

Legal Potpourri Program

THURSDAY, JUNE 22 - 8 AM

TRACK 1

8:00 AM - Problem Solving Courts: THE Option to Address Substance Use in the Criminal Justice System

Presented by:

Judge Abigail Howard - Third Circuit

Anthony Teesdale - Teesdale Law

Austin Oxner - Brookings Co. State's Attorney's Office

Officer Travis Asmus - Brookings Police Department

9:00 AM - IOLTA and Trust Accounting Compliance Issues and Best Practices

Presented by:

Pamela Reiter - Reiter Law Firm

Tom Frieberg - Frieberg, Nelson & Ask

10:00 AM - Time for Update - Title Standard Revisions & Future Real Estate Needs

Presented by:

Billy Stitz - Moody County Abstract

Eric Hanson - Dakota Homestead Title Insurance
Company

Co-Chairs - Eric Hanson, Anita Fuoss, Brandy Rhead

Abigail Howard serves as a magistrate judge for the Third Judicial Circuit. The Third Judicial Circuit includes the counties of Beadle, Brookings, Clark, Codington, Deuel, Grant, Hamlin, Hand, Jerauld, Kingsbury, Lake, Miner, Moody and Sanborn. Judge Howard began her legal career as an Associate Attorney at Fite, Pierce & Ronning Law Office in Brookings in 2011. In 2013, she joined the Brookings County States Attorney's Office as a Deputy States Attorney and was then elected as State's Attorney in 2016. Prior to joining the bench, Judge Howard was active in various community and professional organizations, serving as a board member on the Boys & Girls Club of Brookings, the Eastern Plains Sexual Assault Response Team, and as a past President of the Young Lawyers Section of the State Bar Association. Since joining the bench in 2018, she has been appointed to the Judicial Training and Education Committee, the Fine and Bond Committee, and has previously served on the Drug Court Advisory Council. Judge Howard serves as the Judge on the Brookings County Drug and DUI Court and the Beadle County Drug Court. She and her husband, Lance, live in Brookings, where he works for First Bank & Trust as a trust officer. They have two children.

Anthony J. Teesdale is the attorney owner of Teesdale Law in Brookings, South Dakota. He passionately advocates for the protection of individual liberties. Anthony primarily practices in the areas of criminal law, family law, estate planning, educational law, and civil litigation, as well as assisting students in Title IX and disciplinary proceedings in South Dakota Universities. After growing up in New Jersey, Indiana, and Missouri, Anthony attended the University of South Dakota for both undergraduate and law school. Following law school, Anthony started his legal career in 2015 in Brookings before opening his own practice in 2022. Anthony and his wife Alexandra are proud to call Brookings home and look forward to watching their son and daughter thrive in Brookings. Anthony is the Brookings County Bar Association President, and keeps involved in his community as a volunteer firefighter for the City of Brookings, a member of the Brookings Chapter of the Optimist Club, a mentor for the Brookings County Youth Mentoring Program, and as a founding member of the Brookings Curling Club. Anthony furthers his passion for access to justice and defense of individual liberties as a member of the Board of Directors for East River Legal Services, Third Circuit Representative of the Young Lawyers Section of State Bar of South Dakota, and Chair of the Member Benefits committee of the State Bar of South Dakota. He has served as the Defense Attorney for the Brookings County Problem Solving Courts since 2021 and is the defense lawyer representation on the Drug Court Advisory Council.

Austin Oxner has been practicing law since October of 2019. He was engaged in a general practice in private practice until July 2021, when he joined the Brookings County States Attorney Office. From July 2021 to present he has served as a deputy state's attorney. Austin is assigned to the Office's magistrate docket and primarily prosecutes misdemeanors. He additionally presents felony matters to the grand jury and serves as the State's Attorney representative to the Brookings County Drug and DUI Courts.

Officer Travis Asmus with the Brookings Police Department is a Brookings County native and currently reside there with my wife Ashley and two children Tucker and Briar. Officer Asmus started in law enforcement in 2016 as a Reserve Officer with the Brookings Police Department. In 2017, he was hired as a full-time officer and assigned to Patrol where he has been stationed ever since. He currently is in his third year serving with the Brookings Problem Solving Courts.

Officer Asmus has received 3 Life-Saving Medals, the Meritorious Conduct Award, Brookings Police Department Employee of the Year 2021, and the Chief John Wainman Sr. Service award by the South Dakota Police Chief's Association in 2023.

Officer Asmus has the following specialized training credentials:

- 2019 Patrol Essentials for Treatment Courts
- 2020 Patrol Response to Emotional and Psychological Disorders
- 2021 Crisis Intervention Training (CIT)
- 2022 Presented at Crisis Intervention Training, put on by South Dakota DCI on behalf of Brookings County Problem Solving Courts

**Problem Solving Courts: THE Option to Address Substance Use
in the Criminal Justice System
State Bar Convention – June 22, 2023**

The Panel

Hon. Abigail A. Howard – Magistrate Judge, Third Judicial Circuit

Anthony Teesdale – Teesdale Law, PLLC

Austin Oxner – Brookings County Deputy States Attorney

Officer Travis Asmus – Brookings Police Department

History

First Drug Court founded in Miami, FL in 1989 – battling the advent of crack cocaine the nation had declared “war on drugs”

1995 – developed first DUI Court in New Mexico

As incarceration grew nationwide, South Dakota felt the same effects.

2005 – a volunteer steering committee was formed to explore the possibility of creating a drug court in SD

Specialty Courts in South Dakota

First Drug Court started in SD in 2007 → Northern Hills → started with 6 participants, now up to 60

First DUI Court established in Hughes and Stanley County in 2009

First Veteran’s Treatment Court started in 2013 in Codington County

As of 2023 - 17

- Drug & DUI Courts – 7
- Drug Courts – 3
- DUI Courts – 3
- Mental Health Courts - 2
- Veteran’s Courts – 2

The Goals

3 primary goals:

- Reduce Recidivism
- Reduce Use Disorder Among Participants - Providing increased access and linkage to treatment and community resources
- Rehabilitate Participants - Ensure public safety

What is Drug or DUI Court?

Court-managed intensive probation

Alcohol/drug intervention treatment program

Provide cost-effective alternative to traditional criminal case processing

Voluntary

Includes regular appearances before Judge

Frequent and random drug and alcohol testing

Substance use counseling in individual and group settings

Mental health counseling

Educational classes

System of behavior modification based on incentives and sanctions

Intense community supervision by Team

Can be successfully completed within 18 months to 2 years

The Traditional Model

BUSTED – Arrested and jailed

Court appearance

Bond

Attorney assigned

Preliminary Hearing or Grand Jury

Arraignment

Pre-trial motions and hearings

Trial

Pre-sentence

Sentence → incarceration or probation

The Fast Track

Quick entry – goal is less than 50 days from arrest to sentencing

1. Legal Screen by State's Attorney
2. Info to Defense Attorney, CSO and Coordinator
3. Defendant applies
4. Risk/Needs Assessment by CSO
5. Treatment Needs Assessment by Treatment
6. Staffed by Team
7. Determination of Acceptance → Sentenced to PSC, or Denial → Traditional Process

Traditional Court vs. Problem Solving Court

Limited court interaction v. extensive court appearances before judge

Standard probation for extended period v. intensive probation until graduation

Punishment v. incentives and sanctions

Limited required treatment v. structured, supervised evidence-based treatment

One court service officer for supervision v. team of diverse individuals for management

Periodic drug tests v. many random drugs tests for entire program

Standard rules of probation v. standard rules and many special conditions

Preventing crime v. preventing crime and managing the disease of addiction

Eligibility

Felony offenders not on parole

18 and older

Voluntary basis

High-Risk/High-Needs Offenders

Excludes present convictions for distribution of controlled substances or marijuana

Excludes any individual required to register as a sex offender

Excludes any individual convicted of a violence offense (discretionary)

Sanctions & Incentives

Additional studies reveal incentives provide success in achieving long-term sobriety

Studies show a 4 to 1 ratio of incentives to sanctions is a good model for supporting an individual's success in a program

Incentives offset the years of fighting unsuccessfully to maintain sobriety – these are addicts NOT abusers

Sanctions are imposed as tools to learn NOT punishment

Sanctions must be individualized to the person and the offense

Ultimate sanction is referral back to sentencing court for imposition of sentence for failing the PSC

The Team Approach

Probation

Chemical Dependency and Mental Health Counselors

Prosecutor

Defense Attorney

Law Enforcement

Coordinator

Judge

- Weekly Team update on each participant's completion of requirements
- Discuss specific problems or concerns

What happens at Staffing?

Review program requirements

Address continued treatment concerns

Revise plans for treatment or counseling – amending plans for the individual

Discuss sanctions or incentives

Review Phase advancement

Promote Milestones

The Court Appearance

Announce “Days of Sobriety”

Address any special concerns of the week with the participant

Highlight the highs and lows of participants’ achievements and setbacks

Promote Milestones publicly

Give Incentives

Impose Sanctions

Keep the Participant on the path of recovery

Financial Impact

Funded by the South Dakota Legislature

- Includes treatment costs
- Drug testing costs
- Defense attorney contract
- CSO and Coordinator salaries

Decreased costs to County

- Less incarceration days in County Jail
- Decreased court expense
- Successful, contributing citizens

Community Involvement

Education

Incentive Options

Mentors

Steering Committee

Myth #1 – Defense Attorney

“If my client screws up at all in a PSC, they will end up in prison anyway.”

Myth #2 – Prosecutor

“I cannot ensure the safety of the public if I agree to refer offenders to Problem Solving Courts.

