



BARRRISTER

Advocates for Justice...

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a Fresh Take on a Pressing Problem
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***Happy
Holidays!***

SAVE THE DATE
***SDTLA ANNUAL SEMINAR &
PAC GOLF TOURNEY***

May 12-13, 2016
Lodge of Deadwood



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PRESIDENT'S MESSAGE....

BY STEVEN C. BEARDSLEY

SOME WRONGS CANNOT BE UNDONE

I grew up in a family where all things controversial were discussed. My father was a prosecutor in his young legal career and then defended the accused later. One defense was particularly stressful for my father. It is recorded in the case of *State v. Dove*, 67 N.W.2d. 917 (SD 1955).

Mr. Dove was appointed counsel – my father. The crime was hideous; the rape and kidnapping of a nine year old child. Fortunately, the victim was not killed by the Defendant. The Defendant was convicted of kidnapping in the first degree. He was given the death penalty, even though the child lived.

His case was appealed to the South Dakota Supreme Court, arguing that the statute was unconstitutionally vague and it violated this man's due process rights. The South Dakota Supreme Court agreed, rendering that statute void. Mr. Dove was then sentenced to life imprisonment. While sometimes human beings do commit heinous acts of violence, their defense, guaranteed by our constitution, secures the rights for all.

Due to DNA testing, hundreds of improperly convicted defendants have been exonerated. A documentary film is coming out regarding a gruesome murder of Christine Morton. Mr. Morton, Christine's husband, was convicted of the crime and after being sentenced to death spent 25 years in prison, he was exonerated by DNA testing in 2011.

Twenty years after the conviction, a federal judge ordered the state to turn over the withheld evidence. It turns out a neighbor saw a man with a mustache drive a green van away from the home. Mrs. Morton's son, a toddler, had reported that a "monster with a mustache" had killed his mother. The toddler had indicated his father was not present. None of that evidence was given to the defense team, and of course never provided to the jury.

In addition to the eyewitness testimony, a bloody bandana was discovered the day after the murder. It was immediately given to the police. The bandana's existence was withheld from the defense. It was discovered by Morton's habeas lawyers 20 years later. The state fought the defense's request for DNA testing for more than 5 years. Blood from the victim and an unknown male was present on the bandana. The FBI found a match using DNA – another man, not the husband. The prosecutor eventually spent five days in jail for withholding evidence. That pales in comparison to the 25 years spent in jail by Michael Morton.

Former South Dakota Attorney General, Mark Meierhenry, originally worked to reinstate the death penalty in 1976. Now, Mr. Meierhenry testifies against such a penalty. He presents very reasonable and cogent arguments. My theory is that juries make mistakes, prosecutors and investigative personnel either negligently or purposely withhold evidence. Our system, as great as it is, is deniably fallible. For this reason alone, there is no place for condemning a person to death in our system of justice. As long as the death penalty remains on the books, innocent people will surely die. If the defendant receives the death penalty and is executed, then later discovery of evidence really doesn't help.



Continued on page 13

EDITOR'S Notes & Comments

Marie H. Ruetters

The Holidays are upon us and once again our thoughts turn to our families and traditions. Like our families, traditions feed our hearts and souls, sustain us in times of trouble, and are the touchstones that unite the generations.

I remember my family's numerous holiday traditions: who "always" pulled dish duty on Thanksgiving Day (me, mostly due to my lack of culinary expertise); that turkey was good enough for Thanksgiving so it was good enough for Christmas, but ham was only served at Easter; and, the firm rule that Christmas presents could only be opened on Christmas morning.

But, it is the times my family deviated from our traditions that I remember most vividly. Usually deviations were due to hardship, or the great distances that separated my siblings and me as we became adults and entered the military or took jobs in other states. I remember one year when I was about 8 years old. Turkey was so expensive that my parents decided we would have steak instead for Thanksgiving. I also remember baking Christmas cookies before Thanksgiving one year so that my brother stationed in the Demilitarized Zone in South Korea would get them in time. Our traditions gave way to allow us to spend the holidays together as a family, or at least celebrate them together despite distance or hardship. We did not let tradition get in the way of our core values. Our traditions adapted and changed to accommodate those values.

As trial lawyers, our "family traditions" are the laws we uphold and challenge. Laws guide us, sustain our belief in the legal system, and are the touchstones for us in and outside the courtroom. But like any tradition, sometimes the changing times and society's needs require us to amend and, at times, abandon those traditions to protect our core values.

