Wisconsin Defense Counsel

Defending Individuals And Businesses In Civil Litigation

#WDCAnnual2024

# 2024 Annual Conference

## August 8-9, 2024

**The Wilderness Resort and**
**Glacier Canyon Conference Center**
45 Hillman Rd.
Wisconsin Dells, WI 53965

**Program Chair:**
Megan McKenzie
*American Family Insurance Co.*

*Schedule of Events & More Information inside!*

**Approved for 8.0 CLE Credits.**

Wisconsin Defense Counsel
Defending Individuals And Businesses In Civil Litigation

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# Schedule of Events

## Thursday, August 8, 2024

8:00 - 8:55 AM
**Registration & Continental Breakfast**

8:55 - 9:00 AM
**Opening Remarks**

9:00 - 9:50 AM
**Structured Settlement Best Practices and How to Leverage Plaintiff Tax Strategies**
*Don Engels, Ringler Associates*

9:50 – 10:00 AM
**Break**
*Sponsored by Bell, Moore & Richter, S.C.*

10:00 - 10:50 AM
**Mindful Lawyering: Exploring the Foundations of Mental and Physical Wellness**
*Ryan Johnson, Everson, Whitney, Everson & Brehm, S.C. and Matt Shin, Tall Pines Behavioral Health*

10:50 – 11:00 AM
**Break**
*Sponsored by Rural Mutual Insurance*

11:00 - 11:50 AM
**A Judicial Perspective on the Discovery of Electronically Stored Information**
*Judge Michael Fitzpatrick, Fitzpatrick ADR, LLC*

11:50 AM - 1:00 PM
**Lunch & Annual Business Meeting**

1:00 PM - 1:50 PM
**Diversity, Equity & Inclusion - Alive and Kicking Following Students for Fair Admissions, Inc. SCOTUS Decision**
*Dan Kaplan, Foley & Lardner, LLP*

1:50 – 2:00 PM
**Break**

2:00 PM - 2:50 PM
**Trial Tactics: Use of Learned Treaties, and Other Unconventional Tactics to Gain the Advantage at Trial**
*Mark Budzinski, Corneille Law Group, LLC*

2:50 – 3:00 PM
**Break**

## *Thursday, August 9, 2024 continued*

3:00 - 4:00 PM
**Committee Meetings**

4:00 - 5:30 PM
**Cocktail Reception/ Panel Counsel Meetings**
*Sponsored by Crivello, Nichols & Hall, S.C.*

## Friday, August 9, 2024

8:00 - 8:55 AM
**Registration & Continental Breakfast**
*Sponsored by Kramer Shull Reeths LLP*

9:00 - 9:50 AM
**Interactive Torts Update**
*Aaron Berndt and Alan Ray, Borgelt, Powell, Peterson & Frauen, S.C.*

9:50 – 10:00 AM
**Break**
*Sponsored by Weiss Law Office, S.C.*

10:00 - 10:50 AM
**Employment Law Update – What's New in 2024 and What You Need to Know Now**
*Daniel Finerty, Lindner & Marsack, S.C.*

10:50 – 11:00 AM
**Break**
*Sponsored by Weiss Law Office, S.C.*

11:00 AM - 11:50 AM
**Resetting the Anchor: Securing Reasonable Outcomes**
*Chris Turney, Turney LG and Amy Wilkinson, SECURA Insurance*

11:50 AM
**Adjourn**

# Speaker Biographies

**Aaron Berndt** is a Shareholder with Borgelt, Powell, Peterson & Frauen, S.C.

He specializes in insurance defense litigation and specifically defense against trucking liability, municipal liability and general liability claims. He is also a member of State Bar of Wisconsin and Wisconsin Defense Counsel (past member and President for the Southeast Wisconsin Chapter of the Claims and Litigation Management Alliance).

He has presented at seminars by Wisconsin Defense Counsel, Wisconsin Claims Counsel, State Bar of Wisconsin, Lorman and the Southeastern WI Chapter of the Claims and Litigation Management Alliance.

He earned his J.D. at the University of Wisconsin Law School; B.S., University of Wisconsin-Madison.

**Mark Budzinski** is the Managing Member for the Corneille Law Group, with offices in Madison in Green Bay. He has tried more than 70 cases to verdict in multiple states. He has represented Fortune 500 companies as well as National law firms in litigated matters. He has been admitted Pro Hac Vice in multiple states across the country to serve as lead counsel, and is licensed in both Wisconsin and Michigan.

Mark has been selected as a Fellow into the American College of Trial Lawyers. The ACTL is recognized as the leading trial lawyers organization in the Unites States. Fellowship is extended only by invitation, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality.

He is a Board-Certified Trial Attorney by the National Board of Trial Advocacy (NBTA), has been selected by his peers for membership in the Federation of Defense and Corporate Counsel (FDCC), as well as the American Board of Trial Advocacy (ABOTA). He has been given the highest possible peer review rating by Martindale Hubbell (A/V), has been selected as a Wisconsin Super Lawyer every year since 2013, and has been recognized by the Wisconsin Law Journal as one of Wisconsin's "Leaders in the Law" in recognition of his professional achievements in successfully representing his clients at trial in high exposure cases throughout the State of Wisconsin

**Don Engels** has been a settlement consultant since 1996. He is a resource across the country for attorneys, self-insured companies, insurance companies, brokers, and TPAs.

Don helps craft agreements that focus on leveraging favorable tax treatment. Don's expertise can benefit all parties.

**Daniel Finerty** is a 1998 graduate of Marquette University Law School, 1998. He is a shareholder and member of the Board of Directors at the Milwaukee-based law firm of Lindner & Marsack, S.C.

Daniel he regularly counsels and defends private-sector, public-sector and non-profit clients as well as Native American clients, while also representing the interests of the EPLI carriers in employment litigation, wage and hour and related matters. Daniel appears on behalf of his clients in federal, state, and local administrative agencies, federal, state and tribal courts and in employment arbitration. Daniel is a member of the Wisconsin Defense Counsel's Employment Law Committee, has been named to DRI's Native Nations Task Force, and has published a number of articles for the *Wisconsin Civil Trial Journal.*


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# Speaker Biographies *continued*

**Michael Fitzpatrick** served on the Wisconsin Court of Appeals. Before that, he served as a Circuit Judge and continues to work as a Reserve Judge. In addition, he now serves as a Mediator, Arbitrator, and discovery referee through Fitzpatrick ADR. Judge Fitzpatrick serves on the American Arbitration Association Commercial, Large Complex Claims, Employment, Construction, and eDiscovery panels. He has twice been elected by Wisconsin's Judges to both the Wisconsin Judicial Council and the Wisconsin Civil Jury Instruction Committee. He continues on the faculty of the Wisconsin Judicial College and frequently speaks at seminars for judges and attorneys. In 2022, Judge Fitzpatrick delivered the Chapman Distinguished Lecture in Law at the University of Tulsa College of Law. In 2023, Judge Fitzpatrick presented at the American Bar Association seminar on Toxic Torts on the subject of expert witness testimony. He is an Elected Member of the American Law Institute contributing to the Restatement Third of Torts, a Board Member of the Dispute Resolution Section of the Wisconsin Bar Association, and a Board member of the American Bar Association Tort Trial and Insurance Practice Section Dispute Resolution Committee.

Prior to taking the Bench, Michael Fitzpatrick was a partner at the Brennan, Steil & Basting Law Firm where he chaired the Litigation Practice Group and tried numerous lawsuits including intellectual property disputes, insurance coverage litigation, and product liability cases in federal and state courts throughout Wisconsin and the United States. Several times he was named one of Wisconsin's Super Lawyers in Business Litigation in the years before he became a judge. Judge Fitzpatrick served two terms on the Wisconsin State Bar Committee on Professional Ethics, was President of the Western District of Wisconsin Bar Association and was President of the James E. Doyle Chapter of the American Inns of Court.

Judge Fitzpatrick received his undergraduate degree from Drake University and his law degree from the Drake Law School. He is a member of the Drake Law School Board of Counselors. Judge Fitzpatrick ran varsity track and cross country at Drake and was twice an individual Missouri Valley Conference champion. In 2018, Judge Fitzpatrick received the highest award bestowed by the Drake Athletic Department, the Double D Award.

**Ryan Johnson** is a litigator who defends insurance companies and their insureds, primarily involving personal injury actions. Ryan graduated Magna Cum Laude from Ohio Northern University Pettit College of Law. He was born and raised in Wisconsin and is proud to be back home with The Everson Law Firm after completing law school and beginning his insurance defense career in Ohio. He was an active participant in Moot Court, led award-winning teams, and was individually recognized for his trial advocacy skills. Ryan has been a board member for several organizations, including Law Review. He had two case notes and a legal article published, was a teaching and research assistant, and was an ambassador for the Pettit College of Law. Ryan gained experience in environmental law after interning with the USDA and Fair Shake Environmental Legal Services. He also interned with Legal Aid of Western Ohio where he primarily provided advocacy for survivors of domestic violence.

Prior to his legal career, Ryan earned a Master of Fine Arts degree in creative writing and advocated for at-risk youth as the high school program director for a paramilitary school in Milwaukee, Wisconsin. He was a self-defense instructor and is hoping to continue developing those skills and providing classes in the Green Bay area in the near future. He is an avid reader and writes fiction. Ryan loves to cook and enjoys the outdoors and spending time with his dogs, family, and friends.

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# Speaker Biographies *continued*

**Daniel Kaplan** is a partner and litigation attorney who counsels employers in all aspects of the employer- employee relationship, including wage and hour, employment contracts, confidentiality and non-compete agreements, worker's and unemployment compensation, family and medical leave, disability accommodations and compliance with the Americans with Disability Act, and all state, federal and local discrimination laws. Dan has experience litigating before various state and federal agencies, various state courts, and federal courts throughout the country, including the Supreme Court.

In addition, Dan works with employers on employee and supervisor training and traditional labor matters, such as union organizing, collective bargaining, grievance processes and arbitration. Dan also has extensive experience in defending and advising employers on safety and health-related matters under the Occupational Safety & Health Act (OSHA). Dan has defended employers in OSHA matters throughout the country and in over three dozen matters involving employee fatalities.

Dan also regularly counsels employers on affirmative action obligations under Executive Order 11246, Section 503 of the Rehabilitation Act and VEVRAA, affirmative action plans, AAP audits, and all matters involving the OFCCP. Dan has represented employers throughout the country on their AAP needs, including petitions to the OFCCP for functional plan development, defense of desk and on-site plan audits, and litigation.

Dan's wage and hour experience includes regularly representing national and international clients in federal and state courts, as well as the United States Supreme Court, on FLSA collective action claims and state wage and hour class actions claims.

Dan joined Foley in 1995 after practicing law for a large firm in Salt Lake City, Utah, for three years in the same areas.

**Alan W. Ray** is a Wisconsin native who attended the University of Wisconsin-Madison, where he obtained his Bachelor of Arts degree with majors in Political Science and Legal Studies and a certificate in Criminal Justice. Attorney Ray then attended Marquette University Law School, graduating *cum laude* in 2010. After graduation, Attorney Ray joined Borgelt, Powell, Peterson & Frauen, S.C. where he is currently a shareholder whose practice focuses on large loss subrogation and liability defense. Attorney Ray was named a "Rising Star" lawyer by the publishers of Milwaukee Magazine from 2015–2020. Outside of work, Attorney Ray enjoys spending time with his wife, son, and daughters, and loves golfing, where he has a hole-in-one to his credit.

**Matt Shin** is a psychotherapist-in-training at Tall Pines Behavioral Health in Wausau where he applies his previous experience as an attorney to provide mental health and wellness support for the legal profession. In addition to providing one-on-one counseling, Matt serves as a committee member and volunteer for the Wisconsin Lawyer Assistance Program and provides training, consultations, and seminars for legal teams in Wisconsin. Matt previously operated an independent intellectual property practice, was in-house counsel supporting the R&D function at Mars Wrigley Confectionery in Chicago, and practiced patent prosecution and IP litigation at Foley & Lardner in Chicago and Milwaukee. He is an alum of Michigan State University and Washington University in Saint Louis School of Law, and is currently completing a master's program in Counseling Psychology from Northwestern University.

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# Speaker Biographies *continued*

**Chris Turney** is a civil defense attorney based in Kansas City. In addition to defending products made by innovative companies and critical decisions made by professionals in an imperfect world, Chris invests his professional time into two DRI committees. He is the current chair of DRI's Litigation Skills Committee, which develops programming to improve the quality of our colleagues across the country. He also chairs DRI's Social Inflation Task Force, which analyzes issues that drive up settlement values and verdicts. The Task Force's emphasis is not only on issue identification, but also on the "Pushback" strategies we can implement nationwide to protect the companies and professionals who are essential to our economy and must be protected from abusive litigation.

Most importantly, though, Chris married out of his league. He and his wife, Aimee, have two kids (ages 17 & 13) who are more talented than him in every way. He is unapologetically a long time Chiefs season ticket holder, and as a hobby, he turns chicken wings into purified water for our global neighbors.

When he provides his cell number and email address in the presentation, he is authentically inviting you to reach out to him. The issues we face in our line of work are important, we are under attack, and Chris is committed to driving our team toward success.

**Amy Wilkinson** is the Director of Casualty & Litigation at SECURA Insurance. Between graduating from the University of Wisconsin Law School and going in-house at SECURA, Amy spent over 10 years in private practice as an insurance defense attorney handling a wide variety of cases including asbestos, construction defect, subrogation, products liability, civil rights, auto accidents, coverage, trademark infringement, and more. She is a member of WDC's Insurance Law and Diversity, Equity, & Inclusion Committees as well as DRI's Social Inflation Task Force. She is active in the community and serves as a mentor through the State Bar of Wisconsin, a member of the Paralegal Advisory Committee through Fox Valley Technical College, and both a mentor and board member through Big Brothers Big Sisters of East Central Wisconsin.

