



2023 Winter Conference

December 1, 2023

Milwaukee Marriott West
W231N1600 Corporate Ct.
Waukesha, WI 53186

Program Chair:
Megan McKenzie
American Family Insurance Co.

*Program Agenda &
More Information
inside!*

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Schedule of Events

December 1st, 2023

8:15 - 8:55 AM

COYNE, SCHULTZ, BECKER & BAUER, S.C.
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Registration and Breakfast

Sponsored by Coyne, Schultz, Becker & Bauer, S.C.

8:55 - 9:00 AM

Opening Remarks

9:00 - 9:50 AM

eDiscovery Related to Construction Litigation

Mike Gibbons and Jackie Michalek, Transperfect Legal Solutions

9:50 - 10:00 AM

Break

Sponsored by Cross Jenks Mercer & Maffei, LLP and Bell, Moore & Richter, S.C.

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ATTORNEYS AT LAW SINCE 1948

BMR BELL MOORE
& RICHTER SC

10:00 - 10:50 AM

Under Review: The Rooker-Feldman Doctrine

Morgan Stippel and Kelsey Pelegrin, Bell, Moore & Richter, S.C.

10:50 - 11:40 AM

DE&I Panel: Issues Affecting Your Practice

William Brookley, Cross Jenks Mercer & Maffei, LLP, Patricia Epstein Putney, Bell, Moore & Richter, S.C., Storm Larson, Boardman & Clark, LLP, Laura Lyons, SECURA Insurance and Charles Polk III, Amundsen Davis, LLC

11:40 AM - 1:00 PM

Lunch

1:00 - 1:50 PM

Tripartite Nightmares and Other Ethical Considerations When Dealing with Difficult Clients

Moderator: Megan McKenzie, American Family Insurance Company

Panel: Chester Isaacson, American Family Insurance Company, Amy Scholl, Coyne, Schultz, Becker & Bauer, S.C.

1:50 - 2:40 PM

Charting the Course: Navigating AI Ethics in Wisconsin

Christopher Shattuck, Madison Area Technical College

2:40 - 2:50 PM

Break

Sponsored by Weiss Law Office, S.C.

WEISS LAW OFFICE

2:50 - 3:40 PM

Exploring Ethical Issues Confronting Insurance Coverage and Defense Counsel

Mollie Kugler, von Briesen & Roper, S.C. and John Pinzl, von Briesen & Roper, S.C.



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Speaker Biographies

William Brookley received his Juris Doctor from Marquette University Law School with a certificate in Litigation Practice. He received his Bachelor of Arts degree from the University of Miami. Attorney Brookley's practice is primarily comprised of insurance defense, commercial litigation, and real estate litigation.



Michael Gibbons is the Director of Business Development for TransPerfect Legal Solutions. Michael has been with TransPerfect for 11 years and has advised both law firms and corporate legal departments on a range of topics related to electronic discovery (eDiscovery). TransPerfect's client list ranges from small companies all the way to Fortune 50 corporations.



Chester Isaacson began his career with the Corneille Law Group in Madison and currently practices as a litigation attorney with American Family Mutual Insurance Company. Through his work as a civil defense attorney, Chester has had the opportunity to defend cases in nearly every county in the state of Wisconsin.



Mollie T. Kugler is a Shareholder at von Briesen & Roper, s.c., and practices in Milwaukee. Mollie represents and counsels insurance companies in third-party and first-party insurance coverage matters across the country. A portion of Mollie's practice is also dedicated to general liability litigation. Mollie received her B.A. degree from Georgetown University and her J.D. degree from Fordham University School of Law. She serves as a leader of the von Briesen women's network and is active in the



Defense Research Institute and National Association of Women Lawyers. Mollie is also on the Board of the Junior League of Milwaukee and involved in several Georgetown alumni groups.

Storm Larson practices primarily in the area of labor and employment law. Prior to joining Boardman Clark, Storm was an attorney with a local Madison law firm where he advised and represented clients in a variety of civil issues including general liability defense and labor and employment law.



Prior to graduating law school and starting his practice, Storm served as a judicial intern for the Honorable William Conley as well as the Honorable Ann Walsh Bradley.

Laura Lyons is a Claims Attorney at SECURA Insurance. She was previously a Staff Attorney at Dean Health Plan, and prior to that, a partner at Bell, Moore and Richter, SC. She is also a Past President of WDC.



Megan McKenzie is a Senior Trial Staff Attorney with American Family Insurance Company. She has worked in the American Family litigation department for the past 9 years in the Madison office, conducting all stages of litigation defense and trial work. Before that time, she worked for Habush, Habush & Rottier in Madison for a year and a half representing the plaintiffs in a large environmental mass tort case. Megan began her practice in San Diego for a small insurance defense firm, handling complex personal injury, products liability, medical malpractice, and construction defect cases as an associate attorney.



Megan is licensed to practice in state court in California and Wisconsin, as well as the Southern District Court in California and Western District



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Speaker Biographies *continued*

Court in Wisconsin. She is an active member and serves on the Board of Directors and multiple committees of the Wisconsin Defense Counsel.

Jackie Michalek is a Director of Project Managed in the eDiscovery division at TransPerfect. Regardless if the case is 1GB or 10TBs, she enjoys the challenge of identifying the best workflow for her clients throughout the EDRM process, whether it be through the use of analytics or custom scripts in the document review tool. Prior to joining TransPerfect in 2013, she worked in the litigation support department of a law firm in Chicago. She directly oversaw the electronic discovery for the firm's construction litigation group and handled multiple trials, mediations and arbitrations for the group.



Kelsey A. Pelegrin is an associate at Bell, Moore & Richter, S.C. in Madison. She practices civil litigation, insurance defense, and insurance coverage litigation. She received her B.A. from the University of Wisconsin-Madison and received her J.D. from Marquette University Law School. Ms. Pelegrin is admitted to practice in Wisconsin state courts and before the U.S. District Courts for the Eastern and Western Districts of Wisconsin.



John P. Pinzl is a Shareholder at von Briesen & Roper, S.C., practicing at its Madison office. His practice emphasis is civil litigation with a focus on insurance defense and insurance coverage litigation. He received his B.S. degree from the University of Wisconsin-Madison, and his J.D. degree from the University of Wisconsin Law School. He is a member of the Dane County Bar Association, Wisconsin Defense Counsel, and the State Bar of Wisconsin. He is admitted to practice before the U.S. District Courts for the Eastern and Western Districts



of Wisconsin, and the U.S. Court of Appeals for the Seventh Circuit.

Charles Polk, III handles each case as if his own family member is directly involved. Though many of his clients are businesses and professionals, each case feels personal and relatable. Many cases require detailed reporting and risk assessment, and his clients appreciate the level of attention and dedication they receive. As a member of the firm's Business Litigation Service Group, Charles handles civil rights and personal injury cases, Federal 1983 claims, municipal matters, insurance exposure and data security issues. Outside the office, Charles volunteers at the Sojourner Family Peace Center, which serves victims of domestic violence and abuse. He aids survivors of domestic violence by providing pro bono representation, connecting them with legal aid, and by being a part of their support group that listens to their stories and fosters healing.



Patricia (Patti) Putney is a Shareholder at Bell, Moore & Richter, S.C. and has been with the firm since 2002. Patti is a graduate of Bryn Mawr College (1984) and Brooklyn Law School (1989). She moved to Wisconsin from New York in 1995 and is a proud Packer fan at this point – she even has a cheese hat. The majority of Patti's practice involves the defense of civil litigation, including general liability defense, medical and professional malpractice defense, insurance coverage, and other related matters. She has tried numerous cases in courts throughout the state. She is also now mediating cases so give her a call! Patti was previously an associate at Peterson, Johnson & Murray, SC (Madison), Bower & Gardner (NYC) and Wilson, Elser, Moskowitz, Edelman & Dicker (NYC). Patti has served two 2-year terms on the Board of Governors for the State Bar, as well as held leadership positions on the Litigation Section, including Chair. She is currently the Chair of the Anti-Sexual Harassment Oversight Committee for



Speaker Biographies *continued*

the State Bar. Patti has been voted as a “Superlawyer” every year since 2012 and has been on the “Top 25” list for Madison Lawyers and the “Top 50” for Women Lawyers in the past. She was honored to be selected as a “Woman in the Law” in 2012 by the Wisconsin Law Journal. Patti also started a group called “Lawyer Moms” in the Madison area many years ago, which she is happy to report is still going strong as a networking and support group for women juggling motherhood and the law (now led by Grace Kulkosi). She currently sits on the Board of Wisconsin Defense Counsel and is a frequent contributor to the WDC Journal. Patti mentors younger attorneys regularly and is in charge of BMR’s law clerk program. Finally, Patti plays the flute and piccolo in two community orchestras and two woodwind quintets.

Amy Scholl is a shareholder with Coyne, Schultz, Becker and Bauer, S.C. She specializes in civil litigation with a focus on defending insurers and businesses. Amy has a general civil practice which involves automotive, premise and general liability claims and insurance coverage. She also is involved in defending healthcare providers, long-term healthcare providers and other providers of professional services in Court and before regulatory agencies. Amy is AV Preeminent rated by Martindale-Hubbell and is a member of ABOTA. She is a Fellow in the American College of Trial Lawyers. She has been named to Super Lawyers as one of the Top 25 Attorneys in Madison and Top 50 Attorneys in the State. Amy is certified as a Civil Trial Advocate and Civil Pretrial Practice Advocate by The National Board of Trial Advocacy. Amy has tried cases throughout Wisconsin including Adams, Columbia, Dane, Green, Iowa, La Crosse, Marquette, Richland, Rock and Sauk Counties.



Christopher C. Shattuck is the Program Director and Legal Studies/Paralegal Program Instructor at Madison College. Previously, Mr. Shattuck managed a department and litigated cases for a creditor’s rights firm in Milwaukee. He then dedicated close to six years to the State Bar of Wisconsin as their Law Practice Assistant Manager. Throughout this period, Mr. Shattuck provided over two thousand consultations, authored more than fifty published articles, and delivered over one hundred presentations, all focused on practice management, technology, and their ethical implications. Mr. Shattuck earned his undergraduate and Master of Business Administration degrees from the University of Wisconsin - Oshkosh, and completed his Juris Doctor at the University of La Verne College of Law in southern California.



Morgan K. Stippel is an associate at Bell, Moore & Richter, S.C. specializing in civil defense litigation. She regularly represents clients in personal injury matters, business disputes, and civil rights actions in both state and federal court. Ms. Stippel is also an adjunct professor at the University of Wisconsin Law School where she teaches trial advocacy to mock trial students and coaches mock trial competition teams. She was recognized as a Super Lawyers Rising Star in 2022, and she was selected by her peers to be included in 2024 Best Lawyers: Ones to Watch.



Ms. Stippel takes pride in her active involvement in the legal community. She chairs the Wisconsin Defense Counsel’s Diversity, Equity & Inclusion Committee. She also sits on the Board for the Madison Legal Association for Women and organizes its annual “I Resolve” Fundraiser to benefit Domestic Abuse Intervention Services. In addition, Ms. Stippel regularly volunteers with Legal Action of Wisconsin at its expungement clinics and works on pro bono pardon application cases.