Trial lawyers, whether prosecuting or defending, criminal or civil, have seen the effects of the changing needs of society on our profession. The implementation of the expedited civil action rules is an excellent example of the need for change. The cost of litigation and the need for quick resolution prompted the addition of the expedited civil action to our Rules of Civil Procedure. (As an aside, we thank Clint Sargent for his efforts this past year to educate the Bar on the expedited civil action procedure).

Even more changes are on the horizon. The SDTLA Board of Governors recently discussed proposed legislation on contributory negligence; the proposed end to forced arbitration in nursing home agreements; the DRIVE Act in Congress; and, a draft of proposed legislation that would allow confidential reporting of sexual violence. Stay tuned for updates on these and other important proposed changes to the laws that affect us as citizens and practitioners.

As always, your thoughts and opinions on these and other issues are welcome in *The Barrister*. If you are interested in writing on any of these subjects, please contact me or Sara Hartford for deadlines, and any assistance you need with drafting or editing.

As we move into the holidays, hold fast to your traditions while welcoming the life events that cause us to reconsider, adapt, and change them. The true gift of the holiday season is the time we spend with our families, regardless of how and when we celebrate, as long as we celebrate together.

From my house to yours may the Holiday Season, whether Christmas, Hanukkah, Kwanzaa, Yule, Pancha Ganapati, Bodhi Day, Festivus, or other, bring good cheer, time with family, and only the best in the coming year.

P.S. Many thanks to Bob Trzynka for his editing on my article.



TOAST OF TRIAL LAWYERS**June 2006**

Nancy Turbak
T.F. Martin
Travis Jones
Michael Stevens

June 2007

Roger Tellinghuisen
Mike Butler
Eric Schulte

June 2008

Sid Strange
Jerry Reade
Jim Leach

June 2009

Mike Abourezk
Alicia Garcia
Scott Heidepriem
Shiloh MacNally
Doug Cummings

June 2010

Michael DeMersseman
Hon. John Schlimgen
Joni Cutler
Margo Julius
Scott Abdallah

June 2011

Susan Sabers
TJ Von Wald
John Murphy
Steve Siegel

June 2012

John Blackburn
Linda Lea Viken
Hon. Mark Smith
Ronald Parsons

June 2013

Rep. Michael Stevens
Hon. John Hinrichs
Hon. Michelle Percy
Clint Sargent
McLean Thompson Kerver
Eric C. Schulte
Tim Rensch
Stephanie Pochop
Richard Casey
Ryan Kolbeck

June 2014

Clint Sargent
Raleigh Hansman
Ronald Parsons
Joseph Kosel

SDTLA Calendar of Events**2015**

December 17 Board conference call, 4 pm CT/3pm MT

2016

January 12 – March 11 South Dakota Legislative Session

January TBA Board Conference call for legislative issues

February TBA Board Conference call for legislative purposes

April 14 Board Conference Call

May 12 Board Meeting, 8 am MT, Lodge at Deadwood
May 12—13 SDTLA Annual Seminar & PAC Golf Tourney
Lodge at Deadwood

June 22 Board Meeting at Bar Convention
Sioux Falls, 11 am

June 23 Annual Meeting and Elections
Ramkota Sioux Falls

July TBA Board conference call

August TBA Board meeting, 11 am, Vermillion
1Ls Event 1pm, USD Law School Courtroom

September TBA Board conference call or meeting

The *Barrister* is published electronically six times a year by the South Dakota Trial Lawyers Association as a service to its membership and as part of its continuing commitment to educate and promote professionalism among trial attorneys. Submissions are welcome. Interested authors should contact Sara Hartford, Executive Director at the above address. Articles are accepted from contributors who share the goals of the South Dakota Trial Lawyers. All submissions must be signed by the author. *The Barrister* is not responsible for cite-checking or reference checking materials cited in submissions. The author must verify that any sources included, relied upon or quoted in the submission have been properly credited and cited; the author must obtain all necessary permissions for publication of copyright protected materials. The Executive Director and Editor have the right to edit all submissions or refuse to publish articles that are not in keeping with the goals of the organization. Subscriptions of \$25 are included in the Association's annual membership dues. Non-members subscription rate is \$50 per year.

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Sustaining members pay \$700 in dues each year, which entitles them to a discounted attendance at the Association's annual seminar, the annual meeting and luncheon and a plaque denoting their sustaining membership status. Our gratitude goes to these members so that the association can continue to sustain funding for an on-going defense of the civil justice system!