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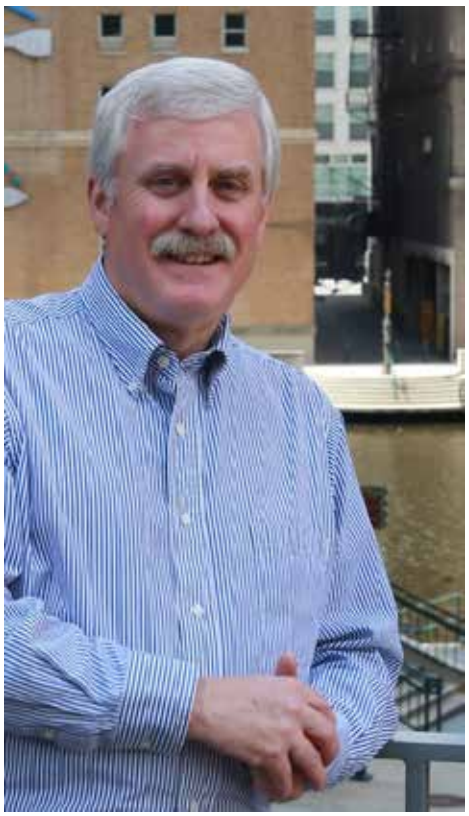

Jim Mathie established Mathie Mediation Services in 2016. Since devoting his entire practice to mediation, hundreds of attorneys have retained his services to mediate their disputes. Jim's four-office downtown Milwaukee suite provides ample space for any mediation. Jim also travels throughout Wisconsin – at no travel expense – to mediate cases. So, if it works best to have a mediation where you are, Jim will accommodate.

Before mediating fulltime Jim litigated cases for 30 years, primarily defending clients in personal injury, property damage, product liability, environmental, construction and transportation lawsuits. His varied background also includes stints as a plaintiff personal injury attorney and in-house counsel for a major insurer. He is a past president of WDC.

Mathie Mediation Services LLC
757 North Water Street, Suite 350
Milwaukee, WI 53202

## Structured Settlement Best Practices and How to Leverage Plaintiff Tax Strategies

Don Engels
Ringler Associates
800-525-2922
DEngels@RinglerAssociates.com

1. Why use structured settlements in today's environment
2. Best practices
    a. early involvement
    b. don't ask
    c. protect your interests
3. What is a structured settlement
    a. combination of cash and periodic payments
    b. usually funded with an annuity
    c. tax advantaged payment stream
        i. US Code Section 104
        ii. revenue ruling 79-220
        iii. Periodic Payment Settlement Act of 1982
4. Which claims are structure candidates
    a. plaintiff will rely on the settlement for support in the future
    b. minors
5. When to call your consultant
6. The defendant's interests
    a. the defendant makes the promise to pay
    b. funding for the periodic payments must come from the defendant directly
    c. the defendant assigns the liability to an assignment company
7. How to leverage plaintiff tax strategies

a. the power of settlement language

   i. the intent of the defendant controls

   ii. taxable v tax free

   iii. Tax Cuts and Jobs Act of 2017

# BMR BELL MOORE & RICHTER SC


William A. Abbott


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Ann C. Emmerich


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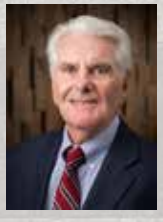
John M. Moore


Melita M. Mullen


Kelsey A. Pelegrin


Patricia J. Putney


David G. Ress


Morgan K. Stippel


Sheila M. Sullivan


William C. Williams

**Bell, Moore & Richter, S.C. has been involved in insurance defense litigation for most of its existence. Due to the firm's extensive experience with all aspects of insurance litigation, we are often called on to defend insurance companies and their insureds in the courtroom and in appeals, both in state and federal court. Our attorneys pride themselves on keeping up to date on the latest changes in insurance law and can help clients untangle the constant legislative and case law changes in insurance. For decades, our attorneys have also successfully defended medical professionals practicing in a broad range of specialties and a wide variety of claims. We know how to build a strong defense to workers' compensation claims and disputes and help employers on all issues which may arise. Our experience has led to successful results in defending claims both in State and Federal courts as well as before the State Medical Examining Board and Medical Mediation Panel. In the defense of business litigation, we bring the experience and judgment of seasoned practitioners from both business and transactional attorneys, on the one hand, and proven civil litigation practitioners on the other. We also have considerable experience helping to defend insurance agents as well as real estate agents and brokers in litigation. Let us help you.**

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- Construction Law/Litigation
- Contracts
- Employment Law
- Environmental Law/Litigation
- Estate Planning/Elder Law/Probate
- Finance/Financial Institutions
- General Liability Defense
- Health Care
- Insurance Agent Litigation
- Insurance Coverage/Bad Faith Litigation
- Insurance Defense
- Intellectual Property
- Landlord-Tenant
- Legal/Accounting Liability Defense
- Medical Malpractice Defense
- Municipal Law
- Personal Injury
- Products Liability
- Public Utilities/Telecommunications
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1

## ABOUT DON ENGELS, CSSC, CLU, AIC

- Don Engels has been a structured settlement consultant since 1996. Don's office is in Chicago, IL with satellite offices in Boulder Junction WI, Omaha NE, Phoenix AZ, and Sandy OR.
  Don has assembled a team that consists of tax attorneys, investment professionals, and pension experts. In addition Don's insurance and investment licenses allow him to act as a fiduciary.
  Don is a nationwide resource for attorneys, self-insured companies, insurance companies, brokers, and TPAs.

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## ABOUT RINGLER ASSOCIATES

- Ringler Associates, incorporated in 1975, is one of the oldest and largest settlement planning firms in the country. Currently Ringler boasts over 70 independent consultants nationwide.

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## GOALS FOR PRESENTATION

- Know what is a structured settlement
- Best practices
- Be able to identify claims that are structure candidates
- Know when to engage a consultant
- Know how and when to offer a structure
- Know how to implement a structure
- Learn how to leverage plaintiff tax strategies
- Understand how this expertise can benefit all parties

4

## WHAT IS A STRUCTURED SETTLEMENT?

A settlement that is a combination of cash and periodic payments

Often funded with an annuity

Tax advantaged payment stream

An alternative to 100% cash settlement

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## WHAT IS A STRUCTURED SETTLEMENT?

USC Code Section 104 – cash settlements tax exempt

Revenue Ruling 79-220 – periodic payments on account of injury settlements are tax exempt

Periodic Payment Settlement Act of 1982 – Created USC Section 130 which allows for Qualified Assignments.

Important tax code sections and Rev Rulings

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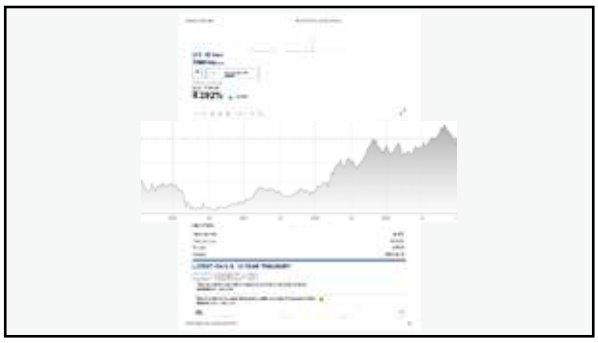

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## BEST PRACTICES

- Involve a consultant early – no charge
- Don't ask plaintiff if they will consider a structure – just do it
- Insist that your structured settlement consultant be involved on your behalf – protect your interests

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## GOOD CANDIDATES

- Any claim where the plaintiff will rely on the settlement proceeds for support in the future

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## SAMPLE PROPOSAL

| BENEFITS | COST | GUARANTEED PAYOUT | EXPECTED PAYOUT |
|---|---|---|---|
| **Immediate Cash**<br>*$3,225,000.00 cash settlement to Julie Bright* | $3,225,000[00] | $3,225,000[00] | $3,225,000[00] |
| **Lifetime Monthly Benefits – Tax Free**<br>*$111,041.00 annually ($9,253.41 per month) payable to Julie Bright for life, guaranteed for 40 years, beginning one month from purchase date* | $2,275,000[00] | $4,441,640[00] | $6,995,583[00] |
| | | | |
| | | | |
| PLAN TOTAL | $5,500,000[00] | $7,666,640[00] | $10,220,583[00] |

PROPOSAL PREPARED FOR: JULIE BRIGHT

Date of Birth: 9/16/2000
Life Expectancy: 63 years

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## GOOD CANDIDATES

- Any claim involving a minor

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## SAMPLE PROPOSAL

| BENEFITS | COST | GUARANTEED PAYOUT | |
|---|---|---|---|
| **Tax Free College Fund**<br>*$26,709.00 payable annually, guaranteed for 4 years, beginning July 1, 2037* | $50,000[00] | $106,836[00] | |
| **Tax Free Lump Sum Payment – age 25**<br>*$47,331.00 payable on March 1, 2044* | $16,666[00] | $47,331[00] | |
| **Tax Free Lump Sum Payment – age 30**<br>*$60,528.00 payable on March 1, 2044* | $16,667[00] | $60,528[00] | |
| **Tax Free Lump Sum Payment – age 35**<br>*$77,169.00 payable on March 1, 2044* | $16,667[00] | $77,169[00] | |
| PLAN TOTAL | $100,000[00] | $291,864[00] | |

PROPOSAL PREPARED FOR: BILLY SELLER

Date of Birth: 3/1/2019

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The willingness and ability to try a case is paramount to a successful defense strategy. One Law Group, S.C.'s team of defense attorneys and paralegals are not afraid to try cases. We successfully defend insurers and insureds in a wide variety of claims ranging from auto, property and casualty, professional malpractice, bad faith, product liability and insurance coverage matters. Our defense team works with a wide variety of insurers and understands the importance of timely reporting and communication with both the file handler and insured. No claim is too large or too small, whether in litigation, appeal, arbitration, mediation or still in the claims phase. Our defense team has decades of experience in all matters for all sizes of insurers, from national carriers to small town mutuals.

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## GOOD CANDIDATES

- Any claim involving a MSA

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## SAMPLE PROPOSAL

| BENEFITS | COST | GUARANTEED PAYOUT | EXPECTED PAYOUT |
|---|---|---|---|
| **MSA seed money**<br>*$11,111.00 cash settlement to Steve Smith* | $11,111[00] | $11,111[00] | $11,111[00] |
| **MSA annual payment**<br>*$5,303.00 annually payable to Steve Smith if living, for a max of 22 years, beginning one year from purchase date* | $63,793[00] | $0 | $116,666[00] |
| | | | |
| | | | |
| PLAN TOTAL | $74,904[00] | $11,111[00] | $127,777[00] |

PROPOSAL PREPARED FOR: STEVE SMITH

Date of Birth: 5/20/1968
Life Expectancy: 23 years

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## KNOW THE DEFENDANT'S INTERESTS

- The defendant promises to make periodic payments via an annuity.

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2.0 **Payments**

2.1 In consideration of the release set forth above, the Insurer on behalf of the Defendant agrees to pay to the individual(s) named below the sums outlined in this Section 2.1 below:

Payments due at the time of settlement as follows:

Cash at settlement in the amount of _____ payable to _____

2.2 In consideration of the release set forth above, the Insurer on behalf of the Defendant agrees to pay to the individual(s) named below (the "Payee(s)") the sums outlined in this Section 2.2 below:

Periodic payments made according to the schedule as follows (the "Periodic Payments"):

All sums set forth herein constitute damages on account of personal injuries or sickness, within the meaning of Section 104(a)(2) of the Internal Revenue Code of 1986, as amended.

3.0 **Payee's Rights to Payments**

Plaintiff acknowledges that the Periodic Payments cannot be accelerated, deferred, increased or decreased by the Plaintiff or any Payee; nor shall the Plaintiff or any Payee have the power to sell, mortgage, encumber, or anticipate the Periodic Payments, or any part thereof, by assignment or otherwise.

4.0 **Payee's Beneficiary**

Any payments to be made after the death of any Payee pursuant to the terms of this Settlement Agreement shall be made to such person or entity as shall be designated in writing by Plaintiff to the Insurer or the Insurer's Assignee. If no person or entity is so designated by Plaintiff, or if the person designated is not living at the time of the Payee's death, such payments shall be made to the estate of the Payee. No such designation, nor any revocation thereof, shall be effective unless it is in writing and delivered to the Insurer or the Insurer's Assignee. The designation must be in a form acceptable to the Insurer or the Insurer's Assignee before such payments are made, but in no event shall the request of the payee be unreasonably withheld or denied.

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5.0 **Consent to Qualified Assignment**

7.1 Plaintiff acknowledges and agrees that the Defendant and/or the Insurer may make a "qualified assignment", within the meaning of Section 130(c) of the Internal Revenue Code of 1986, as amended, of the Defendant's and/or Insurer's liability to make the Periodic Payments set forth in Section 2.2 to _____ ("the Assignee"). The Assignee's obligation for payment of the Periodic Payments shall be no greater than that of the Defendant and/or the Insurer (whether by judgment or agreement) immediately preceding the assignment of the Periodic Payment obligation.

5.2 Any such assignment, if made, shall be accepted by the Plaintiff without right of rejection and shall completely release and discharge the Defendant and the Insurer from the Periodic Payments obligation assigned to the Assignee. The Plaintiff recognizes that, in the event of such an assignment, the Assignee shall be the sole obligor with respect to the Periodic Payments obligation, and that all other releases with respect to the Periodic Payments obligation that pertain to the liability of the Defendant and the Insurer shall thereupon become final, irrevocable and absolute.

6.0 **Right to Purchase an Annuity**

The Defendant and/or the Insurer, itself or through its Assignee reserves the right to fund the liability to make the Periodic Payments outlined in Section 2.2 through the purchase of an annuity policy from _____. The Defendant, the Insurer, or the Assignee shall be the sole owner of the annuity policy and shall have all rights of ownership. The Defendant, the Insurer, or the Assignee may have _____ mail payments directly to the Payee(s). The Claimant shall be responsible for maintaining a current mailing address for Payee(s) with _____

7.0 **Discharge of Obligation**

The obligation of the Defendant, the Insurer and/or the Assignee to make each Periodic Payment shall be discharged upon the mailing of a valid check(s) in the amount of such payment to the designated address of the Payee(s) named in Section 2.0 of this Settlement Agreement.