Myth #3 – Law Enforcement

“These programs don’t work – the system is just a revolving door.”

Nationwide, 75% of Drug Court graduates remain arrestfree at least two years after leaving the program.

In the traditional court model, 46% of probationers commit a new offense and over 60% commit a probation violation.

After release from prison – the re-arrest rate is 60-80%.

The U.S. Government Accountability Office concluded in 2005 that Drug Courts significantly reduce crime and save money for taxpayers by offsetting the costs of law enforcement, court case processing, and victimization resulting from future criminal activity.

Myth #4 – Probation – Court Services

“If they can’t follow the rules on Standard Probation, how can they succeed in this program?”

Contacts:

Judge Howard - abigail.howard@uj.s.state.sd.us

Tony Teesdale - tony@teesdalelaw.com

Officer Travis Asmus - TAsmus@cityofbrookings-sd.gov

Deputy SA Austin Oxner - aoxner@brookingscountysd.gov

Sources

Richard C. Boldt, REHABILITATIVE PUNISHMENT AND THE DRUG TREATMENT COURT MOVEMENT, 76 Wash. U. L. Q. 1205, 1 207-08 (1998).

John Roman et al., RECIDIVISM RATES FOR DRUG COURT GRADUATES: NATIONALLY BASED ESTIMATE-FINAL REPORT, 2003 THE

URBAN INST. 27, 29 (2003).

PATRICK LANGAN & MARK CUNNIFF, BUREAU OF JUST. STATISTICS,
Recidivism of Felons on Probation, 1986-1989 (1992).

ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS
AND MIXED RESULTS FOR OTHER OUTCOMES, REPORT TO
CONGRESSIONAL COMMITTEES, U.S. GOVERNMENT ACCOUNTABILITY
OFFICE 71-73 [No. GAO-05-219] 2005.

Problem Solving Courts: THE Option to Address Substance Use in the Criminal Justice System

STATE BAR CONVENTION

JUNE 22, 2023

The Panel

- Hon. Abigail A. Howard – Magistrate Judge, Third Judicial Circuit
- Anthony Teesdale – Teesdale Law, PLLC
- Austin Oxner – Brookings County Deputy State's Attorney
- Officer Travis Asmus – Brookings Police Department

History

First Drug Court founded in Miami, FL in 1989
– battling the advent of crack cocaine the nation had declared “war on drugs”

1995 – developed first DUI Court in New Mexico

As incarceration grew nationwide, South Dakota felt the same effects.

2005 – a volunteer steering committee was formed to explore the possibility of creating a drug court in SD

Specialty Courts in SD

First Drug Court started in SD in 2007 → Northern Hills → started with 6 participants, now up to 60

First DUI Court established in Hughes and Stanley County in 2009

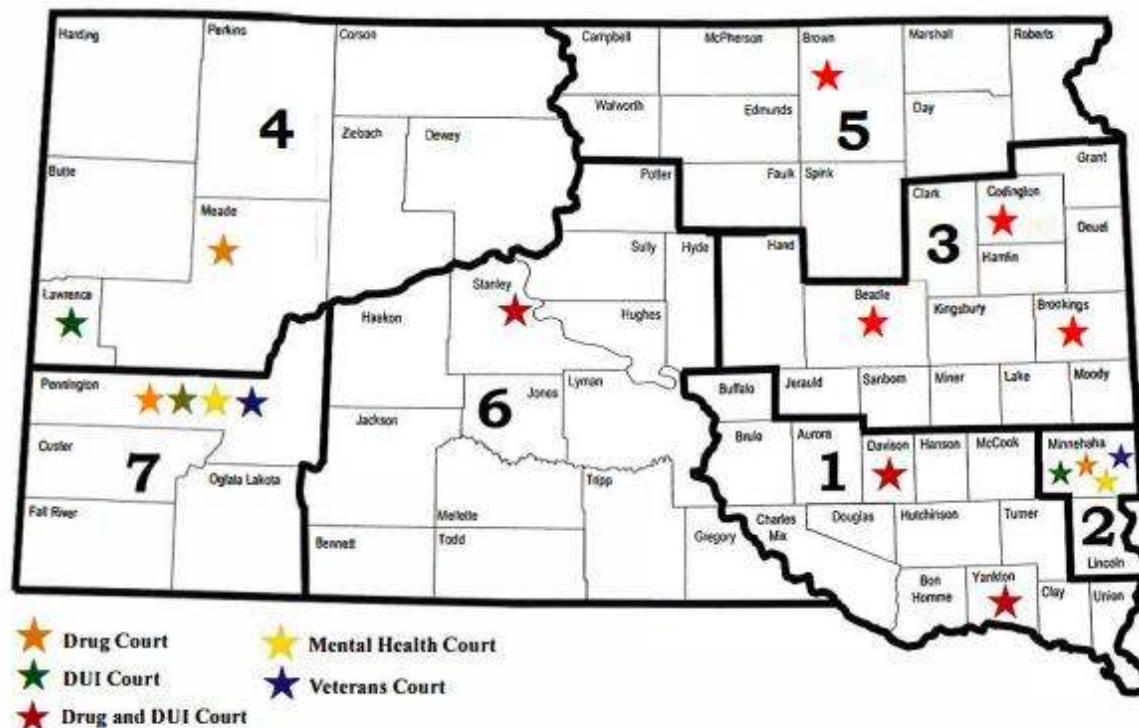
First Veterans' Treatment Court started in 2013 in Codington County

As of 2023 - 17

- Drug & DUI Courts – 7
- Drug Courts – 3
- DUI Courts – 3
- Mental Health Courts - 2
- Veteran's Courts - 2

P-SCs in South Dakota

Problem Solving Courts South Dakota Unified Judicial System



Revised
5/30/2023

The Goals

3 primary goals:

- Reduce Recidivism
- Reduce Use Disorder Among Participants
 - Providing increased access and linkage to treatment and community resources
- Rehabilitate Participants
 - Ensure public safety

What is Drug or DUI Court?

Court-managed intensive probation

Alcohol/drug intervention treatment program

Provide cost-effective alternative to traditional criminal case processing

Voluntary

Includes regular appearances before Judge

Frequent and random drug and alcohol testing

What is Drug or DUI Court?

Substance use counseling in individual and group settings

Mental health counseling

Educational classes

System of behavior modification based on incentives and sanctions

Intense community supervision by Team

Can be successfully completed within 16 months to 2 years

The Traditional Model

BUSTED – Arrested and jailed

Court appearance

Bond

Attorney assigned

Preliminary Hearing or Grand Jury

Arraignment

Pre-trial motions and hearings

Trial

Pre-sentence

Sentence → incarceration or probation

The Fast Track

Quick entry – goal is less than 50 days from arrest to sentencing

1. Legal Screen by State's Attorney
2. Info to Defense Attorney, CSO and Coordinator
3. Defendant applies
4. Risk/Needs Assessment by CSO
5. Treatment Needs Assessment by Treatment
6. Staffed by Team
7. Determination of Acceptance → Sentenced to P-SC, or Denial → Traditional Process

Traditional Court vs. P-SC

Limited court interaction v. extensive court appearances before judge

Standard probation for extended period v. intensive probation until graduation

Punishment v. incentives and sanctions

Limited required treatment v. structured, supervised evidence-based treatment

One court service officer for supervision v. team of diverse individuals for management

Periodic drug tests v. many random drugs tests for entire program

Standard rules of probation v. standard rules and many special conditions

Preventing crime v. preventing crime and managing the disease of addiction

Eligibility

Felony offenders not on parole

18 and older

Voluntary basis

High-Risk/High-Needs Offenders

Excludes present convictions for distribution of controlled substances or marijuana

Excludes any individual required to register as a sex offender

Excludes any individual convicted of a violence offense (discretionary)

RISK/NEEDS ASSESSMENT

HIGH RISK

Addict
Extensive Crim. History
Lower Socio-Economic
Background
Family History
No Support Systems

HIGH NEEDS

Lower functioning
Few skills
Little education
Mental Health Issues
Medical Issues

LOW RISK

Limited Crim. History
Higher Socio-econ
Non-addict/abuser
Strong Support Systems
Faith/Religion

LOW NEEDS

Strong Ed. History
Strong relationships
Healthy
Good empl. history

Sanctions and Incentives

The Stick or the Carrot

Studies show a 4 to 1 ratio of incentives to sanctions is a good model for supporting an individual's success in a program.

Incentives offset the years of fighting unsuccessfully to maintain sobriety – these are addicts, NOT abusers.

Additional studies reveal incentives provide success in achieving long-term sobriety.

Sanctions are imposed as tools to learn; NOT punishment.

Sanctions must be individualized to the person and the offense.

Ultimate sanction is referral back to sentencing court for imposition of sentence for failing the P-SC.

The Team Approach

Probation

Chemical Dependency and Mental Health Counselors

Prosecutor

Defense Attorney

Law Enforcement

Coordinator

Judge

- *Weekly Team update on each participant's completion of requirements*
- *Discuss specific problems or concerns*

What Happens at Drug Court Staffing

Review program requirements

Address continued treatment concerns

Revise plans for treatment or counseling – amending plans for the individual

Discuss sanctions or incentives

Review Phase advancement

Promote Milestones

The Court Appearance

Announce “Days of Sobriety”

Address any special concerns of the week with the participant

Highlight the highs and lows of participants’ achievements and setbacks

Promote Milestones publicly

Give Incentives

Impose Sanctions

Keep the Participant on the path of recovery

Financial Impact

Funded by the South Dakota Legislature

- Includes treatment costs
- Drug testing costs
- Defense attorney contract
- CSO and Coordinator salaries

Decreased costs to County

- Less incarceration days in County Jail
- Decreased court expense
- Successful, contributing citizens

Community Involvement

Education

Incentive Options

Mentors

Steering Committee

Myth #1

Defense Attorney:

“If my client screws up at all in a P-SC, they will end up in prison anyway.”