SDTLPAC is the political action committee of the SD Trial Lawyers Association. Organized in 1987, SDTLPAC contributes to any candidate for a state office who will support fair and equitable legislation to protect the rights of South Dakotans through the preservation of our justice system. WE THANK THESE CONTRIBUTORS FOR THEIR SUPPORT!

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TRIAL LAWYERS OF THE YEAR

87-88 Terry Quinn
88-89 Greg Eiesland
89-90 Steve Johnson
90-91 Glen Johnson
91-92 Bob Burns
92-93 Gary Jensen
93-94 Joe Butler
94-95 Mark Meierhenry
95-96 Jeff Larson
96-97 Nancy Turbak
97-98 David Gienapp
98-99 Rick Johnson
99-00 Jim McMahon
00-01 Mike Schaffer
01-02 John Blackburn
02-03 William F. Day, Jr.
03-04 Michael Abourezk
04-05 Michael W. Strain
05-06 Patrick Duffy
06-07 Thomas G. Fritz
07-08 Michael J. Butler
08-09 Wally Eklund
09-10 James D. Leach
10-11 N. Dean Nasser, Jr.
11-12 Stanley Whiting
12-13 Charles M. Thompson
13-14 Linda Lea Viken
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LIFETIME ACHIEVEMENT AWARD

Carleton "Tex" Hoy John F. Hagemann Robert C. Ulrich
Terry Quinn



**Robert
Trzynka**

Piercing Peer Review, a Fresh Take on a Pressing Problem

On October 25, 2015, Judge Bruce Anderson ruled that, in order to satisfy due process, South Dakota's peer review privilege had to yield to certain exceptions.¹ *Lammers v. Sossan et. al.*, Civ. No. 13-456, First Judicial Circuit, South Dakota, Yankton County. This decision applied to over thirty cases pending against Alan A. Soosan (who was operating under the alias "Dr. Allen A. Sossan"), two hospitals in Yankton, South Dakota, and the peer review committee members of each respective hospital. Judge Anderson's decision overturns the medical community's misplaced belief that the peer review privilege was absolute.

The History of Peer Review

Peer review is a privilege. The privilege initially came as a result of efforts to decrease preventable medical error. The Legislature enacted the South Dakota peer review statute in 1977.² It has since been modified twice: once in 1998 and again in 2002.

In theory, like the attorney-client privilege, the peer review privilege is supposed to encourage doctors to speak freely with one another in order to improve patient safety. According to peer review proponents, that free communication leads to better quality medical care. Most Courts and articles favoring peer review cite these mantras without looking at the data.

The data, however, indicts this belief. Even with peer review, we are facing a medical malpractice crisis. This crisis is as severe if not more so than the one that spurred the development of peer review in the first place. Despite the promises made by peer review proponents, preventable medical error is the *third largest cause of death* in the United States today.³ In fact, approximately 440,000 people die *each year* because their medical providers screwed up.⁴

Worse, rather than promote openness, peer review encourages cover-ups. According to the Office of the Inspector General, approximately 86 percent of adverse events go unreported.⁵ Something needs to change.

The Constitutionality of Peer Review

To date, South Dakota Courts have rarely, if ever, allowed peer review discovery.⁶ Some Courts have gone so far as to suggest that the peer review privilege is absolute.⁷ These Courts have not considered the question of peer review in a constitutional context. They merely addressed the plain language of the statute. As other Courts are beginning to understand, an absolute peer review privilege is dangerous and promotes fraud and cover-ups:

In enacting our peer review statute, the Legislature recognized the need for open discussions and candid self-analysis in peer review meetings to ensure that medical care of high-quality will be available to the public. That public purpose is not served, however, if the privilege created in the peer review statute is applied beyond what was intended and what is necessary to accomplish the public purposes. The privilege must not be permitted to become a shield behind which a physician's incompetence, impairment, or institutional malfeasance resulting in medical malpractice can be hidden from parties who have suffered because of such incompetence, impairment, or malfeasance.⁸

"[A]ll privileges limit access to the truth in aid of other objectives, but virtually all privileges are restricted ... by countervailing limitations."⁹ Whatever "their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."¹⁰ As a result, evidentiary privileges are "strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'"¹¹

