parent's week, the children will be with the other parent from 11:00 a.m. to 8:00 p.m. on Christmas Day.

3.5. ~~Holidays Weekends.~~ Parents will alternate the following holidays weekends so long as they are observed by the child's school district: Martin Luther King, Jr. Day; President's Day; Easter; Memorial Day; the 4th of July; Labor Day; Native Americans' Day; Halloween; and Thanksgiving. Thanksgiving will begin on Wednesday evening and end on Sunday evening; Easter weekend will begin on Thursday evening and end on Sunday evening; Martin Luther King Jr. Day, President's Day, and Native Americans' Day weekends will begin on the preceding Friday evening and end on Monday evening; the 4th of July will begin the evening of July 3 at 5:00 p.m. and end the morning of July 5 at 10:00 a.m.; Halloween will begin at 3:00 p.m. and end at 8:00 p.m. Unless otherwise specified, holiday weekends begin ~~at 5:30~~

~~p.m. when the children are released from school and continues to the morning of the day the children are returned to school. and end at 7:00 p.m. on the designated days. The noncustodial parent will have Memorial Day weekend and the custodial parent will have Labor Day weekend.~~

3.6. Children's Birthdays. As with holidays, a child's birthday will be alternated annually between the parents. If a child's birthday falls on a weekday, it will be celebrated from 3:00 p.m. to 8:00 p.m. If a child's birthday falls on a weekend, it will be celebrated ~~with the noncustodial parent~~ from 11:00 a.m. to 8:00 p.m. ~~(or so much of the period as the noncustodial parent elects to use).~~ In some instances, the parents may agree to share the child's birthday, with each parent spending a few hours with the child.

3.7. Parent's Birthdays. The children will spend the day with the parent on the parent's birthday, unless it interferes with the other parent's scheduled time during a vacation or a major holiday. If a parent's birthday falls on a holiday, that parent may elect to exercise parenting time on another day during that month, upon sufficient advance notice to the other parent.

3.8. Conflicts Between Regular and Holiday Weekends. When there is a conflict between a holiday weekend and the regularly scheduled weekend time with the parent, the holiday takes precedence. Unless mutually agreed, there will be no makeup parenting time in conflicts between holiday weekend and the regularly scheduled weekend time.

3.9. Parenting Time Before and During Summer Periods. The custodial parent will have the weekend before the beginning and the weekend after the end of the noncustodial parent's summer period, regardless of whose weekend it may be. Weekend time "missed" during the summer period will not be "made up." During the noncustodial parent's extended summer time with the children of more than three consecutive weeks, it will be the noncustodial parent's duty to arrange for a mutually convenient 48-hour continuous period of time for the custodial parent to spend with the children, unless impractical because of distance.

3.10. Parent's Vacation with Children Age Five and Older. Unless otherwise specified in a court order or agreed upon by the parents, each parent is entitled to a vacation with the children for a reasonable period of time, usually equal. The custodial parent should plan a vacation during the time when the

other parent is not scheduled to spend time with the children. Parents are encouraged to coordinate vacation plans.

3.1011. Notice of Canceled Time with the Children. Whenever possible, the noncustodial parent will give a minimum of three days notice of intent not to exercise all or part of the scheduled time with the children. When such notice is not reasonably possible, the maximum notice permitted by the circumstances, and the explanation, will be provided to the other parent. Custodial parents will give the same type of notice when events beyond their control make the cancellation or modification of the scheduled time with the noncustodial parent necessary. If the custodial parent cancels or modifies the noncustodial parent's time with the children because the children have a scheduling conflict, the noncustodial parent will be given the opportunity to take the children to the scheduled event or appointment.

3.1112. Pick Up and Return of Children. When the parents live in the same community, the responsibility for picking up and returning the children will be shared. Usually the parent who receives the children will handle the transportation. The person picking up or returning the children has an obligation to be punctual, to arrive at the agreed-upon time, not substantially earlier or later. Repeated, unjustified violations of this provision may subject the offender to court sanctions.

~~**3.12. Additional Time with the Noncustodial Parent.** The children's time with the noncustodial parent should be liberal and flexible. For many parents, these guidelines should be considered only a minimum direction for interaction with the children. These guidelines are not meant to foreclose the parents from agreeing to modify the Parenting Plan as they find reasonable and in the best interests of their children at any given time.~~

GUIDELINE 4. NONCUSTODIAL PARENTING TIME WITH CHILDREN OVER AGE FIVE AND OLDER WHEN PARENTS RESIDE MORE THAN 200 MILES APART

~~**4.1. Summer and Holidays.** This parenting time will consist of all but three weeks of the school summer vacation period. It is recommended that the time start one week after school is out and end two weeks before school begins so that the child will be well prepared to recommence school. In addition, w Where~~

distance and finances permit, on an alternating basis, the Thanksgiving break, school winter (Christmas) break, and spring break will be with the noncustodial parent.

4.2. Summers. This parenting time will consist of all but 10 days of the school summer vacation period beginning three days after school is released and ending one week before school recommences so the children will be well prepared to recommence school.

4.23. Priority of Summer Time with Noncustodial Parent. Summer time with the noncustodial parent takes precedence over summer activities (such as sports) when the noncustodial parent's time cannot be reasonably scheduled around such events. Even so, the conscientious noncustodial parent will often be able to enroll the child in a similar activity in the noncustodial parent's community.

4.34. Notice. At least sixty (60) days written notice (by mail, email, or text message) must be given by the noncustodial parent of the date for commencing extended summer parenting time with the children so that the most efficient means of transportation may be obtained and the parents and the children may arrange their schedules. Failure to give the precise number of days notice does not entitle the custodial parent the right to deny the noncustodial parent parenting time with the children.

4.45. Additional Time with the Noncustodial Parent. Where distance and finances permit, additional parenting time for the noncustodial parent, such as holiday weekends or special events, is encouraged. When the noncustodial parent is in the area where the children reside, or the children are in the area where the noncustodial parent resides, liberal time with the children must be allowed and because the noncustodial parent does not get weekly time with the children, the children can miss some school to spend time with the noncustodial parent, so long as it does not substantially impair the children's scholastic progress.

GUIDELINE 5. SHARED PARENTING PLAN

5.1. Shared Parenting Plan. South Dakota law allows parents to agree in writing to a detailed Shared Parenting Plan, which provides that the children will reside no less than one hundred eighty nights per calendar year in each parent's home, and that the parents will share the duties and responsibilities of

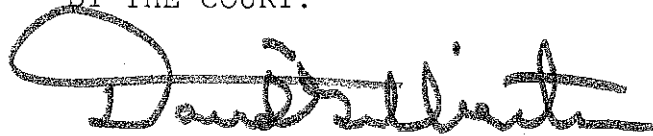
parenting the children and the expenses of the children in proportion to their incomes. Such Shared Parenting Plan must be incorporated into the custody order. SDCL 25-7-6.27. A Shared Parenting Plan requires adaptable children and cooperative parents.

5.2. Factors for Shared Parenting. SDCL 25-4A-24 sets forth the factors the court considers in granting shared parenting.

IT IS FURTHER ORDERED that this rule shall become effective July 1, 2020.

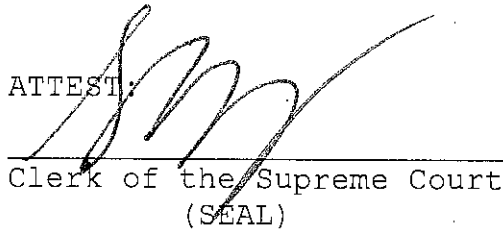
DATED at Pierre, South Dakota, this 2nd day of April, 2020.