Factual Scenario #1

- Client has been in program for over 2 months
- Has yet to have a day of full sobriety
- Lied about using vapes, Delta 8, has used alcohol, taken other supplements
- BUT – doing really well in terms of progress from where he was – got a better job, better housing, engaged in treatment
- They don't get terminated unless we have exhausted all options

Myth #2

Prosecutor:

“I cannot ensure the safety of the public if I agree to refer offenders to Problem Solving Courts.”

Factual Scenario #2

- Client convicted of Hit & Run Injury Accident & DUI-3rd
- Person injured and property damaged
- HR/HN – accepted into DUI Court
- State argued against at sentencing
- Circuit Court sentenced to program
- Prosecutor approached client first day of program and explained position
- Client doing well – has maintained sobriety for 4 months

Myth #3

Law Enforcement:

“These programs don’t work – the system is just a revolving door.”

Factual Scenario #3

- Client successfully graduated from program in 2021
- Drove to get high straight from graduation
- Arrested again within 6 months
- Accepted into program again
- Has been sober almost 1 year
- Much more committed to slowing down and working on treatment this go round
- It can take 3-4 episodes of treatment before it starts to work

Nationwide, 75% of Drug Court graduates remain arrest-free at least two years after leaving the program.

In the traditional court model, 46% of probationers commit a new offense and over 60% commit a probation violation.

After release from prison – the re-arrest rate is 60-80%.

The U.S. Government Accountability Office concluded in 2005 that Drug Courts significantly reduce crime and save money for taxpayers by offsetting the costs of law enforcement, court case processing, and victimization resulting from future criminal activity.

Myth #4

Probation – Court
Services:

*“If they can’t follow the
rules on Standard
Probation, how can they
succeed in this program?”*

Factual Scenario #4

- Client violated standard probation, and then HOPE, then referred to Drug Court
- In program for 604 days, sober for 604 days
- Some individuals need more intensive supervision and treatment than the other probation and outpatient methods can offer
- These are the exact clients that should be going to P-SCs

“One day you will tell your story
of how you overcame
what you went through,
and it will be someone else’s
survival guide.”

Brené Brown

THE REAL STORIES FROM
THE REAL PEOPLE
ALLRISE.ORG

<http://www.youtube.com/watch?v=HM9MLtc8MWM>

THANK YOU

Judge Howard

abigail.howard@ujs.state.sd.us

Tony Teesdale

tony@teesdalelaw.com

Officer Travis Asmus

TAsmus@cityofbrookings-sd.gov

Deputy SA Austin Oxner

aoxner@brookingscountysd.gov

Resources Available

Defense Attorney Toolkit documents

Updated P-SC Map

Best Practice Standards

Statewide Statistics

Sources

Richard C. Boldt, REHABILITATIVE PUNISHMENT AND THE DRUG TREATMENT COURT MOVEMENT, 76 Wash. U. L. Q. 1205, 1 207-08 (1998).

John Roman et al., RECIDIVISM RATES FOR DRUG COURT GRADUATES: NATIONALLY BASED ESTIMATE-FINAL REPORT, 2003 THE URBAN INST. 27, 29 (2003).

PATRICK LANGAN & MARK CUNNIFF, BUREAU OF JUST. STATISTICS, *Recidivism of Felons on Probation, 1986-1989* (1992).

ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES, REPORT TO CONGRESSIONAL COMMITTEES, U.S. GOVERNMENT ACCOUNTABILITY OFFICE 71-73 [No. GAO-05-219] 2005.

IOLTA and Trust Accounting

PAMELA R. REITER, Owner and Founding Partner

R e i t e r L a w F i r m L L C

S i o u x F a l l s , S o u t h D a k o t a

Pamela R. Reiter is the owner and founding partner of Reiter Law Firm Prof. LLC. Pamela has earned an AV – Preeminent Martindale-Hubbell rating and is rated in Band A by Chambers USA, the highest possible ratings an attorney can earn. She also has been named by Benchmark Litigation as one of the Top 250 Women in Litigation in the United States and recognized by Best Lawyers in America in the area of Trust and Estate Litigation. Her practice focuses on civil litigation, including trust and estate litigation, business disputes and other complex civil litigation.

Pamela has nearly fourteen years of experience as a federal district court law clerk. Before opening her own firm in 2023, Pamela joined Johnson, Janklow, Abdallah, & Reiter, LLP, as an associate attorney in early 2008, was named partner in 2011, became an owner in 2013 and assumed the role of managing partner in 2018. While practicing at her former firm, Pamela developed her litigation skills by trying cases before juries and the courts in both federal and state courts throughout South Dakota, representing clients in arbitration, taking over one hundred depositions, and working with her clients to reach sensible and practical solutions to their legal matters through mediation or settlement.

In 1995, Pamela was admitted to the State Bar of South Dakota and has been an active member since that date. She was elected by the members of the State Bar of South Dakota as the President Elect in 2016. She was sworn in as the State Bar President on June 23, 2017, and served in that capacity until June 2018. She served a four-year term as a member of the State Bar's Disciplinary Board from 2013 to 2017. She was elected as a Bar Commissioner in 2010 to serve a three-year term and was appointed to the State Bar's Strategic Planning Committee, on which she continues to serve. She served as President of the Young Lawyers Section from 2000 to 2001 and on the Young Lawyers Board from 1999 to 2001. Pamela has been appointed to several committees, including the Continuing Legal Education Committee, Lawyer Referral Committee, and served as the Chair of the Law School Committee for more than a decade. Her professional memberships include the American Bar Association and the South Dakota Trial Lawyers Association.

IOLTA and Trust Accounting

TOM FRIEBERG

F r i e b e r g , N e l s o n & A s k , L L P
B e r e s f o r d , S o u t h D a k o t a

Thomas H. Frieberg is a fourth generation South Dakota lawyer with Frieberg, Nelson & Ask in Beresford, SD. Tom has practiced at the firm his great-grandfather founded since being admitted to the State Bar in 1988. He graduated from the University of South Dakota and then earned his JD at the University of Minnesota and is also admitted in US District Court and US Tax Court.

Tom has served as the President of the Young Lawyers Section of the State Bar of South Dakota, as a bar commissioner for the State Bar (twice), as a member and chair of the Disciplinary Board for the Bar, was President of the State Bar of South Dakota in 2014-2015, and served the State Legislature from 1993-2000. Mr. Frieberg serves on the South Dakota Bar Foundation board of directors and has served as board president. Currently Tom is Counsel for the Disciplinary Board of the State Bar of South Dakota, is the Beresford City Attorney and maintains his practice. In addition to the State Bar of South Dakota, Tom is a member of the American Bar Association, South Dakota Trial Lawyers Association, South Dakota Municipal Attorneys Association and the South Dakota School Attorneys Association.

ESTABLISHING A CLIENT TRUST ACCOUNT

June 2023 State Bar Convention

Presented by Pamela R. Reiter, Reiter Law Firm, LLC

1. *The Rules for Client Trust Accounts.*

A. Rules of Professional Conduct 1.15(a) provides:

“A lawyer shall hold property of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property. Funds shall be kept in a separate account maintained in the state where the lawyer’s office is situated, or elsewhere with the consent of the client or third party....”

B. Rules of Professional Conduct 1.15(d)(1) provides:

“All funds of clients paid to a lawyer or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein ...”

C. SDCL § 16-18-20.2(1) provides:

“The minimum trust accounting records which shall be maintained are ... [a] separate bank account or accounts and, if utilized, a separate savings and loan association account or accounts. Such accounts shall be located in South Dakota unless the client otherwise directs in writing. The account or accounts shall be in the name of the lawyer or law firm and clearly labeled and designated as a ‘trust account.’”

2. *Setting Up the Client Trust Account.*

A. Obtain the bank charge schedule and check periodically for changes.

1. Rules of Professional Conduct 1.15(a) provides: “.... A lawyer may deposit the lawyer’s own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose....”

a. Lawyer must always have sufficient funds in the account to cover bank charges. **Note:** Unless the bank agrees to assess trust account charges against the operating account.

B. Rule 1.15 allows deposit of lawyer’s funds to cover bank charges.

1. For example, the cost of the check blanks.

2. Deposit at least that amount immediately to avoid any overdraft.

C. Bank forms the lawyer must have:

1. Signature card.
2. Account agreement.
3. Deposit slips.
4. Check blanks.
 - a. Checks must be consecutively numbered,
 - b. Clearly denominated as “trust account” checks, and
 - c. For individual clients, account must be denominated by client’s name.

Note: SDCL § 16-18-20.1 requires an attorney to “... preserve such records for a period of five years after distribution of such funds”

D. Basic banking procedures the lawyer should know.

1. Timing of banking procedures.
 - a. Bank’s schedule for clearing deposits:
 - (1) Checks on same bank – next day.
 - (2) Checks on other local banks – 3 to 5 days.
 - (3) Checks on other banks in the same Federal Reserve District – 5 to 7 days.
 - (4) Checks on other banks in a different Federal Reserve District – 7 to 10 days.
 - b. Verification of electronic funds transfers.
 - (1) When an electronic transfer is made, the sending and receiving banks generate a computer printout with details of date, time, accounts, and amounts.

Note: Always obtain a copy for records when EFT is used.
 - (2) Some banks have a Wire/Funds Transfer Activity Record that they will provide to document outgoing and incoming electronic transfers.
2. Maintaining records of canceled checks.