Due process requires that privileges yield to a crime/fraud exception.¹² In analyzing the spousal privilege, the United States Supreme Court noted that an absolute privilege, like peer review, encourages those protected by the privilege to commit crimes:

As Jeremy Bentham observed more than a century and a half ago, such a privilege goes beyond making "every man's house his castle," and permits a person to convert his house into "a den of thieves." It "secures, to every man, one safe and unquestionable and ever ready accomplice for every imaginable crime."¹³

Continued on next page

Continued from page 6

Judge Anderson agreed. He observed that the Defendants' agents admitted that the Defendants would commit perjury at trial. Judge Anderson also observed that we demonstrated that the hospital Defendants used peer review to defraud patients and abet a doctor who was performing unnecessary spinal fusion surgeries on them:

When considering the important duty a medical facility or doctor has to the patient, it is imperative that the medical providers are bound to disclose important information. Suppression of information the patient has a right to know, and in fact should know, falls within the definitions above as both a fraud and deceit...

Plaintiffs have submitted information that Dr. Sossan allegedly manipulated medical tests, falsified medical records and performed unnecessary medical procedures including substantial surgery, on some patients multiple times. Physicians and other medical providers have "broke rank," so to speak, in this case and have provided evidence and information to Plaintiffs in an effort to assist them....

[I]t is clear to this Court that the plaintiffs have submitted sufficient evidence presently to make out a *prima facie* case of fraud and deceit sufficient for this court to allow access to the peer review records of the Defendants.¹⁴

Negligent Credentialing and Peer Review

Almost all states recognize negligent credentialing as a cause of action. In fact, only two states have rejected negligent credentialing.¹⁵ Courts allow negligent credentialing as a tort because it is little more than the application of other torts, such as direct or corporate negligence, duty of care for patient safety, negligent hiring, negligent supervision, and negligent selection of independent contractors.¹⁶

Due process and access to the courts "forms the bedrock on which the structure of our judicial system is constructed. Essential to the fabric of [these constitutional rights] is the citizen's right of access to the evidence necessary to prove his case, without which mere access to the courts would be vain and useless."¹⁷ A statute is unconstitutional when it restricts those rights or when it "gives all the benefits to the wrongdoer ... while [placing] all the corresponding detriment to the" injured victim.¹⁸

"Procedural fairness is provided for in civil due process.... [O]pen testimony, time to prepare and respond to charges, and a meaningful hearing before a competent tribunal in an orderly proceeding are all elements of civil due process."¹⁹ "Discovery is the quintessence of preparation for trial and, when discovery rights are tramped, prejudice must be presumed."²⁰

Peer review, however, substantially impairs the ability of plaintiffs to prove causes of action against hospitals who hire or keep doctors who are incompetent or unscrupulous. In addressing this tension, most courts allow plaintiffs access to the original source materials relied on by the hospitals. An absolute peer review privilege, however, violates due process because it denies plaintiffs any mechanism for relief.²¹

An absolute peer review privilege also conflicts with South Dakota statute. Under SDCL § 36-4-26, hospitals *may be sued* over peer review decisions made in bad faith. An absolute peer review privilege, however, negates the effect of SDCL § 36-4-26. After all, how could a litigant prove bad faith if he or she cannot get or even use any information that would prove it? The peer review privilege must have some mechanism for the trier of fact to determine that the peer review committee acted in bad faith. Otherwise, SDCL § 36-4-26 is meaningless.

Judge Anderson found that, in order to comply with due process, South Dakota's peer review statute had to allow litigants to discover the original source materials used by hospitals when credentialing a doctor. Like medical records in a medical malpractice case, the original source materials, including the doctor's application, allows a plaintiff to recreate the decision to admit or deny privileges to the doctor in question. That preserves the secrecy of the peer review committee, itself, while giving patients the ability to obtain redress for harm from a hospital's decision to give privileges to a bad or dangerous doctor.

Conclusion

While this is a short synopsis of the issues considered by Judge Anderson (our submissions alone exceeded 100 pages), hopefully it gives you a roadmap as to the contours of peer review. Peer review can positively contribute to patient care, so long as there are appropriate checks and balances. Unfortunately, the pendulum has swung too far toward protecting hospitals and doctors, leaving patients hanging out to dry.

