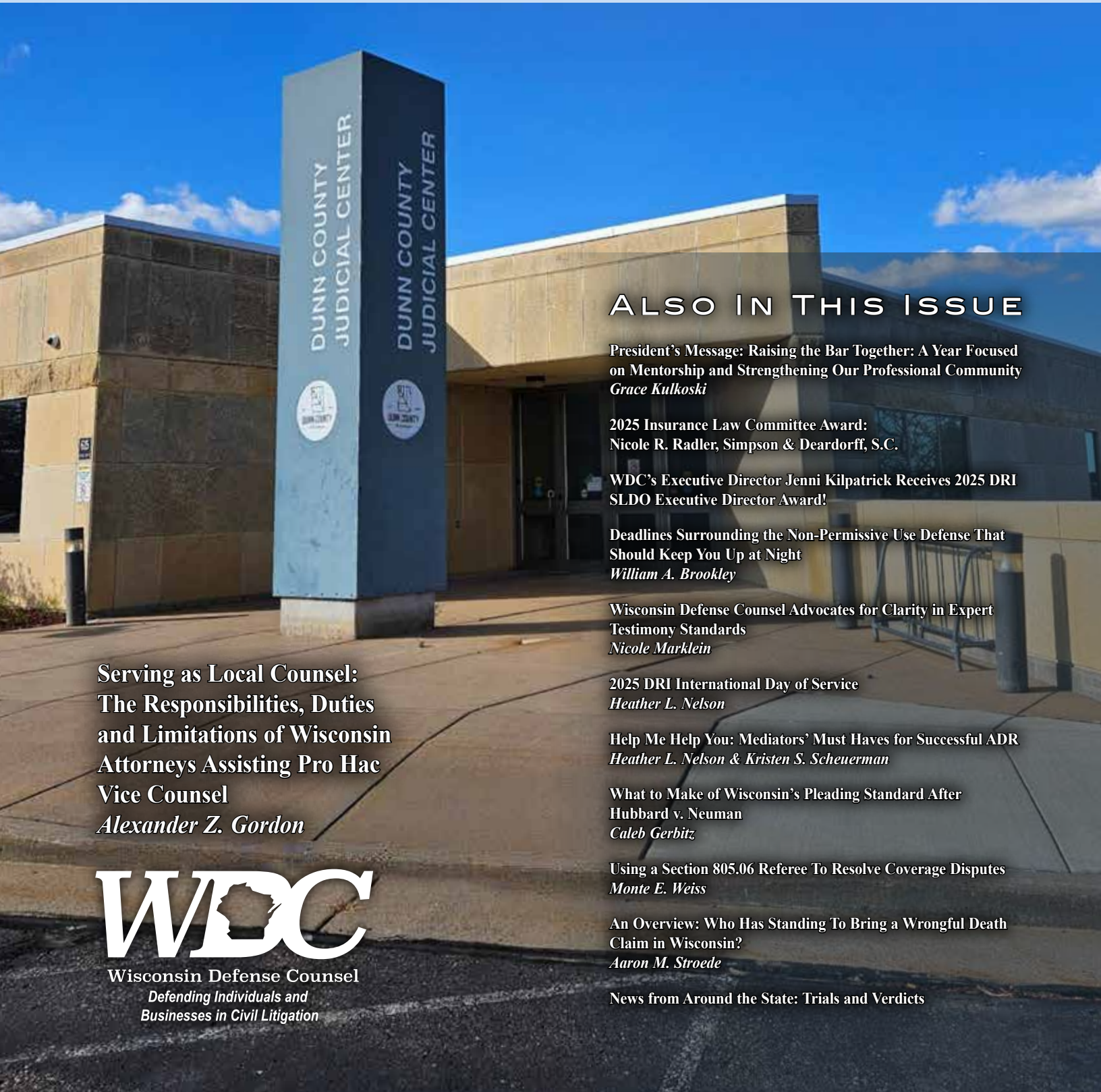
Wisconsin Civil Trial Journal

Winter 2025 • Volume 23 • Number 3



Serving as Local Counsel: The Responsibilities, Duties and Limitations of Wisconsin Attorneys Assisting Pro Hac Vice Counsel
Alexander Z. Gordon

Wisconsin Defense Counsel
Defending Individuals and Businesses in Civil Litigation

Also In This Issue

Columnists

William A. Brookley
Cross Jenks Mercer & Maffei LLP

Caleb Gerbitz
Meissner, Tierney, Fisher & Nichols, S.C.