BY THE COURT:



David Gilbertson, Chief Justice

ATTEST:


Clerk of the Supreme Court
(SEAL)

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED

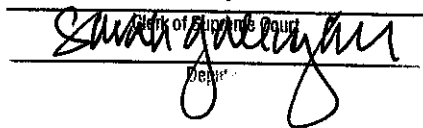
APR 02 2020


Clerk

STATE OF SOUTH DAKOTA
In the Supreme Court

I, Shirley A. Jameson-Fergel, Clerk of the Supreme Court of South Dakota, hereby certify that the within instrument is a true and correct copy of the original thereof as the same appears on record in my office. In witness whereof, I have hereunto set my hand and affixed the seal of said court at Pierre, S.D. this

2 day of April, 2020


Clerk of the Supreme Court

Bill Watch

House Bills

HB 1001	*HB 1117
*HB 1002	*HB 1119
HB 1003	HB 1121
HB 1004	HB 1122
*HB 1010	*HB 1123
*HB 1011	HB 1128
HB 1012	HB 1133
HB 1013	HB 1139
*HB 1014	*HB 1140
*HB 1053	HB 1146
*HB 1067	HB 1147
*HB 1068	HB 1148
HB 1072	HB 1149
*HB 1074	HB 1155
*HB 1086	HB 1158
HB 1087	HB 1167
*HB 1088	HB 1168
*HB 1089	*HB 1178
*HB 1090	*HB 1179
HB 1092	HB 1196
HB 1096	*HB 1205
HB 1107	*HB 1207
*HB 1108	HB 1215
*HB 1109	HB 1238
*HB 1113	
*HB 1114	

Senate Bills

SB 3	SB 79
SB 6	*SB 80
SB 7	*SB 89
*SB 26	SB 95
*SB 27	*SB 96
*SB 44	SB 104
*SB 46	SB 108
*SB 47	SB 114
SB 51	SB 115
SB 63	SB 121
SB 64	SB 138
*SB 65	SB 145
*SB 71	*SB 148
*SB 73	
SB 78	

Bills that are Struck Through have been killed in some manner.

** Signed by Governor*

Highlights:

• The following bills that the State Bar supported have now been signed by the Governor:

- SB 148 (adopt the Uniform Power of Attorney Act);
- HB 1179 (authorize series LLC’s); and
- HB 1205 (revise provisions regarding the custodial parent relocating a minor child)

• The Governor’s veto of HB’s 1012 and HB 1013 was upheld. As a result, the cross reference error addressed in section 6 of the bill will not be corrected.

HOUSE BILLS

HB 1001 An Act to repeal certain provisions regarding the organization of the Legislature.

Sponsor: Representative Haugaard and Senator Greenfield
Summary: Repeals certain provisions regarding the organization of the Legislature including the requirement for the legislature to meet at the seat of government on the second Tuesday of January at noon; elective officers of each chamber; Tie vote for organizing House of Representatives; appointment of legislative employees by presiding officers; assignment of interns; and administration of intern program.

State Bar Position: Monitor

Status: Passed House State Affairs Committee (9-4) on January 24; passed House of Representatives (42-26) on January 27; deferred to 41st legislative day by Senate State Affairs Committee (9-0) on March 4.

HB 1002 An Act to revise certain provisions regarding documents of the Legislature.

Sponsor: Representative Haugaard and Senator Greenfield
Summary: Language is added to SDCL 2-7-5 to include “prefiled” bills, as well as foregoing the need to deliver copies to the printing contractor for pre-session printing, and the “electronic” delivery of the bill; the bill goes on to repeal numerous statutes that relate to contracts covering printing of bills, time of delivery of journals, time allowed of printing of bills, and fees for copies of bills.

State Bar Position: Monitor

Status: Signed by the Governor on March 20.

HB 1003 An Act to repeal certain provisions regarding legislative employees.

Sponsor: Representative Haugaard and Senator Greenfield

Summary: Repeals SDCL 2-5-8 and SDCL 2-5-9 to be consistent with parts of HB 1001 relating to those elective officer positions.

State Bar Position: Monitor

Status: Passed House State Affairs Committee (8-4) on January 24; passed House of Representatives (55-13) on January 27; tabled in Senate State Affairs Committee (9-0) on March 4.

HB 1004 An Act to provide for the defense of laws by the Legislature.

Sponsor: Representative Haugaard and Senator Langer

Summary: This bill would allow the Legislature to defend any law, or intervene in the defense of any law, in any civil action or proceeding in which the state is an interested party; Bill further outlines and describes employment of legal counsel by the legislature in such an instance.

State Bar Position: Monitor

Status: Passed House State Affairs Committee as amended (12-1) on February 19; passed House of Representatives (52-15) on February 25; deferred to 41st legislative day in Senate State Affairs Committee (6-3) on March 4.

HB 1010 An Act to revise provisions regarding testimony of qualified mental health professionals at involuntary commitment hearings

Sponsor: Representative Johns and Senator Kennedy at the request of the Reduce the Overall use of Acute Mental Health Hospitalizations Task Force

Summary: The bill adds clarifying language to SDCL 27A-10-9 to make it clear that the board of mental illness conducting the involuntary commitment hearing shall order testimony by a qualified mental health professional other than the professional who submitted the petition.

State Bar Position: Monitor

Status: Signed by the Governor on February 19.

HB 1011 An Act to require certain examinations of persons awaiting involuntary commitment hearings

Sponsor: Representative Healy and Senator Sutton at the request of the Reduce the Overall Use of Acute Mental Health Hospitalizations Task Force

Summary: The bill mandates that a qualified mental health professional that is not the same professional who brought the petition shall perform an examination for each twenty-four-hour period during which the person is detained.

State Bar Position: Monitor

Status: Signed by the Governor on March 4.

HB 1012 An Act to correct technical errors in the statutory cross-references

Sponsor: The Committee on Judiciary at the request of the Code Commission

Summary: This 94-page bill corrects technical errors in the statutory cross-references by deleting and adding various references to statutes.

State Bar Position: Monitor

Status: Governor's veto upheld on March 30.

HB 1013 An Act to correct technical errors in statutory cross-references

Sponsor: The Committee on Judiciary at the Request of the Code Commission

Summary: This 15-page bill further corrects technical errors in the statutory cross-references by deleting and adding various references to statutes.

State Bar Position: Monitor

Status: Governor's veto upheld on March 30.

HB 1014 An Act to place certain substances on the controlled substances schedule and to declare an emergency

Sponsor: The Committee on Health and Human Services at the request of the Department of Health

Summary: This bill makes the following additions to controlled substances: Diphenidine and Ephedrine in Opium Schedule I; Noroxymorphone to Opium Schedule II; and Solriamfetol and Brexanolone to Opium Schedule IV.

State Bar Position: Monitor

Status: Signed by the Governor on March 9.

HB 1053 An Act to revise certain provisions regarding the submission process for ballot measures

Sponsor: The Committee on Local Government at the request of the Office of the Secretary of State

Summary: This bill adds language to require that each version of the initiated measure or initiated amendment be submitted to the director of the LRC for review rather than the current law which is the most recent/current version.

State Bar Position: Monitor

Status: Signed by the Governor on February 19.

HB 1067 An Act to modify certain provisions regarding notice, service, and execution of judgments

Sponsor: Representative Reed and Senator Ernie Otten

Summary: This bill allows a plaintiff to initiate service by publication on the same day as the first attempt at service under SDCL 21-16-6 without prior approval from the court. This bill also requires a sheriff or constable of the county to attempt to serve the lessee, subtenant, or party in possession with a minimum of four service attempts, six hours apart and within thirty days.