- a. SDCL § 16-18-20.2 requires:
 - (1) Original cancelled checks, or
 - (2) Copies of both sides of the original checks by:
 - (a) Truncation,
 - (b) Check imaging, or
 - (c) The equivalent.

3. The Requirements for Client Trust Accounts.

- A. The rule allows one or more client trust accounts.
 - 1. Only one common client trust account is recommended.
 - a. Record keeping will be less complicated.
 - b. Exceptions: lawyer or firm with multiple locations.
- B. The rule requires client funds be kept in the state where the office is situated.
 - 1. Lawyers practicing in South Dakota: common client trust bank account must be maintained in South Dakota.
 - 2. Lawyers practicing in South Dakota: client funds may be kept in a separate client trust account out of South Dakota only with the consent of the client. *See also* SDCL § 16-18-20.2 which requires client consent be **in writing**.
 - 3. Lawyers licensed in South Dakota but maintaining practice in another state: when representing a South Dakota resident, it is recommended that lawyer have client give written consent to keep their funds out of South Dakota.
- C. NO ATM access.
 - 1. ATM access makes it possible for anyone with the account code to withdraw clients' funds in cash.
 - a. ATM withdrawals are an audit trail disaster.
 - (1) There is nothing to show which client's money was withdrawn.
 - (2) There is nothing to show who withdrew the money.

- (3) There is nothing to show who the money was paid to.
 - b. An ATM receipt will not prove to clients or the Disciplinary Board what happened to the money.
 - 2. Most banks do not offer ATM for business accounts; if this service is offered make sure the correct type of account has been established.
- D. NO automatic overdraft protection.
- 1. “Automatic overdraft protection” means the bank automatically makes a personal loan to cover the amount of insufficient funds.
 - a. The account should never have insufficient funds.
 - b. A lawyer can’t deposit personal funds into the client trust account.
 - 2. The “instant credit” arrangements are also a violation of the rules.
 - 3. Regardless of overdraft protection, an insufficient funds check on a client trust bank account must be reported immediately to the Disciplinary Board AND on the Certificate of Compliance. Banks are also expected to immediately report insufficient funds checks to the Disciplinary Board on trust accounts.

4. “IOLTA” Accounts – Interest On Lawyers Trust Accounts are MANDATORY.

- A. Rules of Professional Conduct 1.15(d)(3) provide:
- “A lawyer shall create and maintain an interest-bearing account for clients’ funds which are nominal in amount or to be held for a short period of time...”
- 1. Rules of Professional Conduct 1.15(e)(1) provides:

“[IOLTA] is a mandatory program for lawyers and law firms, whether proprietorships, partnerships or professional corporations or other business organization for the practice of law who hold clients’ or third party’s funds.”
 - 2. Rationale:
 - a. Clients’ funds are often so small or held for such short periods of time that the interest earned for the client in a separate interest-bearing account would be less than the costs involved in opening or accounting for the interest.
 - b. Collectively the funds can generate substantial interest that would otherwise benefit only the bank.

- c. Funds can be utilized for public benefit and education through Bar Foundation.
3. Lawyer's discretion to determine if clients' funds are nominal in amount or to be held for a short period of time and such sound judgment is not subject to review under Rule 1.15(e)(3)(iv).
4. Advice to clients.
 - a. Rules of Professional Conduct 1.15(e)(3)(v) provides for IOLTA accounts: "Notification of clients whose funds are nominal in amount or to be held for a short period of time is unnecessary for lawyers and law firms."
 - b. Client has the right to request to pay for the cost of separate *interest-bearing* account "... whenever possible upon deposited funds which are neither nominal in amount nor are to be held for a short period of time; however, traditional attorney-client relationships do not compel attorneys to either invest clients' funds or to advise clients to make their funds productive." Rules of Professional Conduct 1.15(e)(3)(ii).
- B. Rules of Professional Conduct 1.15(d)(3)(i) provides: "No earnings from such an account shall be made available to a lawyer or firm."
 1. The account **must** be set up so that the interest the account earns will be paid to the South Dakota State Bar Foundation, or
 2. The account **must** be set up so that the interest the account earns will be paid to the client.
- C. Setting up an "IOLTA" account.
 1. Rule 1.15(d)(3)(iii) provides:

"An interest-bearing trust account shall be established with any bank authorized by federal or state law to do business in South Dakota and insured by the Federal Deposit Insurance Corporation. Funds in each interest-bearing trust account shall be subject to withdrawal upon request and without delay."
 2. Provide the bank with the IOLTA "Notice to Financial Institution." *See* Form 1.
 3. Send the "Notice to State Bar Foundation" to the State Bar office. *See* Form 2.

- a. Attach a blank deposit slip or a voided blank check for the account.
 - b. Attach a list of the names of all the attorneys using the account.
 - c. Mail form to:
State Bar of South Dakota
111 W. Capitol Avenue, # 1
Pierre, SD 57501
4. The account will have State Bar Foundation's taxpayer identification number.
- a. 1099s will be sent to the State Bar Foundation.
5. The bank automatically transmits the interest to the State Bar Foundation.
6. The bank handles the reporting requirements. *See* Form 3.
7. The bank's fee for IOLTA services is paid out of the interest the account earns.
- a. When the monthly service fee is greater than the interest earned, the unpaid portion of the service fee is deducted from the interest earned on other IOLTA accounts.
 - b. The State Bar Foundation may request that the lawyer revoke participation if costs consistently exceed interest.

NOTE: Lawyer is still responsible for paying check printing and other bank charges, such as wire fees.
 - c. Lawyer or firm may petition the Supreme Court to be exempt from mandatory participation in IOLTA on various grounds listed in Rule 1.15(e)(7). *See* Form 4.

**South Dakota Bar Foundation
Interest on Lawyers Trust Accounts
Notice to Financial Institution**

TO:

Name of Financial Institution

The undersigned has elected to participate in the Interest on Lawyers' Trust Accounts Program. Under this program, interest on the trust account described below will be paid directly by you to the South Dakota Bar Foundation rather than being credited to the undersigned. The following information is provided for your records:

1. Account Title or Name
2. Account Number
3. ☐ This is a new NOW account.
☐ This is a conversion of an existing account.
4. Please pay interest at least yearly to:
South Dakota Bar Foundation
111 W Capitol Ave. #1
Pierre, SD 57501

Tax ID Number: 46-0378148

Contact Person: Nicole Ogan, nicole.ogan@sdbar.net

Phone Number: 605-224-7554

The Foundation is a tax-exempt 501(c)(3) organization. Appropriate federal agencies have approved NOW account eligibility for this program.

5. No withholding is required. No separate 1099 is required. W-9s should show the South Dakota Bar Foundation Tax ID Number 46-0378148.
6. A form for remitting interest is attached. If you misplace the form, please contact the Foundation for an updated form. If you are submitting interest via ACH, please email nicole.ogan@sdbar.net for an electronic form for reporting.

Date: _____

Lawyer or Law Firm:

By: _____

Address: _____

Phone Number: _____

Notice to South Dakota Bar Foundation

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

Re: Notice of Participation

The undersigned elects to participate in the Interest on Lawyers' Trust Accounts Program. Please use the following information for our interest-bearing account:

1. Name and Mailing Address of Financial Institution_____

2. Account Title_____

3. Account Number_____

It is understood that all lawyers in this firm are members of the Foundation by virtue of our participation in the program. A current listing will be provided upon request.

Date:_____

Lawyer or Law Firm:

By:_____

Address:_____

Phone Number:_____

Financial Institution Report for Interest Remittance

TO: South Dakota Bar Foundation

Date: _____

From: _____

Financial Institution

Address

City

State

Zip

IOLTA INTEREST REMITTANCE

[illegible]

BY: _____

Person Preparing Report

Send this report with remittance to:

South Dakota Bar Foundation

111 W Capitol Ave. #1

Pierre, SD 57501

Questions or to pay via ACH:

605-224-7554

IN THE SUPREME COURT
OF SOUTH DAKOTA

IN THE MATTER OF MANDATORY
IOLTA TRUST ACCOUNT
PARTICIPATION

REQUEST FOR
EXEMPTION

Comes now: _____ and hereby requests the
Supreme Court for an exemption from Rule 16-68 for the year 20____, which rule requires
a lawyer to have the lawyer's trust account participate in IOLTA, which request is based
upon the following:

I (we) have reviewed our average daily balance in my(our) trust account for the year
20____; and I (we) have inquired from our bank at which the trust account is maintained to
ascertain the interest that would accrue based upon that average daily balance; further,
that the bank at which my(our) trust account is held is: _____;

I (we) have ascertained the charges our bank would levy against the accruing interest
through IOLTA participation; and

That the interest that would accrue through IOLTA participation would be exceeded by
the bank charges; and

I (we) have no reasonable alternative bank for my trust account which would generate
interest in excess of bank charges; and

Upon request, I (we) will provide the Supreme Court and the State Bar with supporting
documentation evidencing the above representations;

That the undersigned requests an exemption on different grounds, specifically as follows:

_____.

Wherefore, the undersigned respectfully requests that the Supreme Court grant the
undersigned lawyer/law firm an exemption from mandatory IOLTA for the calendar year
20____. A copy of this request for exemption has been sent to the State Bar.

Dated this ____ day of _____, 20____.

TRUST ACCOUNT RULES AND CONSIDERATIONS

Presented at State Bar of SD 2023 Annual Meeting

Thomas H. Frieberg

Frieberg, Nelson & Ask, LLP

RULE NUMBER 1: The money is NOT the attorney's money. It is a CLIENT trust account, and the funds belong to the CLIENT.