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E-Discovery Tips & Best practices for construction litigation

- Introduction
 - The Electronic Discovery Reference Model
- Phase 1: Collections
 - Importance of forensically sound collection
 - Different data sources with construction specific considerations
 - Email
 - Text
 - Social media
- Phase 2: Processing
 - Data Processing and Filtering
 - Ways to defensibly control costs and spend at the processing stage
- Phase 3: Document Hosting and Review
 - Construction specific considerations
 - Mobile text review
 - Use of creating facts and outlines
 - Benefits of tools for deposition preparation & exhibits

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Under Review: The *Rooker-Feldman* Doctrine

I. Introduction

- a. “The *Rooker-Feldman* Doctrine is an important foundation for the division of power between federal and state courts.” *Hadzi-Tanovic v. Johnson*, 62 F.4th 394, 399 (7th Cir. 2023).
- b. “The doctrine imposes a ‘jurisdictional bar’ that prohibits federal courts other than the Supreme Court of the United States from reviewing final state court judgments.” *Id.*
- c. The doctrine applies to federal claims that directly challenge a state court judgment or are “inextricably intertwined” with a state court judgment.
- d. When a plaintiff, who loses in state court, presents a claim in federal court that is dependent on the same operative facts from that state court case which the plaintiff lost, defense counsel will have the opportunity to respond with a motion for summary judgment asking the court to dismiss the claim on the ground that the *Rooker-Feldman* Doctrine has divested the court of jurisdiction.

II. The *Rooker-Feldman* Doctrine’s Statutory Basis

- a. The *Rooker-Feldman* doctrine is considered a roadmap of general statutory principles based predominantly on 28 U.S.C. §§ 1257 and 1331.
 - i. 28 U.S.C. § 1257(a) states, “[f]inal judgments [...] rendered by the highest court of a State [...], may be reviewed by the Supreme Court[.]”
 - ii. 28 U.S.C. § 1331 establishes that district courts “shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”

III. The *Rooker* and *Feldman* Cases

- a. The doctrine comes from two U.S. Supreme Court cases—*Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).
- b. *Rooker v. Fidelity Trust Co.* established that it is the duty of state courts to address any direct or indirect constitutional issues raised in state court proceedings and reiterated that U.S. district courts have strictly original jurisdiction. Therefore, any decision from the Indiana Supreme Court could only be appealed directly to the U.S. Supreme Court.

- c. In 1983, *District of Columbia Court of Appeals v. Feldman* furthered the doctrine when it established the standard for what constitutes a judicial decision under the doctrine.
 - i. A judicial decision “investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist.”
 - ii. *Feldman* also established the “inextricably intertwined” test (i.e., claims that are “inextricably intertwined” with a state court’s determination in a judicial proceeding cannot be reviewed by federal district courts, even if they are not directly barred by the doctrine).
 - iii. “To determine whether a plaintiff’s claims are inextricably intertwined with the state court judgment, we ask whether the plaintiff alleges an injury ‘caused by the state court judgment,’” or stated otherwise, whether the court is “‘essentially being called upon to review the state court decision.’” *Hadzi-Tanovic v. Johnson*, 62 F.4th at 399.
- d. Together, the *Rooker* and *Feldman* cases attempted to create a framework establishing that state courts are required to address all constitutional issues that arise in a state court proceeding, and only the U.S. Supreme Court has the authority to review those decisions or review any state court decisions that are judicial in nature.

IV. *Exxon Mobil Corp. and Circuit Splits*

- a. The U.S. Supreme Court has not commented much on the *Rooker-Feldman* Doctrine, which has led to a variety of circuit splits regarding its application.
- b. The U.S. Supreme Court attempted to provide guidance to lower courts and clarify the breadth of the *Rooker-Feldman* Doctrine in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005). It clarified that the *Rooker-Feldman* Doctrine is not triggered solely by the existence of parallel state and federal court litigation.
 - i. Justice Ruth Bader Ginsburg stated, “[v]ariously interpreted in the lower courts, the doctrine has sometimes been construed to extend far beyond the contours of the *Rooker* and *Feldman* cases, overriding Congress’ conferral of federal court jurisdiction concurrent with jurisdiction exercised by state laws and superseding the ordinary application of preclusion law[.]” *Exxon Mobil Corp.*, 544 U.S. at 283.
 - ii. The Court attempted to define the scope of the *Rooker-Feldman* Doctrine: “[The doctrine is] confined to cases [...] brought by state-court losers complaining of injuries caused by state court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.” *Id.* at 284.

- iii. Attempting to provide clear-cut answers for lower courts, the Court explained that the *Rooker-Feldman* Doctrine is meant to be interpreted narrowly and affirmed that the *Rooker-Feldman* Doctrine does not replace preclusion principles or affect doctrines allowing federal courts to stay or dismiss proceedings in deference to state-court actions.
- c. The U.S. Supreme Court has yet to set out an analytical framework under which lower federal courts should apply the doctrine, as circuit courts continue to have a hard time applying it consistently.
- d. The Seventh Circuit has applied the doctrine broadly and has done so as recently as 2023.

V. The Seventh Circuit’s Application of the *Rooker-Feldman* Doctrine

- a. The Seventh Circuit’s broad application of the *Rooker-Feldman* Doctrine was illustrated most recently in the 2023 case of *Hadzi-Tanovic v. Johnson*, 62 F.4th 394 (7th Cir. 2023).
 - i. Facts: This case arose out of a custody dispute in Illinois state court. After the state court issued an order requiring the mother’s parenting time with her children to be supervised, she filed a complaint in federal court alleging that the father, the children’s guardian ad litem, and the state court judge conspired to violate her children’s rights to family association and her right to a fair and unbiased trier of fact. The mother sought compensatory and punitive damages.
 - ii. Procedural Posture: The U.S. District Court for the Northern District of Illinois concluded that the *Rooker-Feldman* Doctrine did not apply for two reasons: (1) the district court questioned the finality of the state court’s order due to the state’s ongoing supervision of the custody/child support arrangements and the mother’s pending motion for relief from the state court order; and (2) the mother’s allegations of corruption in the state court proceedings precluded application of the *Rooker-Feldman* Doctrine. Nonetheless, the district court dismissed the complaint on abstention grounds. The mother appealed.
 - iii. Issues: (1) Is the finality requirement of the *Rooker-Feldman* Doctrine satisfied in divorce cases where the state court has entered an order and ongoing family supervision is provided? (2) Can claims that state courts are corrupt avoid application of the *Rooker-Feldman* Doctrine?
 - iv. Holdings: (1) Where the state court order being challenged is final, the *Rooker-Feldman* Doctrine applies to a plaintiff’s attempt to have the federal

court review it. (2) Allegations of state court corruption are insufficient to avoid application of the *Rooker-Feldman* Doctrine.

- v. Reasoning: (1) The mother challenged a state court order that was final when the federal lawsuit was filed. State law determines the finality of a state judicial decision, and Illinois law provided that the order was final and immediately appealable (even though the order could be modified in the future). The mother's motion to vacate the order did not defeat application of the *Rooker-Feldman* Doctrine because it was a collateral attack on the order and not a direct appeal therefrom. Accordingly, it did not alter the finality of the order. (2) Although the Seventh Circuit had previously recognized a corruption exception to the *Rooker-Feldman* Doctrine, the *Hadzi-Tanovic* decision overturned this previous line of cases. The U.S. Supreme Court has not indicated that the *Rooker-Feldman* Doctrine is subject to a corruption exception, and such an exception would open a large loophole. The essence of the *Rooker-Feldman* Doctrine is that no matter how wrong a state court judgment may be under federal law, lower federal courts do not have subject matter jurisdiction to review it.
- vi. Limitations: (1) There are Seventh Circuit decisions holding that the *Rooker-Feldman* Doctrine does not apply where plaintiffs seek damages for injuries caused by the fraudulent conduct of state court opponents (distinct from state court corruption). The *Hadzi-Tanovic* decision does not address whether, or under what circumstances, allegations of fraud by state court opponents escape application of the *Rooker-Feldman* Doctrine. (2) *Hadzi-Tanovic* did not present the question of whether the *Rooker-Feldman* Doctrine would bar the mother's claim if she filed the federal court lawsuit after obtaining an order setting aside the relevant state court judgment. The Seventh Circuit is "not at all certain" that such a lawsuit would call upon the federal court to review and reject the final state court judgment.

VI. Potential Changes to the Seventh Circuit's Application of the *Rooker-Feldman* Doctrine


- a. *Gilbank v. Marshfield Police Department*, Case No. 20-cv- 601-jdp, 2021 WL 5865453 (W.D. Wis. 2021), arises from the U.S. District Court for the Western District of Wisconsin.
 - i. Facts: After extensive CHIPS (Child in Need of Protective Services) proceedings in state court, Gilbank lost custody of her minor daughter, T.E.H., for more than a year after she was arrested for possession of methamphetamine. Gilbank filed her federal court lawsuit against those involved in arresting her and placing her daughter in protective custody. Gilbank contended that the defendants violated her constitutional rights by falsifying evidence, removing her daughter without probable cause to

believe she was in danger, and denying Gilbank an opportunity to challenge the removal.


- ii. Procedural Posture: Gilbank and the defendants filed cross-motions for summary judgment in the district court, and this decision reflects the district court's rulings on said dispositive motions.
 - iii. Issue: Does the *Rooker-Feldman* Doctrine bar Gilbank's federal court lawsuit?
 - iv. Holding: Yes, the *Rooker-Feldman* Doctrine bars Gilbank's federal court lawsuit.
 - v. Reasoning: (1) Most of the injuries about which Gilbank complained (i.e., loss of custody of her minor daughter) resulted from the state court's orders in the CHIPS case. During multiple hearings, the state court considered Gilbank's claims that T.E.H. was seized without probable cause and not in need of protective services. The state court heard arguments, weighed evidence, determined credibility, and found probable cause that T.E.H. needed protection. The *Rooker-Feldman* Doctrine precluded the district court from reviewing these orders or issuing an opinion that would undermine these orders. (2) Gilbank contended that some of her injuries occurred prior to, and existed apart from, the state court's custody orders (i.e., the warrantless urinalysis, the interrogation without an attorney at the police station, and the denial of due process). If these injuries were independent from the state court custody orders, Gilbank may be able to recover for these injuries in federal court. However, because there was insufficient evidence to support that these constitutional violations occurred, the district court granted the defendants' motions for summary judgment and denied plaintiff's motion for summary judgment.
- b. The district court's decision is currently under Seventh Circuit review. Depending on how the Seventh Circuit rules, application of the *Rooker-Feldman* Doctrine within the Seventh Circuit could be quite limited moving forward.
- i. Gilbank is a pro se plaintiff, and the Seventh Circuit asked counsel to handle and deliver oral argument on Gilbank's behalf. The Seventh Circuit heard oral argument on February 22, 2023.
 - ii. Gilbank's argument on appeal is predicated on the following language from the *Exxon Mobil Corp.* decision: "The *Rooker-Feldman* Doctrine, we hold today, is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced **and inviting district court review and rejection of those**

judgments.” *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005) (emphasis added).