State Bar Position: Monitor

Status: Signed by the Governor on March 24.

HB 1068 An Act to include out-of-state convictions for the basis of an enhanced penalty for the crime of stalking

Sponsor: Representative Hansen and Senator Kolbeck

Summary: This bill adds language to allow a person's past conviction of stalking in another state to be used to determine if the violation being charged in SD is a second or subsequent offense.

State Bar Position: Monitor

Status: Signed by the Governor on March 18.

HB 1072 An Act to place certain substances on the controlled substances schedule

Sponsor: Representative Perry and Senator Novstrup

Summary: This bill adds 7-hydroxymitragynine, Mitragynine, and Mitragynine pseudoindoxyl to Schedule I substances schedule.

State Bar Position: Monitor

Status: Deferred to 41st legislative day by House Health and Human Services Committee (12-0) on February 20.

HB 1074 An Act to revise certain provisions regarding the required time that sexual assault kits be preserved

Sponsor: Representative Reed and Senator Soholt

Summary: This bill amends law to increase the time period of preserving sexual assault kits from one year to seven years or until the victim reaches the age of twenty-five, whichever is later.

State Bar Position: Monitor

Status: Signed by the Governor on February 27.

HB 1086 An Act to repeal certain fees charged by a clerk of courts

Sponsor: The Committee on Judiciary at the request of the Chief Justice

Summary: This bill repeals the following fees charged by a clerk of courts: For a facsimile or electronic mail transmission of any opinion, record, or paper from an active or inactive file in the clerk's custody; Petition for protection orders and Ex parte temporary orders.

State Bar Position: Monitor

Status: Signed by the Governor on February 27.

HB 1087 An Act to authorize a clerk of courts to provide certain notices by electronic mail

Sponsor: The committee on Judiciary at the request of the Chief Justice

Summary: This bill would allow the clerk to provide notice of sale or destruction of exhibits if not collected within thirty days by electronic mail if the electronic mail address is designated for service, or by first-class mail, if an electronic mail address is not designated.

State Bar Position: Monitor

Status: Tabled by House Judiciary Committee (11-0) on February 10.

HB 1088 An Act to create a penalty for violation of a vulnerable adult protection order

Sponsor: The Committee on Judiciary at the request of the Chief Justice

Summary: This bill adds new law to make a violation of a vulnerable adult protection order a Class 1 misdemeanor; This bill also states that if the violation is an assault then it is a Class 6 felony.

State Bar Position: Monitor

Status: Signed by the Governor on March 24.

HB 1089 An Act to provide for the discharge of certain persons who received a suspended imposition of sentence for a misdemeanor

Sponsor: The Committee on Judiciary at the request of the Chief Justice

Summary: This bill states that discharge and dismissal may occur only once with respect to any person for a suspended imposition of sentence under a felony and only once with respect to any person for a suspended imposition of sentence under a misdemeanor.

State Bar Position: Monitor

Status: Signed by the Governor on March 18.

HB 1090 An Act to make an appropriation to evaluate the feasibility of the use of telehealth services within the criminal justice system and to declare an emergency

Sponsor: The Committee on Judiciary at the request of the Chief Justice

Summary: This bill appropriates \$418,000 from fund expenditure authority from donations and other external sources to the Unified Judicial System for the purposes of evaluating the feasibility of the use of telehealth services within the criminal justice system to include the use of telehealth for mental health assessments and services.

State Bar Position: Monitor

Status: Signed by the Governor on March 18.

HB 1092 An act to establish immunity from liability for injuries to or the death of a person engaged in off-road vehicle activity under certain circumstances

Sponsor: Representative Goodwin and Senator Otten

Summary: See title.

State Bar Position: Monitor

Status: Passed both chambers; delivered to the Governor on March 11.

HB 1096 Title Amendment An Act to prohibit commercial surrogacy contracts, provide a penalty for facilitating a commercial surrogacy, and establish an interim committee to evaluate surrogacy in the state.

Sponsor: Representative Hansen and Senator Novstrup

Summary: This bill prohibits any broker to knowingly engage in, advertise services for, or offer payments of money or other consideration for, profit from, or solicit a woman to assist or participate in commercial surrogacy. Said broker is guilty of a Class 1 misdemeanor. A new section was added on the House floor to establish an interim legislative committee to study surrogacy. The study is under the supervision of the Executive Board and LRC and staffed and funded as an interim legislative committee.

State Bar Position: Monitor

Status: Deferred to 41st legislative day by Senate Health and Human Services Committee (4-3) on February 26.

HB 1107 Title Amendment An Act to define style and form and authorize the code ~~counsel~~ commission to make certain style and form edits to legislative acts

Sponsor: Representative Johns and Senator Kennedy

Summary: This bill amends the law to allow necessary style and form edits to legislative acts, without altering legislative meaning or effect. The bar was successful in amending the bill in committee so that the code commission and not just code counsel is authorized to make such style and form changes.

State Bar Position: Oppose

Status: Passed House Judiciary Committee (11-1) on February 10; passed House of Representatives (62-0) on February 12; passed Senate State Affairs Committee (9-0) on March 2; failed Senate (6-28) on March 5.

HB 1108 An Act to adopt the Uniform Civil remedies for Unauthorized Disclosure of Intimate Images Act

Sponsor: Representative Johns and Senator Schoenbeck

Summary: See title above.

State Bar Position: Monitor

Status: Signed by the Governor on March 23.

HB 1109 An Act to revise the Uniform Limited Liability Company Act

Sponsor: Representative Johns and Senator Rusch

Summary: This bill amends the existing law to repeal liability in SDCL 47-34A-303(c) and to state that a member or manager is not personally liable, directly or indirectly, by way of contribution or otherwise.

State Bar Position: Monitor

Status: Signed by the Governor on March 4.

HB 1113 An Act to provide for remote participation in a shareholders' meeting

Sponsor: Representative Rounds and Senator Kennedy

Summary: This bill adds new law to allow the remote participation in a shareholders' meeting.

State Bar Position: Support

Status: Signed by the Governor on March 4.

HB 1114 An Act to authorize additional abbreviations in naming corporations, limited liability companies, and limited liability partnerships

Sponsor: Representative Rounds and Senator Kennedy

Summary: This bill amends law to allow the following abbreviations: "PC"; "Prof. LLC", "P.L.L.C." or "PLLC".

State Bar Position: Support

Status: Signed by the Governor on March 4.

HB 1117 An Act to repeal and revise certain provisions regarding riot, to establish the crime of incitement to riot, and to revise provisions regarding civil liability for riot and riot boosting

Sponsor: The Committee on State Affairs at the request of the Office of the Governor

Summary: This bill repeals numerous riot statutes such as SDCL 22-10-6 and SDCL 22-10-6.1; This bill also adds new law that states the incitement to riot is a felony.

State Bar Position: Monitor

Status: Signed by the Governor on March 23.

HB 1119 An Act to include certain offenses committed in another state for purposes of an enhanced penalty

Sponsor: Representative Barthel and Senator Schoenbeck

Summary: This bill allows crimes committed in other states such as simple assault, aggravated assault, and intentional contact with bodily fluids, to be used for enhancement purposes if the violation to be charged is a third or subsequent offense.

State Bar Position: Monitor

Status: Signed by the Governor on March 18.

HB 1121 An Act to establish immunity from liability for the inherent risk of camping

Sponsor: Representative Goodwin and Senator Phil Jensen

Summary: This bill adds a new law to provide immunity to a private campground, an owner or operator of a private campground, and any employee or officer of a private campground for acts or omissions related to camping at a private campground if a person is injured or killed, or property is damaged as a result of an inherent risk of camping; This bill does provide a few exceptions.