GENERAL CONSIDERATIONS:

- At all times the client funds must be maintained separate from the lawyer's funds. COMMINGLING OF FUNDS IS STRICTLY PROHIBITED.
- Must be able to fully account for funds at all times.

STATUTORY BACKGROUND

1) SDCL 16-18 sets forth the Powers and Duties of Attorneys:

a) SDCL 16-18-20:

An attorney and counselor at law has power to receive money claimed by his client in an action or proceeding during the pendency thereof or afterwards unless he has been previously discharged by his client, and upon payment thereof, and not otherwise to discharge the claim or acknowledge satisfaction of the judgment.

b) SDCL 16-18-20.1:

Every attorney shall maintain complete records of the handling, maintenance, and disposition of all funds, securities, and other properties of a client at any time in his possession, from the time of receipt to the time of final distribution, and shall preserve such records for a period of five years after final distribution of such funds, securities, or other properties or any portion thereof, and failure to keep such records shall be grounds for appropriate disciplinary proceedings.

2) Specific rules of trust accounts are set forth in SDCL 16-18-20.2 and apply to all members of the Bar:

- a) Exceptions are limited (ie., judiciary, non-resident attorney who maintains trust account in other jurisdiction, inactive...); and
- b) Minimum Trust Accounting **RECORDS**:
 - i) Separate Bank Account:
 - (1) Trust Account Designation; and
 - (2) IOLTA.
 - ii) Deposit slips and an additional cash receipts book identifying:
 - (1) Date received;
 - (2) Source; and
 - (3) Client or matter.
 - receipt must be maintained if retainer paid via credit card (ie. LAWPAY)
 - iii) Original or copies of front and back of checks which are numbered consecutively:
 - (1) Strongly suggested to use checks and not on-line transfers;
 - (2) Safeguard in tracking individual transactions;
 - (3) Consider different colored checks from operating account to avoid confusion; and
 - (4) Separate checks for each bill paid also a safeguard worth considering.
 - iv) Documentary support for all disbursements. As an example, wire authorizations.
 - v) Separate Receipts and Disbursements Journal with columns for:
 - (1) Receipts;
 - (2) Disbursements;
 - (3) Transfers;
 - (4) Account balance;
 - (5) Must contain at least:
 - Identification of client or matter for each receipt or disbursement;
 - Date for each transaction;
 - Check number for all disbursements; and
 - Explanation – i.e., retainer, settlement, etc.

(6) Separate file or ledger card for each individual client or matter showing all individual receipts disbursements, transfer and unexpended balance:

- Identification of client or matter;
- Date for each transaction;
- Check number for each disbursement; and
- Explanation.

(7) All bank statements for all trust accounts.

MINIMUM TRUST ACCOUNTING PROCEDURES

MONTHLY

- 1) Reconciliation of bank account with checkbook AND with cash receipts and disbursements journal; and
- 2) Comparison of reconciled balance in trust account AND the total of individual client records.

ANNUALLY

- 1) Detailed listing of balance of unexpended funds held for each client or matter.

MUST KEEP RECORDS FOR 6 YEARS

DISCIPLINARY BOARD MAY CONDUCT AUDITS UNDER CERTAIN CIRCUMSTANCES

- Lawyers have an obligation to cooperate with and produce records for audit if one is warranted.

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF COMPLIANCE FILED ANNUALLY WITH STATE BAR
BETWEEN DECEMBER 1 AND JANUARY 31

- Published in December, January & February newsletters.
- Required for all attorneys, even those who do not maintain client trust accounts.
- These certifications need to be honestly and completely answered.

Many sign off believing that their partner/office manager/bookkeeper has complied with the requirements.

RULES OF PROFESSIONAL CONDUCT and TRUST ACCOUNTS

RULE 1.15 of the Rules of Professional Conduct

- a) Must keep separate from lawyer's property;
Complete records maintained for 5 years after termination of representation;
Lawyer's own funds permitted ONLY to pay bank charges; and
Only withdraw fees and costs when fee earned or cost incurred.

ETHICS OPINION 2019-05 FLAT FEE

- May not be deposited into operating account unless earned and where refund is possible.
 - Fee must still be reasonable under RULE 1.5.
 - Must be available for refund in event of dispute.
- b) Must promptly deliver funds to clients entitled to receive the funds;
 - c) Disputed funds must be retained until dispute is resolved; and
 - d) Preserving identity of funds and property of client.

DISCIPLINARY BOARD PERSPECTIVE OF TRUST ACCOUNT COMPLIANCE

- Lawyers coming before the Board on any issue will be subject to review of their trust account records:
 - Multiple instances in the last several years of lawyers being non-compliant with trust accounting rules.
- Lawyer may not "borrow" from trust funds and replenish funds later.
- Trust Account violations, including false annual certifications, are taken very seriously by the Disciplinary Board and the Supreme Court.

EXAMPLES

- In re Discipline of Pier , 472 N.W.2d 916 (S.D. 1991) – Attorney disbarred for taking client funds for personal use - Reinstatement authorized 6 years later upon several conditions including passing bar exam
- In re Discipline of Tidball, 503 N.W.2d 850 (S.D. 1993) – Attorney disbarred in part due to commingling personal funds with client funds and using trust account to shield personal funds from creditors.
- In re Discipline of Dorothy, 2000 S.D. 23, 605 N.W.2d 493 – Attorney’s failure to notify client of receipt of payment from other party was partial justification for public censure.
- In re Discipline of Mary Ash and Mark Welter
 - Both of these decisions are published in the April, 2022 State Bar Newsletter and resulted in public censures
 - Example of perils of relying on partner to operate trust account within parameters of rules.

ADDITIONAL RESOURCE

The State Bar has Trust Account Manual from 1998 which sets forth in details rules etc. for handling Trust Account.

Eric Hanson's Bio

Today's presenters are Billy Stitz and Eric Hanson.

Billy is the licensed abstracter and office manager for Moody County Abstract in Flandreau. Billy is from Burnsville, Minnesota and graduated in 2011 from South Dakota University with a degree in Journalism. After a brief career in the newspaper industry, Billy joined Moody County Abstract in the spring of 2016 and has been a licensed abstracter since 2017. Billy serves on a variety of committees for the South Dakota Land Title Association, including the designated title industry member of the South Dakota Title Standards Committee.

Eric serves as the President of Dakota Homestead Title Insurance Company and Homestead Holdings, Inc. where he oversees a variety of real estate focused businesses around South Dakota. Eric is from Sioux Falls and is a 2009 graduate from South Dakota State University. He graduated with honors from the University of South Dakota Law School in 2012. Prior to starting as Corporate Counsel for Dakota Homestead, Eric clerked for the First Judicial Circuit. With his roles at Dakota Homestead since 2013, Eric helps to assist, teach, and present to attorneys, lenders, realtors, students, and others on all subjects related to real property.

2023 Proposed Title Standards Revisions

South Dakota Title Standards Committee

Presentation Overview



Our Rational



Proposed
Changes



New
Additions



Further
Guidance

Committee's Rational

- Seeking to find ways to improve available resource for colleagues
 - i.e. abstracters and attorneys
- Incorporate input from various stakeholders to align their rules, regulations, and practices with the title standards
 - i.e. DOT, Bar, and lending community
- Proposed changes mainly surrounding probate portions (plus Transfer on Death on Deeds) that are currently missing

Proposed Changes

5-22. Conveyances under authority of power of attorney

Proposed Change:

- “Except as otherwise provided herein, Aa general authority to convey shall grant to the attorney in fact named in the power of attorney authority to convey any interest the principal has in any property. A general power to convey grants no authority to the attorney-in-fact to self-deal, that is, to convey an interest to the attorney-in-fact, unless that power is specifically articulated, in clear and unmistakable language, in the power of attorney, or in another written document clearly indicating that the attorney-in-fact is authorized to engage in self-dealing.”

Reason:

- Updated to include the second part regarding self-dealing in light of South Dakota Supreme Court cases including *Bienash v. Moller*, 2006 S.D. 78, 721 N.W.2d 431 and *Smith Angus Ranch, Inc. v. Hurst*, 2021 S.D. 40 that make clear that Power of Attorneys must have specific language to authorize self-dealing.
- We have "held that a power of attorney must be strictly construed" *Bienash v. Moller*, 2006 S.D. 78,13, 721 N.W.2d 431, 435. Relying on the general prohibition against self-dealing and our rule that POAs must be strictly constructed, this Court has held that "if the power to self-deal is not specifically articulated in the power of attorney, that power does not exist." Id.14. "As a corollary to this [] rule," in *Bienash* we "adopt[ed] a bright-line rule that no oral extrinsic evidence will be admitted to raise a factual issue" concerning a principal's intent to allow self-dealing by an attorney-in-fact. Id. 23-24.*Smith Angus Ranch, Inc. v. Hurst*, 2021 S.D. 40
- Next, we must look to the extent of Huether's authority under the power of attorney to determine whether Huether breached his fiduciary duty. Powers of attorney "must be strictly construed and strictly pursued." *Bienash*, 2006 S.D. 78,13, 721 N.W.2d at 435 (quoting *In re Guardianship of Blare*, 1999 S.D. 3,14, 589 N.W.2d 211, 214). Because fiduciaries must strictly avoid any acts of self-dealing, the authority to self-deal exists only if the power of attorney provides "clear and unmistakable language" specifically authorizing acts of self-dealing. Id. 4, 721 N.W.2d at 435. "Self-dealing occurs when an agent pits their personal interests against their obligations to the principal." *Wyman*, 2018 S.D. 17, 23, 908 N.W.2d at 177. Self-dealing is precluded "even when the language of a power of attorney might logically entail the ability to self-deal" if there is no explicit provision allowing it. Id. 22, 908 N.W.2d at 177. *Estate of Stoeber v. Huether*, 2019 S.D. 58

5-24. Trust conveyances – curative statute.