- iii. Gilbank argues that the language emphasized above creates another element that must be satisfied before the *Rooker-Feldman* Doctrine can be applied. If the state court loser is not seeking relief from the state court order itself, and is only seeking monetary damages, then the *Rooker-Feldman* Doctrine does not apply. Stated otherwise, if the alleged injuries do not expressly invite the review and rejection of state court judgments, the *Rooker-Feldman* Doctrine does not apply.
- iv. Gilbank also attempts to draw a distinction between injuries inflicted by the state court judgment itself versus injuries inflicted by the defendants’ conduct. She argues that because she would have been injured absent the state court judgment, her claims are not barred by the *Rooker-Feldman* Doctrine.
- v. Conversely, the defendants argue that someone alleging they have been injured in the wake of a state court judgment is necessarily inviting review/rejection of that judgment.
- vi. The defendants further argue that the *Exxon Mobil Corp.* decision must be read as a whole, and that Gilbank is placing undue emphasis on one portion of a single sentence. Since *Exxon Mobil Corp.*, the Seventh Circuit has not applied this language as Gilbank argues it should be applied.



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Under Review: The *Rooker-Feldman* Doctrine

Attorneys Kelsey A. Pelegrin and Morgan K. Stippel

Wisconsin Defense Counsel:
Winter Conference
December 1, 2023

1

What is the *Rooker-Feldman* Doctrine?

- Jurisdictional bar that prohibits federal courts, other than the U.S. Supreme Court, from reviewing final state court judgments, or issues that are “inextricably intertwined” with a state court judgment.
- **Note:** Although the two are related and share some overlap, the *Rooker-Feldman* Doctrine is distinct from issue preclusion and are often argued together.
 - Dismissal on *Rooker-Feldman* grounds is without prejudice, and dismissal on issue preclusion grounds is with prejudice.

2

The Doctrine’s Statutory Basis

- 28 U.S.C. § 1257: Final state court judgments may only be reviewed by the U.S. Supreme Court.
- 28 U.S.C. § 1331: Federal district courts have original jurisdiction of all civil actions arising under the Constitution and federal law.

3

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923)

- State courts have a duty to address all direct or indirect constitutional issues raised in state court proceedings.
- Any decision from the highest state court must be directly appealed to the U.S. Supreme Court.

4

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983)

- What constitutes a judicial decision under the Doctrine?
 - A judicial decision “investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist.”
- “Inextricably Intertwined” Test
 - “To determine whether a plaintiff’s claims are inextricably intertwined with the state court judgment, we ask whether the plaintiff alleges an injury ‘caused by the state court judgment.’”
 - Stated otherwise, the courts asks whether it is “essentially being called upon to review the state court decision.”
 - This “inextricably intertwined” language has created significant confusion for the lower courts.

5

Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280 (2005) and Circuit Splits

- Attempted to clarify application of the Doctrine:
 - The *Rooker-Feldman* Doctrine is “confined to cases brought by state-court losers complaining of injuries caused by state court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.”
- However, the Doctrine’s application remains unclear, which has caused various circuit splits.

6

Seventh Circuit's Application of The *Rooker-Feldman* Doctrine

- Historically, the Seventh Circuit has broadly applied the *Rooker-Feldman* Doctrine.
- The most recent decision was rendered in *Hadzi-Tanovic v. Johnson*, 62 F.4th 394 (7th Cir. 2023).
 - Issues:
 - 1) Is the finality requirement of the *Rooker-Feldman* Doctrine satisfied in divorce cases where the state court has entered an order and ongoing family supervision is provided?
 - The Seventh Circuit answered "yes."
 - 2) Can claims that state courts are corrupt avoid application of the *Rooker-Feldman* Doctrine?
 - The Seventh Circuit answered "no."

7

Western District of Wisconsin's Decision in *Gilbank v. Marshfield Police Department*

- Case Citation:** Case No. 20-cv-601-jdp, 2021 WL 5865453 (W.D. Wis.)
- Facts
 - After extensive CHIPS (Child in Need of Protective Services) proceedings, Gilbank lost custody of her minor daughter for more than a year after she was arrested for possession of methamphetamine. Gilbank filed a federal lawsuit against those involved in arresting her and placing her daughter in protective custody.
- Issue
 - Does the *Rooker-Feldman* Doctrine bar Gilbank's federal court lawsuit?

8

Western District of Wisconsin's Decision in *Gilbank v. Marshfield Police Department*

- Holding**
 - The *Rooker-Feldman* Doctrine barred Gilbank's federal lawsuit for the following reasons:
 - 1) Most of the injuries about which Gilbank complained (i.e., loss of custody of her minor daughter) resulted from the state court's orders in the CHIPS case, and the *Rooker-Feldman* Doctrine precludes the district court from reviewing these orders or issuing an opinion that would undermine these orders.
 - 2) Gilbank contended that some of her injuries occurred prior to, and existed apart from, the state court's orders in the CHIPS case. If true, Gilbank could recover for these injuries in federal court. However, there was no evidence to support that these alleged constitutional violations occurred.
- The Western District of Wisconsin granted the defendants' motions for summary judgment.

9

Under Seventh Circuit Review: *Gilbank v. Marshfield Police Department*

- Gilbank appealed the Western District of Wisconsin's decision, and the Seventh Circuit appointed counsel to represent her and deliver oral argument on February 22, 2023.
- Gilbank's argument on appeal attempts to shift the focus from the cause of the alleged injury to the relief sought.
 - This argument is predicated on the following language from *Exxon Mobil*: "The *Rooker-Feldman* Doctrine, we hold today, is confined to cases brought by state-court losers complaining of injuries caused by state court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments."
- Based on the highlighted language, Gilbank argues that if the plaintiff does not seek relief from the state court order itself, the plaintiff can escape application of the *Rooker-Feldman* Doctrine.

10

Potential Implications of the Seventh Circuit's Decision

- If the Seventh Circuit adopts Gilbank's proposed analysis, it will mark a significant change in the application of the *Rooker-Feldman* Doctrine.
 - What was once broadly applied will now be much more narrowly applied.

11

Questions?

12

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DE&I Panel: Issues Affecting Your Practice

I. Statistics

a. Wisconsin State Bar

- i. *Disclaimer:* The following data is based on information that is self-reporting and voluntary, and 100% of the Wisconsin State Bar Membership has not reported.
- ii. Based on the available data, we know the following:
 1. 62% of those reporting identify as Male.
 2. 37% of those reporting identify as Female.
 3. 1% of those reporting identify as LGBTQ+.
 4. 1% of those reporting identify as Native American.
 5. 2.5% of those reporting identify as Asian.
 6. 3% of those reporting identify as Latinx.
 7. 3% of those reporting identify as Black.
 8. 80% of those reporting identify as White.

b. Marquette Law School

- i. The following data has been reported for the fall 2023 entering class:
 1. 92 undergraduate schools are represented.
 2. 48 undergraduate majors are represented.
 3. 29 states are represented.
 4. 52% are Wisconsin residents.
 5. 51% are women.
 6. 22% are students of color.
 7. The average age is 24, and the age range is 18-43.

c. University of Wisconsin Law School

- i. The following data has been reported for the Class of 2025:
 1. 56% are students from outside Wisconsin.
 2. 24% are students of color.
 3. 12% are first-generation students.
 4. 29% are the first in family to go to graduate school or law school.
 5. 5% are veterans.
 6. The average age is 25.
 7. 62 undergraduate majors are represented.
 8. 29 languages are spoken.

- d. Based on these statistics, it is critical for all employers to recognize/acknowledge these different backgrounds and look for ways to provide support accordingly (e.g., providing constructive feedback from an informed position of knowing the employee's background, how they identify, where they come from, etc.).

II. Intersectionality

- a. Explains how systems of inequality based on gender, race, ethnicity, sexual orientation, gender identity, disability, socioeconomic class, and other forms of discrimination intersect with one another to create unique dynamics and effects. (<https://www.intersectionaljustice.org/what-is-intersectionality>).
- b. All forms of inequality are mutually reinforcing and must be addressed simultaneously. (<https://www.intersectionaljustice.org/what-is-intersectionality>).
- c. To put the concept of intersectionality to work, we can use a topic that is widely discussed in the legal profession: why there are few female partners at law firms and few women in leadership roles in private companies.
 - i. On the surface, this may come across as a “women’s issue,” but it is much more complicated than that.
 - ii. One driving force behind this trend is the “parent penalty,” which negatively impacts people of all backgrounds, and some disproportionately more so.
 - 1. Parental Leave
 - 2. Expiration of Federal Emergency Childcare Funding
 - 3. Workplace Flexibility

III. The PUMP Act.

- a. General Overview and Key Takeaways
 - i. The PUMP Act responds to coverage gaps in the federal Fair Labor Standards Act (FLSA). When the Affordable Care Act amended the FLSA in 2010, it obligated covered employers to provide “reasonable break time” for employees who were not exempt from overtime requirements “to express breast milk for her nursing child for 1 year after the child’s birth each time such employee has need to express the milk.”
 - ii. This meant that employees who were exempt from overtime requirements and were nursing were not legally entitled to break time to express milk. Many employers adopted policies or practices to cover exempt employees even though they were not legally required to do so. Commentary estimates

that millions of additional nursing workers will now be legally entitled to break time and designated pumping space under the PUMP Act.

- iii. The PUMP Act mandates covered employers to provide all nursing employees with a reasonable break time to express breast milk for 1 year after the child is born when the mother needs to express milk.
 - 1. According to the Department of Labor (DOL), “[t]he frequency and duration of breaks needed to express milk will likely vary depending on factors related to the nursing employee and the child.”
 - 2. Covered employers will therefore need to be flexible with employees’ requests to pump and address such requests on a case-by-case basis.
- iv. In addition, covered employers must provide the employee with “a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.”
 - 1. Practically speaking, this may mean designating a room or a visually secluded area with access to a compatible electrical outlet. This space must likely have to have the capacity to be locked or at the very least designated with a sign depending on the circumstances. Employees should also be given a space to sit and a surface to place the pump.
 - 2. The importance of providing a clean, functional, secluded, and designated space cannot be overstated. Being able to pump in the workplace is a private, personal matter which helps nursing mothers be the best mother and workers they can be. Employers invite more legal risk if the designated space is unfit for pumping.

b. Coverage

- i. Employers that are covered by the FLSA are now covered by this law. There are limited, industry-specific exceptions which include:
 - 1. Rail, air, and motorcoach.
 - 2. Small companies (fewer than 50 employees), can also be exempt if they can demonstrate that compliance would “impose an undue hardship.”
 - a. The 50-employee threshold counts all employees regardless of full-time status or job site.