Continued on page 13



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Jon Hansen

Law School Times

By Jon Hansen & Austin Hoffman, SDTLA Co-Law Student Liaisons

Hello again from the law school. I'm happy to report that, throughout this semester the USD Law School Trial Team, under the expertise of Professor Horton, has once again demonstrated that USD law students can use the knowledge and skills learned here at USD to compete with any law school on a national level. Here is a brief update from Professor Horton:

During the fall of 2015, 12 USD School of Law 3Ls competed in five elite national invitation-al trial competitions in Gulfport, Fla.; San Francisco, CA; Buffalo-Niagara, NY; New York City, NY; and Atlanta, GA. Highlights included a sixth (6th) place finish at Stetson's National Invitational Pretrial Competition, and advancing to the knockout round at the 36 team Buffalo-Niagara National Invitational Trial Competition for the third time in four years following head-to-head victories over teams from Duquesne, Loyola-Chicago, and SMU. Special thanks to recent USD School of Law graduates and trial team alums Andy Fick and Rachel Preheim, as well as Professor Ramon Ortiz, for their valuable help and assistance. We are looking forward to an exciting spring 2016 trial tournament season.

It is also with great sorrow that I note the passing of a beloved member of the USD Law community, Sam Garrity. Sam was an exceptionally bright and incredibly well liked student. I leave you with words from Sam's dad, Pat, writing for both himself and Sam's mom, Jan:

Sam is our world and inspiration. Jan and I appreciate all of your support and love. The social media comments have proven Sam's impact on so many lives. Sam was experiencing something that we cannot taste, see, hear, feel or smell. As parents, it is the most debilitating feeling we have ever experience. It is labeled depression and the power it has can be deadly. As parents we ask each of you to look around and understand everyone has a story you do not know or understand.

Jan and I are creating a Samuel Garrity Foundation to develop a depression awareness campaign. It is time to talk about the unexplainable, provide resources for the victims and their families and promote research to provide answers for this terrible disease. The candle is to provide light in times of complete darkness. Be kind to each other, hug each other and always love each other.



Austin Hoffman

The Christmas Break Transition

As I sit in my office writing this, the snow is falling, my Federal Tax Procedure final, that I am supposed to be taking in half an hour, got rescheduled because of the weather, and I turned 30. What a day. Getting out of a final and being able to take your 2 year-old son sledding for the first time is a pretty good birthday indeed. But this day comes with caution. The final is still looming, as are many others. I used to get excited when those first Christmas lights lit up the night. But during law school, it just means finals are approaching and the lights are not nearly exciting as they used to be. But it is a time that also comes with excitement.

For first year students it means they have made it. That first semester is almost behind them. It is a feeling of great accomplishment. The beginning of law school is no easy task. Hundreds of pages of reading assigned every night, case books that seem to never end, and professors using words that you need to Google to figure out what they mean. While the second semester of that first isn't much easier than the first, you at least know what you are walking in to. That in itself is a relief.

Second year students are almost half way done with last school, they are almost over that hump. And everyone knows that the second half of law school is much easier than the first. It is still challenging but many are starting to "think like a lawyer," as many professors say. You know what needs to be done, what doesn't need to be done, and everything seems to click. This is also a time when you get to know your classmates much better. During the first year, many people are fairly guarded. But during the second year people start to take everything in stride much more and have more time spend with classmates outside of studying. And you are one more semester closer to that last and final year.

Third year students almost need to wear sunglasses because the light at the end of the tunnel is getting brighter and brighter. By this time you know what finals are all about. They still stress you out, but you know exactly what to expect.

South Dakota Trial Lawyers Association

Notice of 2015-2016

MEMBERSHIP DUES

DUE July 1, 2015

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*** Anyone may apply for a subscribing membership in the Association, i.e. associations, institutions of higher learning, research companies, etc. Subscribing members shall receive all Association membership benefits, but are not entitled to vote.

NEW LAWYER REFERRAL LIST

The South Dakota Trial Lawyers Association has compiled a list of aspiring young trial lawyers who are interested in accepting civil case referrals. The list is not for pro bono referrals, but rather cases that another attorney is not interested in handling due to his or her caseload, area of interest, or the client's ability to pay.

The purpose of creating this list is to allow young lawyers to gain experience handling civil cases on their own, while at the same time matching a worthy client with a willing lawyer. The goal is to give the lawyer the opportunity to independently plan case strategy, pursue a discovery plan and try a jury trial. By agreeing to be on the list, the attorneys have not automatically agreed to accept a case. They have the independence to accept or decline any case referred to them. Any lawyer in practice less than five years interested in accepting referrals is encouraged to contact the SDTLA office to join this list.