State Bar Position: Monitor

Status: Deferred to 41st legislative day by House Judiciary Committee (10-1) on February 24.

HB 1122 An Act to require child abuse or neglect investigations upon the filing of truancy complaints

Sponsor: Representative Cwach and Senator Kennedy

Summary: This bill amends existing law to require child abuse or neglect investigations upon the filing of truancy complaints.

State Bar Position: Monitor

Status: Deferred to the 41st legislative day by House Judiciary Committee (11-1) on February 12.

HB 1123 An Act to ~~provide for the termination of a lease by a victim of alleged domestic abuse~~ revise provisions regarding termination of a lease by a victim of alleged domestic abuse.

Sponsor: Representative Diedrich and Senator Castleberry

Summary: This bill adds a new section of law to states that a lease governing residential property may not include any term that authorizes the eviction of a tenant who calls or otherwise seeks assistance from law enforcement or other emergency responders because of an alleged incident of domestic abuse, unlawful sexual behavior, or stalking.

State Bar Position: Monitor

Status: Signed by the Governor on March 24.

HB 1128 An Act to modify the penalty for causing a child to be present during methamphetamine use, distribution, or manufacture

Sponsor: Representative Reed and Senator Schoenbeck

Summary: This bill amends existing law by adding language to state that it is a Class 4 felony for any person to knowingly cause a child under the age of fourteen years to be present where any person is using, distributing, or manufacturing methamphetamine; This bill further amends existing law to clarify a child of fourteen years or old when stating it is a Class 1 misdemeanor for any person using or distributing with a child present.

State Bar Position: Monitor

Status: Deferred to 41st legislative day by House Judiciary Committee (10-2) on February 26.

HB 1133 An act to provide a rebuttable presumption in favor of joint physical custody of a minor child

Sponsor: Representative St. John

Summary: This bill would change the law to provide that in initial determinations regarding cases involving physical custody of a minor child there is a rebuttable presumption that equal or approximately equal time spent between the child and each parent is in the best interest of the minor child.

State Bar Position: Monitor

Status: Failed House Health and Human Services Committee (6-6) on February 13; passed Health and Human Services Committee (8-5) on February 18; passed House of Representatives (41-25) on February 20; deferred to the 41st legislative day (5-2) on March 5.

HB 1139 An Act to require the payment of attorney's fees in cases addressing noncompliance with visitation orders

Sponsor: Representative Pischke and Senator Phil Jensen

Summary: This bill amends existing law to state that if a court finds that any party has willfully violated or willfully failed to comply with any provision of a custody decree, the court may require the offender to pay, to the other party, court costs and reasonable attorney's fees incurred as a result of the noncompliance.

State Bar Position: Monitor

Status: Deferred to 41st legislative day by House Judiciary Committee (9-3) on February 21.

HB 1140 An Act to provide for a regular review of parenting guidelines

Sponsor: Representative Pischke and Senator Bolin

Summary: This bill was amended in committee per an agreement between the prime sponsor and the Unified Judicial System. The amended bill provides that "The Supreme Court shall establish rules pursuant to § 16-3-1 to provide for a public hearing process to review the standard guidelines and to recommend any amendments deemed to be necessary."

State Bar Position: Monitor

Status: Signed by the Governor on March 24.

HB 1146 An Act to exclude second job income from child support obligations

Sponsor: Representative Pischke and Senator Monroe

Summary: This bill eliminates the rebuttable presumption that a second job is included in child support obligations.

State Bar Position: Oppose

Status: Deferred to 41st legislative day by House Judiciary Committee (11-1) on February 24.

HB 1147 An Act to recalculate abatement of the basic child support obligation

Sponsor: Representative Pischke

Summary: This bill amends law to provide seven factors that must be met for the court to grant an abatement of the basic child support obligation.

State Bar Position: Oppose

Status: Deferred to 41st legislative day by House Judiciary Committee (8-5) on February 24.

HB 1148 An Act to provide for protection orders

Sponsor: Representative Pische

Summary: This bill amends the existing Protection Order statutes by requiring that a police report be filed with the Petition; This bill also requires the attorney general to prepare the forms for the petitioner to use in the proceedings.

State Bar Position: Monitor

Status: Withdrawn at the Request of the Prime Sponsor on February 21.

HB 1149 An Act to establish qualifications for child custody evaluators

Sponsor: Representative Pischke and Senator Phil Jensen

Summary: This bill amends existing law to list the different professionals that can be used in home study or custody evaluations.

State Bar Position: Monitor

Status: Deferred to 41st legislative day by House Judiciary Committee (10-2) on February 21.

HB 1155 An Act to except certain retirements funds from division of property in a divorce

Sponsor: Representative Frye-Mueller and Senator Ewing

Summary: This bill would exclude any retirement funds that were acquired before the marriage and held individually during the marriage in a fund or account exempt from taxation as it relates to equitable division of property.

State Bar Position: Oppose

Status: Deferred to 41st legislative day by House Judiciary Committee (10-3) on February 19.

HB 1158 An Act to remove irreconcilable differences as a cause for divorce

Sponsor: Representative Randolph and Senator Brock Greenfield

Summary: Removes irreconcilable differences as grounds for a divorce and conviction of a felony but replaces it with a criminal conviction resulting in incarceration.

State Bar Position: Oppose

Status: Deferred to 41st legislative day by House Judiciary Committee (10-3) on February 19.

HB 1167 An Act to revise provisions regarding confidential communications between a student and certain school employees

Sponsor: Representative Chris Johnson and Sue Peterson

Summary: This bill adds a new section of law to allow for the disclosure between communications of a student and counselor with written permission by the parent; This bill also allows the communication if the school counselor has reason to suspect the student may have been subjected to child abuse by that parent or legal guardian.

State Bar Position: Oppose

Status: Passed House Education Committee as amended (8-6) on February 19; failed House of Representatives as amended (30-37) on February 24; failed reconsideration on February 25.

HB 1168 An Act to revise tenant and landlord rights

Sponsor: Representative Mulally and Senator Phil Jensen

Summary: This bill amends numerous aspects of landlord tenant law including the violation of a material term of the written lease agreement between lessor and lessee as grounds for action; This bill further allows stay for execution for defendant for possession of a reasonable period, not to exceed five days.

State Bar Position: Monitor

Status: Tabled in House Judiciary Committee (13-0) on February 19.

HB 1178 An Act to revise the seller’s property condition disclosure statement

Sponsor: Representative Chase

Summary: This bill completely overhauls the property disclosure statement.

State Bar Position: Monitor

Status: Signed by the Governor on March 11.

HB 1179 An Act to authorize series limited liability companies

Sponsor: Representative Hansen

Summary: This bill adds new law that states an operating agreement may establish or provide for the establishment of a series of members, manages, or limited liability company interests having separate rights, powers, or duties with respect to a specified property or obligations of the limited liability company or profits and losses associated with specified property or obligations

State Bar Position: Support

Status: Signed by the Governor on March 23.

HB 1196 An Act to authorize the revival of certain civil claims

Sponsor: Representative Bordeaux

Summary: This bill adds a new section of law to state that any action for damages resulting from childhood sexual abuse that is barred because the applicable statute of limitations had expired is revived until July 1, 2022.

State Bar Position: Monitor

Status: Deferred to 41st legislative day by House Judiciary Committee (9-4) on February 24.

HB 1205 An Act to revise provisions regarding a custodial parent relocating a minor child

Sponsor: Representative Johns and Senator Rusch

Summary: This bill provides that if an objection to the relocation is filed, the court shall consider the traditional best interest of the child factors when determining a proposed relocation that would result in a substantial alteration to the existing parenting time arrangement.