- b. According to the DOL, “[w]hether compliance would be an undue hardship is determined by looking at the difficulty or expense of compliance for a specific employer in comparison to the size, financial resources, nature, and structure of the employer’s business.”
- c. In practice, this may be a difficult standard for small employers to meet.

c. Remedies

- i. Employees may file complaints with the DOL’s Wage and Hour Division (WHD) or bring a civil suit against the employer for damages and other relief in a court of competent jurisdiction.
- ii. Different procedures apply depending on the type of complaint and the forum:
 - 1. If the employee intends to file suit due to an employer’s failure to provide a space to pump, the employee must give ten days of notice for the employer to cure the issue prior to filing suit. During this period, the employer can change its practice to avoid liability. There is no ten-day notice period for break time complaints under the PUMP Act.
 - 2. This safe harbor requirement will not apply if the employer does either of the following: (1) retaliates against the employee for asserting their rights under the PUMP Act; or (2) if the employer has stated that it will not be complying with the law’s requirements.
 - 3. Employees do not have to give this notice if they want to file a complaint with the WHD under the PUMP Act.
 - a. Beginning April 28, 2023, employees may obtain as relief: employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages, compensatory damages and make-whole relief, such as economic losses that resulted from violations, and punitive damages where appropriate.

d. Compensation

- i. Employees are not necessarily required to be compensated each time they take a break to express breast milk, but payment is complicated under Wisconsin law.

1. If the employer does provide paid breaks to employees, nursing employees must also be compensated in the same way for time to express milk.
 - a. For example, if the employer provides a 20-minute paid break to employees during the day and a nursing worker opts to use that 20-minute break to express milk, the break must be paid.
 2. If the employer does not provide paid breaks, then the employee must be completely relieved from duty each time they need to express milk.
- ii. Under Wisconsin state law, the general rule is that any break that is less than a full 30 minutes (and completely relieved from duty) must be paid, unless it can be shown that the break is solely for the benefit of the employee. However, it is unclear from the state law guidance we have received whether an employee who needs multiple breaks shorter than 30 minutes during the day to express milk must have that time paid if the employee needs more breaks than the employer already grants.

IV. Pregnant Workers Fairness Act (PWFA)

a. General Overview

- i. The PWFA was first introduced into Congress in May 2012. President Biden signed the PWFA into law on December 29, 2022, and it went into effect on June 27, 2023.
 1. We are expecting guidance from the EEOC regarding examples of what qualify as reasonable accommodations by December 23, 2023. The EEOC has already released FAQs which can be reviewed here: <https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act>
 2. On August 7, 2023, the EEOC published its proposed regulations interpreting the PWFA. The proposed rule sets forth how the EEOC intends to interpret the law. This is just a proposed rule and could change. The proposed rule can be found here: <https://public-inspection.federalregister.gov/2023-17041.pdf>
 3. The PWFA strengthens the Pregnancy Discrimination Act (PDA) and gives workers more protection for pregnancy-related conditions. It does not displace other anti-discrimination laws such as the Family and Medical Leave Act (FMLA).

- a. The U.S. Supreme Court’s decision in *Young v. United Parcel Service*, 575 U.S. 206 (2015) made clear that pregnant workers are not entitled to a “most-favored-nation” status in the workplace. Some believe that this decision removed the teeth from the intent of the PDA.
 - b. The PWFA therefore expands federal protections for pregnant workers while borrowing certain existing principles from the ADA.
4. Prior to this law, federal law only required covered employers to reasonably accommodate pregnant employees’ medical restrictions if those restrictions rendered the employees “disabled” under the ADA as amended.

b. Coverage

- i. Applies to all private employers who have 15 or more employees, federal/state/local employers, employment agencies, and labor organizations.
- ii. Both employees and applicants are entitled to protection if they are considered “qualified.” An applicant or employee is “qualified” under the PWFA if:
 1. They can perform the essential functions of the job with or without a reasonable accommodation; or
 2. Their inability to perform an essential function of the job is temporary and can be reasonably accommodated.

c. Remedies

- i. Employees must first exhaust administrative remedies prior to bringing a private action. The EEOC and the U.S. Attorney General possess the same enforcement and investigatory rights that they have under Title VII.
- ii. The PWFA has the same compensatory and punitive damages as Title VII as well as the right to award attorney’s fees to prevailing employees.
- iii. The PWFA does grant employers a defense to failure-to-accommodate claims. More specifically, employers may avoid liability for damages: “if the covered entity demonstrates good faith efforts, in consultation with the employee with known limitations related to pregnancy, childbirth, or related medical conditions who has informed the covered entity that accommodation is needed, to identify and make a reasonable

accommodation that would provide such employee with an equally effective opportunity and would not cause an undue hardship on the operation of the covered entity.” (emphasis added).

d. Proposed Regulations

i. On August 7, 2023, the EEOC published its Proposed Rule interpreting the PWFA. The Proposed Rule sets forth how the EEOC intends to interpret the law. This is just a Proposed Rule and could change.

ii. Key Provisions of the EEOC’s Proposed Rule.

1. “Known limitation” is defined in the PWFA as a “physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee or the employee’s representative has communicated to the covered entity whether or not such condition meets the definition of disability” under the ADA.
2. “Limitation” means “a physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions. The physical or mental condition that is the limitation may be a modest, minor, and/or episodic impediment or problem. The physical or mental condition also may be that a worker affected by pregnancy, childbirth, or related medical conditions has a need or problem related to maintaining their health or the health of their pregnancy. The physical or mental condition required to trigger the obligation to provide a reasonable accommodation under the PWFA does not require a specific level of severity.”
3. “Known” means “the employee or applicant, or representative of the employee or applicant, has communicated the limitation to the covered entity.”
4. If an employer has reasonable concerns about whether a physical or mental condition or limitation is “related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions,” the employer may request information from the employee regarding the connection using the principles set out in the sections in the Proposed Rule about the interactive process and supporting documentation. However, the EEOC has stated they believe in most instances this will be a straightforward determination that can be accomplished through a conversation between the employer and employee as part of the interactive process and without the need for the employee to obtain documentation or verification.

5. The Rule proposes two definitions of “qualified:”

- a. The PWFA uses language from the ADA: “an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment.”
- b. Second, the PWFA allows an employee or applicant to be qualified even if they cannot perform one or more of the essential functions of the job if the inability to perform the essential function(s) is “temporary,” the worker could perform the essential function(s) “in the near future,” and the inability to perform the essential function(s) can be reasonably accommodated.
 - i. The terms “temporary” and “in the near future” and “can be reasonably accommodated” are not defined in the PWFA. However, the Proposed Rule defines them as follows:
 1. “Temporary” means lasting for a limited time, not permanent, and may extend beyond “in the near future.”
 2. “In the near future” generally means 40 weeks. The EEOC suggests that could extend to 52 weeks in some circumstances. The guidance provides this does not mean the essential function must always be suspended for 40 weeks, but emphasizes that any time period up to and including 40 weeks will not, on its own, render a worker unqualified under the PWFA. Essentially, the employer will then likely have the burden of proving the time period would create an undue hardship.
 3. “Can be reasonably accommodated,” may mean that:
 - a. One or more essential functions are temporarily suspended, with or without reassignment to someone else, and the employee continues to perform the remaining functions of the job.

- b. For other jobs, some of the essential functions may be temporarily suspended, with or without reassignment to someone else, and the employee may be assigned to other tasks to replace them.
- c. In other situations, one or more essential functions may be temporarily suspended, with or without reassignment to someone else, and the employee continues to perform the remaining functions of a different job to which the employer temporarily transfers or assigns them, or the employee may participate in the employer's light or modified duty program.
- d. The Rule emphasizes that throughout this process an employer may need to consider more than one alternative to identify reasonable accommodations that does not pose an undue hardship.

e. Key Takeaways

- i. The PWFA requires employers to reasonably accommodate pregnancy-related medical conditions regardless of whether the condition rises to the level of a disability under the ADA unless the employer can show that such an accommodation would impose an undue hardship.
- ii. To succeed on a claim of pregnancy discrimination under the PWFA, employees no longer must identify another employee who was "similar in their ability or inability to work."
- iii. Employers may no longer require that a qualified employee take paid or unpaid leave if another reasonable accommodation is available. So, employers can only require leave if no other accommodation is available.
- iv. An employee is entitled to a reasonable accommodation even if they cannot perform an essential function of their position if that inability is temporary and the employee will be able to perform that essential job function in the near future with a reasonable accommodation.

1. This is potentially different from the ADA's requirement that only requires employers to reasonably accommodate a condition to the extent that an employee "can perform the essential functions of the employment position that [she] holds or desires."



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Tripartite Nightmares and Other Ethical Considerations when Dealing with Difficult Clients

Chester Isaacson, American Family Insurance Company
Megan McKenzie, American Family Insurance Company
Amy Scholl, Coyne, Schultz, Becker & Bauer, S.C.

1

The Tripartite Relationship

- Tripartite means involving, composed of, or divided into three parts or elements.
- In insurance defense, it is used to refer to the relationship between an insurer, its insured, and the attorney hired by the insurer to represent the insured.

2

Ethical Considerations related to the Tripartite Relationship

- Conflicting interests regarding case settlement vs. defense costs
- Who controls the defense strategy?
- Scope of representation?

3

Zealous Advocacy



The preamble to the Model Rules of Professional Conduct states that a lawyer, as a member of the legal profession, "is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."



The preamble also states that as advocate, "a lawyer zealously asserts the client's position under the rules of the adversary system."



Conflicting interests: a lawyer's responsibility to the client vs. the legal system vs. their own interests

4

Conflicts of Interest

- Rule 1.7 of the Model Rules of Professional Conduct: Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest, a concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

5

ABA Formal Opinion 497: Conflicts Involving Materially Adverse Interests (Feb. 10, 2021)

Rules 1.9(a) and 1.18(c) address conflicts involving representing a current client with interests that are "materially adverse" to the interests of a former client or prospective client on the same or a substantially related matter, but neither rule states what "materially adverse" interests are. Some clear materially adverse interests include: negotiating or litigating against a former or prospective client on the same or a substantially related matter, attacking the work done for a former client on behalf of a current client, or, in many but not all instances, cross examining a former or prospective client.

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Attorney Withdrawal

SCR 20:1.16 Declining or Terminating Representation

Attorney withdrawal is permitted in a variety of circumstances. The rules governing withdrawal are found in SCR 20:1.16. The rules are divided into two parts: (a) declining or terminating representation and (b) withdrawing from representation.

(a) Declining or terminating representation. A lawyer shall not accept representation if the lawyer knows or reasonably should know that the representation will result in a conflict of interest that cannot be resolved by informed consent. A lawyer shall not accept representation if the lawyer knows or reasonably should know that the representation will result in a conflict of interest that cannot be resolved by informed consent.

(b) Withdrawing from representation. A lawyer shall not withdraw from representation if the withdrawal will result in a conflict of interest that cannot be resolved by informed consent. A lawyer shall not withdraw from representation if the withdrawal will result in a conflict of interest that cannot be resolved by informed consent.

13

SCR 20:1.4 Communication

(a) A lawyer shall:

- (1) Promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in SCR 20:1.0(f), is required by these rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests by the client for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

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

14

Wisconsin Ethics Opinion E-96-2: Attorney's Responsibilities When Client Cannot Be Located

- Duty of communication depends on knowing client's whereabouts and how to contact him/her.
- Lawyer should make a "reasonable inquiry and effort" to learn a client's whereabouts.
- If efforts are unsuccessful, lawyer may have to withdraw, taking "steps to the extent reasonably practicable" to protect the client's interest.

15

SCR 20:1.6 Confidentiality

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

(b) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another.

