President's Message

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INSIDE THIS ISSUE:

This message will be my last as President of the South Dakota Defense Lawyers Association, as I turn the reins over to Doug Abraham at the end of this calendar year. I know Doug is excited to serve in his new role, and I look forward to the things he will achieve during his "administration."

As I look back on the last two years, my time serving as the president of this organization has proven to be one of constant change and adaptation. **Unfortunately, due to the rising COVID-19 cases across our state, our Executive Committee has made the difficult decision not to hold our annual meeting and seminar in Deadwood this year.** We remain optimistic, however, that we will be able to move forward with our traditional annual program next year, so please mark your calendars for November 3-4, 2022.

One of my priorities as president has been to build our membership by developing a relationship with the USD Law School and by increasing our outreach to young lawyers. I became involved in SDDLA within my first few months of my practice when a partner and mentor within my firm handed me the application and encouraged – well, insisted – that I not only join but also become involved. As a result of that experience, I have always believed that the future success of this organization rises and falls with early engagement of young lawyers and law students. In other words, if we can get them when they are young and show them the value of our organization, they will stay with us for the duration of their careers.

With the help of our Law School Committee (Chair: Tyler Haigh), SDDLA has made great strides in building a relationship with the USD Law School. We have created a law school liaison position, and began offering reduced cost membership and seminar attendance to law students. This week, we also once again held our "Day in the Life of a Civil Defense Attorney" program in which we share with law students the realities of private practice. And on October 4, 2021, in collaboration with the Rural Practice Project, we will once again host a reception for the South Dakota Supreme Court at Valiant Vineyards in Vermillion. We look forward to continuing to partner with the law school on other programs and networking opportunities for law students and our members.

We have also increased our outreach to young lawyers. As you will notice in this newsletter, Young Lawyers Committee members have been very busy putting together newsletter articles and other programming focused on litigation tactics, practice development, and other topics with young lawyers in mind.

President's Message, Continued

Additionally, last spring, our Women in Law Committee (Chair: Cassidy Stalley) put together a seminar modeled after the ABA's Grit Project that focused on teaching young lawyers to adopt a "growth mindset" as a key to building a successful and sustainable practice. We look forward to continuing that program again this spring.

As one final note, I would be remiss if I did not mention the passing of SDDLA's former president, Terry Westergaard. Terry served as president of SDDLA before I stepped in this role, and I thoroughly enjoyed his thoughtfulness, wisdom, and good sense of humor. In honor of his many contributions to our organization, our Executive Committee has decided to posthumously award Terry the Robert C. Riter Distinguished Service Award, which is granted to an SDDLA member for his exceptional service to the SDDLA on a continuing and sustaining basis. It is difficult to imagine someone more deserving of this award than Terry.

I look forward to what this organization will continue to accomplish under Doug's leadership. I have greatly enjoyed my time serving in this position, and I want to thank our membership for this opportunity to give back to our Bar and this organization.

COVID for Defense Lawyers

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Given that COVID-19 is now a pervasive disruptor of our social lives and an ever-present topic of discussion no matter where we go, I figured it was time to write a brief overview of COVID-19 legal developments for the civil defense lawyer. On a statewide basis, the 2021 South Dakota Legislature passed House Bill 1046, which resulted in an entirely new chapter in our code, 21-68. That chapter provides significant limitations of liability for exposure to COVID-19. The chapter contains far-reaching protections and, for the most part, precludes liability for an individual or entity unless intentional exposure to COVID-19 occurred with the intent to transfer COVID-19. The chapter contains heightened pleading standards ("state with particularity") and a heightened burden of proof ("by clear and convincing evidence").

Subsequent sections also limit liability for personal protective equipment manufacturers, sellers, and distributors, excepting only gross negligence, recklessness, or willful misconduct. Health care providers are afforded broad protection in virtually all aspects of COVID care. Last, the chapter clarifies that COVID-19 "is not an occupational disease under state law" for those of you work compers out there.

I have heard from other defense counsel that intentional exposure has been litigated in at least a handful of cases, but I am unaware of any results in that regard.

More recently, on September 9, the EEOC recognized that "long COVID" may be a disability under the Americans with Disabilities Act (ADA) and Section 501 of the Rehabilitation Act in certain circumstances. The EEOC will issue technical assistance about COVID-19 and ADA disability in the employment context in the "coming weeks," whatever that means. Looking forward, there does not appear to be a substantial likelihood that there will be a wave of litigation in relation to COVID exposures, but litigation appears more likely in the employment context within the scope of the ADA and in regard to vaccination mandates. Several members of the South Dakota House are already shopping legislation to prevent employers from mandating COVID vaccination and one bill draft would preclude employers from mandating *any* vaccination. The Noem administration has opposed vaccine mandates and mandates on businesses so 2022 should shape up to be an interesting session. In short, defense counsel need to stay tuned as the legal impact of COVID is likely to shift and change almost as much as the public health guidance we've received.