Second Circuit

Melissa Fiksdal

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275-4529
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Fourth Circuit

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SAVE THE DATE

SDTLA ANNUAL SEMINAR &

PAC GOLF TOURNEY

May 12-13, 2016 * Lodge of Deadwood

Welcome New Members!!

Aaron Pilcher is practicing in Huron with Blue & Haeder Law Offices, alongside Gary Blue. Aaron has an active general practice with experience in criminal law, family law, business formation, insurance negotiation, estate planning and is Defense Counsel for the Beadle County Drug Court and a member of the Huron Noon Lions Club. Aaron and his wife Lauren have a daughter Ainsley, who will turn 2 in February but are expecting their second child in April.

Brendan (Bo) F. Pons is an associate attorney with the Cutler Law Firm in Sioux Falls. Bo was previously a law clerk for the South Dakota Supreme Court for Justice Zinter.



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When a jury wrongfully convicts a defendant, the pain and anguish continues for many years. A wrongful conviction on a murder case can result in the death penalty. If that sentence is carried out, then the wrong cannot be undone.

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We are in the midst of a medical malpractice crisis: 440,000 people die every year in the United States because we do not hold our medical professionals accountable for their bad acts. Hospitals and doctors increasingly use peer review as a black hole to cover up fraud, deceit, negligence, and even criminal activity. Judge Anderson correctly found that peer review, like any other privilege, must yield to some exceptions to remain constitutional.

NOTES

1 As of the date of writing, the South Dakota Supreme Court is considering an application for intermediate appeal on this decision.

2 SDCL § 36-4-26.1

3 James, John T., "A New, Evidence-based Estimate of Patient Harms Associated with Hospital Care." *J. Patient Saf* 2013; 9:122-128; Hoyert, Donna, Xu, Jiaquan, Deaths: Preliminary Data for 2011, *National Vital Statistics Reports*, Vol. 61, No. 6, October 10, 2012.

4 *Id.*

5 Levinson, Daniel R., "Hospital Incident Reporting Systems Do Not Capture Most Patient Harm." OEI-06-09-00091, January 2012.

6 *See e.g., Uhing v. Callahan*, 2010 U.S. Dist. LEXIS 70, [6], 2010 WL 23059, Civ. No. 08-4200 (D.S.D. January 4, 2010) ("The peer review privilege is absolute.").

7 *Id.*

8 *Trinity Medical Center, Inc. v. Holum*, 544 N.W.2d 148, 154 (N.D. 1996).

9 *United States v. Textron, Inc.*, 577 F.3d 21, 31 (1st Cir. 2009) cert. denied 2010 U.S. LEXIS 4373 (U.S., May 24, 2010).

10 *United States v. Nixon*, 418 U.S. 683, 710, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974).

11 *Trammel v. United States*, 445 U.S. 40, 50, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950), *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

12 *See e.g., Clark v. United States*, 289 U.S. 1, 15, 53 S.Ct. 465, 77 L.Ed. 993 (1933) (attorney-client privilege); *State v. Witchey*, 388 N.W.2d 893 (S.D. 1986) (spousal privilege); *Nixon*, 418 U.S. at 705-07 (presidential privilege).

13 *Trammel*, 445 U.S. at 51-52 (quoting 5 *Rationale of Judicial Evidence* 340 (1827)).

14 *Lammers v. Sossan et. al.*, Civ. No. 13-456, First Judicial Circuit, South Dakota, Yankton County, "Memorandum Decision: Plaintiffs' Motion to Compel Discovery; Plaintiffs' Motion on Constitutionality of Peer Review Statute SDCL 36-4-26.1; Plaintiffs' Motion and Argument Concerning Hospital Liability and Negligent Credentialing." (October 23, 2015).

15 *Larson v. Wasemiller*, 738 N.W.2d 300, 307 fn. 5 (Minn. 2007) (citing *Svindland v. A.I. Dupont Hosp. for Children of Nemours Found.*, No. 05-0417, 2006 U.S. Dist. LEXIS 80601, 2006 WL 3209953, * 3-4 (E.D. Pa. Nov. 3, 2006) (holding that a claim of negligent credentialing is precluded by Delaware's peer review statute); *McVay v. Rich*, 255 Kan. 371, 874 P.2d 641, 645 (Kan. 1994) (finding an express statutory bar to a claim of negligent credentialing). *See, however, Adams v. St. Francis Reg'l Med. Ctr.*, 264 Kan. 144, 171-74, 955 P.2d 1169 (1998) (declaring the peer review unconstitutional because it prohibited access to documents necessary to prove a negligent supervision claim against a hospital).