(c) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably likely death or substantial bodily harm;
- (2) to prevent, mitigate or rectify substantial injury to the financial interest or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud or from a substantial breach of the client's contract with the lawyer's services;
- (3) to rectify the lawyer's conduct under these rules;
- (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
- (5) to comply with other law or a court order; or
- (6) to detect and resolve conflicts of interest, the duty of the lawyer to disclose would not compromise the attorney-client privilege or otherwise prejudice the client.

16

Wisconsin Ethics Opinion EF-23-01: Responding to Online Criticism

- Lawyer may respond to online criticism as long as the response is proportional to the post.
- Lawyer may not disclose confidential client information in his or her response.
- In most cases, no response is the best response.

17

Wisconsin Formal Ethics Opinion EF-20-01: Responsibilities of a Lawyer when a Grievance is filed against the Lawyer (Feb. 12, 2020)

The fact that a client has filed a grievance against a lawyer who is currently representing the client does not by itself create a conflict that requires the lawyer to withdraw from the matter or seek informed consent of the client to continue the representation. Where the lawyer is confident they behaved appropriately, neither consent nor withdrawal is required, although there may be grounds for permissive withdrawal. Where the allegations are of sufficient gravity and merit, the lawyer's self-defense interest will conflict with the client's interests and the lawyer must withdraw.

18

**Wisconsin Formal Ethics Opinion EF-20-01:
Responsibilities of a Lawyer when a Grievance
is filed against the Lawyer (Feb. 12, 2020)
(contd.)**

A lawyer is not prohibited from communicating with a client who has filed a grievance against the lawyer. If the representation continues, the lawyer's duty of communication with the client about the ongoing representation continues. There is no prohibition on communicating with the client about the grievance, but the lawyer may not attempt to induce the client to cease cooperation with the investigation of the grievance or otherwise impede the investigation of the matter.

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Questions?

- Chester Isaacson, American Family Insurance Company
cisaacson@amfam.com
- Megan McKenzie, American Family Insurance Company
mmckenzi@amfam.com
- Amy Scholl, Coyne, Schultz, Becker & Bauer, S.C.
ascholl@cnsbb.com

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Charting the Course: Navigating AI Ethics in Wisconsin

I. Technology Competence

A. Speaker Background - Program Director and Legal Studies/Paralegal Program Instructor at Madison College. Previously, I managed a department and litigated cases for a creditor's rights firm in Milwaukee. I then dedicated close to six years to the State Bar of Wisconsin as their Law Practice Assistant Manager. Throughout this period, I provided over two thousand consultations, authored more than fifty published articles, and delivered over one hundred presentations, all focused on practice management, technology, and their ethical implications. I earned my undergraduate and Master of Business Administration degrees from the University of Wisconsin - Oshkosh, and completed my Juris Doctor at the University of La Verne College of Law in southern California.

B. SCR 20:1.1 Competence

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

Comment [8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

II. Confidentiality

A. SCR 20:1.6 prohibits the disclosure of client information, whether direct or indirect, without informed consent or authorized exception. Lawyers must safeguard against unauthorized access or disclosure by ChatGPT [and other AI] or other nonlawyer assistance.

B. See [Wisconsin Lawyer: Technology ChatGPT Artificial Intelligence: Will It Replace Lawyers and Legal Staff?: \(wisbar.org\)](https://www.wisbar.org/technology-chatgpt-artificial-intelligence-will-it-replace-lawyers-and-legal-staff/).

III. Tech Competence + Confidentiality

A. SCR 20:1.1 Competence + SCR 20:1.6 Confidentiality

- 1) Understand the benefits and risks of the technology you are using based on these rules.
- 2) Not required to write a thesis about the intersection of AI and professional conduct rules.
- 3) Must comprehend how the technology functions and safeguards confidential information in its application.
- 4) Upcoming slides will cover major AI developments, their workings, and their effectiveness in protecting confidential information.

B. [What is AI and How Can Law Firms Use it](#)

- 1) Artificial intelligence (AI) is the simulation of human intelligence by machines to perform tasks typically done by people.

- 2) Machine learning is a subset of AI. It refers to humans training machines to learn based on data input. More than simply performing (or mimicking) a human task, machine learning looks for patterns in data to draw conclusions.
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C. Technology Workings of ChatGPT



You

Search the local rules in Milwaukee County Circuit Court and tell me the requirements for filing a motion for default judgment in civil court.



ChatGPT

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D. How Does ChatGPT Protect Confidential Client Info?



You

Can I safely place confidential information into ChatGPT?



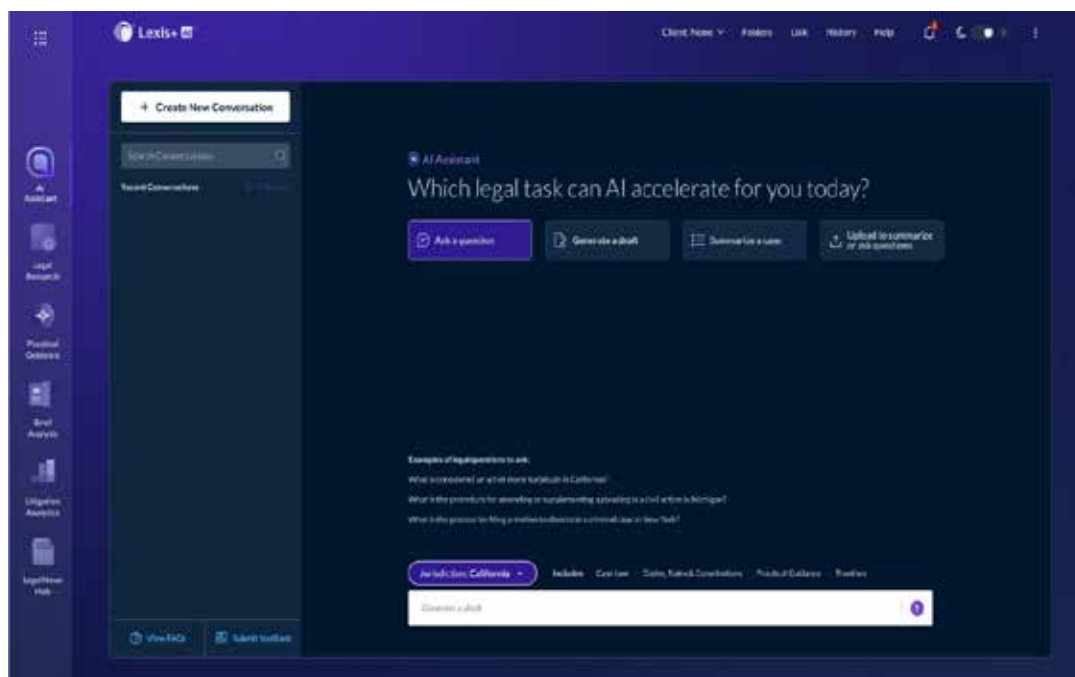
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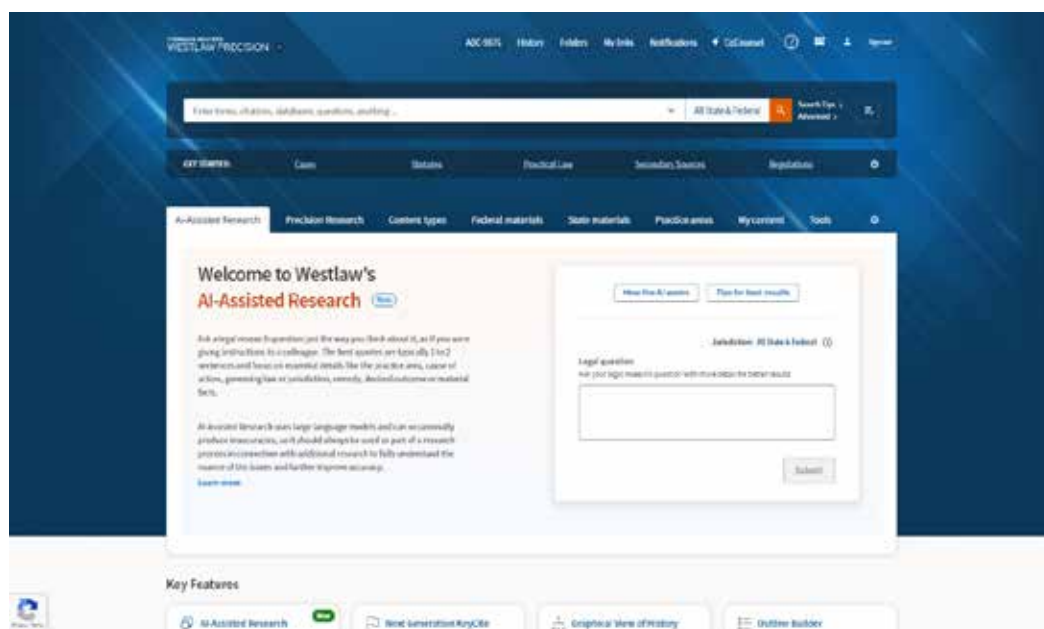
- Personal identification numbers (e.g., social security numbers, driver's license numbers)
- Financial account information (e.g., bank account or credit card numbers)
- Health information (e.g., medical records or health conditions)
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- Contact information (e.g., phone numbers, addresses, email addresses)

Remember, interactions with ChatGPT can be stored and might be reviewed for quality and training purposes. To safeguard your privacy and security, it's best to keep such sensitive information private.

E. Technology Workings of [Lexis+ AI](#)



F. Technology Workings of AI Research in [Westlaw](#)



G. How Do Lexis & Westlaw Protect Confidential Client Info?

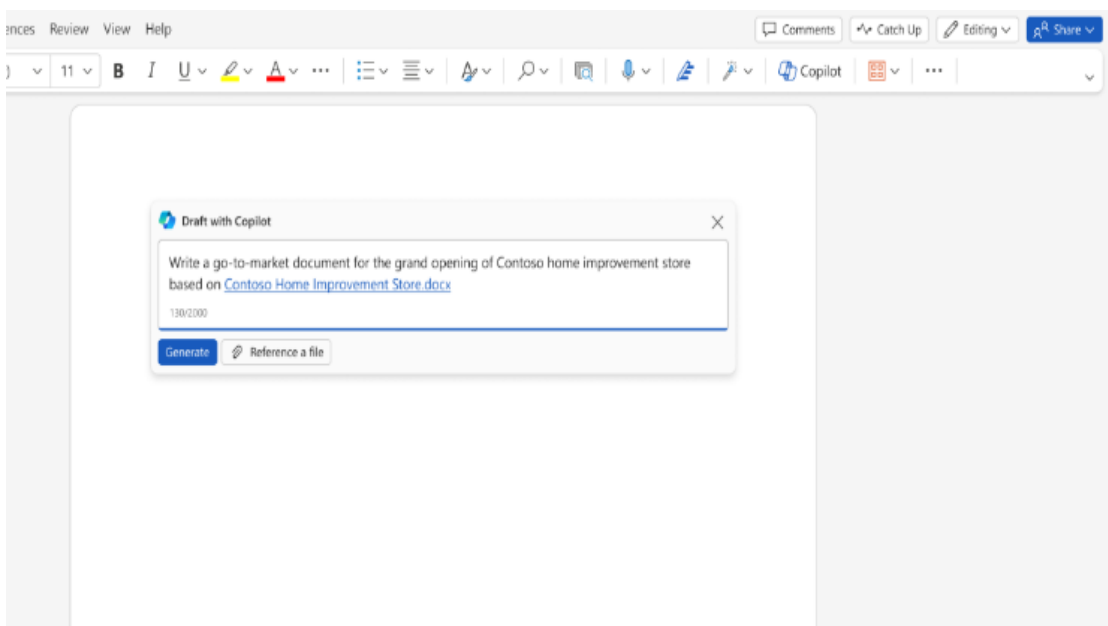
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Charting the Course: Navigating AI Ethics in Wisconsin