Alexander Z. Gordon
Bell, Moore & Richter, S.C.

Grace Kulkoski
President, Wisconsin Defense Counsel

Nicole Marklein
Cross Jenks Mercer & Maffei LLP

Heather L. Nelson
Everson, Whitney, Everson & Brehm, S.C.

Kristen S. Scheuerman
Weiss Law Office, S.C.

Aaron M. Stroede
Bell, Moore & Richter, S.C.

Monte E. Weiss
Weiss Law Office, S.C.

Amicus Curiae Committee
Chair: Erik Gustafson
von Briesen & Roper, S.C.
erik.gustafson@vonbriesen.com

Vice Chair: Jim Biese
SECURA Insurance
JBiese@secura.net

Bylaws Committee
Chair: Megan McKenzie
American Family Insurance Co.
mmckenzi@amfam.com

Vice Chair: Caleb Gerbitz
Meissner, Tierney Fisher & Nichols, S.C.
crg@mtfn.com

Diversity, Equity & Inclusion Committee
Chair: Roger Flores
Crivello, Nichols & Hall, S.C.
RFlores@crivellolaw.com

Vice Chair: Alexander Gordon
Bell, Moore & Richter, S.C.
agordon@bmrlawyers.com

Employment Law Committee
Chair: Storm Larson
Boardman & Clark LLP
slarson@boardmanclark.com

Vice Chair: Nicole Marklein
Cross Jenks Mercer & Maffei, LLP
nmarklein@cjmmlaw.com

In House Counsel Committee
Chair: Ariella Schreiber
Rural Mutual Insurance Co.
aschreiber@ruralins.com

Co-Chair: Grace Kulkoski
Wisconsin Mutual Insurance Co.
gkulkoski@wiins.com

Insurance Law Committee
Co-Chair: Erik Gustafson
von Briesen & Roper, S.C.
erik.gustafson@vonbriesen.com

Co Chair: Mollie Kugler
von Briesen & Roper, S.C.
mkugler@vonbriesen.com

Law School Committee
Co-Chair: John Pinzl
von Briesen & Roper, S.C.
john.pinzl@vonbriesen.com

Co-Chair: Katherine Cortesy
Baker, Sterchi, Cowden & Rice, LLC
katherine.cortesy@bakersterchi.com

Litigation Skills Committee
Chair: Monte Weiss
Weiss Law Office, S.C.
monte@weissinjurylaw.com

Membership Committee
Chair: Amy Freiman
Hills Legal Group, Ltd.
afreiman@hillslegal.com

Website and Social Media Committee
Chair: Ashleigh Johnson
American Family Insurance Co.
Ashleigh.Johnson@amfam.com

Wellness Committee
Chair: Ryan M. Johnson
Everson, Whitney, Everson & Brehm, S.C.
rjohnson@eversonlaw.com

Vice Chair: Grace Kulkoski
Wisconsin Mutual Insurance Co.
gkulkoski@wiins.com

Wisconsin Civil Jury Instructions Committee
Representative: Amy Freiman
Hills Legal Group, Ltd.
freiman@hillslegal.com

Women in the Law Committee
Chair: Megan McKenzie
American Family Insurance Co.
mmckenzi@amfam.com

Vice Chair: Vanja Pemac
Gordon Rees Scully Mansukhani
vpemac@grsm.com

Young Lawyer Committee
Chair: Ryan Johnson
Everson, Whitney, Everson & Brehm, S.C.
rjohnson@eversonlaw.com

Vice Chair: Ashleigh Johnson
American Family Insurance Co.
Ashleigh.Johnson@amfam.com

DRI Representative
Nicole Marklein
Cross Jenks Mercer & Maffei, LLP
nmarklein@cjmmlaw.com

Executive Director
Jenni Kilpatrick, CAE
jenni@wdc-online.org

Legislative Advisor
Rebecca Hogan
Hamilton Consulting Group
hogan@hamilton-consulting.com

Wisconsin Defense Counsel

Defending Individuals and Businesses in Civil Litigation

In This Issue…

Journal Policy

WDC Members and other readers are encouraged to submit articles for possible publication in the *Wisconsin Civil Trial Journal*, particularly articles of use to defense trial attorneys. No compensation is made for articles published and all articles may be subjected to editing.