State Bar’s Position: Support

Status: Signed by the Governor on March 24.

HB 1207 An Act to extend the termination date for the Juvenile Justice Public Safety Oversight Council

Sponsor: Representatives Jensen (Kevin), Chase, Diedrich, Duvall, Peterson (Sue), and Wiese and Senators Steinhauer, Bolin, Kennedy, Nesiba, Rusch, Soholt, and Stalzer

Summary: This bill would extend the work of the Juvenile Justice Oversight Council from 5 to 8 years.

State Bar’s Position: Monitor

Status: Signed by the Governor on March 18.

HB 1215 An act to prohibit the state from endorsing or enforcing certain policies regarding domestic relations

Sponsor: Representative Randolph

Summary: This bill creates new law to prevent the state from enforcing, endorsing, or favor 11 different policies, including permitting any form of marriage that does not involve a man and a woman.

State Bar's Position: Monitor

Status: Withdrawn at the Request of the Prime Sponsor.

HB 1238 An Act to permit the modification of the term of a perpetual conservation easement after the death of the grantor

Sponsor: Representative McCleerey and Senator Heinert

Summary: This bill amends law to state that the conservation easement shall be established by the parties to the easement, but if the term is perpetual, a person receiving a fee simple interest in the real property burdened by the easement may unilaterally modify the term of the easement after the death of the person who granted the easement.

State Bar's Position: Oppose

Status: Passed House Agriculture and Natural Resources Committee (8-5) on February 25; failed House of Representatives (27-38) on February 27.

SENATE BILLS

SB 3 An Act to revise certain provisions regarding documents of the Legislature

Sponsor: Senator Brock Greenfield and Representative Haugaard

Summary: This bill amends language impacting the documents of the legislature; This bill allows a bill or joint resolution to be introduced by any committee of either house of the legislature and that the committee must receive a written request for the introduction from the Governor or department head; This bill further repeals numerous statutes pertaining to documents such as journals as office record of proceedings, engrossment of bills and amendments, and enrollment of bill after passage by both houses.

State Bar Position: Monitor

Status: Tabled in Senate State Affairs Committee (8-0) on February 26.

SB 6 An Act to revise certain conditions under which presumptive probation may be applied

Sponsor: The Committee on Judiciary at the request of the Office of the Attorney General

Summary: This bill adds language to make it aggravating circumstance if the court determines the person failed to cooperate with law enforcement in an ongoing investigation.

State Bar Position: Monitor

Status: Passed Senate Judiciary Committee (5-2) on February 20; passed Senate (19-16) on February 25; deferred to 41st legislative day by House Judiciary Committee (8-5) on March 4.

SB 7 An Act to revise the eligibility for presumptive probation

Sponsor: The Committee on Judiciary at the request of the Office of the Attorney General

Summary: This bill adds language and a new section stating that a person is entitled to presumptive probation for two offenses within a ten-year period. The bill goes on to say that no previous conviction or plea of guilty occurring more than ten years prior to the date of the violation being charged may be used to determine that the violation being charged is a second, third, or subsequent offense.

State Bar Position: Monitor

Status: Tabled in Senate Judiciary Committee (5-0) on February 25.

SB 26 An Act to increase the assessment of liquidated court costs and to revise the disposition of the funds collected

Sponsor: The Committee on Judiciary at the request of the Office of the Attorney General

Summary: This bill increases the assessment of liquidated court costs from \$40 to \$50; This bill then increases the disposition of such funds to the respectively listed funds.

State Bar Position: Monitor

Status: Signed by the Governor on March 18.

SB 27 An Act to establish a missing persons clearinghouse

Sponsor: The Committee on Judiciary at the request of the Office of the Attorney General

Summary: This bill establishes a missing persons clearinghouse which shall be used by all law enforcement agencies in the state as a central repository for information on missing persons.

State Bar Position: Monitor

Status: Signed by the Governor on March 18.

SB 44 An Act to authorize the use of crime victims' compensation funds to reimburse law enforcement for certain emergency expenses incurred for victims

Sponsor: The Committee on Judiciary at the request of the Dept of Public Safety

Summary: The fund may be used if the law enforcement officer reasonably believes the person was the victim of a crime and no other services were reasonably available for the victim at the time.

State Bar Position: Monitor

Status: Signed by the Governor on March 18.

SB 46 An Act to revise provisions related to the restoration of competency of criminal defendants

Sponsor: The Committee on Health and Human Services at the request of the Dept of Social Services

Summary: This bill allows defendants to be placed into a treatment program under the direction of an approved facility or for the defendant to be placed on outpatient status for treatment if the defendant is not considered to be a danger to the health and safety of others.

State Bar Position: Monitor

Status: Signed by the Governor on March 18.

SB 47 An Act to revise certain provisions regarding sex offender registration statutes

Sponsor: The Committee on Judiciary at the request of the Office of the Attorney General

Summary: This bill amends the definition of a sex crime to include the felony use or dissemination of visual recording or photographic device without consent and with intent to self-gratify, harass, or embarrass.

State Bar Position: Monitor

Status: Signed by the Governor on March 18.

SB 51 An Act to authorize the possession of a concealed pistol by employees in county courthouses

Sponsor: Senator Russell and Representative Goodwin

Summary: This bill allows the possession of a firearm or other dangerous weapon in a county courthouse by any person who is employed by the county and assigned to work in the county courthouse.

State Bar Position: Monitor

Status: Scheduled for hearing in Senate Judiciary Committee on January 28; motions made to amend; tabled in Senate Judiciary Committee (7-0) on February 4.

SB 63 An Act to establish certain provisions regarding pore spaces

Sponsor: Senator Maher

Summary: This bill defines pore space and states that title to any pore space in all strata underlying the surface of land and water is vested in the owner of the overlying surface ground.

State Bar Position: Monitor

Status: Failed Senate Agriculture and Natural Resources Committee (4-5) on February 6; deferred to 41st Legislative Day in Senate Agriculture and Natural Resources Committee (6-3) on February 6.

SB 64 An Act to prohibit capital punishment for any person suffering from a severe mental illness

Sponsor: Senator Rusch and Representative Duba

Summary: This bill prohibits capital punishment for a person who was severely mentally ill at the time of the commission of the offense, whose severe mental illness was manifested and documented prior to the commission of the offense, and whose offense was a product of the person's mental illness or due to an irresistible impulse that was caused by the person's mental illness.

State Bar Position: Monitor

Status: Scheduled for hearing in Senate Judiciary Committee on February 6; Hoghoused by Senate Judiciary Committee on February 6; deferred to the 41st legislative day by Senate Judiciary Committee (4-3) on February 20.

SB 65 An Act to revise certain provisions pertaining to trusts

Sponsor: Senators Partridge and Representative Johns

Summary: This bill amends numerous codified laws pertaining to trusts including an amendment stating that a settlor's creditors may not satisfy their claims from an irrevocable trusts if one of the three conditions take place; This bill also amends an existing statute to state that a court of this state has exclusive jurisdiction over an action brought under a claim for relief that is based on a transfer of property to a trust that is subject of this section; This bill also amends existing law to provide protections for trustees if they receive written directions from the settlor.

State Bar Position: Monitor

Status: Signed by the Governor on March 11.

SB 71 An Act to revise the offenses for which an order for interception of communications may be granted

Sponsor: Senator Duhamel and Representative Milstead

Summary: This bill amends existing law to add crimes of violence, sex crimes, escape, and fugitives from justice with an active felony warrant to the list of crimes that may be intercepted by wire, electronic, or oral communications.