16 *Id.* at 307-09.

17 *Kammerer v. Sewerage & Water Bd.*, 633 So.2d 1357, 1362 (La.App. 4 Cir. 1994).

18 *Knowles ex. rel. Knowles v. United States*, 1996 SD 10, ¶ 33, 544 N.W.2d 183.

19 *In re Moseley*, 34 Wash.App. 179, 660 P.2d 315, 318 (1983).

20 *Scott v. Greenville Housing Authority*, 353 S.C. 639, 579 S.E.2d 151, 158 (2003).

21 *Adams v. St. Francis Reg'l Med. Ctr.*, 264 Kan. 144, 171-74, 955 P.2d 1169 (1998).

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They aren't nearly as scary as they once were. In just a few short weeks there is only one semester of law school left.

How did this happen? Only yesterday we were hoping The Bible would save us in Civil Procedure and attempting to decipher the 30 pages of Professor Thatcher's self-written Contracts "supplement." But now many of us already have jobs and those 12 last credits don't seem to tough. The end is near.

It is a time of transition for each class. Each Christmas break brings with it a different feeling each year. But each year it is a feeling that brings a sense of accomplishment along with looking forward to what is to come. They are transitions that most people reading this have all gone through. But they are also transitions that are easy to forget about. So now that Christmas lights probably no longer bring a sense of looming fear, send a wish of good luck to a law student if you know any. Or send them food. Food is always welcome.

SOUTH DAKOTA TRIAL LAWYERS ASSOCIATION
Board of Governors
Meeting Minutes
October 23, 2015
Pierre

In attendance: Steve Beardsley, Margo Julius, Ryan Kolbeck, Nate Oviatt, Clint Sargent, Tim Rensch, Aaron Eiesland, Alecia Fuller, Robbie Rohl, TJ Von Wald, McLean Kerver, Mike Beardsley, Stanton Anker, Jason Krause and Sara Hartford. Past President Bob Morris attended as a guest. A quorum was present.

President Beardsley called the meeting to order and asked for approval of the August 13 minutes. Krause made a motion to approve as presented, Eiesland seconded. Motion unanimously carried.

Kolbeck gave the treasurer's report. Account balances are \$6,786 in Operations, \$75,019 in Savings, \$5,110 in the Reserve Fund and two CDs for \$10,000 each. The PAC account has a balance of \$29,672. Hartford answered questions regarding the first quarter budget report. A list of unpaid dues was discussed. Rohl made a motion to approve the treasurer's report, Von Wald seconded. Motion unanimously carried.

Under old business, Beardsley gave a report on the contributory negligence legislation.

Under new business, Eiesland reported there is a petition circulating to end forced arbitration in nursing home agreements. There was discussion regarding all forced arbitration. Eiesland made a motion for SDTLA to support the petition by sending it out to the membership of SDTLA so members can either offer comments or not to the Centers for Medicare and Medicaid Services, Fuller seconded. Motion unanimously carried.

Hartford asked for discussion on the DRIVE Act being heard in Congress. There was a brief discussion. She will circulate details to the board for an email vote to either support or not.

Hartford asked the board for comment on the confidential reporting of sexual violence legislation proposed by the Board of Regents. There was discussion. She will circulate more detail to the board for an email comments.

Julius reported Dean and Jolene Nasser will be attending the Oct 29 Worker's compensation advisory council meeting and seeking input from the SDTLA committee regarding proposed legislation regarding abrogating the Wheeler decision for some claims prior to the date of the SCt decision in Wheeler.

The business meeting adjourned and Chief Justice Gilbertson joined the board for discussion and lunch.

The Meeting adjourned.

The South Dakota Chapter of the College of Workers' Compensation Lawyers is pleased to announce that it has established a South Dakota Kids' Chance. Kids' Chance is a non-profit charitable organization whose mission is to provide need-based educational scholarships to the children of South Dakota workers who have been fatally or seriously injured on the job. Kids' Chance of South Dakota will begin the process of seeking donations for the scholarships. The new organization hopes to be in a position to award at least one scholarship for the 2016-2017 school-year. More information about Kids' Chance can be found on the National web site, Kidschance.org.