- “A curative statute validates transfers made to or by a trust prior to July 1, **2003**, and construes such transfers to have been made to or by the trustee.”
- Authority – SDCL 43-28-22.
- Updated the date of the curative statute from July 1, 1991 to July 1, 2003.

6-01. Delivery, delay in recordation

Proposed Change:

- “Delivery of an instrument, acknowledged and recorded, is presumed. Delay in recordation, with or without record evidence of the intervening death of the grantor, does not dispel the presumption. ~~However, that fact that such deed is presumed to be valid and effective does not dispose of the question whether the transfer of the property conveyed may have been subject to inheritance tax. (See Standard [7.1] relative to lien for inheritance tax.)~~”

Reason:

- Removed the reference to the inheritance tax as more than 12-years have passed from the date of death of any decedent dying prior to July 1, 2001 (Title Standard 15-08)

6-02. Forms of acknowledgment

Proposed Change:

- “Recommended forms of certificates of acknowledgement for various situations are set forth in SDCL Chapter 18-4, and SDCL Chapter 18-5. Certificates of acknowledgment substantially following the forms recommend by either chapter are acceptable.
- Chapter 18-4’s recommendations appear in the following:
 - SDCL 18-4-12 – General individuals
 - SDCL 18-4-13 – Corporate officers
 - SDCL 18-4-14 – Attorneys in fact
 - SDCL 18-4-15 – Deputy Sheriffs.
 - SDCL 18-4-29 – Remote Acknowledgement (Video)
- Chapter 18-5’s recommendations appear in the following:
 - SDCL 18-5-8 – Individuals
 - SDCL 18-5-9 – Corporate officers
 - SDCL 18-5-10 – Attorneys in fact
 - SDCL 18-5-11 – Public officers and fiduciaries
 - SDCL 18-5-12 – Partners
- The recommended forms may be adapted as appropriate for legal entities, legal representatives, or officers other than those listed.”

Reason:

- Intended to provide guidance to specific forms of acknowledgment and where to find them in SDCL 18-4 and SDCL 18-5
- That change also moves back the numbering of former Title Standards 6-02 through 6-07 back by one number.

7-02. Alternative grantees

- Current Standard – “A conveyance to grantees in the alternative renders the conveyance void.”
- Authority:
 - Patton on Titles Sec. 183 and 336 (2d ed. 1957)
 - *Armstrong v. Hellwig*, 18 NW2d 284 (SD 1945)
- No change has been proposed yet, but members of the Committee believe that the Title Standard does not reflect how attorneys are addressing alternative grantees in practice.

7-10 and 16-03

- The former 16-03 – Contents of affidavit – interest of marker has been moved to the new Title Standard 7-10.
 - The move was to put the standard in the same location as other affidavit Title Standards compared to be in an area dealing with omissions, curative acts, and condominiums.
- That moves former Title Standards 7-10 through 7-12 back one spot.

Title Standard 8-08 – Minerals

- Current 8-08. Consult SD Mineral Title Standards. “A title examiner should consult the South Dakota Mineral Title Standards if the title opinion being given includes the status of a mineral estate or interest.”
- New 8-08, the former 8-09 (Former Title Standards 8-09 through 8-13 all moved up one spot)
- Reason – the Committee agreed with input from attorneys and the title industry that the reference in the old 8-08 to a South Dakota Mineral Title Standards that does not exist and is likely to never exist, was creating more harm than good.
- Long-term – the Committee believes that all of Chapter 8 regarding Minerals should be reviewed by the applicable substantive law committees for their input and review.

Wind and Solar Easements

- Committee has been requested to add Solar Energy to go with Wind Energy for Title Standards 9-05 through 9-07.
- Addition reflects the update to the underlying statutes, SDCL 43-13-17 and 19 which now read “wind or solar easements”.

Proposed Changes Probate

15-01. Probate and Estate Administration

Proposed Change:

- “Prior to July 1, 1995 (the effective date of adoption of the Uniform Probate Code in South Dakota), for ultimate distributions from an estate, as distinguished from conveyances from an estate, a certified copy of a decree of distribution made by a South Dakota circuit court is sufficient to complete the chain of title.”

Reason:

- The standard applies not only to probate, but also to intestate estate administration. The effective date of the Uniform Probate Code.
- This title standard applies to the ultimate distributions from the estate pursuant to the Will or Intestate Succession, as distinguished from Title Standard 15-2, which applies to conveyances, or sales, from an estate. Prior to the UPC, a certified copy of a decree of distribution was sufficient to pass title.

15-02. Executor's deed

Proposed Change:

- “For conveyances out of an estate, as distinguished from ultimate distributions from an estate pursuant to decedent's will or intestate succession, prior to July 1, 1995 (the effective date of adoption of the Uniform Probate Code in South Dakota), a certified copy of an order confirming sale made by a South Dakota circuit court and an executor's or administrator's deed is necessary to complete the chain of title, except in certain circumstances of an independent administration.”

Reason:

- This Title Standard applies to conveyances, or sales, from an estate, as opposed to ultimate distributions pursuant to a Will or Intestate Succession. The statutes require both an order confirming sale and an Executor's Deed. Effective date of the Uniform Probate Code (UPC).

15-03. Conveyances made under ~~probate~~ the Uniform Probate Code

Proposed Change:

- “For conveyances occurring after July 1, 1995 under the Uniform Probate Code, SDCL ch. 29A, whether or not in ultimate distribution of the estate under the decedent’s will or intestate succession, a duly recorded personal representative's deed with attached certified copy of the Letters of Personal Representative ~~or a duly recorded order of complete settlement distributing specifically described real property to the heirs or devisees in specified shares or proportions~~ is required to complete the chain of title.”

Reason:

- This Title Standard applies to both conveyances from the estate (e.g., sales) and to ultimate distributions for the estate pursuant to the decedent’s Will or Intestate Succession.
- It would appear this Title Standard is an incorrect statement of the law. It appears that SDCL 29A-3-907 would require a deed as evidence of distributee’s title, for the distribution in kind of real estate, and would not permit an order of complete settlement. The statute provides: “If distribution in kind is made, the personal representative shall execute an instrument or deed of distribution assigning, transferring, or releasing the assets to the distributee as evidence of the distributee's title to the property.” SDCL 29A-3-908 would seem to confirm this conclusion. It provides “Proof that a distributee has received an instrument or deed of distribution of assets in kind, or payment in distribution, from a personal representative, is conclusive evidence that the distributee has succeeded to the interest of the decedent and the estate in the distributed assets, as against all persons interested in the estate, except that the personal representative may recover the assets or their value if the distribution was improper. Further, SDCL 29A-3-1001 provides that the petition for order of complete settlement may “adjudicate the final settlement and distribution of the estate”. It does not provide that the order of complete settlement may distribute the real estate.

15-04. Chain of title--probate

Proposed Change:

- “A title examiner examining a title for an intended purchaser or mortgagee for value from a distributee of an estate need only require proof of unrestricted letters of the personal representative in effect on the date of the original conveyance from the estate to the distributee of the estate in order to complete the chain of title.”

Reason:

- This Title Standard applies not only to probate, but also to intestate estate administration.
- This revision makes it clear that the letters of personal representative must be in effect on the date of the distribution from the estate to the distributee, not the date of the purchase or the mortgage from the distributee.

15-05. Authority of personal representative

Proposed Change:

- “Upon the death of a person, the real and personal property devolves to the heirs or devisees, subject to claims and the administration of the estate, and the personal representative, acting on behalf of the estate, and on behalf of the heirs or devisees of the decedent, has the authority to convey said real and personal property ~~which includes the authority of the personal representative to convey.~~”

Reason:

- This cleans up the grammar. Under the existing wording of the Title Standard, the effective meaning is that “the estate includes the authority of the Personal Representative to convey”, which is awkward.

15-07. Delayed probate **or administration**

Proposed Change:

- “If **no proceedings concerning succession or estate administration** have been commenced within three years of the date of the decedent’s death, ~~a probate has not been commenced within three years from the decedent’s death~~ a personal representative may be appointed for the **sole** purpose of transferring property **pursuant to the terms of the decedent’s will or by intestate succession** ~~by will or intestacy.~~”

Reason:

- The Title Standard applies not only to probate, but also to instate succession. See SDCL 29A-3-108.

15-08. South Dakota inheritance tax liens

Proposed Change:

- “The South Dakota inheritance tax was repealed effective July 1, 2001, and any remaining inheritance tax liens of record are of no further force or effect ~~is limited to twelve years from the date of death for any decedent dying prior to July 1, 2001. When the record does not establish that a decedent died more than twelve years prior to the examination of the title, a title examiner should require evidence of record that no tax is owed, that any tax owing has been paid, or that any potential lien has been removed from the subject property.~~”

Reason:

- The repeal of the inheritance tax does not affect the estate tax liens imposed under SDCL ch. 10-40A, but the time period for their effectiveness has expired.

15-09. Termination of ~~life tenant~~ a life estate or the interest of a life tenant

Proposed Change:

- “To establish termination of the interest of a life tenant in real property, the certified record of death must be recorded together with an affidavit setting out the legal descriptions of the property involved. Alternatively, if the interest of a life tenant is the subject of proceedings concerning succession or estate administration, the court, in its order of complete settlement, may terminate the decedent’s life estate in the property by the recording of the order of complete settlement in the land record.”