Statements and expression of opinions in this publication are those of the authors and not necessarily those of the WDC or Editor. Letters to the Editor are encouraged and should be sent to the WDC office at 6737 W. Washington St., Suite 4270, Milwaukee, WI 53214. The Editor reserves the right to publish and edit all such letters received and to reply to them.

Energized Defense. Exceptional Team.

Stephen Trigg, Isaiah Simons, Rachel Potter, Richard Orton, Daniel Manna, Tamar Kelber, John Franke, David Turek, Joshua Greenberg, Joshua Bernstein, Linda Meagher.

Strategic. Fearless. Unrivaled.

Our team of bold, experienced trial attorneys stand ready to defend your case. We focus on complex matters in a variety of industries and practice areas, including insurance disputes, personal injury, and product liability. Above all, we think unconventionally and tailor creative legal strategies that carry the day.

GASS TUREK LLC
TRIAL ATTORNEYS

241 N Broadway, Suite 300 | Milwaukee, WI 53202 | (414) 223-3300 | **www.gassturek.com**

Wisconsin Defense Counsel

Defending Individuals and Businesses in Civil Litigation

WDC: The Voice of the Wisconsin Defense Bar

Wisconsin Defense Counsel ("WDC") is a premier statewide organization consisting of more than 375 defense attorneys. Founded in 1962, WDC (formerly known as the Civil Trial Counsel of Wisconsin) is dedicated to defending Wisconsin citizens and businesses in a professional manner, maintaining an equitable civil justice system, educating its members, creating referral sources for its members, providing networking opportunities for its members, and influencing public policy. To be eligible for membership, WDC bylaws require that an individual be a member of the State Bar of Wisconsin and "devote a substantial portion of his or her professional time in the defense of civil litigation."

WDC Mission, Vision, and Values

Our Mission: Wisconsin Defense Counsel exists to promote and protect the interests of civil litigation defense attorneys and their clients by providing professional education and development, fostering collegiality, promoting principles of diversity and inclusion and striving to ensure equal access to justice for all defendants.

Our Vision: Delivering superior legal services with integrity and professionalism.

Our Values: Educate; Diversity & Inclusion; Collegiality; Integrity; Development; and Service.

WDC Benefits of Membership

Education: WDC holds three education programs during the year, all of which provide continuing legal education (CLE) credits.

Expert Witness & Deposition Requests: Members can find expert witnesses or copies of depositions in various subject fields by using the knowledge and experience of other members. Requests are sent by broadcast email to all WDC members.

Web Resources: Members are included in a searchable database on the WDC website. Members can also obtain all the seminar outlines that are presented at WDC educational events online. These outlines are a quick and easy way to get access to the latest information on various topics.

... and so much more!

ONE Law Group sc

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.

THE POWER OF ONE

Tim Hawley

Insurance Law
Mediation
Arbitration
Litigation & Trials

Erik J Pless

Insurance Defense

- Auto & Premises
- Legal Malpractice
- Bad Faith Defense
- Coverage Litigation

866.525.5200 www.onelawgroupsc.com 920.336.5766

President's Message: Raising the Bar Together: A Year Focused on Mentorship and Strengthening Our Professional Community

by: Grace Kulkoski, President, Wisconsin Defense Counsel

Ever since I was a little girl, I knew I wanted to be an insurance defense lawyer. I still remember sneaking the auto policy that came in the mail at renewal out of the mailbox and hiding it in my backpack so I could read it on the bus on the way to school. While other kids read through the latest issues of Seventeen Magazine and Sports Illustrated, I busied myself pondering the potential applications of the Drive Other Car exclusion, anxious to one day make this my career.

Ok, so maybe that's not entirely accurate. If I'm being honest, I stumbled into this field. I really wanted a job during my first year of law school, mostly because I was broke, so I took a peek at the law school job board. As it turned out, the only company that would even accept an application from a 1L student was an insurance company. I applied, got the job, and spent the next few months very confused as I started to hear words like "uninsured motorist coverage," "subrogation," and "indemnification."