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## BEST PRACTICES

- Involve a consultant early – no charge
- Don't ask plaintiff if they will consider a structure – just do it
- Insist that your structured settlement consultant be involved on your behalf – protect your interests

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## HOW TO LEVERAGE PLAINTIFF TAX STRATEGIES

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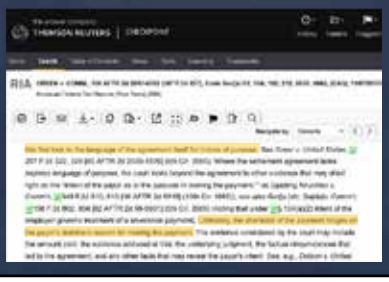
## The Power of Settlement Language



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## Fees & Taxes


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Comparing Results


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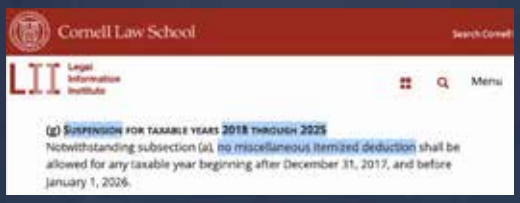
26 USC Section 67(g)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(g) SUSPENSION FOR TAXABLE YEARS 2018 THROUGH 2025

Notwithstanding subsection (a), no miscellaneous itemized deduction shall be allowed for any taxable year beginning after December 31, 2017, and before January 1, 2026.

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THANK YOU!

Don Engels

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# Mindful Lawyering: Exploring the Foundations of Mental and Physical Wellness

**Attorney Wellness is Relevant to at Least Two Rules of Professional Conduct:**

> **SCR 20:1.1 – Competence:** A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
>
> **SCR 20:1.3 – Diligence:** A lawyer shall act with reasonable diligence and promptness in representing a client.
>
> > ABA COMMENT [2] A lawyer's workload must be controlled so that each matter can be handled competently.

**A 2023 Study of 2,900 Lawyers Indicates High Levels of Emotional and Psychological Conditions That May Impact Competence and Diligence:**

- 38% reported feelings of depression
- 71% reported feelings of anxiety
- 51% reported feelings of failure and self-doubt
- 54% reported "lost" motivation
- 62% reported difficulty concentrating
- 66% reported physical and mental overwhelm and fatigue

**Emotions Include Physical Elements Needing Attention and Maintenance**

- **Cardiovascular System** – Heart rate, temperature
- **Respiratory System** – Breathing depth and rate
- **Digestive System** – Appetite, distress
- **Endocrine System** – Fight or flight, energy
- **Sensory Organs** – Heightened or reduced inputs
- **Musculature** – Tension, pain, movement

**Emotions Include Mental Elements Needing Attention and Maintenance**

- **Thoughts** – Catastrophizing, positive, negative
- **Evaluations** – Optimistic, pessimistic, positive, negative
- **Choices** – Coping, soothing, avoidant, confrontational

- **Values** – Motivation, interest, disinterest
- **Interpretations** – Mind reading, positive, negative
- **Instructions to Body** – Voluntary movement, actions, speech

## Wellness, Emotions, and Mental Health

**Burnout Results from Emotional Depletion and Involves Each of Three Elements:**

1. **Exhaustion** – Chronic emotional drain and fatigue
2. **Cynicism** – Distant and negative attitudes towards job, clients, and colleagues
3. **Inadequacy** – Feelings of professional ineffectiveness

**Risk of Burnout is a Function of the Way We Process Information**

- **All or Nothing Thinking** – Black and white, complete success or complete failure, etc.
- **Mind Reading** – Interpreting the actions and motives of others
- **Catastrophizing** – Spiraling negative predictions without supporting evidence
- **Mislabeling** – Over/underinclusive categorization of self and others
- **Magnification and Minimization** – Fixating on negatives, dismissing positives
- **Personalization** – Making it/things/actions/choices personal

**Burnout Stems from a Lack of Meaning**

- **Emotional attrition** and a **lack of meaning** are the root causes of burnout
- **Missed dreams, expectations or needs** often define meaning and values
- **Changes in enrichment, work context, and development** can provide solutions

## Wellness, Emotion, and Physical Health

**Maintaining Wellness Will Help Practitioners Avoid Personal Conflicts of Interest**

**Adequate Sleep is Vital**

- Adults should sleep 7 or more hours per night on a regular basis to promote optimal health
- Sleeping less than 7 hours per night on a regular basis is associated with adverse health outcomes, including weight gain and obesity, diabetes, hypertension, heart disease and stroke, depression, and increased risk of death. Sleeping less than 7 hours per night is also associated with impaired immune function, increased pain, impaired performance, increased errors, and greater risk of accidents. (Watson NF, Badr MS, Belenky G, Bliwise DL, Buxton OM, Buysse D, Dinges DF, Gangwisch J, Grandner MA, Kushida C, Malhotra RK, Martin JL, Patel SR, Quan SF, Tasali E. *Recommended amount of sleep for a healthy adult: a*


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*joint consensus statement of the American Academy of Sleep Medicine and Sleep Research Society*. SLEEP 2015;38(6):843–844.)

**Movement and Fueling Movement Are Vital Parts of the Equation**

- Diet, exercise, and sleep are the three pillars of a healthy life. Diet, exercise, and sleep influence one another in complex and innumerable ways. (Newsom, R. & Rehman, Dr. A, (2024, April 1). *The connection between diet, exercise, and sleep*. Sleep Foundation. https://www.sleepfoundation.org/physical-health/diet-exercise-sleep).

- Eating a healthy, balanced diet has been shown to reduce the risk of a myriad of health conditions, including heart disease, stroke, diabetes, and obesity. Diet can also affect mental health, with several studies suggesting that certain diets may reduce the risk of developing depression and anxiety. *Id*.

- "What a person eats also impacts sleep quality and duration. Caffeine is notorious for making it more difficult to fall asleep and eating too close to bedtime can lead to sleep disruptions." *Id*.

- "A substantial amount of research has shown that getting regular exercise can improve sleep … Multiple studies have shown that exercise can reduce pre-sleep anxiety and improve sleep quality in people with insomnia." *Id*.

- "Food can either help or hinder a workout[.]" *Id*.

- "While some people find that drinking alcohol helps them fall asleep more easily, alcohol ultimately has a negative impact on sleep. Even in moderate amounts, alcohol consumed in the hours before bedtime can cost you sleep and leave you feeling tired the next day." (Bryan, L., & Singh, Dr. A. (2024, May 7). *Alcohol and sleep*. Sleep Foundation. https://www.sleepfoundation.org/nutrition/alcohol-and-sleep)

**We have a Duty of Candor that we owe to ourselves as well, which means being honest about where we are on our wellness journey**

**Mindful Lawyering:**
Exploring the Foundations of Mental and Physical Wellness

**Matt Shin, J.D.**
*Owner*
Sidebar Counseling, LLC

**Ryan Johnson, J.D.**
*Associate*
Everson, Whitney, Everson & Brehm, S.C.

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## AGENDA

- Introductions
- Why wellness?
- Self-Maintenance and Burnout
  - ❑ Mental wellness
  - ❑ Physical wellness
- Questions



2

## INTRODUCTIONS



3

**"Human beings are never going to be perfect, Roy. The best we can do is to keep asking for help and accepting it when you can. And if you can keep on doing that, you'll always be moving towards better."**

- Leslie Higgins

"So Long, Farewell." *Ted Lasso*, written by Jason Sudeikis, Bill Lawrence, & Brendan Hunt, directed by Declan Lowney, Ruby's Tuna, 2023.



4

## WISCONSIN RULES FOR PROFESSIONAL CONDUCT

SCR 20:1.1 – **Competence**: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, **thoroughness and preparation reasonably necessary for the representation**.

SCR 20:1.3 – **Diligence**; A lawyer shall act with reasonable **diligence and promptness** in representing a client.

- ABA COMMENT [2] A lawyer's **workload must be controlled** so that each matter can be handled competently.



5

## STATISTICS

**A 2023 study of 2,900 practicing lawyers:**

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## BURNOUT DEFINED

**EXHAUSTION** – Drained emotional energy and chronic fatigue

- I am buried in work.
- My sleep is terrible.
- I feels like I neglect my friends and family.

**CYNICISM** – Distant and negative attitude towards job.

- My morale is in the gutter.
- I think about leaving.
- I have less and less to give.
- I am losing interest in my clients and colleagues.

**INADEQUACY** – Feelings of ineffectiveness regarding work.

- I question the value of my work.
- I'm underperforming.
- I don't feel appreciated.

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## PROPOSITIONS: EMOTIONS

**PROPOSITION 1:**

AN EMOTION TAKES 2-4 MINUTES TO RESOLVE.

**PROPOSITION 2:**

EMOTIONAL DEPLETION PRESENTS A GREATER BURNOUT RISK THAN A HIGH WORKLOAD.

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## WHAT IS AN EMOTION?

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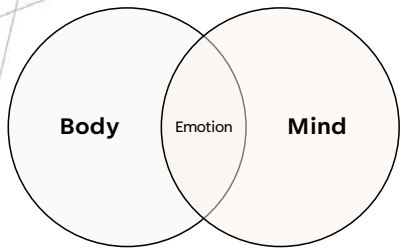


## WELLNESS AND EMOTIONS

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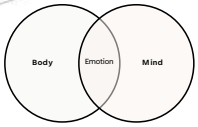


**Body**

- Cardiovascular system
- Respiratory system
- Digestive system
- Endocrine system
- Sensory organs
- Musculature

**Mind**

- Judgments
- Choices
- Values
- Interpretations
- Thoughts
- Actions

## COMPONENTS

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## Emotions and the Body

- **Cardiovascular System** – Heart rate, temperature
- **Respiratory System** – Breathing depth and rate
- **Digestive System** – Appetite, distress
- **Endocrine System** – Fight or flight, energy
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## Emotions and the Mind

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- **Evaluations** – Optimistic, pessimistic, positive, negative
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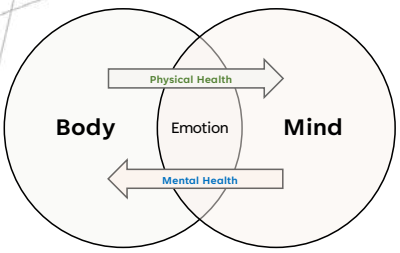


AN EMOTIONS MODEL OF WELLNESS

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## PROPOSITIONS: BURNOUT

**PROPOSITION 1:**

Time off is necessary and sufficient for overcoming burnout.

**PROPOSITION 2:**

Believing that you can manage negative emotions reduces the risk of burnout.

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COGNITIVE DISTORTIONS
COSTS ARISING FROM WITHIN

All or Nothing Thinking
It's not heads or tails, but a two-sided coin

Mind Reading
Are they thinking this, or are you?

Negative Prediction/Catastrophizing
What's your supporting evidence?

Mislabeling
Is that label of yourself/others accurate? Fair?

Magnification and Minimization
Being your own worst critic

Personalization
Is it about you or the work?

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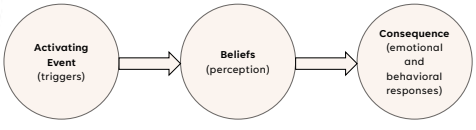


**In the context of burnout:**

EMOTIONS AND BURNOUT

- What are your recurring beliefs?
- What are your recurring rules?
- What are your recurring "shoulds" or "shouldn'ts"?

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## COGNITIVE FLEXIBILITY:
THOUGHTS, BEHAVIORS, AND CONSEQUENCES

**RULES**

Inflexible

- **Black and white**
- **Right and wrong**
- **All or nothing**
- Win $100 or $0
- Lose $0 or $100

**VALUES**

Flexible

- **Shades of gray**
- **A bit of both**
- **More gained and less lost**
- Win $100 or $30
- Lose $0 or $70

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MEANING:
MORE THAN JUST BEING TIRED AND STRESSED

Our Need for Significance

Instead of stress, burnout is "the end result of a process of **emotional attrition**." (Malach-Pines, 2004, p. 66).

"[T]he root cause of burnout lies in people's **need to believe that their lives are meaningful** . . . [w]hen they feel that they have failed [in this way,] that their work is meaningless, that they make no difference in the world—they start feeling helpless and hopeless and eventually burn out." (Malach-Pines, 2004, p. 67).

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MEANING:
WHERE AN ABSENCE OF MEANING LEADS TO BURNOUT

Missed Dreams, Expectations, or Needs

When current occupation fails to actualize dreams and expectations or resolve unmet needs

Early Sources of Values and Expectations

When current circumstances are out of alignment with early influences and experiences

Significance or Meaning Itself

When an individual feels as though their work is not significant or meaningful

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MEANING THROUGH CHANGE
WHEN WE KNOW WHAT IS NOT WORKING

**ENRICHMENT**

Pursuing roles and responsibilities that match level of development.

**CHANGE IN WORK CONTEXT**

At work and at home, finding activities and responsibilities that align with personal sense of meaning and significance.

**DEVELOPMENTAL CHANGE**

Finding surroundings, circumstances, or cultures that align with personal values.

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INTERCONNECTIVITY:
THE MIND BODY CONNECTION AND HEALTHY LIVING

The Pillars: Diet, Exercise, and Sleep

"Eating a healthy, balanced diet has been shown to reduce the risk of a myriad of health conditions, including heart disease, stroke, diabetes, and obesity. Diet can also affect mental health, with several studies suggesting that certain diets may reduce the risk of developing depression and anxiety."

Sleep

Sleeping less than 7 hours per night on a regular basis is associated with adverse health outcomes, including weight gain and obesity, diabetes, hypertension, heart disease and stroke, depression, and increased risk of death. Sleeping less than 7 hours per night is also associated with impaired immune function, increased pain, impaired performance, increased errors, and greater risk of accidents.

Diet

"What a person eats also impacts sleep quality and duration. Caffeine is notorious for making it more difficult to fall asleep and eating too close to bedtime can lead to sleep disruptions."

Exercise

"A substantial amount of research has shown that getting regular exercise can improve sleep … Multiple studies have shown that exercise can reduce pre-sleep anxiety and improve sleep quality in people with insomnia."

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QUESTIONS?

**Matt Shin, J.D.**
*Owner*
Sidebar Counseling, LLC

**Ryan Johnson, J.D.**
*Associate*
Everson, Whitney, Everson & Brehm, S.C.

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# A JUDICIAL PERSPECTIVE ON THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION

Hon. Michael R. Fitzpatrick (Ret.)
Wisconsin Court of Appeals and Wisconsin Circuit Court
Fitzpatrick ADR, LLC
Mediator/Arbitrator/Discovery Referee
www.michaelfitzpatrickadr.com

WDC Conference
August 2024

---

## I. INTRODUCTION.

A. This outline discusses applicable Wisconsin statutes and federal rules related to the discovery of ESI and the resolution of ESI discovery disputes, and includes practical tips to increase your client's prospects of success in an ESI discovery dispute.