SAVE THE DATE!!

ANNUAL SEMINAR - NOVEMBER 3-4, 2022

Sioux Falls

The Impact of Holborn V. Deuel Co. Board of Adjustment on Quasi-Judicial Proceedings

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With a practice that includes defending city, county, and township boards whose decisions are appealed to circuit court, I have come to recognize the significance of quasi-judicial proceedings in South Dakota's legal landscape. I have also come to recognize the challenges that come with ensuring that such proceedings are conducted in a manner that comports with due process and South Dakota law.

In these proceedings, board members are called upon to essentially act like "judges." When called upon to act like a judge, board members' decision-making should not be tainted by bias or predisposition. But what types of influences on quasi-judicial officials cross the line and make a decision vulnerable on appeal? A recent decision from our supreme court provides some guidance in this area.

In Holborn v. Deuel Cnty. Bd. of Adjustment, 2021 S.D. 6, ¶ 22, 955 N.W.2d 363, the South Dakota Supreme Court clarified that, while it is the Legislature's prerogative to establish public policy within this State for determining the statutory basis for disqualification of public officials, the Court defines the limits of Constitutional due process protections afforded to individuals in quasi-judicial proceedings, apart from any statutory grounds for disqualification. In Holborn, the Court concluded that the due process standard described in the United States Supreme Court's decision in Caperton v. A.T. Massey Coal Co., Inc. should apply to those who make quasi-judicial determinations. In Caperton, the Court reaffirmed that the standard for disqualification of a judicial officer is extremely high and should only be applied in extraordinary situations where the Constitution requires recusal. Caperton noted that, in each of its prior decisions requiring the recusal of a judicial officer under the Due Process Clause, the Court dealt with extreme facts that created an unconstitutional probability of bias that cannot be defined with precision. In applying this standard, the Court cautioned that most disputes over disqualification will be resolved without resort to the Constitution, and application of the constitutional standard will thus be confined to rare instances.

The Holborn Court also noted that, apart from the Due Process Clause, the South Dakota Legislature has adopted SDCL 6-1-17 and SDCL 6-1-21 to address potential conflicts and biases in decisions made by public officials. SDCL 6-1-17 requires disqualification in the following two instances: (1) the official has a direct pecuniary interest in the matter before the governing body; or (2) if at least two-thirds of the governing body votes that an official has an identifiable conflict of interest prohibiting the official from voting on a matter. SDCL 6-1-21 allows officials to communicate with and receive information from the public about any matter of public interest and creates a rebuttable presumption that public officials are able to be objective and act fairly. This statutory presumption that an official is qualified may only be rebutted by clear and convincing evidence that the officer's authority, statements, or actions regarding an issue or a party involved demonstrates prejudice or unacceptable risk of bias.

Peterson's Message, Continued

The upshot of the Holborn decision is that most disputes over quasi-judicial officers' ability to fairly decide matters before them will come down to state law, and only in the extreme cases will the Due Process Clause be implicated. Nonetheless, there remains a sound reason for counsel advising public boards to play it safe on the front end of quasi-judicial proceedings. This can be done on two levels: evaluation and disclosure.

Each Board member should carefully consider their ties to the matter before them, i.e., whether the board member or a close family stands to benefit, or whether there is some other relationship that creates a potential conflict. And if that evaluation process prompts a concern, it would be advisable to make a record of it at the beginning of the quasi-judicial hearing. This serves two purposes. First, it gives the parties notice, and if they have a problem, they should make it known. If a participant fails to object and waits and to see how the official decides, they may have waived their argument regarding the conflict. Second, under SDCL 6-1-17, even if the official does not feel there is a conflict, other Board members may disagree. Following the disclosure, the Board should vote on whether the official is able to sit. If 2/3 find a conflict, the official sits out.

Holborn suggests that the bar is set pretty high for disqualification of a quasi-judicial officer. Proper evaluation and disclosure on the part of the governing boards will further insulate governing boards' decision-making from attack on appeal.

Perfect Practice Makes Perfect

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Baseball – America's pastime. Carefree and simple; it is concentration made easy by the professionals. Hall of Famer Yogi Berra is quoted as saying, "Baseball is ninety percent mental. The other half is physical." Consider the following scenario:

> Top of the 6th inning, the home team is up by 1 run; there is a fast runner on first base with one out. The ball splits the right-center field gap, but the outfielder cuts the ball off before it can roll to the wall.