Although it was mostly by happenstance, I'll be forever grateful that my path led me to insurance. I didn't know anything about insurance defense when I first took that job as a 1L, and I might have moved on to do something else if it weren't for the people I met as a law clerk and young associate. What drew me into this career, as it turns out, was not the Drive Other Car exclusion, but rather, the mentorship and guidance I received from other attorneys in the field. I was fortunate enough to be able to tag along to depositions, mediations, trials, and networking events. My supervising attorneys insisted that I join WDC (CTCW at that time) as a way to meet attorneys at defense firms and gain experience helping to author articles for the journal. The engagement and enthusiasm of the attorneys I met was contagious, and I couldn't wait to graduate and start practicing so I could be a part of this community. I suspect I am not alone in that experience, and I know that many of us have found WDC to be a space where we have met not only colleagues, but friends.

Having now spent many years with this organization, and being fortunate enough to lead it, I am excited to show the next generation of attorneys what a rewarding and fulfilling career this can be, and how WDC can help us all find connection and community within the practice. Additionally, I see WDC as a space where the leaders in the insurance defense industry can lean on one another to support and mentor the up-and-coming generation of defense attorneys.

Over the course of this coming year, I will be focusing my energy on making it easier for all of us to be a part of what makes WDC such a valuable organization to our industry - mentorship, education, and community. I am asking each of you to take a moment to think about how one of the following options would fit into your practice and life, and let's work on this together this year.

I. Mentorship Program

We are rolling out a new mentorship program this year. I expect that it will evolve over time as we learn what best serves our membership. For now, my plan is to pair up in-house attorneys with

WISCONSIN LAWYERS
WILMIC
MUTUAL INSURANCE COMPANY

REAL People Responding in REAL Time

Whether You're Requesting a Quote or Reporting a Claim

WE'RE ON IT!

WANT A QUOTE? GIVE SARAH A CALL!

Sarah McQuin
Account Executive
(608) 821-6966

HAVE A CLAIM? BETTER CALL BRIAN!

Brian Anderson
Director of Claims
(608) 821-6988

A Member Benefit of

STATE BAR OF WISCONSIN

younger attorneys. Why? There are a few reasons. First, as an employee of one of our insurance company members, I feel strongly that the carriers have a need and incentive to mentor and educate our industry's up-and-coming attorneys. Having a strong and capable field of trial lawyers is in the best interests of the carriers who rely on capable counsel to represent their interests. For our carrier members, I am asking you to pitch in and take on a younger WDC member to mentor, because it benefits us all. We can offer perspective on industry trends, handling work/life logistics, and navigating firm dynamics from an outside perspective. We can also offer experience and advice on practice issues, weighing in on how a coverage motion may transpire or thoughts on resolving a discovery dispute. Giving our younger members a resource like this outside of the firms will hopefully take some of the load off the managing partners at firms while also providing a fresh perspective from someone outside of their immediate work circle. As we work through this first year implementing this program, please reach out to me if you have thoughts or suggestions for improving on this initial idea.

II. Committee Work

Many of you are already actively involved in committees, and our committees do great work. I would ask committee leaders and members to think about how they can engage WDC's newer members in this work. Would a younger attorney be able to assist in an amicus brief? Could an associate at another firm co-present with you at a seminar on a committee-related topic, like employment law or insurance law? Can you bring an associate to an event sponsored by the wellness committee, like the hike in the summer, to meet other attorneys who enjoy being active? I have seen great community building take place within our committees, so let's capitalize on this momentum. I encourage all members to take a moment to think about how engaging or continuing to engage in a committee could help you build your own community and network within WDC.

III. Journal Articles

WDC is known for the caliber of the content of the journal thanks to the high-quality submissions of its members. As we head into another year, consider how you might be able to share your experience with a nuanced legal issue or your knowledge about a specific area of the law that could be beneficial to other members and our industry. Giving a younger attorney the opportunity to research a unique issue and assist in authoring an article is both great experience for that attorney and provides valuable educational content for our readers. Please think about whether you might have encountered an issue in your practice that would lend itself well to an article and consider if one of our younger members could assist you with the research and drafting of that article.