B. Electronically stored information (ESI) is omnipresent.

1. With a population of about 330 million people, the U.S. has more than 400 million cell phone accounts. *Carpenter v. U.S.*, 585 U.S. 296 (2018).

2. According to a United Nations agency, more than 26 billion devices are connected to the internet around the world.

3. At least 2.5 billion emails are sent each day.

4. Younger adults average over 100 text messages per day or about 3,000 per month.

C. Why is ESI discovery important?

1. Emails, text messages, and other ESI are seen more often in every type of case.

a. ESI can establish past activities of parties and state of mind such as intent and motive.

D. There are unique aspects of ESI discovery as compared to other types of evidence, and those include:

1. Volume.

2. Difficulties in preservation.

3. Proportionality of costs.

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- Lost Profits/Loss of Hire
- Personal Injury/Wrongful Death
- Product Liability & Recall
- Employment Litigation
- Subrogation

### Valuation Matters

- Acquisition/Disposition of Business
- Business Disputes
- Divorce Matters
- Shareholder Disputes
- Succession Planning

### Construction Litigation

- Surety Bonds
- Funds Control
- Delay in Start-Up
- Insolvency

### Fraud Investigations

- Asset Tracing, Kickbacks, and Misappropriation
- Financial Condition Analysis
- Financial Institutional Bonds
- Piercing the Corporate Veil & Alter Ego
- Ponzi Schemes
- Whistleblower Investigations
- Bankruptcy
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4. Privilege and work product assertions.

E. What is ESI?

1. A definition of ESI is codified at Sec. 804.09(1) and FRCP 34(a)(1)(A), which state in relevant part:

> [E]lectronically stored information, including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any other medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form ...

2. The Judicial Council Note with that Wisconsin statute and the notes of the federal Advisory Committee on Civil Rules make clear that the definition applies to all ESI references in the Wisconsin statutes and federal rules:

> References elsewhere in the rules to "electronically stored information" should be understood to invoke this expansive approach.

II. THE SCHEDULING CONFERENCE.

A. FRCP 16 and 26 (as will be discussed in more detail shortly) mandate a meeting of counsel prior to the scheduling conference and require the parties to confer regarding the discovery of ESI.

B. Section 802.10(3)(jm) concerns scheduling and states that a Circuit Court should, early in the case, consider the need for discovery of ESI.

C. This Wisconsin subpart is modest because the introduction to subsection (3) of Sec. 802.10 states that a Court "may" make orders on certain issues. However, there is a focus on ESI mentioned in the Judicial Council Note for this statute:

> Sub. (3) has been amended to encourage courts to be more active in managing electronic discovery.

D. Remember that, in the typical Wisconsin Circuit Court case, the Judge almost certainly cannot tell from the few pleadings in the file at the time of the Scheduling Conference whether management of ESI will be needed in that particular case. The Judge will need a prompt from counsel before the Scheduling Conference about a need to manage ESI discovery.

III. NO DISCOVERY OF ESI UNTIL A CONFERENCE OCCURS.

A. Under the federal rules, parties may not seek discovery until counsel have conferred about discovery. One subject at the conference must be "any issues about disclosure, discovery or preservation of electronically stored information, including the form or

forms in which it should be produced." See FRCP 16(c)(2)(F), 26(d)(1) and 26(f)(3)(C).

B. Section 804.01(2)(e)1r., 2. and 3. include a requirement of Wisconsin law that counsel must confer before certain discovery of ESI may occur. The Wisconsin statute is more detailed than the applicable federal rules.[1] Those Wisconsin statutory subparts can be summarized as follows.

1. When must a conference about ESI discovery occur?

a. Before a party serves on another party requests to produce ESI.

b. Before a party produces ESI in response to an interrogatory under Sec. 804.08(3).

c. Some discovery may go forward before the ESI discovery conference occurs. No conference is required before the taking of depositions or sending Requests to Admit. See the unique "Supreme Court Note" that is found immediately after Sec. 804.01. While the Judicial Council Notes about ESI

[1] Section 804.01(2)(e)1r., 2., and 3. read:

(e) Specific limitations on discovery of electronically stored information.

….

1r. No party may serve a request to produce or inspect under s. 804.09 seeking the discovery of electronically stored information, or respond to an interrogatory under s. 804.08(3) by producing electronically stored information, until after the parties confer regarding all of the following, unless excused by the court:

a. The subjects on which discovery of electronically stored information may be needed, when such discovery should be completed, and whether discovery of electronically stored information shall be conducted in phases or be limited to particular issues.

b. Preservation of electronically stored information pending discovery.

c. The form or forms in which electronically stored information shall be produced.

d. The method for asserting or preserving claims of privilege or of protection of trial-preparation materials, and to what extent, if any, the claims may be asserted after production of electronically stored information.

e. The cost of proposed discovery of electronically stored information and the extent to which such discovery shall be limited, if at all, under sub. (3)(a).

f. In cases involving protracted actions, complex issues, or multiple parties, the utility of the appointment by the court of a referee under s. 805.06 or an expert witness under s. 907.06 to supervise or inform the court on any aspect of the discovery of electronically stored information.

2. If a party fails or refuses to confer as required by subd. 1r., any party may move the court for relief under s. 804.12(1).

3. If after conferring as required by subd. 1r., any party objects to any proposed request for discovery of electronically stored information or objects to any response under s. 804.08(3) proposing the production of electronically stored information, the objecting party may move the court for an appropriate order under sub. (3).

have been published for guidance (but not adopted) by the Supreme Court, this "Supreme Court Note" appears to be a direct statement from the Court.

C. Which subjects must be discussed at the conference? Please note: Each of these subjects are important to ESI discovery and are implicated in many ESI-related disputes.

1. Subject matters of ESI or limitations to particular issues.

2. Dates for completion of ESI discovery.

3. Phasing of ESI discovery.

4. Preservation of ESI.

5. Forms in which ESI will be produced.

6. Assertions of privilege and work product and "clawback" provisions for privileged or work product information produced.

7. Costs and protective orders.

8. Appointment of a "Referee" (using the term in the Wisconsin statutes) to assist the Court with ESI discovery.

D. In both Wisconsin and federal courts, no one has to agree to anything at an ESI discovery conference; counsel simply have to confer.

E. Section 804.01(2)(e)1r. states that the mandatory ESI discovery conference need not occur if the parties are excused from that requirement by the Court. There is a similar provision in FRCP 26(d)(1).

F. What might happen if counsel do not confer about ESI discovery as required?

1. If one party fails or refuses to confer about ESI, another party can request sanctions. See Sec. 804.01(2)(e)2. and FRCP 16(f).

2. In addition, the Judge has the inherent authority to decline to hear a Motion to Compel or Motion for a Protective Order until after an ESI discovery conference occurs.

IV. UNIQUE PROVISIONS OF WIS. STAT. SEC. 802.06(1)(b).

A. This provision of Wisconsin law stops discovery, including ESI discovery, upon the filing of a motion to dismiss for failure to state a claim or a motion for judgment on the pleadings or a motion for a more definite statement.

B. When any such motion is filed, "all discovery" is stayed for 180 days or when the Circuit Judge rules on the motion, whichever is sooner. The Circuit Judge can allow "necessary" "particularized discovery" if by motion a party shows "good cause."

C. There is no federal equivalent to this Wisconsin statutory subpart.

V. REQUESTS FOR PRODUCTION OF ESI.

A. This outline section addresses practical concerns about ESI production that arise in ESI discovery disputes.

B. Portions of Sec. 804.09 and FRCP 34 concern the form, and organization, of the production of ESI.

C. How should a responding party decide which form to use?

1. Section 804.09(2)(b)2.b. and FRCP 34(b)(2)(E)(ii) state that the producing party shall produce ESI in a form "in which it is ordinarily maintained or in a reasonably usable form ...."

2. Section 804.09(2)(b)1. and FRCP 34(b)(2)(D) state: "The response [to a request for ESI] may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form, or if no form was specified in the request, the party shall state the form or forms it intends to use."

a. In other words, the response to a request for ESI may object to the form of ESI requested. If no form of ESI is requested, or the producing party objects to the requested form, the response must state the form the producing party intends to use.

D. The Judicial Council Note with Sec. 804.09 and the federal Advisory Committee Note from which the Judicial Council Note was drawn make excellent points which should be kept in mind when producing ESI. Portions of those Notes are summarized and quoted in 1.-3., immediately below.

1. ESI must not be converted to a burdensome form by the party producing.

> "The option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation."

2. All ESI need not be produced in the same form.

> "The rule recognizes that different forms of production may be appropriate for different types of electronically stored information. Using current technology, for example, a party might be called upon to produce word processing documents, e-mail messages, electronic spreadsheets, different image or sound files, and materials from databases. Requiring that such diverse types of electronically stored information all be produced in the same form could prove impossible, and even if possible could increase the

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> cost and burdens of producing and using the information. The rule therefore provides that the requesting party may ask for different forms of production for different types of electronically stored information."

3. In order to avoid disputes, and a possible court-mandated second production of the ESI, the producing party should inform the requesting party of the form to be used before production occurs.

> "Stating the intended form before the production occurs may permit the parties to identify and seek to resolve disputes before the expense and work of the production occurs. A party that responds to a discovery request by simply producing electronically stored information in a form of its choice, without identifying that form in advance of the production ... runs a risk that the requesting party can show that the produced form is not reasonably usable and that it is entitled to production of some or all of the information in an additional form."

4. A Wisconsin statutory subpart, and a federal rule, concern the organization of the produced ESI; that is, the way it is packaged for the requesting party. See Sec. 804.09(2)(b)2.a. and FRCP 34(b)(2)(E)(i) which state: "A party shall produce documents as they are kept in the usual course of business or shall organize and label them to correspond to the categories in the request."

## VI. INTERRELATIONSHIP OF INTERROGATORY ANSWERS AND ESI.

A. Section 804.08(3) and FRCP 33(d) concern production of ESI in response to an interrogatory:

> "Option to produce business records. If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records, including electronically stored information, and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by: (a) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and (b) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries."

B. Under those rules, the responding party need not give a substantive answer to an interrogatory if two tests are met.

1. An answer to the interrogatory may be determined by reviewing business records of a party, including ESI; and

2. The burden of ascertaining the answer will be substantially the same for either party.

C. If those two tests are met, then the responding party may:

1. Specify the records in sufficient detail to enable the requesting party to locate and identify those as readily as the responding party could; and

2. Give the requesting party a reasonable opportunity to examine the records and make copies.

D. Keep in mind a large practical consideration in using this method. As the Judicial Council Note and federal Advisory Committee Note point out, use of this option may require the producing party to provide technical support or assistance so the requesting party can actually use the ESI that is produced.

VII. THIRD-PARTY DISCOVERY OF ESI.

A. Section 805.07(2) and FRCP 45(a)(1) make clear that ESI is discoverable from third parties through a subpoena. Please note that Sec. 805.07 and FRCP 45 have numerous differences, but detailing each difference is beyond the scope of this outline.

B. In what form must the ESI be produced by the third party? Section 805.07(2)(a) and FRCP 45(a)(1)(C) state:

> A subpoena may specify the form or forms in which electronically stored information is reproduced.

C. In addition, Sec. 805.07(2)(c) and FRCP 45(e)(1)(B) and (C) state:

> "If a subpoena does not specify a form for producing electronically stored information, the person responding shall produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms. The person responding need not produce the same electronically stored information in more than one form."

1. Unlike party production of ESI, Sec. 805.07 does not explicitly mention the producing party's option to object to the form requested. FRCP 45(d)(2)(B) explicitly allows such an objection. However, Sec. 805.07(3) states that the producing party may seek a protective order, and that gives the Court authority to order that the ESI be produced in a given form under reasonable conditions.

VIII. A PARTY IS NOT REQUIRED TO PROVIDE CERTAIN CATEGORIES OF ESI.

A. Pursuant to Sec. 804.01(2)(e)1g. and FRCP 26(b)(2)(B), a party need not produce ESI that is "not available to the producing party in the ordinary course of business and that the party identifies as not reasonably accessible because of undue burden or cost."


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1. It is the burden of the party from whom the ESI discovery is sought to show that the information is "not reasonably accessible because of undue burden or cost." The burden then shifts to the requesting party to show "good cause" for the production considering the factors of proportionality and expense applicable to all discovery under Sec. 804.01(2)(am) and FRCP 26(b)(1) and (2)(C). In ordering the production of ESI under this rule, the Court may "specify conditions for the discovery."

B. In addition, Sec. 804.01(2)(e)1g.a.-c. detail other categories of ESI that need not be produced absent a showing of "substantial need and good cause." The federal rules do not explicitly include those categories.

1. Data that cannot be retrieved without substantial additional programming or without transforming the data into another form before search and retrieval can be achieved by the producing party;

2. Backup data that are substantially duplicative of data that are more accessible elsewhere; and

3. Legacy data remaining from obsolete systems that are unintelligible on successor systems.

## IX. A SHORT DISCUSSION ABOUT METADATA.

A. What is metadata?

1. ESI concerning:

a. Who created/changed the information?

b. How has it changed?

c. Who deleted it?

d. Who looked at it?