Reason:

- See, Estate of Jackson, 508 N.W.2d 374 (S.D. 1993). This case, however, cites SDCL 30-23-41 as authority, which statute was repealed when the UPC was adopted. Unable to find a provision in the UPC which allows the Court to terminate the decedent’s life estate but believe the Court would have the inherent authority to do so.

15-17. Foreign personal representative

Proposed Change:

- “A foreign personal representative appointed in testacy must be appointed by an order or statement from a South Dakota court or clerk, qualify and be issued letters in order to ~~administrate~~ transfer title to the real estate. If no local administration or application or petition therefor is pending in this state, a foreign personal representative appointed in intestacy may file certified copies of the foreign documents of appointment and of any official bond with the clerk of courts in a county in which property belonging to the decedent is located and thereafter be authorized to transfer title to real property in South Dakota with the same authority as a locally appointed personal representative. However, a bank or trust company shall not have the authority to act unless qualified to do trust business or exercise trust powers in this state.”

Reason:

- Outlines authority and caveats not previously specified. Notably, a will must be probated in order to prove title.
- Larger discussion on foreign personal representatives later on.

New Additions

Transfer on Death Deeds

17-01. Requirements For Transfer On Death Deed.

Proposed Addition:

“To create a transfer on death deed, the transferor must have the same capacity required to make a will. The transfer on death deed must be recorded in the county where the property is located before the transferor’s death and must include:

- a. the essential elements and formalities of a recordable inter vivos deed; and
- b. a statement that the transfer is to occur at the transferor’s death.

A transfer on death deed does not require consideration, notice, delivery, or acceptance during the transferor’s life. A transfer on death deed has no effect while the transferor is alive, nor does it affect the rights and interests of a designated beneficiary, creditor, or future creditor until the death of the transferor.”

Reason:

- Authority: SDCL 29A-6-407; 408; 409; 413; 414; 29A-2-501
- Broad Title Standard that combines multiple statutes to cover what are the essential elements of a Transfer on Death Deed.

17-02. Revocation Of Transfer On Death Deed.

Proposed Addition:

“A transfer on death deed may not be revoked by a revocatory act, such as burning, tearing, canceling, or otherwise destroying the deed, after it is recorded. A recorded transfer on death deed can only be revoked, in whole or in part, by an instrument subsequently acknowledged by the transferor and recorded. The instrument must be either:

- a. a transfer on death deed, inter vivos deed, or other instrument of revocation expressly revoking the prior transfer on death deed; or
- b. a transfer on death deed revoking the prior transfer on death deed by inconsistency.
- An optional revocation form can be found in SDCL 29A-6-431.”

Reason:

- Authority: SDCL 29A-6-405; 410; 411; 412; 431
- Outlines the process for termination of a transfer on death deed and points readers to the statutory form in SDCL 29A-6-431.

17-03. Limitations On Liability Of Beneficiary Of Transfer On Death Deed.

Proposed Addition:

“A purchaser for value or a lender acquiring a security interest in the property from the beneficiary takes their interest free and clear of any claims or liability to the transferor’s estate or creditors as long as they had no knowledge that the transfer was improper.”

Reason:

- Authority: SDCL 29A-6-425
- Similar to SDCL 29A-3-910 and other provisions that provide protections for purchasers / lenders for value without knowledge of any claims or liabilities of the estate. Key statutory protection for title industry for estate claims that have not yet become liens against the real property of the descendant.

17-04. Impact Of Transfer On Death Deed At Transferor's Death.

Proposed Addition:

“Upon the death of the transferor, property that is the subject of a transfer on death deed transfers to the designated beneficiaries who survived the transferor, subject to any restrictions contained in the transfer on death deed and disclaimers recorded by beneficiaries with the Register of Deeds in the county where the property is located. Beneficiaries take the property subject to all conveyances, encumbrances, assignments, contracts, mortgages, liens, and other interests the property is subject to at the time of the transferor's death. The transfer on death deed transfers the property without covenant or warranty of title, even if the transfer on death deed contains a contrary provision.”

Reason:

- Authority: SDCL 29A-6-415; 416; 418; 419; 29A-2-801
- Details what happens upon the death of the transferor and the necessity for the Transfer on Death Deed to be recorded prior to the transferor's death.

17-05. Joint Owners Making A Transfer On Death Deed.

Proposed Addition:

“If the transferor is a joint owner of the land, upon the transferor’s death, the property which is the subject of the transfer on death deed will belong to any surviving joint owners. However, if the transferor is the last surviving joint owner, then the transfer on death deed is effective and the property transfers to the designated beneficiaries.”

Reason:

- Authority: SDCL 29A-6-417
- Provides the statutory authority for how property held by joint owners is handled with Transfer on Death Deeds.

17-06. Transfer On Death Deed Beneficiary's Liability For Debts And Obligations.

Proposed Addition:

“A beneficiary of a transfer on death deed may be liable to the creditors or personal representative of a deceased transferor for an amount up to the value of the property conveyed to the beneficiary, as determined at the time of transferor's death.”

Reason:

- Authority: SDCL 29A-6-420; 421; 422; 423; 424
- Variety of discussion on this topic – ultimately the Committee decided that a brief statement that the beneficiary may be liable for claims was the best approach for the Title Standards.
 - If the beneficiary is concerned about potential claims, they likely will need an attorney to assist them making the inclusions of the time period for claims to be filed and the presumption that the assets of the estate are insufficient absent a probate unnecessary.

17-07. The Making Or Modification Of Beneficiary Of Transfer On Death Deed By Agent.

Proposed Addition:

“In the absence of a document establishing an agent’s right to act or a court order expressly authorizing such action, an attorney in fact, custodian, conservator, or other agent of the transferor may not make, change, or revoke a beneficiary designation on a transfer on death deed. However, this does not prohibit or limit the agent’s ability to sell, pledge, or otherwise enact a present transfer of the property during the transferor’s life with such express authorization, in effect, extinguishing the designated beneficiary’s right to receive the property upon the transferor’s death.”

Reason:

- Authority: SDCL 29A-6-426
- Work was done to clarify that authorized acts, including those authorized by court order or custodian powers under SDCL 55-10A-9, are permitted. Additionally, it makes clear that powers related to the power to transfer, sell, pledge, or others that are available during the transferor’s life – the restriction is that the party acting on behalf of the transferor cannot modify the Transfer on Death Deed explicitly unless they have that power granted to them by the transferor.

17-08. Affidavit Of Confirmation After Transfer On Death Deed.

Proposed Addition:

“To evidence the transfer of property upon the death of the transferor of the transfer on death deed, a beneficiary must file and record an affidavit of confirmation in the county where the property is located. The affidavit must comply with the requirements of SDCL 29A-6-427. An optional form of the affidavit of confirmation can be found in SDCL 29A-6-432. The register of deeds will make an index reference in the record of deeds to any affidavit of confirmation properly filed.”

Reason:

- Authority: SDCL 29A-6-427; 428; 429; 432
- Details the process for filing an affidavit of confirmation and where to find the statutory form.

DOT

Purpose

- After sharing the DOT presentation from last summer's SDLTA meeting, the Committee worked on reviewing the applicable existing Title Standards and drafted several new standards to incorporate key parts of that presentation.
- Additionally, the Committee reached out to the DOT for comment and drafting assistance. The first revisions were just received back in January and are being shared with this group before the full Committee has weighed in on them so proposed wording may change.

8-06. Conveyances to state for highway purposes – Current

- “In transfers to the State of South Dakota or any of its political subdivisions of property for highway purposes, the grantee only acquires an easement. (No opinion is expressed as to ownership of non-fluid minerals/substances on or underlying the grantee’s acquired right of way.)”
- As the presentation last summer highlighted, the State’s ownership of highway property depends on the timing of when it was acquired and for what purpose.

8-06. Conveyances to state for highway purposes – DOT Proposal

- “Prior to July 1, 1986, the South Dakota Department of Transportation could not acquire fee title in right-of-way. On and after July 1, 1986, the South Dakota Department of Transportation may acquire fee title in right of way by gift, devise, or purchase, but may not acquire fee title in right of way acquired by condemnation.”
- Authority: SDCL 43-16-3; S.D. Const. Art. VI §13; *Pluimer v. City of Belle Fourche*, 549 NW2d 202, 1996 SD 65; 1986 S.D. Sess. L. ch. 238, § 1; SDCL 31-19-42; S.D. Const. Art. VI, § 13; *Cuka v. State*, 122 N.W.2d 83 (S.D. 1963); *Northwest Realty Co. v. Jacobs*, 273 N.W.2d 141 (S.D. 1978).
- Whether a conveyance of right of way transfers fee title or only an easement depends on the following factors: (1) amount of consideration; (2) particularity of description; (3) extent of limitation on use; (4) type of interest that best serves parties’ intent; (5) peculiarities of wording; (6) to whom was property assessed and who paid taxes; and (7) how have parties, heirs and assigns treated the property.”
- Highlighted text comes from the application of a variety of legal analysis used by the DOT with the understanding that it is shared for the Committee’s consideration. Since it is not a clearly established statute or rule, it is not part of the Title Standards.

Proposed New DOT Standard # 1

- “Effective July 1, 1939, all rights-of-way of the state trunk highway system, together with all appurtenances, the right or interest in or to which was in any county, transferred to and vested in the State of South Dakota for highway purposes.”
- Authority: 1939 S.D. Sess. L. ch. 113, § 12
- Purpose – outlines the statutory transfer of property to the State for those chains of title that include highway property prior to July 1, 1939.