Television blinds the viewer to the mental agility and focus required of the fielding team when the ball is hit: the first baseman will trail the batter to second; the second baseman and shortstop will both go out as relay men for the throw from the outfield; the pitcher will run to the midway point between home and third and watch the base runners to determine which base he needs to back up. The ability to execute this play is polished with practice. However, the TV cameras follow the ball and show the result only: the full play is missed and may go unappreciated – the rotation of defenders around the diamond, made to look effortless by major leaguers, is, in fact, only noticed if not performed with precision.

Hollywood can make lawyering seem simple, but it does so while also masking the focus that practicing law demands. For many, lawyering appeared to take on a new life in 2021. "Going to court" is no longer simply going to court – consideration now needs to be given to the format of the presentation to the judge. New levels of objections may need to be considered and researched; even preserving objections must be re-interpreted to avoid a waiver for untimeliness should there be a delay or quirk in the technology or internet provider's systems. Taking depositions is no longer the same: the feel of the environment is different when dealing in two-dimensional video conferences. Such behind-the-scenes preparation requires greater mental resilience. However, concentration is finite, and Hollywood does not capture this degree or effort of preparation and concentration that generates the result that Hollywood produces.

Major league baseball players train by repetition, including basic fielding, hitting, and throwing. They also practice numerous scenarios that build muscle memory in order to create room for mental concentration and focus. Similarly, attorneys rely on experience, which must grow with the profession. Interviewing, trial work, and other advocacy-based presentations are transitioning to the digital environment. The two-dimensional environment is not comfortable at first. Even for those practitioners who grew up with social media and YouTube videos, reading and interpreting cues without the benefit of a comfortable 3-D environment takes practice.

Unlike the Hollywood portrayals, whether in baseball or in the practice of law, the result follows the preparation, and the rigors of the professions are not lessening. Mental agility is required like never before. The standard for both professions is equally exacting: no errors. While a mental error in the game of baseball could cost a team the game, a mental error in our profession can cause us to mishandle a case, lose a trial, or appear before the disciplinary board.

2021 SDDLA Awards

Heather Bogard

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Terry Westergaard

The Robert C. Riter Distinguished Service Award is granted to the SDDLA member for his or her exceptional service to the SDDLA on a continuing and sustained basis.

Alexis Warner

The SDDLA Associate Lawyer Award (Rising Star) is given annually to recognize one of the Association's associate lawyers who has consistently demonstrated growing professional excellence and service to his or her community.

Collective Wisdom

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Below are ideas and insights shared by friends and colleagues over the last few years. Thank you to everyone for their time and help training the new attorneys to the profession.

"Sometimes it's about the cases you don't take."

As attorneys begin managing their own cases and clients, they need to develop the skills necessary for assessing what cases they can realistically add to their practice. Sometimes a case that is not well vetted can result in the diversion of significant time and resources into problems that could have been avoided from the start. Understanding a client's goals and expectations from the outset can help you know if the client's case is one you can realistically take on.

"You have to delegate."

As your practice grows, you will be tasked with additional responsibilities that are important to client and case management. Some of these things you will have to do yourself, and some of these things you can delegate. The key is understanding the difference and being able to trust the people that support you.

"Invest in others."

Sometimes it's easy to lose sight of the long term benefits of investing in others when you're managing the day-to-day operations of your practice. Try not to miss the opportunities to train and teach the people that help and support you in your work. If you expect others to take on additional duties, take the time to train them on how to do them correctly.

2 Lessons I Learned During My Last 5 Years as a Lawyer

Ceasar Juarez

When my colleague, Tracye, asked me to share “wisdom” from my last five years in practice, my instant response was something along the lines of “I am not sure I have learned much over the past ten years, let alone the last five” or “I am not sure I have much, if any, wisdom to share.” Those who know me well know I am an introvert, a rather reserved person, and I like to keep to myself. Thus, the idea of writing an article to share my experiences as a younger lawyer is outside my comfort zone. Writing about myself in general makes me uncomfortable. After reflecting on Tracye’s request, I realized one of the things I have learned is that it is okay to be uncomfortable. What follows is my attempt at succinctly describing two lessons I learned during my last five years being a lawyer. I do not claim that my lessons are unique or somehow special. In fact, most of what I have learned, I learned from talking with other colleagues, reading lawyerly articles, and attending CLEs, workshops, and conference. I hope this article helps other young lawyers, even in a small way, as they continue to build their careers as lawyers and live their best lives.