IV. Social Engagement

Our conferences are great because, well, we're a fun bunch! The education at the seminars is highly relevant and valuable, and it gives us all a great way to spend some time socializing with our peers while keeping on top of legal trends. Think about ways that you can provide that same social environment for our younger members. Even something as simple as introducing yourself to a younger member during a break or the reception or sitting by someone new at lunch is a great way to help build our larger community. Let's all make an effort to connect with our younger members when we're together at our seminars throughout the year. And for the younger WDC members, I would challenge you to embrace a bit of discomfort and start up a conversation, join a committee, and meet some new colleagues!

Finally, I would ask you all to hold me accountable this year. If you see a way that I can improve the accessibility of our organization for the next generation, I'd love to hear that feedback. I look forward to a rewarding year spending time learning and connecting with you all, and hopefully I can leave the organization every bit as welcoming and engaging to our younger members as I have found it to be for myself. Working alongside you all on this


AMERICAN FAMILY
INSURANCE
Insure carefully, dream fearlessly.

task gives me a lot of optimism. It's going to be a great year.

Author Biography:

Grace Kulkoski serves as in-house legal counsel to Wisconsin Mutual, where she oversees litigation, advises claims and performs other legal duties for the company. Before joining the Wisconsin Mutual team, Grace spent the first part of her career in private practice as a litigation attorney. Grace received her law degree from the University of Wisconsin, and her undergraduate degree from the University of Notre Dame.

Grace is an active member of various organizations supporting the insurance defense industry. She currently serves as the President of the Wisconsin Defense Counsel, and is also active in DRI, where she serves as a Vice-Chair of the Corporate Counsel Committee. She also serves on the litigation section of the Wisconsin State Bar. Outside of work, Grace enjoys running, spending time outside and providing taxi services for her family.

Cross Jenks Mercer & Maffei LLP

ATTORNEYS SINCE 1889

LET US SHOW YOU THE BENEFIT THAT A CENTURY OF INSURANCE DEFENSE EXPERIENCE AFFORDS.

For nearly a century, insurance defense has been the core of our business.

WAYNE MAFFEI	NICOLE MARKLEIN	WILLIAM BROOKLEY

221 3RD AVENUE, BARABOO, WISCONSIN
PHONE: 608-356-3981
VISIT OUR WEBSITE WWW.CJMMLAW.COM

2025 WDC Winter Committee Award

The WDC Winter Committee Awards recognize the talent, effort, and accomplishments of our incredible committee members and volunteer leaders. Congratulations to the following award recipient who will be recognized during the WDC 2025 Winter Conference on Friday, December 12, 2025.

2025 Insurance Law Committee Award: Nicole R. Radler, Simpson & Deardorff, S.C.

Congratulations to Nicole Radler for being selected by the Insurance Law Committee and the Awards Committee for the 2025 Insurance Law Committee Award! Nicole is a long-term member of the Insurance Law Committee. She is a regular attendee at committee meetings, encourages others from her firm and other firms to join and participate on the committee, and brings great ideas to the table. She has also presented on numerous occasions at the "We've Got You Covered" seminar, including a great presentation this year, with Maria Krause, on "Timely Payment of Claims and Section 628.46."

Nicole is a shareholder at Simpson & Deardorff in Milwaukee. She earned her bachelor's degree from the University of Wisconsin-Milwaukee in 2012, and her law degree from the Marquette University Law School in 2015. She has been recognized as a "Rising Star" by Wisconsin Super Lawyers since 2019. She is a member of the Wisconsin Defense Counsel and currently serves on the Executive Committee as Program Chair.

COYNE, SCHULTZ, BECKER & BAUER, S.C.

ATTORNEYS AT LAW | MADISON, WISCONSIN

Choosing an attorney to represent you is an important decision. Our attorneys deliver cost-effective, high quality litigation services while promoting personal working relationships and individual accountability.