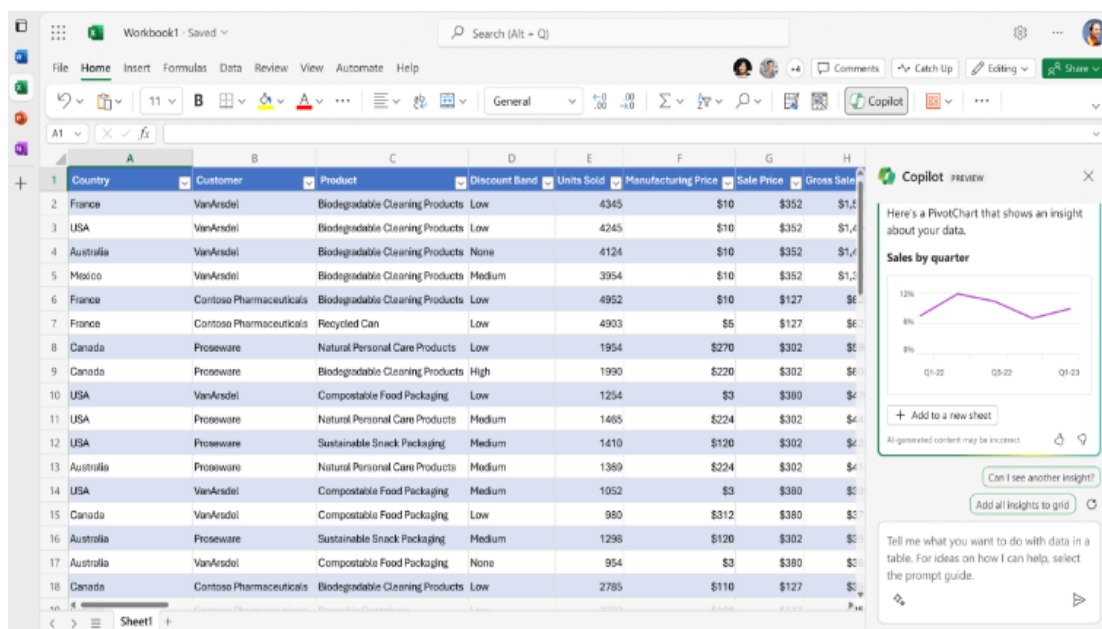
Christopher C. Shattuck

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H. Technology Workings of [Microsoft Copilot for Word](#)



I. Technology Workings of [Microsoft Copilot for Excel](#)



J. Technology Workings of [Microsoft Copilot for PowerPoint](#)



K. How Does [Copilot Protect Confidential Client Info?](#)

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- A. SCR 20:5.3 requires the law firm to have in effect measures that give reasonable assurance that the assistance by a nonlawyer is compatible with the professional obligations of the lawyer and that a lawyer having direct supervisory authority over the nonlawyer assistance make reasonable efforts to ensure that the assistance is compatible with the professional obligations of the lawyer. In addition, the firm's lawyers may be vicariously responsible for violation of the rules caused by the assistance.
- B. See [Wisconsin Lawyer: Technology ChatGPT Artificial Intelligence: Will It Replace Lawyers and Legal Staff?: \(wisbar.org\)](#).

V. Honesty

A. Ethical Guidelines

- 1) SCR 20:4.1, SCR 20:3.3, and SCR 20:8.4(c) prohibit a lawyer from making false statements. ChatGPT cautions “that the model is not able to verify the authenticity of the citation or the source it’s referencing, and the generated text might contain false or inaccurate citations that were present in the training data.”
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VI. Independent Professional Judgment

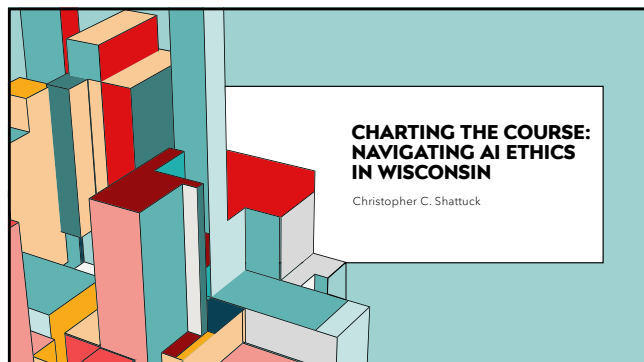
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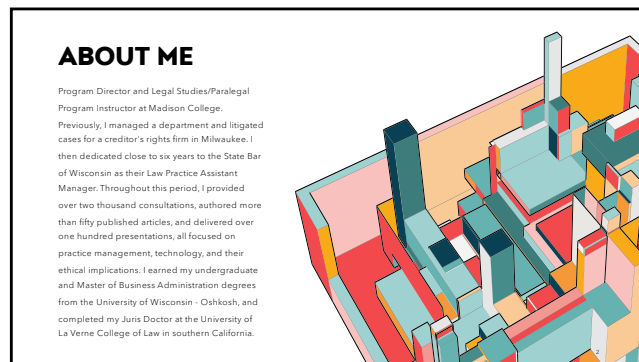
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VII. Conclusion

- A. The More You Know - AI applications will continue to grow and expand into the legal field. Your competitors will be using this technology to reduce their costs, and your clients will apply pressure on you to learn and develop these technologies for use in your practice. Learn the rules, understand how the technologies work, protect confidential information, and responsibly utilize AI to increase the efficiency of your law firm.
- B. Contact Information - [Christopher Shattuck](#), 608-616-1553, & [Christopher Shattuck | LinkedIn](#).



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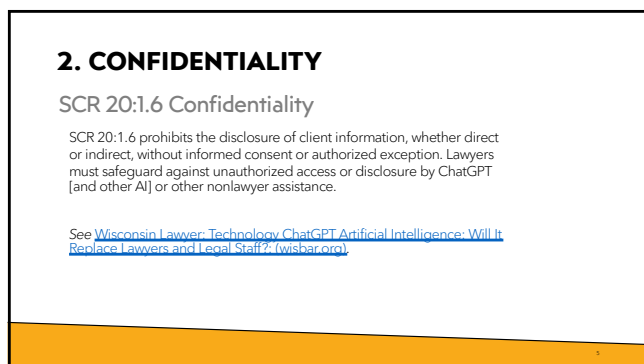
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6

3. TECH COMPETENCE + CONFIDENTIALITY

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Technology Workings of Lexis+ AI



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3. TECH COMPETENCE + CONFIDENTIALITY

Technology Workings of AI Research in Westlaw



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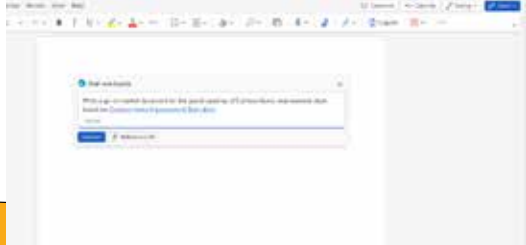
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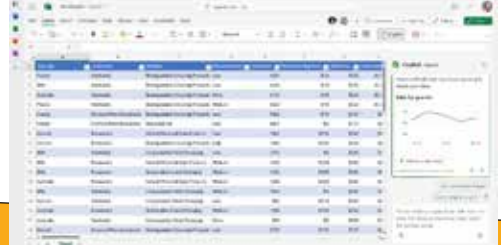
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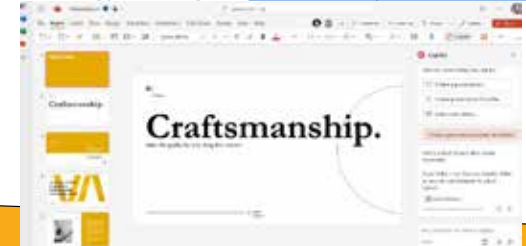
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20

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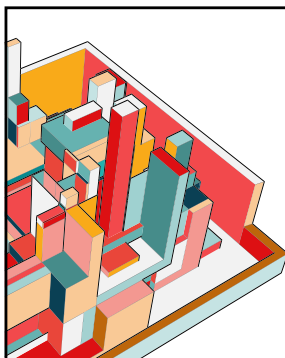
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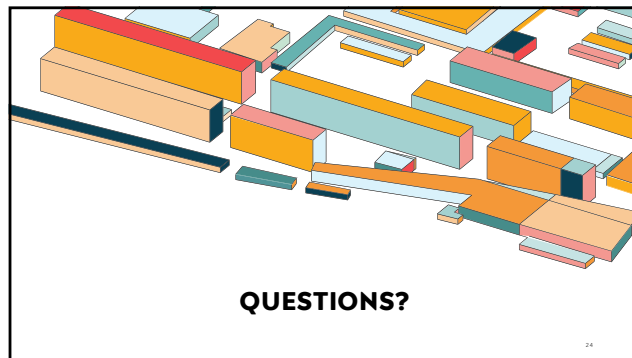
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THE MORE YOU KNOW

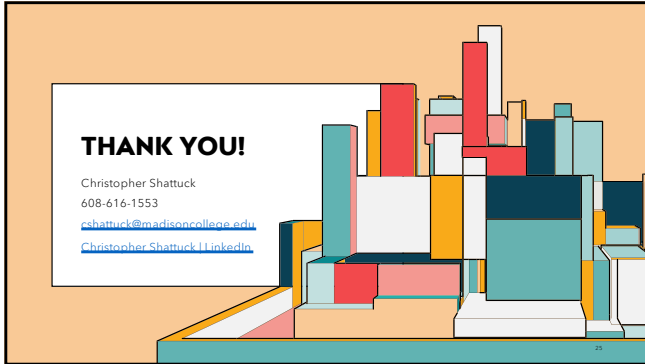
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QUESTIONS?

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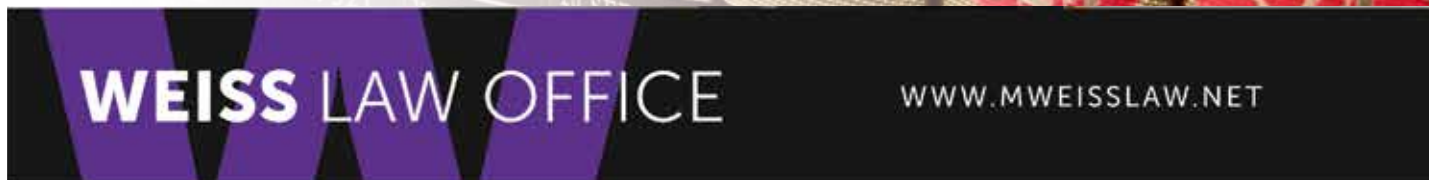


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Your toughest problems need innovative thinking, deserve dogged determination, and are successfully resolved with decades of courtroom-won experience. Weiss Law Office is here for you from start to finish.