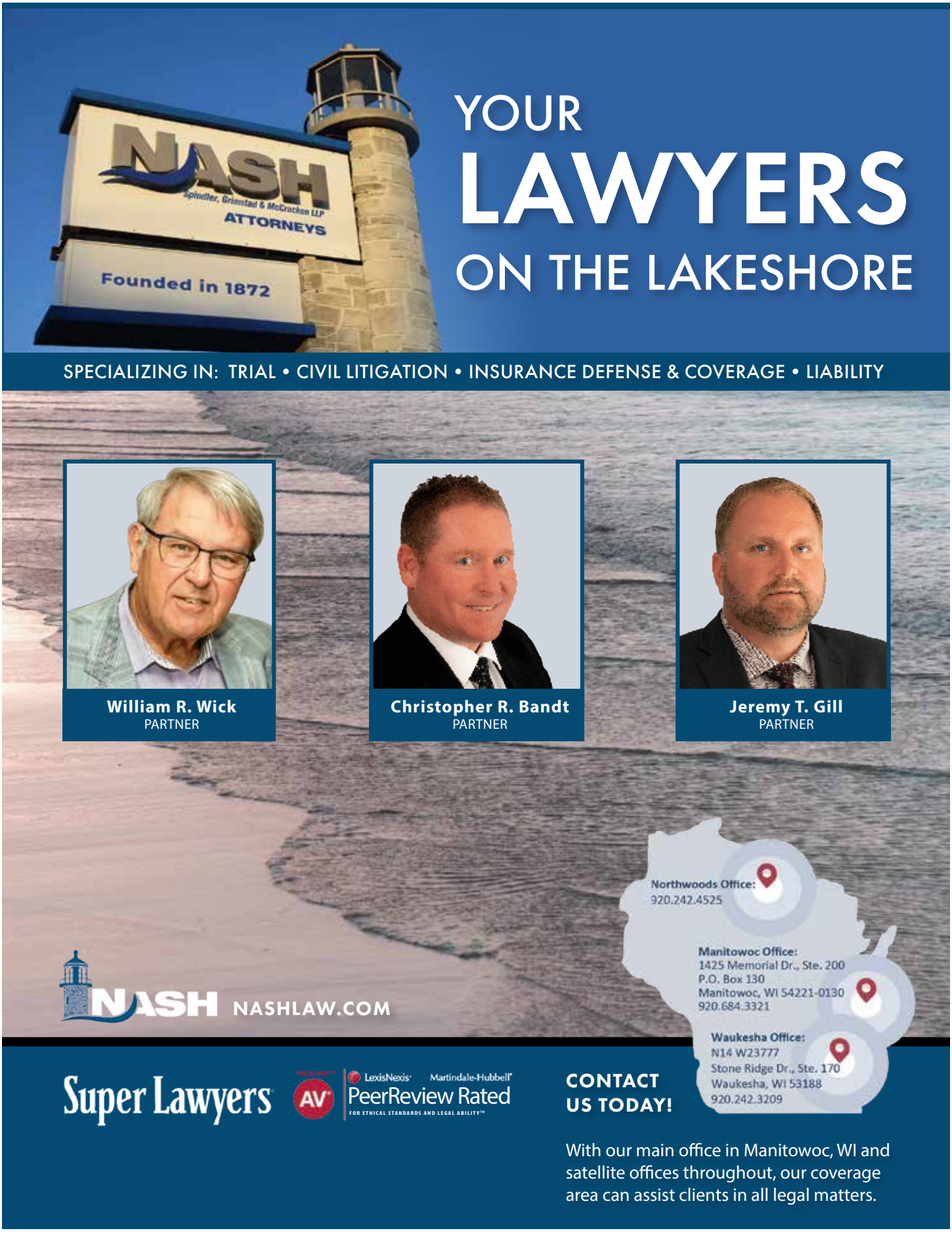
e. When did those events occur?

f. Who sent or received the ESI?

B. Metadata may make a difference in litigation in various ways including showing a sequence of events, evidence of knowledge or intent, and evidence of destruction or changes.

C. Is metadata discoverable?

1. No Wisconsin state court case, published or unpublished, has decided whether metadata is discoverable. However, in some situations, metadata must be produced in response to a Public Records request. *Lueders v. Krug*, 388 Wis. 2d 147, ¶16 (Ct. App. 2019).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2. Federal courts do not take a uniform approach on this issue. Metadata may be discoverable depending upon the issues in the case and considerations of relevancy and proportionality. See, as an example, *Aguilar v. Immigr. and Customs Enf. Div. of U.S. Dep't of Homeland Sec.*, 255 F.R.D. 350, 360-62 (S.D.N.Y. 2008).

## X. WHAT HAPPENS WHEN THERE IS A DISPUTE ABOUT ESI PRODUCTION?

A. Now that the mechanics of ESI discovery have been reviewed, assume the parties have reached an impasse on ESI discovery. The next pages of this outline consider these questions: What are the procedural vehicles available to resolve the issue, and what factors must the Judge balance in resolving a dispute about ESI production? Keep in mind that Judges are given a large amount of discretion in resolving discovery disputes. See, as an example, *State v. Beloit Concrete*, 103 Wis. 2d 506, 513 (Ct. App. 1981).

B. If the parties cannot agree, or there is an objection on an issue about production of ESI, the procedures available to resolve the dispute are that a party may: (1) request a protective order; or (2) file a motion to compel. See Secs. 804.01(2)(e)3. and (3), 804.12, FRCP 26(c) and 37.

C. The Supreme Court Note following Sec. 804.01 and the Note from the federal Advisory Committee on Civil Rules, detail the factors it is "appropriate" for a Judge to consider in deciding ESI discovery disputes. The factors are consistent with more generalized statements about proportionality, costs, and discovery in Sec. 804.01(2)(a) and (am) and FRCP 26(b)(1) and (2)(C).

1. The costs and potential benefits of the discovery.

2. The specificity of the discovery request.

3. The quantity of information available from other and more easily accessed sources.

4. The failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources.

5. The likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources.

6. Predictions as to the importance and usefulness of the requested information.

7. The importance of the issues at stake in the litigation.

8. The parties' resources.

D. Now that the factors which may be balanced by the Judge are known, the following is a checklist of questions that should be considered in crafting your arguments in order to help the Judge exercise their discretion so your client can prevail in an ESI discovery dispute.

1. What is the relevance of the proposed ESI discovery to the issues in this case?

2. How specific is the ESI discovery request?

3. What are the potential benefits of the requested ESI discovery?

    a. Does the requested ESI relate to a key time period?

    b. Does the requested ESI discovery relate to an important issue?

4. Is the ESI available from other, and more easily accessed, sources?

    a. What is the likelihood of finding relevant, responsive information from this source as compared to other sources?

5. What are the burdens on the parties and the costs involved in finding and producing the ESI?

    a. What is the amount in controversy in the suit?

    b. What is the total cost of production compared to the amount in controversy?

    c. What are the relative resources of the parties?

    d. What is the relative ability of each party to control costs for production of the ESI?

E. The following are tools applicable to ESI discovery that a Judge might use to balance the various interests of the parties and the factors discussed above.

1. Sequencing or staging of ESI discovery.

2. Sampling.

3. Cost shifting; see *Vincent and Vincent v. Spacek*, 102 Wis. 2d 266, 273 (Ct. App. 1981).

4. Keyword searches.

5. Attorney-eyes only orders.

6. Appointment of a Special Master (Referee).

7. Cost sharing, see *Hake v. Lincoln Co.*, 246 F.R.D. 577 (W.D. Wis. 2007).

F. The federal Courts have dealt with these issues for years and federal case law gives specific, concrete examples of trial court Judges exercising their discretion in balancing the appropriate factors.

1. A wonderful example of a trial court Judge balancing numerous factors and practical aspects of a difficult ESI discovery dispute is a set of opinions from the Southern District of New York: *Zubalake v. UBS Warburg*. The citations are:

217 F.R.D. 309 (*Zubalake I*); 230 F.R.D. 290 (*Zubalake II*); 216 F.R.D.280 (*Zubalake III*); 220 F.R.D. 212 (*Zubalake IV*); and 229 F.R.D. 422 (*Zubalake V*).

XI. USE OF SPECIAL MASTER FOR ESI DISPUTES.

A. In Sec. 804.01(2)(e)1r.f., FRCP 16(c)(2)(H), and FRCP 26(e)(3)(F), the use of a Special Master (called a "Referee" in Wisconsin state court) to supervise or inform the Court on any aspect of the discovery of ESI is noted in the topics for discussion at the ESI discovery conference. A special master can be a useful tool to expedite ESI discovery in light of the workload of a typical trial court Judge.

XII. SPOLIATION ISSUES REGARDING ESI.

A. Currently, the Wisconsin statute and the federal rules regarding spoliation of ESI are not similar. See *Federal Rules of Civil Procedure Changes May Affect Wisconsin Practice*, by Fitzpatrick and Gleisner, WISCONSIN LAWYER, January 2015. We will look, first, at the federal approach and then consider the Wisconsin approach.

B. FRCP 37(e) concerns spoliation of ESI and reads:

> (e) FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> > (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
> >
> > (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
> >
> > > (A) presume that the lost information was unfavorable to the party;
> > >
> > > (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
> > >
> > > (C) dismiss the action or enter a default judgment.

C. Section 804.12(4m) concerns ESI discovery and spoliation and is based on a previous version of FRCP 37(e). The Wisconsin statute reads:

1. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

2. The accompanying Judicial Council Note amplifies its meaning:

> "The rule applies to information lost due to the routine operation of an information system only if the operation was in good faith.

> Good faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of the routine operation to prevent the loss of information, if that information is subject to a preservation obligation. A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case. The good faith requirement ... means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve."

3. As the Judicial Council Note makes clear, even if the deletion was made in good faith and by a routine operation, the Wisconsin rule only limits the "sanctions":

> "This rule restricts the imposition of "sanctions." It does not prevent a court from making the kinds of adjustments frequently used in managing discovery if a party is unable to provide relevant responsive information. For example, a court could order the responding party to produce an additional witness for deposition, respond to additional interrogatories, or make similar attempts to provide substitutes or alternatives for some or all of the lost information."

4. Section 804.12(4m) works in the following manner. See *Fabco v. Kreilkamp*, 352 Wis. 2d 106, ¶ 21 (Ct. App. 2013):

    a. The moving party has the initial burden of showing that the ESI was lost.

    b. The burden then shifts to the producing party to show that the ESI was lost as a result of the routine, good faith operation of an electronic system.

    c. If that burden is met, the burden shifts back to the moving party to convince the Judge that exceptional circumstances warrant sanctions anyway.

5. If the ESI is not lost in a routine and good faith manner, then Sec. 804.12(4m) does not apply. As a result, that statutory subpart is limited and does not displace more generalized Wisconsin case law on spoliation of evidence. The next section of this outline discusses pertinent portions of Wisconsin spoliation case law that apply when ESI is not lost in a routine and good faith manner.

D. Applicable Wisconsin spoliation law that applies to ESI not lost in a routine and good faith manner is summarized next and is taken from *Mueller v. Bull's Eye*, 398 Wis. 2d 329, ¶¶18-22, 35-43 (Ct. App. 2021).

1. Every potential litigant and party has a duty to preserve evidence essential to a claim that will be litigated. If a potential litigant or party destroys, alters, or loses evidence in a manner that constitutes spoliation, a Circuit Court may impose sanctions for that spoliation.


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2. Courts engage in a multi-step process to analyze spoliation issues.

    a. First, the Court must identify with as much specificity as possible the evidence that is alleged to have been destroyed, altered, or lost.

    b. Second, the Court makes a factual inquiry into the following three factors:

        i. The relationship of the destroyed, altered, or lost evidence to the issues in the action.

        ii. The extent to which the destroyed, altered or lost evidence can now be obtained from other sources.

        iii. Whether the party responsible for the evidence being destroyed, altered or lost should have known at the time that litigation against the opposing party was a distinct possibility.

    c. Third, the Court must decide, in light of the three previous factual inquires, whether sanctions should be imposed upon the party responsible for the evidence destruction, alteration or loss and, if so, what the sanction should be.

3. Circuit Courts have discretion in determining the necessary sanctions in a spoliation scenario and have a "broad canvas" on which to paint in that regard. Potential remedies for evidence spoliation are:

    a. Discovery sanctions.

    b. Monetary sanctions.

    c. Exclusion of evidence.

    d. Reading the spoliation inference instruction, WIS JI—CIVIL 400, to the jury. Please note: Reading WIS JI—CIVIL 400 to the jury is not appropriate when evidence is negligently destroyed, altered or lost but may be appropriate when the acts are intentional.

    e. Dismissal of one or more claims. *Mohn v. BMO Harris Bank*, 395 Wis. 2d 421 (2021), discusses dismissal, or the grant of a default judgment, as a sanction.

        i. A Court should only rarely impose dismissal or a default judgment as a sanction, and a Court does so only when the spoliation conduct is "egregious." Egregious conduct involves more than negligence. It consists of a conscious attempt to affect the outcome of the litigation or a flagrant, knowing disregard of the judicial process.

            1. Before dismissing a plaintiff's case or granting a default judgment, the Circuit Court need not make an explicit finding of prejudice to the party seeking discovery.

2. Rather, before dismissing a plaintiff's case or granting a default judgment, the Circuit Court must make a finding of "egregious conduct" or "bad faith" and that the offending party's failure to provide discovery was without a clear and justifiable excuse.

3. This is the applicable standard because these are drastic penalties that should be imposed only when harsh measures are necessary.

XIII. THE ATTORNEY-CLIENT PRIVILEGE, THE WORK PRODUCT DOCTRINE, AND ESI.

A. Assume that ESI has been produced in discovery, and some of the materials produced constitute attorney-client privileged communications or work product. With the advent of ESI discovery and the production of enormous amounts of data, problems of scale and scope of discovery previously unknown in the law have arisen. Wisconsin and federal rules discussed next attempt to balance various interests of fairness and efficiency in light of practical concerns.

XIV. FORFEITURE OF THE ATTORNEY-CLIENT PRIVILEGE.

A. The provisions of Sec. 905.03(5) and Federal Rule of Evidence 502(a) and (b) are substantially the same with a few differences that will be noted. One difference is that FRE 502 concerns both the attorney-client privilege and work product. Wisconsin law separates out the discussion of work product forfeiture in another statute as will be seen.

B. Changes were made to discovery rules for the following reasons stated in the Judicial Council Note and the Note of the federal Advisory Committee on Evidence Rules.

1. There must be a balance between a lawyer's duty to protect a client's confidences (see SCR 20:1.6) and the practicalities of the production of information in digital form.

2. With the production of millions of documents, a privilege review of each e-mail may be prohibitively expensive and cause attorney fees for the privilege review to be greater than the value of the case.