State Bar Position: Monitor

Status: Signed by the Governor on March 18.

SB 73 An Act to exempt certain persons from the requirement to publish name changes

Sponsor: Senator Monroe and Representative Goodwin

Summary: This bill adds a new law stating that a court may grant an order changing a petitioner's name without publication of notice or a hearing in open court if the court finds that the petitioner is a victim of human trafficking, domestic abuse, or child abuse.

State Bar Position: Monitor

Status: Signed by the Governor on March 24.

SB 78 An Act to increase funding for court appointed special advocates

Sponsor: Senator Klumb and Representative Post

Summary: This bill increases funding for court appointed special advocates from forty to forty-three dollars.

State Bar Position: Monitor

Status: Withdrawn at the Request of the Prime Sponsor.

SB 79 An Act to modify provisions regarding the building of fences across certain unimproved highways

Sponsor: Senator Klumb and Representative Borglum

Summary: This bill eliminates the language of "and never altered from its natural state in any way for the purpose of facilitating vehicular passage" from the definition of an unimproved county, township, or section-line highway.

State Bar Position: Monitor

Status: Deferred to 41st legislative day by Senate Local Government Committee (6-1) February 12; passed reconsideration by Local Government Committee (6-0) on February 21; deferred to 41st legislative day by Local Government Committee (5-2) on February 24.

SB 80 An Act to revise certain sheriff's fees and costs

Sponsor: Senator Schoenbeck and Representative Gross

Summary: This bill increases levy fees for sheriffs from \$15 to \$50 and allows sheriffs to collect any necessary costs for each sale rather than the current \$10 for each sale.

State Bar Position: Monitor

Status: Signed by the Governor on March 16.

SB 89 An Act to revise provisions regarding victim's rights

Sponsor: Senator Rusch and Representative Bordeaux

Summary: This bill adds "and of any vehicle accident resulting in death" to SDCL 23A-28C-A, Rights of a crime victim.

State Bar Position: Monitor

Status: Signed by the Governor on March 18.

SB 95 An Act to modify certain provisions regarding the repayment of restitution

Sponsor: Senator Russell and Ewing

Summary: This bill adds new law to state that a probationer given a term of probation on or after July 1, 2020 may not be awarded earned discharge credit if the probationer has not repaid the full amount of restitution ordered by the court; This bill goes on to state that instead, a probationer shall accumulate earned discharge credit, which may not be awarded to a probationer until the full amount of restitution has been repaid.

State Bar Position: Monitor

Status: Passed Senate Judiciary Committee (4-2) on February 13; failed Senate (11-24) on February 27.

SB 96 An Act to prohibit the denial of benefits based solely on a controlled substance felony

Sponsor: Representative Nisiba and Senator Healy

Summary: This bill adds new to prevent the department from denying benefits based solely on a controlled felony.

State Bar Position: Monitor

Status: Signed by the Governor on March 24.

SB 104 An Act to limit entitlement to mechanics' liens

Sponsor: Senator Cammack

Summary: This bill amends existing law by adding language that states entitlement to a first lien does not extend to a contractor or subcontractor who furnishes skills, labor, services, or materials, for the development, improvement, operation, or repair of a public highway or roadway if the development, improvement, operation, or repair is undertaken principally for the benefit of a private entity that is not the owner of the abutting property.

State Bar Position: Monitor

Status: Deferred to 41st legislative day by Senate Commerce and Energy Committee (4-2) on February 13; passed reconsideration (7-0) on February 18; passed Senate Commerce and Energy Committee (4-3) on February 25; passed Senate (29-6) on February 27; deferred to 41st legislative day by House Local Government Committee (9-3) on March 5.

SB 108 An Act to revise the time period allowable for certain covenants not to compete

Sponsor: Senator Brock Greenfield

Summary: This bill amends the covenants not to compete law by reducing the time period from not exceeding two years to not exceeding one year.

State Bar Position: Monitor

Status: Tabled in Senate Commerce and Energy Committee (5-1) on February 11.

SB 114 An Act to require an incentive program to provide diversion opportunities for certain substance abuse offenses

Sponsor: Senators Kennedy, Nesiba, and Partridge and Representative Bordeaux

Summary: This bill creates new law to state that the Department of Corrections shall develop a fiscal incentive program to incentivize county use of diversion opportunities for certain substance abuse offenses.

State Bar Position: Monitor

Status: Deferred to the 41st legislative day by Senate Judiciary Committee (4-3) on February 20.

SB 115 An Act to revise the penalty for the ingestion of certain controlled substances

Sponsor: Senators Kennedy, Nesiba, and Partridge and Representatives Johns, Bordeaux, Finck, and McCleerey

Summary: This bill would reduce the penalty for ingestion of a controlled substance from a felony to a misdemeanor unless it is a third offense within a 10-year period.

State Bar Position: Monitor

Status: Deferred to the 41st legislative day by Senate Judiciary Committee (5-2) on February 20.

SB 121 An Act to revise parenting guidelines and repeal Supreme Court authority to promulgate guidelines

Sponsor: Senator Russell and Representative Pischke

Summary: This bill revises parenting guidelines and repeals Supreme Court authority to promulgate rules by adding multiple new sections of law.

State Bar Position: Oppose

Status: Tabled in Senate Judiciary Committee (6-0) on February 25.

SB 138 An Act to amend parole provisions regarding life sentences

Sponsor: Senators Rusch, Duhamel, Kennedy, Nesiba, Partridge, Soholt, and Steinhauer and Representatives Bordeaux and Johns

Summary: This bill would authorize parole after a specified period of time for certain inmates receiving life sentences for conviction of a Class B or C felony.

State Bar Position: Monitor

Status: Deferred to 41st legislative day by Senate Judiciary Committee (5-2) on February 25.

SB 145 An Act to recalculate abatement of the basic child support obligation

Sponsor: Senator Jensen (Phil)

Summary: This bill amends law to provide seven factors that must be met for the court to grant an abatement of the basic child support obligation.

State Bar Position: Oppose

Status: Deferred to 41st legislative day (5-2) in Senate Health and Human Services Committee on February 19.

SB 148 An Act to adopt the Uniform Power of Attorney Act

Sponsor: Senators Partridge and Curd and Representatives Johns and Diedrich

Summary: This bill would adopt the provisions of the Uniform Power of Attorney Act.

State Bar Position: Support

Status: Signed by the Governor on March 20.

**Judicial Qualifications Commission
State of South Dakota**

500 East Capitol Avenue

Pierre, SD 57501

Telephone: (605) 773-3474

Fax: (605) 773-8437

Email: lori.grode@ujs.state.sd.us

Mark W. Haigh, Chair

Mark S. Roby, Vice Chair

Hon. Bruce V. Anderson, Acting Secretary

Kimberley A. Mortenson

Hon. Robin J. Houwman

Timothy M. Engel

Rebecca A. Porter

Lori Grode, Executive Assistant

Notice of Judicial Vacancy

TO: All Active Members of the State Bar of South Dakota

FROM: Bruce V. Anderson, Acting Secretary, Judicial Qualifications Commission

The retirement of the Chief Justice David Gilbertson in January 2021 will create a vacancy for a Supreme Court Justice position in the Fifth Supreme Court District of South Dakota. The Judicial Qualifications Commission is now taking applications for this position.

All lawyers and judges interested in applying should obtain the application form at <http://ujs.sd.gov/>, or contact Lori Grode at the State Court Administrator's Office. The application must be returned to the Administrator's Office and must be postmarked no later than **5:00 PM on May 29, 2020**. Applicants should make sure the application submitted is the 2018 revision.