150 E. Gilman St. #1000
Madison, WI 53703
Tel.: 608-255-1388
Fax: 608-255-8592

www.cnsbb.com

HIGHLY SKILLED AND EXPERIENCED CIVIL TRIAL ATTORNEYS

AMY F. SCHOLL | ERIK H. MONSON | VINCENT J. SCIPIOR | STEPHEN O. MURRAY | BRUCE A. SCHULTZ
KAREN M. GALLAGHER | MYRANDA STENCIL | ANDREW J. LAWTON | SRISHTI PONNALA

WDC's Executive Director Jenni Kilpatrick Receives 2025 DRI SLDO Executive Director Award!

Congratulations to our Executive Director, Jenni Kilpatrick, on winning the 2025 DRI SLDO[1] Executive Director Award! This award recognizes an individual who demonstrates exceptional service to the defense bar and to their SLDO and who effectively builds a strong relationship between their SLDO and DRI.

Jenni was nominated by WDC's Executive Board, which provided a detailed nomination providing numerous examples of Jenni's contributions to WDC. The nomination praised Jenni's fantastic, steady and level-headed performance of her duties in supporting, educating and guiding WDC and its officers. Jenni was also nominated by the president of Minnesota's defense bar who has seen Jenni in action and has also been duly impressed.

DRI is the largest international membership organization of attorneys defending the interests of business and individuals in civil litigation. The DRI Foundation's mission is to provide financial, educational, and volunteer aid to those in need.

DRI's Annual Professional Achievement and Service Awards celebrate and honor outstanding performance by state, local, and national defense organizations (SLDOs/NDOs), DRI law firms, and individual members. The awards identify peers who deserve recognition either for their professional contributions to and achievements on behalf of, the defense bar and the civil justice system or their involvement in community and public service activities that have a positive impact on society at large. Recognition enhances members' personal growth and accomplishments, provides us all with role models and strengthens members' images in the legal and business communities and with the general public.

Jenni was recognized for her accomplishments at the DRI 2025 Annual Meeting in Chicago, Illinois, on October 15–17.

WDC thanks Jenni for her exceptional work in supporting our organization, its members, and its officers and are grateful for her continued excellence. Congratulations Jenni!

References

1 State and Local Defense Organization

YOUR BUSINESS ADVANTAGE, IN AND OUT OF THE COURTROOM

With offices now in Green Bay and Madison, Baker Sterchi has nearly 100 trial attorneys across the Midwest and Pacific Northwest to deliver the results our clients deserve.

Green Bay
615 S. Monroe Avenue
Green Bay, WI 54301
920.884.2312

Madison
3113 W. Beltline Hwy
Suite 100
Madison, WI 53713
608.662.1180

- Health Care
- General Liability
- Insurance
- Long Term Care
- Professional Liability Defense
- Commercial/Business
- Employment
- Appellate
- Legal Malpractice

The choice of a lawyer is an important decision and should not be based solely on advertisements.

Baker Sterchi COWDEN & RICE

bakersterchi.com

Missouri | Illinois | Kansas | Oregon | Washington | Wisconsin

Deadlines Surrounding the Non-Permissive Use Defense That Should Keep You Up at Night

by: William A. Brookley, Cross Jenks Mercer & Maffei LLP

As you review a new claim file and begin your initial investigation into possible defenses, you learn the insured vehicle was operated by an individual without the owner's consent and/or permission. This article addresses the steps you must take to ensure you do not inadvertently waive the defense of non-permissive use. As set forth in Wisconsin Statute § 344.15(4)-(5):

> After receipt of the report of an accident of the type specified in s. 344.12, the secretary may forward to the insurer named therein, that portion of the report or other notice which pertains to an automobile liability policy or bond. The secretary shall assume that an automobile liability policy or bond as described in this section was in effect and applied to both the owner and operator with respect to the accident unless the insurer notifies the secretary otherwise ***within 30 days from the mailing to the insurer of that portion of the report or other notice pertaining to the automobile liability policy or bond***…
>
> Nothing in this chapter shall be construed to impose any obligation not otherwise assumed by the insurer in its automobile liability policy or bond except that if no correction is made in the report or other notice ***within 30 days after it is mailed to the insurer***, the insurer, except in case of fraud, whenever such fraud may occur, is estopped from using as a defense to its liability the insured's failure to give permission to the operator or a violation of the purposes of use specified in the automobile liability policy or bond or the use of the vehicle beyond agreed geographical limits.[1]