Proposed New DOT Standard # 2

- “Land held as public use easements by the South Dakota Department of Transportation may be abandoned by resolution of the South Dakota Department of Transportation Commission and such lands then revert to their former owner or his assign.”
- Authority: SDCL 31-19-60
- Purpose – outlines the process for what happens after easement property is abandoned.
 - Key issue discussed last summer; it is reverting to the former owner. If the H-Lot has not been conveyed to subsequent owner, the prior owner could be a prior owner in the chain of title.

Debated New DOT Title Standards

- H Lot held in fee. “The South Dakota Department of Transportation may transfer and convey a fee interest in an H Lot which was held in fee.”
 - Authority: SDCL 31-19-60; 63; 63.1; 64; 31-2-27
- H Lot held as easement. “The South Dakota Department of Transportation may transfer and convey an H Lot acquired as a public use easement to a political subdivision, the federal government, or an Indian tribe without any payment. The South Dakota Department of Transportation may not sell and convey an H Lot acquired as a public use easement to a non-governmental entity. If the South Dakota Department of Transportation concludes lands are no longer needed for public highway purposes, it may abandon the lands.”
 - Authority: SDCL 31-19-60; 63; 63.1; 64
- Discussion Regarding These Standards: The DOT has a variety of options for disposing of State Land outlined in the statutes so having a Title Standard trying to simplify that process might be counterproductive when it comes to others pointing to the Title Standards. DOT is wondering if these items would be better to be addressed in a future Green Book revision so that they can be covered in greater depth.

New DOT Title Standards

- 8-05.1 – Effect of abandonment of public use easement by South Dakota Department of Transportation or county commission.
 - “A public use easement held by the South Dakota Department of Transportation or a county may be abandoned by resolution of the South Dakota Transportation Commission or board of county commissioners, respectively, and such lands then revert to the former owner or such former owner’s assigns.”
 - Authority: SDCL 31-19-60.
- 8-06.1 – Rights of way in state trunk highway system acquired prior to 1939.
 - “Effective July 1, 1939, all rights-of-way of the state trunk highway system, together with all appurtenances, the right or interest in or to which was in any county, transferred to and vested in the State of South Dakota for highway purposes by operation of law.”
 - Authority: S.D. Code of 1919 §18.1301; 1939 S.D. Sess. L. ch. 113.

9-02. Rights-of-way as encumbrances.

- “A covenant of warranty should not be considered broken by the existence of a highway or railway, or right-of-way for either, upon the land conveyed by an instrument of conveyances, unless otherwise particularly specified in the deed. However, the existence of such highway, railway, or right-of-way should be noted.”
- Authority: *Murray v. United States*, 292 F.2d 161 (8th Cir. 1961); *Winter v. United States*, 783 F.2d 152 (8th Cir. 1986) (Source – South Dakota Land Title Guide: Ch. 9, p. 93)
- DOT Concern – the existing standard is incorrect in the DOT’s opinion because the railroad or other governmental entity could own the right-of-way in fee, rather than just an easement interest.

Further Guidance

Input Needed

1. 7-02. Alternative grantees

- “A conveyance to grantees in the alternative renders the conveyance void.”
- **Concern:** actual practice does not seem to follow this standard

2. 8-12. Leases--oil--gas

- “Prior to July 1, 1995, where the mineral owner is deceased an oil-gas lease must be executed by the personal representative as provided by statute. After July 1, 1995, a personal representative of an estate holding unrestricted letters may execute oil and gas leases and other instruments affecting the mineral estate without court approval.”
- **Concern:** should be reviewed

3. 14-03. Mortgages--release or assignment

- “Where a mortgage has been re-recorded and a release or assignment is given which describes only one of the recordings, the release or assignment is sufficient; but where a new mortgage is recorded which purports to be given to correct a defect in a former mortgage, there should be a release or assignment of both mortgages.”
- **Concern:** If the re-recorded instrument contains the recording information for the prior instrument, shouldn't the satisfaction of the re-recorded instrument be sufficient to satisfy the first instrument regardless of whether it is a pure re-record or a new instrument?

Input Needed (Cont'd)

4. 14-07. Release--assignment of rents

- “A title examiner shall require a release of a separately recorded assignment of rents even though the mortgage given on the same date or for the same debt is satisfied or released, unless the assignment of rents by its own terms is satisfied when the mortgage is satisfied or released or the satisfaction or release indicates the underlying debt is paid.”
- **Concern:** The practice of providing specific releases for assignments of rent is inconsistent compared to just releasee underlying mortgages and with different form services including default language; unsure if all of them comply with this provision.

5. 14-10. Mortgage--merger of title VS. 2-02. Contract for deed--merger

- **14-10:** “If the holder of a mortgage acquires the estate of the mortgagor, the mortgage interest may be merged in the fee and the mortgage extinguished, although it is only when the fee and the lien center in the same person without any intervening claims, liens or equities that a merger of the title and the lien will take place. However, merger depends upon the intent of the parties. In determining intent, equity is not limited by the rules of law, and under unusual circumstances, a mortgage may be extinguished where it would continue to exist at law, or a mortgage may be preserved where it would be merged at law. Because of the difficulty in determining what a court might decide in any particular case, if merger cannot be determined from the instruments, then a merger is not ordinarily assumed so long as the mortgage remains unsatisfied of record. If there is an outstanding or intervening lien or title, the foundation for the merger does not exist and no merger will be declared.”
- **2-02:** “A deed executed in pursuance of a contract for deed supersedes and merges all prior negotiations or contracts relating to it, provided there is no fraud or mistake or collateral contractual provisions or agreements which are not intended to be merged in the deed.”
- **Concern:** The concept of merger and how it is described in 14-10 versus 2-02. The Title Standards should be consistent with that approach so changing to requiring for non-merger to for sure not occur, it needs to be explicitly stated in the instrument makes some sense.

Input Needed (Cont'd)

6. 19-09. Plats, effect of replat on rights in the public and easements.

- The replat of a platted subdivision extinguishes the rights in the public and the public easements and rights-of-way created in the original plat as set forth in the replat or to the extent they are inconsistent with the replat. Any private easements shown on a plat cannot be extinguished without joinder of the parties benefitted by the private easement.
- **Concern:** This Title Standard does not seem to be correct as it relates to replating practices and the explanation given by surveyors and municipal attorneys regarding public rights of way and easements. Making changes would be a substantive change

7. 23-03. Validity of patent under General Allotment Act

- A title examiner may not assume the validity of a fee patent issued pursuant to the General Allotment Act of February 8, 1887. **A title examiner may rely upon a deed from the heirs of a deceased allottee as passing title free of trust provided that the deed has been approved by the Secretary of the Interior.**
- **Concern:** Does the bolded portion still hold true? With court cases related to issues associated with the General Allotment Act and management by the BIA / Department of the Interior, most underwriters have exceptions for situations like this calling the Title Standard into question.

Ideas for New Title Standards

- SDCL 43-31-17 – the Homestead Statute
 - Issue of some attorneys and title companies treating the homestead requirements applying in situations involving the conveyance of property from just one spouse to both spouses.
 - Closest authority is 40 Am Jr 2 § 129, where the majority of states have determined “that a purported conveyance of homestead property by husband to wife is effective although it is not joined in by the wife. The reasons stated for this conclusion include that the homestead rights of the parties for whose protection the statutes require joinder were enacted are not affected, that the statutes refer only to conveyances to third persons, and that joinder in such circumstances is an absurd and idle ceremony.”
- Other practice areas not covered by the Title Standards
 - Impact of defective acknowledgments.
- Areas for other groups to review and update.
 - Mineral interests in Chapter 8.
 - Bankruptcy in Chapter 12.

Foreign Personal Representatives

- Dispute between members of the Committee (and the State Bar) regarding the appointment of Foreign Personal Representatives and the ability to administer property in South Dakota
 - Main statutes or SDCL 29A-3-103 and 29A-4-204; 205
- Key part of SDCL 29A-4-205 – Powers
 - “A domiciliary foreign personal representative, who has complied with § SDCL 29A-4-204, may exercise as to assets in this state all power of a local personal representative and may maintain action and proceedings in this state subject to any conditions imposed upon nonresident parties generally, *except that no will is effective to prove the transfer of any property unless admitted to probate in a local proceeding*, and a bank or trust company shall not have the authority to act unless qualified to do trust business or exercise trust powers in this state.”
- One view is that as it relates to real property, the use of Ancillary Appointment (SDCL 29A-4-204) is not the same as local appointment (SDCL 29A-4-103) – thus to effectively administer real property in South Dakota, local appointment is necessary.
 - This view is supported by drafters of the South Dakota UPC
- Other view is that the filing of the paperwork from the probate in another state with the Clerk of Courts is sufficient and confers the same powers as if administered locally.

Topics for Discussion

- South Dakota Tax Sale and Tax Deed Process
 - In light of *Tyler v. Hennepin County*, South Dakota's tax taking statutes found in SDCL 10-23; 24; and 25 should likely be reviewed in light of this case as our statutory scheme does address returning excess proceeds to the property owner in the event that the tax sale generates excess proceeds.
- Back taxes and current year taxes:
 - People do NOT owe back taxes AND their current year taxes before payment is accepted on the back taxes. In other words, there is not an accelerated due date for current year if you owe back taxes.
 - However, county treasurers are often telling people they DO owe both before payment will be accepted.
- Additionally – based on feedback and experience from different title companies around the state, compliance with the tax sale and tax deed statutes can vary by county.

Contact Information

- Eric Hanson – Dakota Homestead Title Insurance Company
 - Email: eric@dakotahomestead.com
 - Phone: 605-336-0388
- Billy Stitz – Moody County Abstract
 - Email: bstitz@tsptitle.com
 - Phone: 605-997-3723