You may also obtain the application form by writing or telephoning:

Lori Grode
State Court Administrator's Office
500 East Capitol Avenue
Pierre, SD 57501
Telephone: 605-773-2099
Email: lori.grode@ujs.state.sd.us

Or, visit <http://ujs.sd.gov/> for current job openings.

The Fifth District is comprised of the following counties: Harding, Butte, Perkins, Corson, Ziebach, Dewey, Campbell, Walworth, Potter, McPherson, Edmunds, Faulk, Brown, Spink, Marshall, Day, Clark, Roberts, Codington, Hamlin, Grant, and Deuel.

PUBLIC NOTICE

REAPPOINTMENT OF INCUMBENT MAGISTRATE JUDGE

The current appointment of Magistrate Judge Patrick Schroeder is due to expire on September 26, 2020. Magistrate Judge Patrick Schroeder serves in the Second Judicial Circuit.

The duties of a magistrate judge include conducting preliminary hearings in all criminal cases, acting as committing magistrate for all purposes and conducting misdemeanor trials. Magistrate judges may also perform marriages, receive depositions, decide temporary protection orders and hear civil cases within their jurisdictional limit.

Pursuant to UJS policy members of the bar and the public are invited to comment as to whether Magistrate Judge Patrick Schroeder should be reappointed to another four-year term. Written comments should be directed to:

Chief Justice David Gilbertson
Supreme Court
500 East Capitol
Pierre, SD 57501

Comments must be received by June 26, 2020

PUBLIC NOTICE

REAPPOINTMENT OF INCUMBENT MAGISTRATE JUDGE

The current appointment of Magistrate Judge Sara Pokela is due to expire on August 15, 2020. Magistrate Judge Sara Pokela serves in the Second Judicial Circuit.

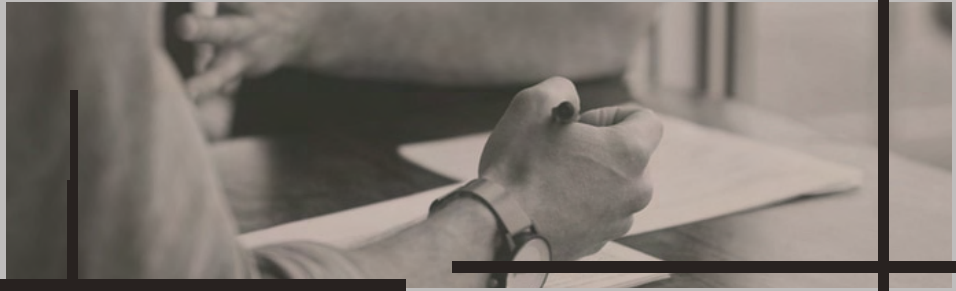
The duties of a magistrate judge include conducting preliminary hearings in all criminal cases, acting as committing magistrate for all purposes and conducting misdemeanor trials. Magistrate judges may also perform marriages, receive depositions, decide temporary protection orders and hear civil cases within their jurisdictional limit.

Pursuant to UJS policy members of the bar and the public are invited to comment as to whether Magistrate Judge Sara Pokela should be reappointed to another four-year term. Written comments should be directed to:

Chief Justice David Gilbertson
Supreme Court
500 East Capitol
Pierre, SD 57501

Comments must be received by May 17, 2020

Career Center



STATE BAR OF SOUTH DAKOTA CLASSIFIEDS

Email your employment announcement to tracie.bradford@sdbar.net by May 26th to have it included in the June Newsletter. Please be sure to include a closing date. To see more jobs listings, visit www.statebarofsouthdakota.com

Deputy Stat's Attorney - Deadwood

CONTACT PERSON: SHELLY BAUMANN

CLOSING DATE: TO BE DETERMINED\START DATE JULY 1, 2020

STARTING PAY: DEPENDING ON EXPERIENCE

RESUMES TO BE SUBMITTED TO:

LAWRENCE COUNTY STATE'S ATTORNEYS OFFICE

90 Sherman Street

Deadwood, South Dakota 57732

FAX: 605-578-1468

PHONE: 605-578-1707

GENERAL DESCRIPTION OF WORK TO BE PERFORMED: CRIMINAL PROSECUTION

EXPERIENCE EDUCATION: Graduation from a college of law and attainment of a Juris Doctorate degree.

LAWRENCE COUNTY IS AN EQUAL OPPORTUNITY EMPLOYER

Associate Attorney - Sioux Falls

Boyce Law Firm, LLP, a top-rated 20+ lawyer firm located in Sioux Falls, is accepting applications for ASSOCIATE ATTORNEYS in the firm's litigation section. Applicants must be self-starters with a strong desire to learn. Superior written and verbal communication skills are of utmost importance. Visit our website at www.boycelaw.com to learn more about the firm, our history, and our people.

All applicants are welcome to apply. Preference will

be given to applicants in the top 1/3 of their class, to those who have prior work experience, and to those currently licensed to practice in South Dakota.

Start Date: Upon hiring.

Benefits include generous 401K match, profit sharing, health insurance, annual CLE tuition, professional dues and memberships, and numerous incidental benefits.

Direct resume, cover letter, and law school transcript to Michele Benson, Boyce Law Firm, LLP, PO Box 5015, Sioux Falls, SD 57117-5015 or to mlbenson@boycelaw.com.

Trust Officer, Dakota Dunes

The Trust Officer works with senior trust and client service personnel to provide trust, tax, estate planning and wealth management services for clients with significant assets and sophisticated financial needs, seeking to optimize the inter-generational transfer of wealth.

ESSENTIAL RESPONSIBILITIES:

- Assist with providing expert trust, tax, estate planning and wealth management counsel and advice in working with clients, beneficiaries, attorneys and CPAs to administer client accounts.
- Administer accounts for an affluent and high net worth client base where Bridges Trust is acting as trustee, executor or agent, in a manner that ensures compliance with applicable fiduciary requirements and business policies and procedures.

- Assist with fiduciary decision making for administrative matters, including discretionary distributions, account maintenance and account opening/closing.
- Represent Bridges Trust in business related and professional activities in order to develop, manage and retain client relationships.
- Special projects as assigned.

QUALIFICATIONS:

Education and Experience:

- Bachelor's degree in a business-related field.
- Three years' trust experience or education equivalent preferred.
- Preferred education to include graduate degree(s) in law and/or business.
- Preferred professional certification(s) such as CPA, CTFA, CFP, CAP, etc.

Knowledge, Skills and Abilities:

- Expert written and verbal communications skills.
- Advanced problem solving and analytical skills.
- Advanced time management and organization skills.
- Intermediate computer skills, including Microsoft Office.
- Preferred experience to include operating FIS TrustDesk and APX.

NOTES:

Additional Salary Information: Bridges Trust offers a competitive comprehensive benefits package. Compensation will vary depending on education and experience.

Apply:

<https://careers.nebar.com/jobs/13549537>

Assistant US Attorney, Civil Division - Rapid City

About the Office:

The United States Attorney's Office prosecutes federal criminal offenses and represents the interests of the United States in civil cases. The United States Attorney's Office for the District of South Dakota includes a main office located in Sioux Falls, South Dakota and two branch offices located in Pierre and Rapid City. South Dakota encompasses a large and diverse geographical area of 77,123 square miles and a population of about 858,469 people.

This vacancy is located in the Rapid City branch office. Our office places a high value on diversity of experiences and perspectives and encourages

applications from all qualified individuals from all ethnic and racial backgrounds, veterans, LGBT individuals, and persons with disabilities.