Be Original and Stay True to Yourself

One of the reasons (the primary reason) I became a lawyer was my desire to help Spanish-speaking individuals. I am a first-generation Mexican immigrant. My first language is Spanish, and I have an obvious accent when speaking English. I learned early in life how difficult it is for Spanish-speaking folks to receive adequate legal representation. Even when they speak fluent English, folks are often concerned with not understanding the legal terms or the lawyers not understanding them, which results in folks left without legal representation. I went to law school with this altruistic objective as a motivating factor. After law school, I clerked for a year and then entered private practice. Shortly after I started practicing, I began to question my altruistic objectives. While the firm I worked for supported my goals, I struggled to generate enough paying clients my first three years in private practice. It was not for lack of trying. Despite being an introvert, I was active in the Spanish-speaking community, volunteering on boards, attending community events with booths marketing myself and my firm, advertising on Spanish-speaking publications, and shaking hands with as many “community influencers” as I could. I was doing everything that came in the door: criminal defense, family law, business formation, wills, drafting contracts, immigration, personal injury, worker’s compensation, civil litigation, etc. I was trying to do things the way other lawyers, lawyers I looked up to, had done things. I was trying to be the go-to lawyer for everything for the Spanish-speaking community.

After three years in practice, realizing I was no longer a brand-new lawyer and that I needed to consistently make money for my firm (again my firm was always supportive, but business 101 teaches us that if you are not covering your share of the overhead, you are a liability to your employer, right?), I temporarily shifted from my altruistic goals and began to specialize in business work and complex commercial litigation. That enabled me to develop a successful practice and become “successful” by a traditional business definition, meaning I had a profitable practice. Despite all that success, my mental health was deteriorating. I was not enjoying my practice, my relationships with clients, or my work environment. I felt burnt out. I questioned whether I was cut out to continue being a lawyer. I questioned whether I could get a job in-house somewhere, with a government agency, or if I should quit the legal profession all together. After much soul searching and endless conversations with family, colleagues, and friends, I discovered one of the reasons for those feelings was that I was turning away the very people I kept telling myself were the primary reason I went to law school to help. I was turning into a hypocrite and feeling like one, too.

Juarez's Message, Continued

As most lawyers, I could find endless logical reasons for my career choices. I needed to charge market rates, I needed clients who could pay those market rates, I could not afford to let my receipts fall below the traditional partnership-track goals, I had to be viewed as a successful lawyer by traditional standards, I had a family to support, I was just trying to do what was best for my family and career, and on and on. All those logical reasons and all my success were not enough to stop me from feeling like a hypocrite or a "sellout." Not wanting to be, or feel like, a hypocrite or a sellout, shortly after my 8th anniversary as a lawyer, I decided to shift away from my "successful" practice and find a way to continue to have a profitable practice while at the same time doing what I wanted to do all along: provide legal services for Spanish-speaking individuals. I decided to be original and stay true to myself.

Be Willing to Change

To recap, I spent roughly three years struggling to generate receipts to justify my salary and overhead. I wanted to be the go-to lawyer for everything for the Spanish-speaking community. I then spent roughly five years changing my practice to do mostly business work and complex civil litigation. From roughly year five to year eight, I had what most would call a thriving law practice. During that time, I tried multiple bet-the-company cases, I became a partner in my firm at that time, and I was compensated well for my work. But I was not happy. Happiness is overrated, some may say. You need to do what you need to do to be successful, some may say. Change is hard and there is no guarantee it will work or be worth it, some may say. However, in my experience, being willing to change and adapt is exactly what I needed to save my legal career.

Since I made that switch, I continue to be blessed with a successful practice. The main difference is that I define my current success a little differently than before. There are times when my practice is not as financially profitable, but that is greatly outweighed because I know I am being original and staying true to myself. While I still do a fair amount of business work and complex civil litigation, I now also do a substantial amount of work for Spanish-speaking folks, primarily business work, civil litigation, personal injury, and worker's compensation. Most of my marketing is tailored to the Spanish-speaking community, and most of my community involvement is with the Spanish-speaking community.

In closing, I realize I failed miserably in trying to keep this article concise. I am sorry about that (not really). Yes, the primary lessons I have learned are to stay true to myself and be willing to change. Within those lessons, though, there are sub-lessons that were instrumental to my current "success", both professionally and personally. Rather than make this article even longer, I will simply list those below. If any of you are still reading this and want to discuss any of those in further detail, I am always happy to chat about my experiences. And yes, believe it or not, I am an introvert. It is not easy for me to meet new people, but it is definitely worth it.

1. Find a mentor or mentors—they do not have to be within your organization.
2. Do not be afraid to ask for help, whether it is from your organization or outside of it.
3. Be active within the State Bar and its committees.
4. Actively network and expand your network—as difficult as it may be for us introverts.
5. Slow down and take time to enjoy what is truly important to you.
6. Prioritize your mental health.
7. Manage your clients' expectations from the start of the relationship, even if costs you a file or two or more—your mental health is more important than a few files.
8. Find good support staff and once you find them, keep them.