C. Please note that the Wisconsin statute uses the term "forfeiture" and FRE 502(a) and (b) use the term "waiver."

1. The distinction between "waiver" and "forfeiture" was drawn by the Wisconsin Supreme Court in *State v. Ndina*, 315 Wis. 2d 653, ¶ 29 (2009):

> Although cases sometimes use the words "forfeiture" and "waiver" interchangeably, the two words embody very different legal concepts. "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right. *United States v. Olano*, 507 U.S. 725, 733 (1993)" (quotation marks and citation omitted).

2. There is no substantive difference between the Wisconsin statutes' use of the term "forfeiture" and the federal rule's use of the term "waiver."

D. No discussion of this area of Wisconsin law is complete without a consideration of *Sampson v. Sampson*, 271 Wis. 2d 610 (2004). Section 905.03(5) does not change or alter any holding of *Sampson*. This is stated explicitly in the Judicial Council Note with the Supreme Court Order which created Sec. 905.03(5).

1. *Sampson* concerned a deliberate and voluntary act of a lawyer which sent attorney-client privileged materials to opposing counsel without knowledge or consent of the client. *Sampson*, 271 Wis. 2d 610, ¶ 2. The mistake of the lawyer was his conclusion that the documents were not privileged. *Sampson*, 271 Wis. 2d 610, ¶ 28. Only the client can waive the attorney-client privilege and, as a result, *Sampson* holds that those specific facts do not constitute a waiver of the privilege under Sec. 905.11, Wis. Stats. *Sampson*, 271 Wis. 2d 610, ¶¶ 32, 46, 47.

E. Section 905.03(5) is a subpart of the attorney-client privilege statute which reads:

> (a) Effect of inadvertent disclosure. A disclosure of a communication covered by the privilege, regardless of where the disclosure occurs, does not operate as a forfeiture if:
>
> 1. the disclosure is inadvertent;
>
> 2. the holder of the privilege or protection took reasonable steps to prevent disclosure; and
>
> 3. the holder promptly took reasonable steps to rectify the error, including, if applicable, following the procedures in s. 804.01(7).[2]
>
> (b) Scope of forfeiture. A disclosure that constitutes a forfeiture under sub. (a) extends to an undisclosed communication only if:
>
> 1. the disclosure is not inadvertent;
>
> 2. the disclosed and undisclosed communications concern the same subject matter; and
>
> 3. they ought in fairness to be considered together.

F. To summarize, pursuant to Sec. 905.03(5)(a) and FRE 502(b), a disclosure of an attorney-client privileged communication is not a forfeiture of the privilege if each part of the three-part test is met:

1. The disclosure is inadvertent.

   a. "Inadvertent" is not defined but it seems to be the opposite of the "deliberate" disclosure noted in *Sampson*.

2. The holder of the privilege took reasonable steps to prevent the disclosure; and

[2] As will be discussed shortly, Sec. 804.01(7) is substantially identical to FRCP 26(b)(5)(B) referred to in FRE 502.

3. The holder promptly took reasonable steps to rectify the error.

    a. In reviewing tests 2 and 3 concerning reasonable steps to prevent disclosure and reasonable steps to rectify an error, the Wisconsin Judicial Council Note and the federal Advisory Committee Note cite nine non-dispositive factors that a Judge may consider:

        i. the reasonableness of the precautions taken;

        ii. the time taken to rectify the error;

        iii. the scope of discovery;

        iv. the extent of disclosure;

        v. the number of documents to be reviewed;

        vi. the time constraints for production;

        vii. whether reliable software tools were used to screen documents before production;

        viii. whether an efficient records management system was in place before litigation; and

        ix. any overriding issues of fairness.

    b. In other words, a Judge must balance the applicable factors to determine if reasonable steps were taken to prevent disclosure and to rectify any error; also, a Judge must exercise their discretion and consider issues of fairness.

G. Subpart (b) of Sec. 905.03(5) and FRE 502(a) concern the scope of the forfeiture. Put another way, when can the disclosure of privileged communications lead to the disclosure of even more privileged communications?

1. Three tests must be met.

    a. The disclosure is not inadvertent – in other words, the producing party gave up the privileged documents deliberately; and

    b. The disclosed and undisclosed communications concern the same subject matter; and

    c. The disclosed and undisclosed communications ought in fairness to be considered together.

2. Why would a party ever deliberately give up privileged communications?

a. There are situations in which a party raises advice of counsel as a defense and puts into evidence selected communications from counsel. Some examples are:

i. Alleged crimes regarding non-payment of taxes ("My lawyer told me I could take that deduction"); and

ii. Patent infringement suits. Parties sometimes have two sets of lawyers; one firm gives an opinion on infringement and another firm litigates the suit; the opinion on infringement goes to whether the infringement was willful.

3. In sum, Sec. 905.03(5)(b) and FRE 502(a) allow a Judge discretion to determine if, in fairness, other privileged communications about the same subject matter must be produced if a disclosing party selectively gives out some, but not all, privileged communications.

## XV. DISCLOSURE OF WORK PRODUCT.

A. This sentence has been included near the end of the work product statutory subpart, Sec. 804.01(2)(c)1.: "This protection is forfeited as to any material disclosed inadvertently in circumstances in which, if the material were a lawyer-client communication, the disclosure would constitute a forfeiture under Sec. 905.03(5)."

1. This means that, if the disclosure of work product is inadvertent, then there may be a forfeiture. A Judge is to use the same analysis as was discussed previously for privilege forfeitures under Sec. 905.03(5)(a).

a. In other words, did the producing party take reasonable steps to prevent disclosure and did the producing party take reasonable steps to rectify the error?

B. This sentence was also included at the end of the work product statutory subpart, Sec. 804.01(2)(c)1.: "This protection is waived as to any material disclosed by the party or the party's representative if the disclosure is not inadvertent." Remember that waiver is distinct from forfeiture under the applicable Wisconsin statutes.

1. There is a waiver if the disclosure of the work product is not inadvertent. In other words, if the disclosure was by deliberate action.

2. The disclosure can be made by the party or the attorney.

3. This is distinct from the analysis under the attorney-client privilege in which only the client can waive the privilege. With work product, the attorney's actions can operate as a waiver. If so, the protection is lost if there was deliberate disclosure of work product by the attorney (or the client).

4. When would an attorney deliberately disclose work product to a non-client?

a. As an example, sometimes counsel will send letters to testifying experts with the lawyer's thoughts about the case to give the expert an idea of what the case concerns.

b. There is an excellent discussion of these issues in *Intermedics v. Ventritex*, 139 F.R.D. 384 (N.D. Ca. 1991) and *Karn v. Ingersoll-Rand Co.*, 168 F.R.D. 633 (N.D. Ind. 1996).

XVI. "CLAWBACK" OF PRODUCED ESI.

A. Section 804.01(7) is identical to FRCP 26(b)(5)(B) (except the Wisconsin statute includes the word "inadvertently" in the first sentence) and reads as follows:

> If information inadvertently produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

B. This is generally known as a "clawback" provision.

C. This Wisconsin statute and this federal rule do not state the factors which must be considered to decide if there has been a waiver or forfeiture of a privilege or work product protections. Instead, Sec. 804.01(7) and FRCP 26(b)(5)(B) give parties a procedure to resolve a claim of privilege or work product protection.

D. These rules require that:

1. A party asserting a claim of privilege or protection after production must:

   a. Give notice to a receiving party that received the information;

   b. State the basis for the claim of protection; and

   c. "Preserve" the information until the claim is resolved.

2. Then, after being so notified, the receiving party must do the following:

   a. Either promptly return, sequester, or destroy the specified information and any copies it has.

   b. Not use or disclose the information until the claim is resolved.

c. Take reasonable steps to retrieve the information if the party disclosed it to another before being notified by the producing party.

3. The receiving party "may" promptly present the information to the Court under seal for a determination of the claim or wait until the claimant files a motion.

E. Please note: This Wisconsin statute and the federal rule concern all privileges, not just the attorney-client privilege. As an example, Wisconsin has a trade secrets privilege. See Sec. 905.08.

F. Section 805.07(2)(d) and FRCP 45(e)(2)(B) concern subpoenas to non-parties and have identical language (except that the Wisconsin statute includes the word "inadvertently" in the first sentence), and read as follows:

> If information inadvertently produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

1. This provision grants, in the context of production pursuant to a subpoena, the same protections and procedures as the previously-noted Wisconsin and federal rules regarding "clawback."

Hon. Michael R. Fitzpatrick (Ret.)
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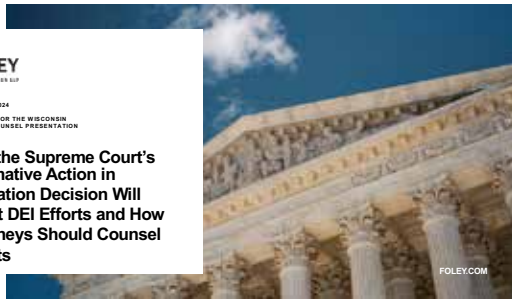
FOLEY & LARDNER LLP

AUGUST 8, 2024

PREPARED FOR THE WISCONSIN DEFENSE COUNSEL PRESENTATION

# How the Supreme Court's Affirmative Action in Education Decision Will Affect DEI Efforts and How Attorneys Should Counsel Clients

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## Agenda for Today's Program

- An historical review of Affirmative Action.
- Analysis of the U.S. Supreme Court's decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina et al.*
- What does *SFFA* mean for DEI programs and efforts?
- What sort of litigation has arisen in the DEI space since *SFFA*?
- Learning points and best practices for counseling clients in the DEI space.


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## *Educational* Affirmative Action Pre-2024

- 1978 — *Regents of the University of California v. Bakke*
  - SCOTUS held "quota systems" are an unconstitutional violation of the Equal Protection Clause of the 14th Amendment.
    - Requires the government to show a "**compelling interest**" for any race-based (or other similarly based) classification and to demonstrate that the at-issue policy is "**narrowly tailored**" to achieve this compelling interest.
  - College admissions **COULD** still consider race as one factor among many others in their admissions decisions.
- 2003 — *Grutter v. Bollinger*
  - SCOTUS found student body diversity could be a compelling interest to justify the consideration of race in admissions.
  - **BUT**: (1) can't let use of race become "negative stereotyping;" (2) can't use race as a "negative" to other racial groups; (3) "the use of racial preferences will no longer be necessary to further the interest approved today" in 25 years.

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## The SCOTUS Affirmative Action Decisions

- Both Decisions issued on June 29, 2023
  - *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*
  - *Students for Fair Admissions, Inc. v. University of North Carolina et al.*

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## The Majority Opinion Written by Chief Justice John Roberts

- Found the policies violated the Equal Protection Clause (EPC) of the Fourteenth Amendment.
  - The Court found that the "**compelling interests**" behind the admissions programs could not be subject to judicial review because the court found them "**immeasurable**" → Training future leaders, acquiring knowledge based on diverse outlooks, promoting a robust marketplace of ideas, creating engaged and productive citizens.
  - The Court found that that the admissions **programs did not have a meaningful connection** between their goals and the means employed to achieve those goals → Used racial categories that were overly broad, arbitrary or undefined, or underinclusive.
- Did **not** expressly overturn *Grutter* but tried to clarify by finding:
  - The policies relied on "stereotyping."
  - The policies had a "negative effect" on Asian Americans.
  - The policies had no "logical end point."

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## What Isn't (And Is) Allowed in Educational Admissions After *SFFA*

- No express consideration of race for race's or "diversity's" sake alone. Presumably:
  - No adding points to a score based on race.
  - No consideration of prior year's demographics.
  - No consideration of a tentative class's racial makeup as a whole.
  - No pulling waitlisted applicants based on race.
- **However,** the Court suggested that educational institutions **CAN** consider how race affected an applicant's life in making a decision — so long as the decision is made on the "quality of character or unique ability that the particular candidate can contribute to the university."


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## "Graduating" From the Classroom

- These decisions are limited to entities covered by the Equal Protection Clause (state actors and those receiving state funding) → Does not apply to fully private actors.
- However, as we have seen, *SFFA* is having an impact (overtly or otherwise) on courts' considerations of DEI programs established by private employers even if not covered by the Fourteenth Amendment.
- And we have seen a lot of Anti-DEI efforts from legislation through litigation throughout the country since *SFFA*

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## But my client is not an educational institution or a "state actor"

- What does this mean for counseling clients that are NOT state actors or in education?
- What is the impact on employment-related DEI efforts
- What about non-employment related DEI efforts, like the supply chain, community relations, and charitable giving?


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## First, What Does *SFFA* Mean for Employer DEI Programs and Efforts?

1. Understand the legal landscape for employers in general.
   - Title VII of Civil Rights Act of 1964
   - Section 1981 of Civil Rights Act of 1866
   - Executive Order 11246 obligations
2. Appreciate that the "great reckoning" following George Floyd did not ***change*** the law.
3. Engage in DEI efforts without running afoul of the law; which was NOT changed by *SFFA* for most employers.


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## What Does Title VII Prohibit/Permit?

- Makes it illegal to **"fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to [the individual's] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]"**
- **Bottom Line**: The "message" of Title VII is that protected traits are "not relevant to the selection, evaluation, or compensation of employees." *Bostock v. Clayton Cty.* (2020)
- Title VII, however, does **NOT** prohibit efforts to improve diversity. As EEOC Chair Charlotte Brown noted, **"It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace."**

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## Section 1981 — What is it? What Does it Prohibit?

- Civil War Era Legislation
- Requires equal treatment of **ALL** citizens:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

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## What About Executive Order 11246?

- Executive Order 11246 — Presidential Order that requires all federal contractors and subcontractors to take affirmative action to ensure that the workforce closely resembles the races/gender of the community from where employees come.
- Does **NOT** permit a violation of Title VII (or any other non-discrimination law).
- **Does** require identification of job groups and goals where the race/gender attributes of the job group is not consistent with the available pool of persons for the position(s).
  - Goals are required to be identified
  - Goals are **NOT** quotas
  - **Efforts are the "key" to meeting goals**


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## So, Are DEI Efforts Still Legal, or What?

- DEI efforts are still legal. *SFFA* did not make DEI efforts illegal.
  - *SFFA* is a stark reminder that ***the law is the law***
  - Educational institutions are on the exact same footing as all employers — there is NO PLUS FACTOR allowed or permitted.
- So, if a client had an appropriate and legal DEI Program prior to *SFFA*, **changes are not required**.
- **BUT**: *SFFA* should be a wake-up call to ensure that client DEI programs are appropriately drafted and implemented. They may **NOT** violate Title VII or other non-discrimination laws.