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Suite 207
Mequon, WI 53092

Phone: 262-240-9663

Fax: 262-240-9664

Email: info@mweisslaw.net

“Exploring Ethical Issues Confronting Insurance Coverage and Defense Counsel”

Mollie T. Kugler and John P. Pinzl, von Briesen & Roper, s.c.

Description:

Ethics are critical, and a host of ethical issues may arise for attorneys handling insurance coverage and insurance defense matters. This presentation will address a few common scenarios, such as conflicts of interest, independent counsel, and confidentiality. We will explore ethical and practical considerations in this context, as well as the rules that are implicated.

Link to Annotated Rules of Professional Conduct for Attorneys:

<https://www.wicourts.gov/courts/offices/docs/olrscr20annotated.pdf#page=64&zoom=100,117,496>

I. Conflicts of Interest

Where Conflicts of Interest Arise

- The Tri-Partite Relationship – the relationship between an insurer, a defense attorney, and an insured
 - Generally, a lawyer may represent the insurer and an insured simultaneously.
 - *Juneau Cnty. Star-Times v. Juneau Cnty.*, 2013 WI 4, ¶ 48, 345 Wis.2d 122, 824 N.W.2d 457
 - “Insurance defense counsel are generally recognized as having two clients in any given case: the insurer and the insured.”
 - There are, however, risks to this simultaneous representation which could present a conflict of interest under **SCR 20:1.7 (Conflicts of interest current clients)**:
 - In the event a lawyer is representing both the insurer and the insured, the lawyer should fully disclose to the insured the lawyer’s relationship to the insurer.
 - The lawyer should remain sensitive to any divergence of interests between the insured and insurer.
 - The lawyer must act in a way that the insured has no basis to believe his/her interests are not fully represented.
 - When representing both the insured and insurer, a lawyer must be cautious with the information he/she learns from each party because under **SCR 20:1.8(b) (Conflict of interest: prohibited transaction)**, the lawyer may not use any information relating to the representation of a client to the disadvantage of the client without that client’s informed consent.
 - Under **SCR 20:1.7 (Conflicts of interest current clients)**, conflicts of interest can be waived by obtaining a written waiver from both affected clients evidencing the clients’ informed consent to the continued representation despite the conflict of interest.
 - *Mowry v. Badger State Mut. Cas. Co.*, 129 Wis. 2d 496, 385 N.W.2d 171 (1986)
 - The Wisconsin Supreme Court endorsed bifurcation of coverage issues from liability issues under Wis. Stat. § 803.04(2)(b), which can help avoid a conflict of interest issue.

- Ordinarily, payment by the insurance company does not create a conflict of interest by itself.
 - **SCR 20:1.8(f) (Conflict of interest: prohibited transaction)** allows a lawyer to accept compensation for representing a client from someone other than the client if the client gives informed consent.
- Reservation of Rights
 - Defense counsel may run into a conflict of interest if the insurer undertakes the defense of an insured with a reservation of the insurer's right to deny coverage later.
 - For example, discovery could yield information that is unfavorable to the insured.
 - An attorney may also feel constrained when strategizing or preparing to defend the insured.
 - If this is the case and a conflict exists, the attorney may need to limit his/her representation pursuant **SCR 20:1.7 (Conflicts of interest current clients)**.
 - If representation is already underway, the attorney may need to withdraw from representing one or both parties entirely. If the attorney wants to continue representing one party, the attorney will need to consider **SCR 20:1.9 (Duties to former clients)** to ensure continued representation is permitted.

II. Actions Seeking Damages in Excess of Policy Limits

When an insurance company fails to settle a third-party claim brought against its insured for an amount within the policy limits and there is a verdict in excess of the limits, the insured is exposed to liability for the excess amount. As a result, the insured might have a cause of action against the insurance company for failure to settle the third-party liability claim.

- Typically, an excess warning is accompanied by informing the insured that it has the option to retain separate counsel to assist it in evaluating the excess risk.
- But, even if the insured gets separate counsel to advise it, the carrier typically retains control over the litigation and whether to settle.
- There is some question as to whether the remedy of separate counsel really fixes this potential conflict of interest.
- Typically the insurer has to consider the insured's interests in good faith, along with the insurer's interest, and evaluate settlement offers within policy limits as though it alone carries the entire risk of loss.

III. Issue Conflicts

- Issue conflicts, also known as positional conflicts, arise when an attorney takes a position on a legal issue in one case and takes a contrary position on the same legal issue in another case.
- This issue may arise in the course of representation of defense counsel or coverage counsel.
- Under **SCR 20:1.7(a)(2) (Conflicts of interest current clients)**, a lawyer shall not represent a client if there is a significant risk that the representation of one or more clients

will be materially limited by the lawyer's responsibilities to another client, a former client, or a third party.

- Generally speaking, an attorney can “take inconsistent legal positions in different tribunals at different times on behalf of different clients.” See **SCR 20:1.7, Comment 24**.
- However, if there is a significant risk that the lawyer's representation on behalf of one client will “materially limit” the lawyer's effectiveness in representing another client, an issue conflict exists. See **SCR 20:1.7, Comment 24**.
- Lawyers should evaluate each matter on a case-by-case basis to determine whether representation of one client will be limited by the lawyer's representation of another client.
- If the lawyer determines any of the above considerations are present, then continuing the representation of at least one affected client would be a violation of **SCR 20:1.7 (Conflicts of interest current clients)**.
- If, however, the lawyer reasonably determines that representation of one client would not adversely affect another, then the lawyer may proceed with the representation *provided the affected client(s) provide their consent after being fully informed of the issues*.

IV. Independent Counsel

When is Independent Counsel Necessary?

- When an insured is sued, and an insurer sends a reservation of rights letter, there may exist a need to hire independent counsel for the insured. Independent counsel is typically necessary when a potential conflict of interest exists which threatens the strategy to be used in defending the underlying lawsuit, and there is a prospect of defending under some but not all available defenses.
- Independent counsel typically is not necessary so long as the issue of coverage is separate from the issue of liability.

Rate Issues

- When independent counsel is requested or required, rate issues often arise. Essentially, this means that the insurance company may dispute whether it needs to pay independent counsel more than panel counsel rates.

Wisconsin Law Regarding Independent Counsel and Rates

- Wisconsin does not have a statute mandating an insurer provides independent counsel when that duty arises.
- However, Wisconsin case law establishes that an insurer has a responsibility for *reasonable* defense costs, which is invoked when paying for independent counsel:
 - *Jacob v. West Bend Mut. Ins. Co.*, 203 Wis. 2d 524, 536, 553 N.W.2d 800 (Ct. App. 1996).
 - *HK Systems, Inc. v. Admiral Ins. Co.*, 2005 WL 1563340 at *4 (E.D. Wis. June 27, 2005).
 - *Haley v. Kolbe Millwork Co., Inc.*, 97 F. Supp. 3d 1047, 1055 (W.D. Wis. 2015)
 - *Fireman's Fund Ins. Co. v. Waste Mgmt.*, 777 F.2d 366 (7th Cir. 1985).

V. Confidentiality

Who Are the Parties?

- **SCR 20:1.6 (Confidentiality)** states a lawyer shall not reveal information relating to the representation of a client without informed consent. Thus, an attorney must identify all clients in the insurance defense relationship in order to determine which parties are owed the duty of confidentiality.

Confidentiality Issues

- Confidentiality issues can arise when a lawyer represents both an insurer and insured.
 - A lawyer may not share certain confidential information relating to one represented party with another. This issue often comes up when a lawyer is representing both the insured and the insurer.
 - A lawyer may also have trouble reconciling the confidentiality duty under **SCR 20:1.6 (Confidentiality)** and the duty to keep the client reasonably informed about the matter under **SCR 20:1.4 (Communication)** when representing both the insurer and the insured.
 - A lawyer may not use information gained from an insured to the benefit of the insurer when the revelation could result in denying the insured insurance protection.
- Subsequent litigation also may lead to confidentiality issues: the insurer or insured may request the attorney's file to use in subsequently litigation, such as a bad faith claim by the insured against the insurer.
- Confidentiality issues also arise in billing practices.
 - Discussed further in Billing/Rate Disputes section below.

VI. Strategies for Handling Confidentiality

- Although these strategies are not run of the mill, these are some strategies that could be necessary in certain circumstances:
 - Provide joint client agreements to limit the release of certain information to certain clients.
 - Consult with insured/insurer joint clients about the use and distribution of confidential information.
 - Redact portions of documents distributed to certain clients.
 - If the lawyer's representation of either client is compromised due to confidentiality constraints, the lawyer may need to withdraw from representation pursuant to **SCR 20:1.7(b) (Conflicts of interest current clients)**, which requires a lawyer to reasonably believe the lawyer can provide competent and diligent representation to each client affected by a potential conflict of interest. Withdrawing from representation is permitted in certain circumstances under **SCR 20:1.16 (Declining or terminating representation)**.

VII. Waiving Confidentiality

- Lawyers may ask their clients to waive confidentiality through informed consent. This can be beneficial when representing an insurer and an insured.
- However, the lawyer must obtain informed consent to obtain a waiver.

- It is in the lawyer's best interest to get the consent in writing.
- Lawyers should be careful to not waive the attorney-client privilege or work product doctrine protections when seeking a confidentiality waiver.

VIII. Billing Issues

Handling Billing Statements

- Information in detailed billing statements may contain confidential information, which could implicate restrictions under **SCR 20:1.6 (Confidentiality)**.
- **SCR 20:1.8(b) (Conflict of interest – prohibited transactions)** can also come into play if the lawyer uses the confidential information in the billing statements in a way which is detrimental to the interests of a client without the client's informed consent.

Outside Auditors

- Some insurers require attorneys to submit their detailed bills for services to outside auditors.
- A lawyer should not submit a bill for services to an outside auditor that contains confidential information without the insured's consent so as to not violate **SCR 20:1.6 (Confidentiality)**.
- Lawyers should consider using drafting protocols that assure their billing narratives on billing statements do not reveal confidential information.