Job Description:

The U.S. Attorney's Office for the District of South Dakota is seeking an experienced attorney to work in the Civil Division in the Rapid City Office. The position offers a unique and challenging experience for a highly motivated attorney to represent the United States and federal agencies in significant and complex civil cases. Civil Division assignments include defending the United States in tort cases, affirmative employment discrimination cases, challenges to agency actions, and handling affirmative fraud and enforcement cases on behalf of the United States. The successful applicant may also handle other civil matters, as needed, and civil appeals.

Qualifications:

Required Qualifications: Applicants must possess a J.D. degree, be an active member of the bar (any jurisdiction) and have at least one year of post-JD litigation experience and be a U.S. citizen. In addition, applicant must also be a member, or be eligible to become a member, of the federal district court bar. If the successful candidate is not a member of the South Dakota Bar, he or she must become a member within twelve months.

Preferred Qualifications: Applicants must demonstrate superior analytical ability; strong research, writing and courtroom skills; exercise fair and sound judgment; follow all Department of Justice and United States Attorney's Office policies; exhibit the ability to work collaboratively in a supportive and professional manner with other attorneys, support staff and law enforcement agencies; superior analytical and communications skills; handle matters in court persuasively and justly on behalf of the United States of America; and be devoted to excellence.

Salary:

Assistant United States Attorneys' pay-is administratively determined based, in part, on the number of years of professional attorney experience. The range of basic pay is \$55,204 to \$129,528, plus locality pay of 15.95%.

Travel:

Employment will require occasional travel to court at designated sites within and outside the district. Travel is also required for training at the Department of Justice's National Advocacy Center, Columbia, SC.

Application Process:

Provide cover letter, resume, writing sample (not to exceed 20 pages), and a list of three professional references with contact information. All documents should be submitted electronically in one continuous .PDF attachment and include the announcement number (20-SD-CIVIL-001) in the subject line of your email. Email address for application package: USASD.applications@usdoj.gov.

Note: The District of South Dakota cannot be responsible for lost/misrouted or delayed email transmissions.

Application Deadline: Friday, May 15, 2020

Relocation Expenses: Relocation Expenses will not be authorized

STAFF ATTORNEY – FORT THOMPSON

DAKOTA PLAINS LEGAL SERVICES (DPLS), a non-profit legal services program, has an opening for a Managing Attorney position in our Fort Thompson, South Dakota, branch office. The Fort Thompson office serves the Crow Creek and Lower Brule Indian Reservations in South Dakota and Brule, Buffalo, Hughes, Hyde, Lyman, Stanley and Sully counties in South Dakota.

QUALIFICATIONS/RESPONSIBILITIES:

Applicants must have a JD degree and be licensed to practice, or by reciprocity be able to obtain a license to practice, in South Dakota, or be qualified to take the next South Dakota Bar Exam; must be a bright, motivated, self-starter; must have the tenacity to assume immediate practice responsibilities, including handling a significant caseload touching on many different areas of law with regular appearances in court; must demonstrate an interest in poverty law and working with Native American and low income clients. Applicant must have at least one year's experience in the practice of poverty law or Indian law, with trial and appellate experience in state and federal courts or two years' experience in the general practice of law. If Applicant does not possess this experience we would consider Applicant for a staff attorney position until qualified to be a Managing Attorney.

SALARY: Competitive, depending on experience. DPLS has an excellent fringe benefits package

including generous leave benefits and employee insurance coverage (medical, dental, life, disability).

CLOSING DATE: Open until filled.

APPLICATION INFORMATION: Please submit a letter of interest and resume to: Thomas S. Mortland, Executive Director, Dakota Plains Legal Services, PO Box 727, Mission, SD 57555, (605) 856-4444, dpls@venturecomm.net
Native Americans, Women and Minorities are encouraged to apply. Dakota Plains Legal Services is an Equal Opportunity Employer.

STAFF ATTORNEY - MISSION

DAKOTA PLAINS LEGAL SERVICES (DPLS), a non-profit legal services program, has an opening for a Staff Attorney position in our Mission, South Dakota, office. The Mission office serves the Rosebud Sioux Indian Reservation and Gregory, Jones, Mellette, Todd and Tripp counties in South Dakota.

QUALIFICATIONS/RESPONSIBILITIES:

Applicants must have a JD degree and be licensed to practice, or by reciprocity be able to obtain a license to practice, in South Dakota, or be qualified to take the next South Dakota Bar Exam; must be a bright, motivated, self-starter; must have the tenacity to assume immediate practice responsibilities, including handling a significant caseload touching on many different areas of law with regular appearances in court; and must demonstrate an interest in poverty law and working with Native American and low income clients.

SALARY: Competitive, depending on experience. DPLS has excellent fringe benefits, including generous leave benefits and employee insurance coverage (medical, dental, life, disability).

CLOSING DATE: Open until filled.

APPLICATION INFORMATION: Please submit a letter of interest and resume to: Thomas S. Mortland, Executive Director, Dakota Plains Legal Services, PO Box 727, Mission, SD 57555, (605) 856-4444, dpls@venturecomm.net.

Native Americans, Women and Minorities are encouraged to apply. Dakota Plains Legal Services is an Equal Opportunity Employer.

STAFF ATTORNEY - PINE RIDGE

DAKOTA PLAINS LEGAL SERVICES (DPLS), a non-profit legal services program, has an opening for a Staff Attorney position in our Pine Ridge, South Dakota, branch office. The Pine Ridge office serves the Pine Ridge Indian Reservation in South Dakota and Oglala Lakota, Jackson and Bennett counties in South Dakota.

QUALIFICATIONS/RESPONSIBILITIES:

Applicants must have a JD degree and be licensed to practice, or by reciprocity be able to obtain a license to practice, in South Dakota, or be qualified to take the next South Dakota Bar Exam; must be a bright, motivated, self-starter; must have the tenacity to assume immediate practice responsibilities, including handling a significant caseload touching on many different areas of law with regular appearances in court; must demonstrate an interest in poverty law and working with Native American and low income clients. Applicant must have at least one-year experience in the practice of poverty law or Indian law, with trial and appellate experience in state and federal courts or two years' experience in the general practice of law.

SALARY: Competitive, depending on experience. DPLS has an excellent fringe benefits package including generous leave benefits and employee insurance coverage (medical, dental, life, disability).

CLOSING DATE: Open until filled.

APPLICATION INFORMATION: Please submit a letter of interest and resume to: Thomas S. Mortland, Executive Director, Dakota Plains Legal Services, PO Box 727, Mission, SD 57555, (605) 856-4444, dpls@venturecomm.net.

Assistant County Attorney I - Worthington, MN

Nobles County Attorney's Office

Provides legal services, representation, prosecution and advice for Nobles County. **QUALIFICATIONS:** Minimum of Juris Doctor degree from accredited law school; current license to practice law in Minnesota, or will obtain prior to start date. Experience preferred but not required. Valid driver's license required. Salary DOE. Nobles County offers a competitive benefits package.

APPLY TO: Nobles County Administration Office. Visit our website at www.co.nobles.mn.us for application and to view full job description and benefit sheet. **REQUIRED:** County application forms are required. Closing Date for Applications: Open until filled. EEO/AA Employer



DO YOU HAVE A JOB ANNOUNCEMENT?

Send it to
tracie.bradford@sdbar.net

May

2020



Bar Commission Teleconference ••••• May 21, 2020 •••••
Disciplinary Board ••••• June 15-16 2020 ••••• Red Rossa, Pierre
Annual Business Meeting ••••• June 18, 2020 ••••• Online

For all upcoming webinars, check out the calendar on the State Bar website at
www.statebarofsouthdakota.com.