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## What Can We Expect in the Future?

- The law is what the law is. So long as a client's DEI efforts are created in a manner that does not now conflict with Title VII — that is, does not take race, gender, etc. into account for an employment-related decision — then unless Congress changes Title VII, DEI will continue to be legal.
- This only makes sense. ***The goal of Title VII was to eliminate reliance on immutable characteristics for decision-making***.
- And like for federal contractors under Executive Order 11246, the key to compliance will be the focus on creating "**opportunities**" and expanding "**pools**" as opposed to decision-making.

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## What Type of Litigation Are We Seeing?


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## How Plaintiffs Are Using *SFFA*

- Letter campaigns to raise public awareness
- Lawsuits challenging diversity targets and associated compensation and promotion decisions (executive compensation programs).
- Lawsuits challenging economic bonuses provided ONLY to certain underrepresented groups.
- Lawsuits challenging fellowships and scholarships that are restricted to certain underrepresented groups.
- Challenging resources, opportunities, or trainings provided to certain underrepresented groups through affinity groups or the like.

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## Letter Campaigns / Efforts

- Letters to EEOC and Private / Public Employers
  - ***America First Legal*** – this special interest group has sent numerous letters to the EEOC with "investigation requests" as to various employers
    - For example, sent one such letter attacking Major League Baseball with respect to three of its programs: (i) Diversity Pipeline Program; (ii) Diversity Fellowship Program, and (iii) Diversity in Ticket Sales Program
  - American First Legal and American Civil Rights Project have also reportedly sent "public shareholder letters" to a number of companies (both private and public) claiming their various DEI programs constitute illegal discrimination which dilutes the company's value


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## Litigation

- Emerging Trends in Litigation
  - Cases challenging DEI Targets
    - Claim that setting internal diversity goals and / or tying incentive compensation to achieving them is illegal
  - Cases challenging DEI Training
    - Claim that DEI training creates or contributes to a race-based hostile work environment
  - Cases challenging DEI Programs
    - Claim that programs which limit eligibility to certain races is discriminatory


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## *Powers v. Broken Hill Proprietary Inv.*

**District Court for Southern District of Texas**

- Plaintiff claimed sex discrimination under Title VII and post-termination retaliation.
- Plaintiff alleged that company announced initiative to increase the female workforce to 50% by 2025.
- Plaintiff alleged that the company considered progress towards the goal of gender balance as a metric in determining the overall annual bonus pool and in determining individual bonuses for employees.
- On summary judgment, Court held that there was a factual dispute as to whether "BHP's gender-balance goal, including its tie to the performance evaluation and bonuses of those making the hiring and promotion decisions at issue, amounts to an unlawful affirmative action plan that adversely affected Power's employment."
- The case settled shortly after the summary judgment decision.


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## *De Peiro v. Pa. State Univ. et al.*

**District Court for the Eastern District of Pennsylvania (2024)**

- Allegations
  - Plaintiff claimed that over course of five (5) training sessions, training facilitators ascribed "negative traits to white people . . . Without exception and as flowing inevitably from their race."
  - Also claimed that DEI Director instructed white employees to "feel terrible" and levied other "problematic" race-based comments
- Claim
  - Plaintiff brought Title VII hostile work environment claim premised in part o the DEI training.
- So Far
  - Court denied motion to dismiss distinguishing the allegations from "acceptable" DEI training at least partially based upon the employer's alleged "drumbeat" of negative and deterministic commentary about white person.


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## *Am. Alliance for Equal Rights v. Morrison Foerster LLP*

**District Court for Southern District of Florida**

## *Am. Alliance for Equal Rights v. Perkins Coie LLP*

**District Court for Northern District of Texas**

- Plaintiffs in both cases alleged that the firms' fellowship programs, which are limited to underrepresented minorities, LGBQT, and disabled applicants, violate 42 U.S.C. § 1981.
- These fellowships are awarded to applicants who then participate in the firms' summer associate programs.
- Plaintiffs sought declaratory judgments that the fellowships violated 42 U.S.C. § 1981, as well as injunctions.
- Both firms modified their specific programs in face of legal challenges.

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## Closer to Home – *Suhr* Litigation

- **State Bar Diversity Clerkship Program**
- What is it: Program that facilitates paid summer internships at private law firms, corporate legal departments, and governmental agencies in Wisconsin that choose to participate by coordinating opportunities for applicants to the Program to meet, interview, and be connected with those employers who participate in the Program.
- The State Bar defines "diversity" as an:
  "inclusive concept that encompasses, among other things, race, ethnicity, national origin, religion, gender, gender identity, age, sexual orientation and disability. Inclusion helps to create a culture that embraces people from the widest range of talent and experience and promotes understanding and respect for all people and different points of view in the legal profession."
  - This expansive definition could include diversity of political or ideological thought, as well as geographic diversity – such as law students from rural areas or urban centers. It can also include students who have been historically excluded from the legal field based on socioeconomic status or other factors.
  - Diversity is not a distinct feature but a panoply of unique features or circumstances that make law students different from one another; it is not race-based. Rather, the term "diverse" is tied to the "unique, special, distinctive, and/or impressive" background of individual applicants.

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## Closer to Home - *Suhr* Litigation

- Complaint filed in December 2023.
- Alleged that Wisconsin State Bar's Diversity Clerkship Program is unlawful because if violates the equal protection clause.
- Asserted that preferences were made for persons of color or others with immutable characteristics different from the majority.

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## State Bar Diversity Clerkship Program

- Eligibility Criteria
  - Attend a Wisconsin-based law school
  - Demonstrate a record of academic achievement.
- All students who meet the eligibility criteria are encouraged to apply and will be considered.
- Applicants must also demonstrate a "commitment to diversity" through personal statements. This is an acknowledgment that colleagues and potential clients have differing views, customs, backgrounds, and value systems of which they should be cognizant as future lawyers, judges, and officers of the court. This is a recognition that not everyone comes from the same perspective, and that law is not a "one-size-fits-all" practice.
- Successful applicants demonstrate a commitment to diversity.

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## Is the Bar's Diversity Clerkship Program Legal?

- **YES – the Diversity Clerkship Program IS legal**
- Plaintiff dismissed challenge to Clerkship Program after acknowledging the identified eligibility criteria did not violate the EPC, and once State Bar agreed to be more specific in its description of the program to clearly indicate that minority status is not a pre-requisite for participation.

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## How Should Attorneys Counsel Clients


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## The Takeaway — What Should Clients Do?

- Clients need **NOT** end their DEI efforts.
- **Rule**: Basing an employment-related decision on a protected classification is NOT permitted: end-of-story… or is it?
  - Very limited exception for historical, proven, prior discrimination.
  - Do you want to admit to a past practice of discrimination?
  - Very challenging to support.
- Improving and expanding "opportunities" and "pools" to achieve greater diversity in employment is permitted.
- Programs that are aimed at ensuring equity and inclusion in the workplace are generally okay. Focus on present employment environment and ensuring that everyone has an equal opportunity for success.

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## Questions?

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## Thank you for Attending!

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# INTERACTIVE TORTS UPDATE

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## *Martinez v. Rullman*

2023 WI App 30, 408 Wis. 2d 503, 992 N.W.2d 853

**(1) The *Presser* exception to the independent contractor rule, that the negligent performance or nonperformance of a contractual duty may constitute actionable negligence against a general contractor, precluded a grant of summary judgment for the Defendant on the Plaintiff's negligence claim because the general contractor contracted to take on all responsibility for worker safety.**

**(2) Genuine issues of material fact precluded summary judgment for the Defendant general contractor on the Plaintiff's claim under the Safe Place Statute, Wis. Stat. §101.11.**

This lawsuit arose from a multi-year $1.7 million residential remodeling project on a two-story home owned by Mr. Dillion. The homeowner and the general contractor, a business operated by William Rullman, entered into a handshake agreement for the renovation of the home. This renovation included, *inter alia*, installing an elevator to go back and forth between the first and second floors. The second floor of the home consisted of a hallway and three doors. Two of these doors led to bedrooms. The third led to the elevator shaft.

In January 2017, William Rullman, the general contractor, began work to prepare for the elevator and cut a shaft for the elevator on the second floor. Afterwards, he barricaded the area with guardrails, which complied with OSHA requirements. Later that same month, the general contractor and Access Elevator ("Access") entered into a contract for Access to provide the elevator. Pursuant to that contract, the general contractor agreed to assume sole responsibility for the safety of all workers and subcontractors on the site.

In early July 2017, Stanke, the subcontractor who would install the elevator, arrived on the scene of the project. He saw the 2 x 4 guardrails and removed them because he could not install the door with the guardrail in place. After he installed the door that would access the elevator, he added a wood block to the door to serve as a latch. This latch rested horizontally, and one would need to turn it vertically to open the door. Stanke did not reinstall the guardrails, nor did anyone tell him that he needed to do so.

On July 14, 2017, AM Painting Inc. was onsite to do some work on the second floor. AM Painting's employee, Fernando Martinez, was assigned to vacuum anything on the second floor that had been sanded. Fernando proceeded to do so, presumably opening the door to the elevator shaft. Though he did not remember opening the door, no one else was in the hallway at the time

[1] Ruth L. Nord-Pekar researched the subject cases and was the principal author of this outline.

of the accident. Fernando subsequently fell through the elevator shaft and suffered severe cranial and spine injuries, requiring surgery.

Fernando filed a personal injury lawsuit against the homeowner, general contractor, the carpentry subcontractor, and Stanke, the carpenter for Access Elevator, alleging violations of the Safe Place Statute and ordinary negligence.

All the Defendants moved for summary judgment. The Circuit Court granted summary judgment to the general contractor, concluding that the independent contractor rule precluded liability. Further the Circuit Court concluded that there was no unsafe condition for which the general contractor could be held responsible. Fernando appealed the Circuit Court's decision.

First, the Court of Appeals concluded that an exception to the independent contractor rule applied, which precluded summary judgment. The independent contractor rule, as articulated in *Wagner v. Continental Casualty Co.,* 143 Wis. 2d 379, 400-01, 421 N.W.2d 835 (1988), states that "an employee of an independent contractor is precluded from receiving worker's compensation benefits from the independent contractor and also maintaining a tort action against the person who employs the independent contractor, the principal employer or general contractor, unless the principal employer is affirmatively negligent with respect to the employee."

The Court of Appeals noted two exceptions to this general rule. The first is "when the injuries are 'caused by the [general contractor's] affirmative act of negligence.'" The Court of Appeals found this exception did not apply because the first affirmative act, the allegedly negligent cutting of the elevator shaft in January, was too far removed from the injury in July. Second, any of the other alleged acts, including failure to provide proper lighting and failure to warn, constituted an act of omission, rather than an affirmative act.

However, the Court of Appeals found a second exception to the general independent contractor rule may subject the general contractor to liability. This exception was articulated in *Presser v. Siesel Constr. Co*., 19 Wis. 2d 54, 59, 119 N.W.2d 405 (1963). In *Presser,* the Wisconsin Supreme Court stated that "[T]he negligent performance or nonperformance of a duty created by a contract may constitute actionable negligence." *Presser v. Siesel Constr. Co*., 19 Wis. 2d 54, 59, 119 N.W.2d 405 (1963). Similarly, the Court of Appeals concluded that in the case at bar, the contract between the general contractor and Access, by which the general contractor assumed sole responsibility for the safety of all workers and subcontractors, created a duty beyond common law. Therefore, an exception to the independent contractor rule applied, and liability could be imposed.

The second issue the Court of Appeals considered was whether the Circuit Court's grant of summary judgment for the general contractor on the Safe Place claim was appropriate. The Court of Appeals first concluded that the Safe Place Statute, Wis. Stat. § 101.11, applied to the construction project because the general contractor was an employer at the place of employment. Accordingly, the general contractor owed a duty to keep the place as safe as reasonably could be expected given the nature and premises.

The Court of Appeals then evaluated whether summary judgment was appropriate and concluded that the Circuit Court erred when it determined there was no unsafe condition on the

property as a matter of law. An unsafe condition exists where an employer fails to keep a property that is originally safe in a safe condition through improper repair or failure to conduct proper maintenance. The Court of Appeals found the fact that guardrails were erected when the elevator shaft was originally cut in January was insufficient to establish compliance with the Safe Place Statute — the general contractor had to maintain the property in a safe manner. Accordingly, it reversed the grant of summary judgment to the general contractor.

## *Rembalski v. John Plewa, Inc.*

2023 WI App 58, 409 Wis. 2d 647, 998 N.W. 2d 523

**The Circuit Court did not err in declining to apply the *res ipsa loquitor* doctrine and dismissing the Plaintiff's complaint where the Defendant had left an unsecured outlet in the Plaintiff's home in construction-safe condition for months after ceasing work on the home and the Plaintiff was electrocuted trying to remove a charger from the outlet.**

In June 2019, Rembalksi entered into a contract with Plewa to remodel his kitchen. The project involved relocating a kitchen cabinet somewhere with an existing electrical outlet on the wall. An employee of the cabinetry subcontractor unscrewed that outlet from the wall, secured it with electrical tape, and cut a hole in the cabinet to accommodate the outlet. When the subcontractor left the premises, the outlet was in a construction-safe condition. However, before the project was completed, the homeowner and the contractor had a disagreement about the price of continued remodeling work and the contractor stopped working on the property. No one arranged for an electrician to finalize replacing the outlet.

Later, Rembalski plugged a handheld vacuum battery charger into the unsecured outlet. He chose to use that particular outlet rather than the other finished outlets in the kitchen. Months later, in March 2020, Rembalski tried to unplug the battery charger from this unsecured outlet and suffered an electrical shock. He then went to the emergency room, complaining of numbness and tingling in his right hand. He incurred medical bills for treatment, including occupational and physical therapy. As a result of the injuries he sustained, Rembalski then filed a civil lawsuit alleging negligence. The case was tried to the Circuit Court, which entered a written judgment dismissing Rembalski's action.

Rembalski appealed, arguing that the Circuit Court erred in ruling that the doctrine of *res ipsa loquitor* ("*res ipsa*") did not apply. He further argued that the erroneous ruling affected his substantial rights, so he was entitled to a new trial. The Defendant argued the Circuit Court correctly exercised its discretion in ruling that *res ipsa* did not apply and that the claim was properly dismissed because Rembalski failed to prove the elements of negligence.