Litigation Controls/Billing Guidelines

- Litigation controls, or billing guidelines, may place restrictions on the tasks that lawyers need to perform when representing an insured.
- Typically not a problem when only representing an insurer as coverage counsel, but may be problematic when representing an insurer and insured as defense counsel
- These restrictions could impact various litigation decisions
- When the lawyer's duty is to the insured, the lawyer must act in the insured's best interest, which involves determining whether these litigation controls compromise the representation or negatively impact the exercise of the lawyer's professional judgment in violation of **SCR 20:5.4(d)(3) (Professional independent of a lawyer)**.
 - **SCR 20:5.4(d)(3) (Professional independent of a lawyer)** prohibits a nonlawyer from directing or controlling the professional judgment of a lawyer, and litigation controls direct or regulate the lawyer's professional judgment.
 - Many litigation control guidelines are narrow enough that they do not unreasonably control a lawyer's professional judgment, but some might.
 - If the guidelines do control the lawyer's professional judgment, the lawyer is ethically obligated to perform all work that is, in his/her professional opinion, required to thoroughly and completely represent the client's interest, despite any guidelines in place.
- If a defense attorney finds him/herself in a compromised position due to litigation controls, the attorney should contact the insurance company to discuss an appropriate course of action that allows him/her to properly represent the insured.
 - If this is not possible, he/she must consider whether to withdraw

- Litigation controls/billing guidelines can also implicate the following ethics rules:
 - **SCR 20:1.1 (Competence)**, which requires a lawyer provides competent representation to a client with the legal knowledge, skill, thoroughness, and preparation necessary for representation.
 - **SCR 20:1.2 (Scope of representation and allocation of authority between lawyer and client)**, which requires an attorney to abide by a client's decisions as to the objectives of the representation.
 - **SCR 20:1.3 (Diligence)**, which requires an attorney to act with reasonable diligence and promptness when representing a client.
 - **SCR 20:1.4 (Communication)**, which requires an attorney to keep the client reasonably informed about the case and to explain the matter to the extent necessary for the client to make informed decisions about the representation.

IX. Cooperation

- In general, insurers may manage the defense of claims because they have contracted for this right in insurance policies issued to the insureds.
- However, the management is not without limits (such as the litigation controls discussed above) because lawyers must abide by the ethical rules and may not follow orders that interfere with their independent professional judgment.
- Additionally, **SCR 20:1.16** permits an attorney to withdraw from representation if the lawyer and client are fundamentally disagreeing on a course of action, among other reasons.
- Insureds, pursuant to their policies, may be under a duty to cooperate with their insurance company as well.

X. Dealing with Unrepresented Insureds

- This comes up frequently for coverage attorneys – many insureds do not have separate coverage counsel, because then they would have to pay for it
- It is in the lawyer's best interest to inquire whether a nonclient insured is represented by counsel to ensure compliance with **SCR 20:4.3 (Dealing with unrepresented person)**.
- Under **SCR 20:4.3 (Dealing with unrepresented person)**, a lawyer must inform the unrepresented insured of the lawyer's role in the matter.
- If the lawyer knows or should reasonably know that the unrepresented insured misunderstands the lawyer's role in the matter, the lawyer needs to take reasonable steps to correct the misunderstanding.

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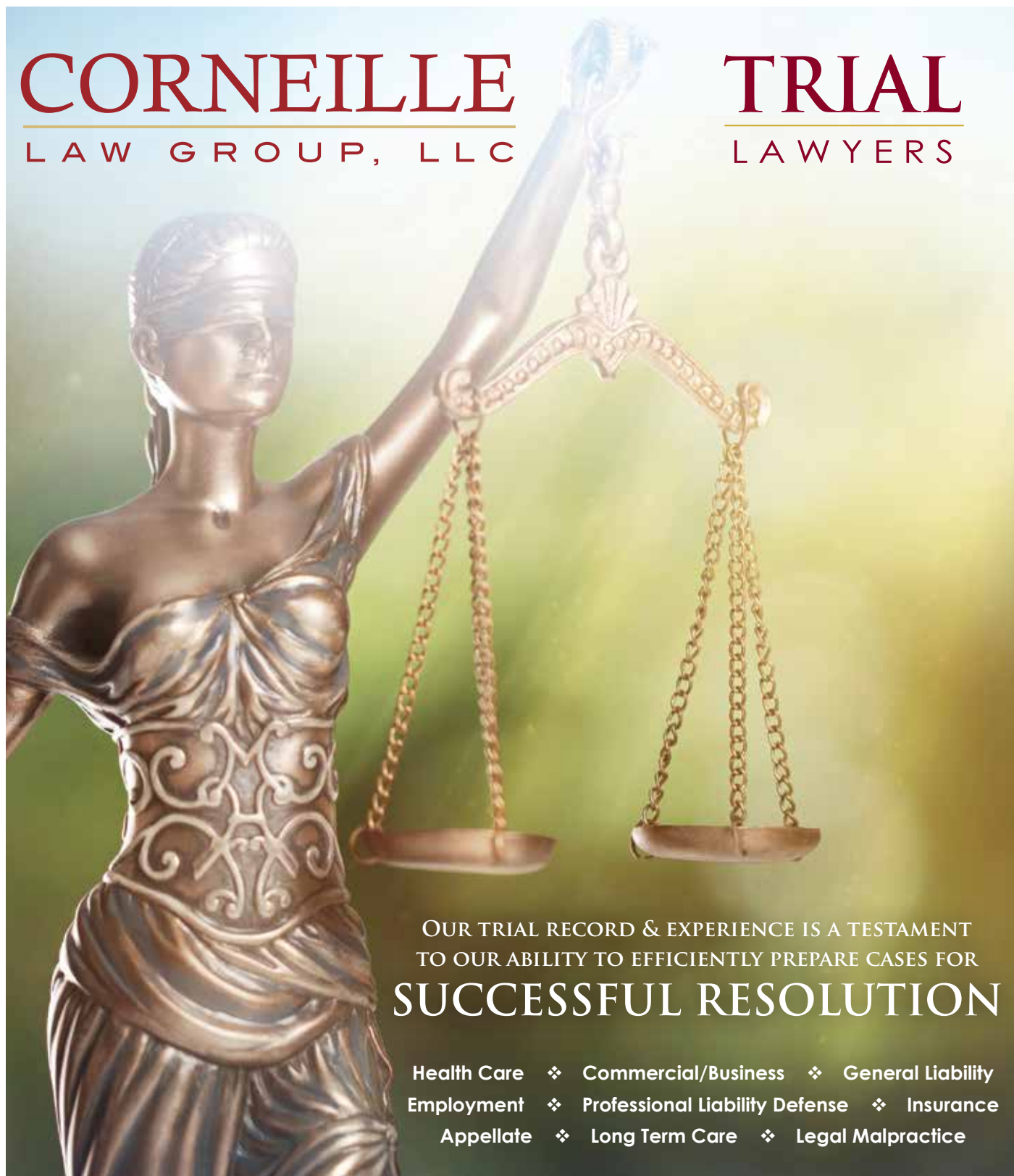
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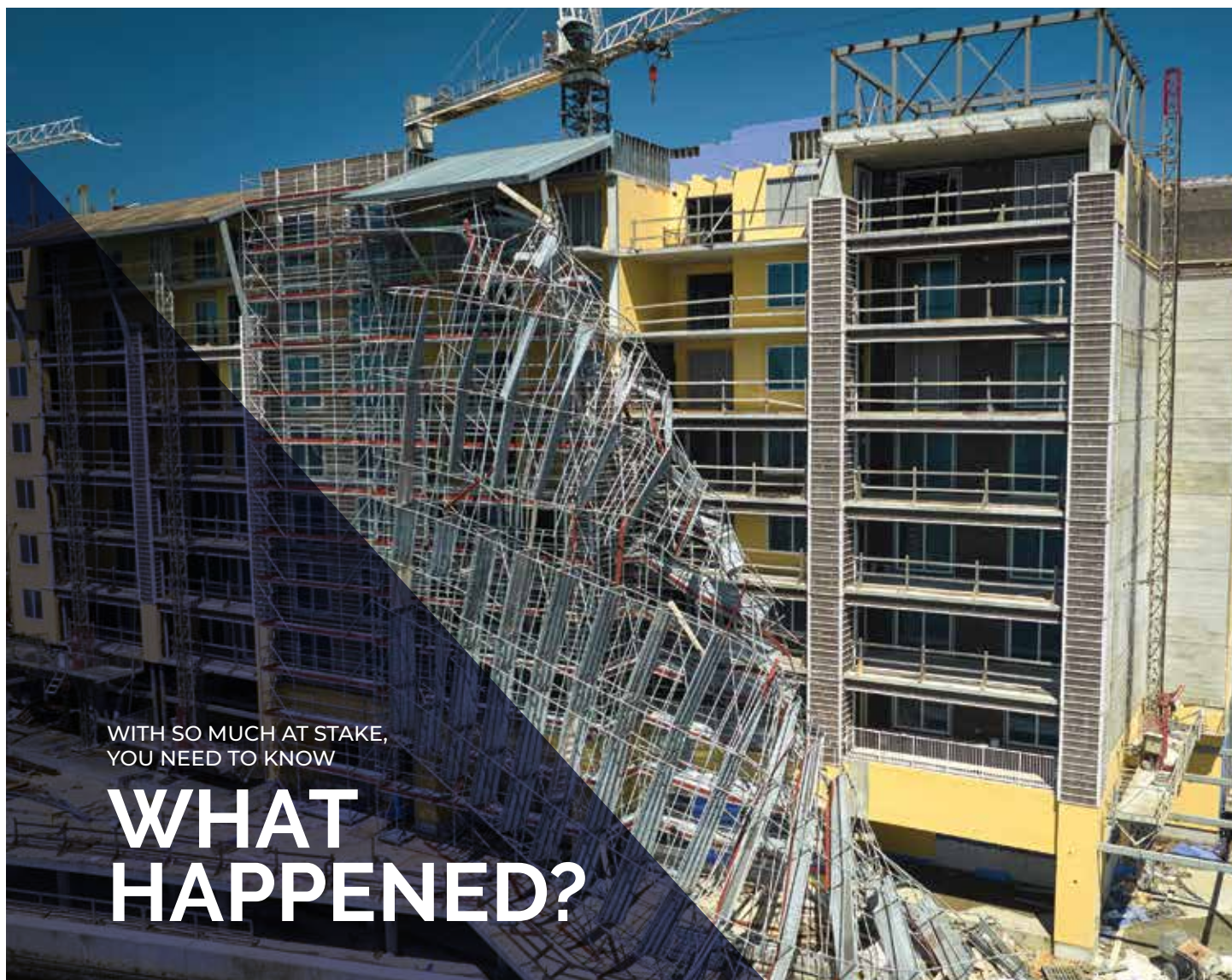
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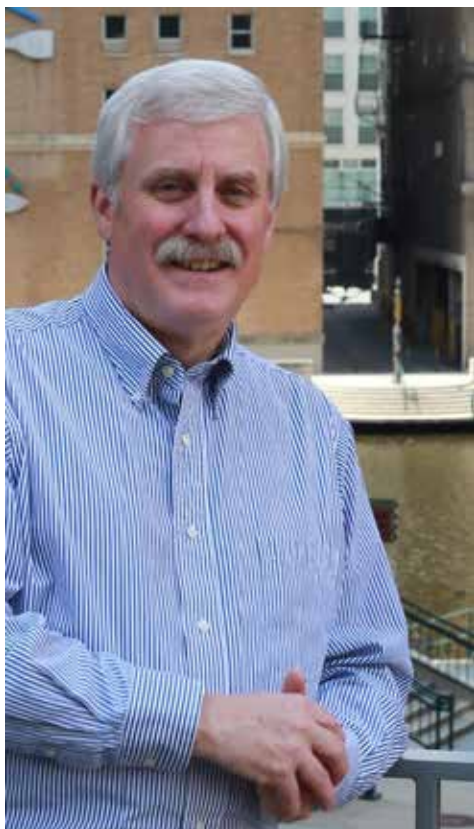
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