*Res ipsa* is a rule of circumstantial evidence, permitting "a fact-finder to infer a defendant's negligence from the mere occurrence of the event." For the doctrine to apply, two conditions must be met "(1) the event in question must be of a kind which does not ordinarily occur in the absence

of negligence; and (2) the agency of instrumentality causing the harm must have been within exclusive control of the defendant."

The Court of Appeals analyzed both requirements and ultimately found that the Circuit Court did not err in finding that *res ipsa* did not apply. As to the first prong, the record reflected that the Circuit Court made several findings supporting its decision. First, the Circuit Court found that "[t]he outlet was properly secured with electrical tape and left in a construction-safe condition until the electrician could arrive at the Rembalski home to do the electrical work." Next, the Circuit Court found that no arrangements were made to have an electrician finish securing the electrical outlet. Furthermore, the Circuit Court found that "Rembalski knew that the unsecured outlet was energized and still needed to be affixed to the cabinet wall." Finally, the Circuit Court found that "[o]n March 11, 2020, Rembalski suffered an electric shock as he attempted to unplug the battery charger from the unfinished outlet" and that Rembalski "attempted to secure that back of the outlet" with his hand while he tried to remove the charger.

Regarding the second prong, exclusive control, the Court of Appeals found that the Defendant had not worked on the house for several months prior to the incident. Even though the Defendant "controlled the method, details, and means of performing services, including the use of subcontractors" and installation of the outlet was not complete, the Plaintiff and his family members used the outlet, including plugging in the battery charger. Accordingly, the Court of Appeals concluded that the Plaintiff failed to prove that the Defendant maintained exclusive control over the outlet.

The Court of Appeals agreed with the Defendant, that there was "not enough mystery to the cause of Rembalski's shock and injury for the *res ispa loquitor* inference to apply." Accordingly, the Court of Appeals concluded that "the circuit court acted within its discretion when it rejected an application of the doctrine of *res ipsa loquitor.*"

## *Estate of Wiemer v. Zeeland Farm Servs.*

2023 WI App 47, 409 Wis. 2d 131, 995 N.W.2d 802

**Where a tractor-trailer was a motor vehicle for purposes of Wis. Stat. § 893.54(2m), an accident that occurred while the tractor-trailer was stationary and the deceased worker was assisting with the unloading of the load, was caused by an accident involving a motor vehicle and was barred by the two-year statute of limitations.**

On September 16, 2019, a co-op ordered 25.17 tons of pelletized corn gluten from Zeeland Farm Services, which was to be delivered three days later. Zeeland Farm Services hired Atlantic Carrier to transport the load and Atlantic Carrier, in turn, hired Blackhoof Trucking to load, transport and unload the corn gluten.

Blackhoof Trucking used a gravity-operated hopper trailer to transport corn gluten. This trailer was attached to a semi-tractor, which was self-propelled. Upon on-time arrival at the Co-

Op's facility, the driver maneuvered the tractor-trailer so the gravity feed bin was positioned over a conveyor pit, intending for the corn gluten to drain out of the trailer onto the conveyor. Regrettably, the corn gluten had compacted during transport and did not drain out as the driver had expected. Wiemer, a co-op employee, ascended to the top of the trailer and tried to break up the gluten. Tragically, Wiemer fell into the body of the trailer, got trapped in the current of corn gluten and was smothered to death.

In March 2022, Wiemer's Estate filed a wrongful death lawsuit, alleging the Defendants were negligent by using a gravity-operated hopper trailer to load and transport the corn gluten. The Defendants moved for summary judgment, arguing that the lawsuit was barred by the two-year statute of limitations for wrongful death "arising from an accident involving a motor vehicle" under Wis. Stat. § 893.54(2m).

The Circuit Court decided that the tractor-trailer qualified as a motor vehicle for the purposes of Wis. Stat. § 893.54(2m), but agreed with the Plaintiffs that the accident did not involve a motor vehicle, concluding the statutory phrase was not broad enough to cover the alleged negligence because the allegations did not involve driving or the actual operation of the tractor-trailer. The Circuit Court further concluded that the statutory language was restricted to circumstances in which the motor vehicle was in motion, illegally parked, parked without lights, or a circumstance of a similar nature. As such, the Court denied the Defendants' motion for summary judgment. The Defendants appealed. On appeal the issues were (1) whether the tractor-trailer qualified as a "motor vehicle" for purposes of § 893.54(2m); (2) whether Wiemer's accident involved a motor vehicle; and (3) whether Wiemer's death arose from an accident.

The Court of Appeals first concluded that the tractor-trailer was a motor vehicle for the purposes of Wis. Stat. § 893.54(2m) under the plain statutory language. Although that specific statute does not define "motor vehicle," other Wisconsin statutes did define "motor vehicle" and the Court found that the tractor-trailer qualified as a motor vehicle under both alternative clauses above.

Second, the Court of Appeals was tasked with defining the term "involving," which was also not defined in the statutes. It ultimately concluded that the Circuit Court erred in concluding that the accident did not involve a motor vehicle. The Court of Appeals applied definitions found in Webster's and the Cambridge dictionaries to conclude that Wiemer's accident involved a motor vehicle. The accident undisputedly happened when Wiemer climbed on top of the trailer to try to break the bridge, fell into the trailer's body and was entrapped by the corn gluten, resulting in his death by smothering. The Court of Appeals bolstered its conclusion by explaining that, in the insurance coverage context, Wisconsin courts have long held that the use or operation of a vehicle includes loading and unloading its cargo. Accordingly, since Wiemer was actively engaged in unloading the cargo, that is the corn gluten, at the time of the accident the accident arose out of the use or operation of the vehicle.

Finally, the Court of Appeals concluded that Wiemer's death arose from an accident, as required by Wis. Stat. § 893.54(2m). The Wisconsin Supreme Court has held that, in the context of the Worker's Compensation Act, "arising out of" "refers to the causal origin of the injury."

*Goranson v. DILHR,* 94 Wis. 2d 537, 549, 289 N.W.2d 270 (1980). The Court of Appeals concluded that there was a causal relationship between an accident and Wiemer's death because the undisputed facts discussed above demonstrated as much.

For the foregoing reasons, the Court of Appeals concluded that the undisputed facts established that Wiemer's death arose from an accident involving a motor vehicle and, consequently, the wrongful death action was untimely under Wis. Stat. § 893.54(2m) because it was filed more than two years after the accident. Accordingly, the Court of Appeals reversed the Circuit Court's order and remanded for the court to grant the Defendant's Motion for Summary Judgment.

## *Tauscher v. Acuity*

2023 WI App 11, 406 Wis. 2d 245, 986 N.W.2d 576

*Unpublished opinion that may be cited as persuasive authority. Wis. Stat. § 809.23(3)(b).*

**The Circuit Court erred in concluding that the Plaintiff's negligence claim was time-barred under Wis. Stat. § 893.89(2).**

Around 7 pm on a December evening in 2020, Tauscher fell on the unlit exterior front step of a private residence as she was leaving the home. Tauscher had exited the front door, walked across the front porch and then encountered this single step separating the porch from a concrete walkway leading to the city sidewalk. The step was a six-inch step down from the porch. The porch, step and walkway had existed for decades and had been well maintained. In any event, as a result of the fall, Tauscher shattered her kneecap. The undisputed testimony showed that Tauscher fell because she did not see the step.

Tauscher filed a lawsuit against Acuity as the insurer of the home, but not against the homeowner. Tauscher alleged in her complaint that the homeowner was negligent for failing to install exterior lighting on the property which Tauscher alleged would have allowed her to see the step.

Acuity moved for summary judgment, arguing that Tauscher's claims were time barred under Wis. Stat. § 893.89, the builder's statute of repose. The Circuit Court agreed and granted Acuity's motion for summary judgment. Tauscher appealed.

As outlined by the Court of Appeals, section 893.89 is a statute of repose that requires a plaintiff to initiate an action for injury arising out of "deficiencies or defects" in the design or construction of "improvements to real property" within the seven-year "exposure period." An item qualifies as an improvement to real property if it is a "permanent addition to real property that enhances its capital value, involves the expenditure of labor and money, and was designed to make the property more useful or valuable." *See Kohn v. Darlington Cmty. Sch*., 2005 WI 99, ¶33, 283 Wis. 2d 1, 698 N.W.2d 794. "Exposure period means the 7 years immediately following the date of substantial completion of the improvement to real property." The Court of Appeals also explained that substantial completion includes the occupation of the improvement for its intended

purpose. Importantly, as outlined in 893.89, this statute of repose does not apply to claims related to negligent maintenance, operation or repair of an improvement.

Acuity's principal argument on appeal was that the absence of exterior lighting was part of the original design of the sidewalk and thus and claim for lack of a light should be included in the statute of repose bar.

However, the Court of Appeals disagreed. The Court began by pointing out that exterior light fixtures could be temporary or permanent. The Court analyzed Wisconsin case law and concluded that design of an improvement encompasses intrinsic features and components that cannot be readily altered after completion. The Court then found that as to the subject case, the absence of exterior lighting was an alterable condition to the front walk, not an intrinsic feature of the improvement's design. Accordingly, the Court of Appeals rejected Acuity's argument that lack of a light was an issue of design or construction subject to the statute of repose.

As such, the Court of Appeals determined Acuity was not entitled to summary judgment on Tauscher's negligence claim and reversed and remanded the case.

# Resetting the Anchor: Securing Reasonable Outcomes

Amy Wilkinson, Secura Insurance
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I. What is anchoring?
   A. Anchoring effect is a cognitive bias in which people simplify the decision-making process by relying too heavily on the first piece of information provided
   B. Once a numerical anchor is set, decisions are adjusted around the anchor, regardless of whether the anchor itself is reasonable
   C. Used in marketing and retail
      1. Ads show regular price (anchor) next to sale price
      2. Salesperson shows customer most expensive models before models in price range
      3. Prices end in $0.99 because brain uses first number as anchor
   D. Used heavily by Plaintiffs' attorneys at different stages of litigation
      1. Settlement negotiations-opening demand is several times higher than what Plaintiff is willing to accept
      2. Trial-suggest a huge number during *voir dire* and repeat it often so when Plaintiff's attorney asks jury for several million in closing, jurors are desensitized to it
   E. Not a new strategy, but looks different in today's legal climate
      1. Plaintiffs' attorneys are getting bolder
      2. Plaintiffs' anchors are getting higher
      3. Verdicts are getting higher
      4. Jurors are also influenced by nuclear verdicts publicized by media

II. Social inflation and nuclear verdicts - Where does anchoring fit in?
   A. Social inflation: The unjustifiable and unsustainable increase in the cost of litigation
   B. Drivers include intentional and unintentional behavior inside and outside the courtroom
   C. Anchoring fits into intentional behaviors inside and outside the courtroom

III. Due to the changing legal environment, counter-anchoring is more important than ever
   A. Common defense reservations about counter-anchoring

1. Jurors will be so offended by Plaintiff's astronomical anchor that counter-anchoring is unnecessary
2. Builds rapport with jury to tell jurors you trust them to award an amount that is "reasonable"
3. Jurors will pick a number between the anchor and counter-anchor so it is best to argue for $0 or provide no number at all
4. In cases with strong liability defenses, suggesting a number other than $0 could be perceived as a concession of liability

B. Despite common objections, counter-anchoring is effective and necessary

1. Jurors are not easily offended when Plaintiff's attorneys ask for high damages awards
2. Jurors appreciate guidance regarding what is reasonable
3. Suggesting a counter anchor generally does not reduce chance of a defense verdict
4. Wisconsin jurors must answer damages questions regardless of how they apportion liability so it's easy for defense counsel to explain why they are discussing specific damages despite strong liability defenses

IV. Argue pain and suffering damages with care

A. Pain and suffering damages are often the largest component of nuclear verdicts
B. Plaintiffs' attorneys devote significant time to telling the jury Plaintiff's story about how the accident changed Plaintiff's life
C. Tell Plaintiff's story from a different lens by focusing on strength, resilience and hope
D. Put as much effort, if not more, into developing noneconomic damages arguments as you do into developing economic damages arguments

V. How to determine the counter-anchor

A. Begin with the end in mind
B. Base it on evidence and common sense
C. Be reasonable: the counter-anchor should be low enough to not artificially inflate damages, but high enough to maintain credibility with jury
D. Use discovery to obtain information you need to determine and support a counter-anchor long before trial
E. Discuss an appropriate counter-anchor with insurer and client before trial

VI. Court guidance regarding damages arguments

A. Wisconsin Courts

1. Can suggest a lump sum dollar amount is closing if it is reasonably supported by the evidence. *Peot v. Ferraro*, 83 Wis. 2d 743, 266 N.W.2d 586 (1978)
2. Can't use *per diem* approach to pain and suffering in state court. *Affett v. Milwaukee & Suburban Transp. Corp.*, 11 Wis.2d 604, 609-10, 106 N.W.2d 274 (1960)
3. Can't ask jurors to put themselves in another's place (Golden Rule), *Rodriguez v. Slattery*, 54 Wis.2d 165, 170-71, 194 N.W.2d 817 (1972)

B. Other court decisions

1. Can generally use *per diem* approach to pain and suffering in federal court. *Waldron v. Hardwick*, 406 F.2d 86 (7th Cir. 1969)
2. Professional athlete's salaries are not a measure of non-economic damages because they are an unrelated circumstance. *See e.g.*, *Faught v. Washam*, 329 S.W.2d 588 (Sup. Ct. MO 1959)
3. Unsubstantiated anchors are not allowed; there must be evidence to justify the amount awarded. *Gregory v. Chohan*, 670 S.W.3d 546 (Tex. 2023)

IX. Trial strategies

A. Consider filing pre-trial motions
B. Expose Plaintiff's attorney's tactics
C. Explicitly reject Plaintiff's anchor
D. Provide counter-anchor
E. Repeat counter-anchor early and often
F. Tell a compelling story regarding Plaintiff's life by focusing on strength, resilience and hope
G. If Plaintiff does not offer a number in the first closing argument, Defendant may want to avoid offering a number, lest the Plaintiff is allowed to counter the number in rebuttal


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