In other words, an insurer has only thirty days from the date it receives an accident report, or other notice from the Department of Transportation, to notify the department that the individual operating the vehicle did not have the owner's permission to do so at the time of the accident.[2]

Wisconsin Courts have narrowly construed this requirement, finding the 30-day notice requirement under the statute is mandatory. For example, in *Midwest Mutual Insurance Co. v. Nicolazzi*, the plaintiff was operating a motorcycle when he was involved in a collision with an automobile on April 28, 1984.[3] The automobile was owned by a different individual than the one operating it at the time of the collision.[4] After suit was filed, defendant's insurer admitted it issued a liability policy to the owner of the automobile but alleged it was being operated without the owner's consent and permission when the accident occurred.[5] Plaintiff later brought a motion to strike the defense on the grounds that defendant's insurer failed to comply with Wisconsin Statute § 344.15.[6]

Defendant's insurer first learned of the accident on May 8, 1984.[7] Upon investigation, the insurer

BORGELT POWELL
PETERSON & FRAUEN S.C.

ATTORNEYS & COUNSELORS
ESTABLISHED 1881

Our mission is to provide the very best legal services to insurance companies, businesses, and individuals by providing innovative, effective and efficient advice, consultation, and representation during the investigation, evaluation, and litigation of civil and administrative claims.

Our expertise has resulted in Borgelt Powell's selection as Panel Counsel by some of the largest companies and insurance companies in the country.

Licensed in Wisconsin and Illinois

1243 N. 10th Street, Milwaukee, WI 53205 **(414) 276-3600**

Virtual Offices, Madison, WI **(608) 258-1711**

dri™ The Voice of the Defense Bar

Martindale-Hubbell® AV PREEMINENT® Peer Rated for Highest Level of Professional Excellence 2021

Super Lawyers® 2023

CLM

sent the defendant-owner an affidavit to be signed before a notary public for purposes of complying with Wisconsin Statute § 344.15.[8] Formal notice of the accident was given to defendant's insurer by the Department of Transportation on July 13, 1984.[9] The insurer forwarded the defendant-owner's affidavit to the department on July 23, 1984, but the defendant-owner failed to get it properly notarized.[10]

The affidavit was rejected by the department and sent back to the insurer on July 30, 1984.[11] The insurer immediately sent a new copy of the affidavit to the defendant-owner and requested that she get it notarized immediately.[12] In the meantime, the 30-day deadline for the insurer expired on August 13, 1984.[13] The defendant-owner finally returned a notarized affidavit to its insurer on October 8, 1984, who then immediately forwarded it to the Department of Transportation.[14]

The circuit court granted plaintiff's motion to strike the defense of non-permissive use on the basis of it being untimely.[15] The court of appeals later affirmed, holding the statutory scheme set forth in Wisconsin Statute § 344.15 is mandatory in character, and therefore the doctrine of substantial compliance did not apply.[16] *Midwest Mutual* demonstrates the critical importance of fully complying with the 30-day notice requirement.

I. What Form of Notice Must the Insurer Provide Within 30 days?

As alluded to in *Midwest Mutual*, and as further set forth in Wisconsin Statute § 344.15(4), an insurer "may correct the report or other notice only if it files with the secretary…an affidavit signed by the owner stating that the operator did not have the owner's permission to operate the vehicle."[17] Notably, "owner" includes a lessee pursuant to Wisconsin Statute § 344.01(2)(cm).

Assuming an insurer is able to file a timely affidavit with the department, it should expect to receive a request that the owner or operator, or both, deposit security:

> Upon receipt of notice from the insurer that an automobile liability policy or bond was in effect as to the owner only, the operator only or was not in effect as to either of them, the secretary shall within the remainder of the 90-day period specified in s. 344.13 (3) require the owner or operator or both, whichever is applicable, to deposit security pursuant to this chapter.[18]

However, an exemption from depositing security may be available if the owner or insurer provides uncontroverted proof that the vehicle was operated without actual or implied permission at the time of the accident. Acceptable proof includes:

> (a) Written notice from the law enforcement agency where the offense occurred stating that the motor vehicle was reported stolen prior to the accident or that the law enforcement agency investigated the report and found it to be a stolen motor vehicle.
>
> (b) Written notice from a district attorney that the owner has filed a complaint against the operator and that the operator is being charged with operating without the owner's consent or another crime indicating the operator's involvement in the theft of the motor vehicle.
>
> (c) An affidavit signed by the operator stating that the motor vehicle was being operated without the owner's expressed or implied consent is filed with the department. This paragraph does not apply to an owner who is the sponsor of the operator, under s. 343.15, Stats.[19]

Notably, while failure to correct an accident report within the 30-day period estops an insurer from

asserting defenses relating to lack of permission, it does not estop an insurer from asserting other policy defenses.[20]

II. Conclusion

Within thirty days from the date of receiving notice from the Department of Transportation, an insurer must correct the accident report or other notice by filing with the secretary an affidavit signed by the owner of the vehicle. The affidavit itself must state that the individual operating the automobile at the time of the accident did not have the owner's permission to operate it. Failure to do so in a timely manner will bar the insurer's ability to rely on the non-permissive use defense.

Author Biography:

William A. Brookley is a partner with Cross Jenks Mercer & Maffei, LLP in Baraboo, Wisconsin. He concentrates his practice on civil defense litigation, both defending insureds on the merits of claims and representing insurers regarding coverage issues.

References

1 Wis. Stat. § 344.15(4)-(5) (emphasis added).
2 *See also* Wis. Admin. Code § Trans 100.09 ("Any affidavit, police report or statement of a person other than the owner contending the motor vehicle was parked or operated with the owner's permission shall result in an initial determination that the operator did have permission to operate the vehicle.")
3 *Midwest Mutual Insurance Co. v. Nicolazzi*, 138 Wis. 2d 192, 195, 405 N.W.2d 732 (Ct. App. 1987).
4 *Id.*
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.*
10 *Id.* at 196.
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.* at 193.
16 *Id.* at 202.
17 Wis. Stat. § 344.15(4).
18 *Id*.
19 Wis. Admin. Code § Trans 100.09; *see also* Wis. Stat. § 344.14.
20 *See, e.g.*, *Holmgren v. Strebig*, 54 Wis. 2d 590, 196 N.W.2d 655 (1972)

WOODLAKE
MEDICAL MANAGEMENT

TAKING THE STRESS OUT OF THE IME PROCESS SINCE 1994

- PERSONALIZED, EFFICIENT SERVICE
- HIGH QUALITY, OBJECTIVE REPORTS
- FRIENDLY STAFF AND HAPPY CLIENTS
- FAMILY OWNED AND OPERATED

LIST OF SERVICES:

INDEPENDENT MEDICAL EXAMINATIONS
INDEPENDENT MEDICAL RECORD REVIEWS
VIDEO/NON-VIDEO DEPOSITIONS
TELECONFERENCE WITH PHYSICIAN
IMPAIRMENT RATINGS

OPTIONAL SERVICES:

COMPLIMENTARY COVER LETTER WRITING
DIAGNOSTIC IMAGING RETRIEVAL
NOTIFICATIONS/REMINDERS
TRANSPORTATION/INTERPRETER

Contact your Account Manager
today to schedule a service:
Jennifer Imig
jen.imig@woodlakemedical.com
952-253-6605

Wisconsin Defense Counsel Advocates for Clarity in Expert Testimony Standards

by: Nicole Marklein, Cross Jenks Mercer & Maffei LLP

WDC has remained active in legislative efforts to promote a fair civil justice system. Most recently, WDC members testified before both houses of the Wisconsin State Legislature in support of legislation to update Wisconsin Statute § 907.02(1), Wisconsin's expert testimony statute, to bring it in line with federal law. The legislation, introduced as Senate Bill 459 (SB 459) and Assembly Bill 458 (AB 458), is aimed at bringing Wisconsin's rules governing expert testimony in line with the amendment to Federal Rule of Civil Procedure 702 (FRE 702) that went into effect on December 1, 2023.

On October 22, 2025, WDC members Caleb Gerbitz of Meissner Tierney Fisher & Nichols, S.C. and John Pinzl of von Briesen & Roper, S.C. testified before the Senate Committee on Judiciary and Public Safety in favor of Senate Bill 459. On November 5, 2025, the Assembly Committee on Judiciary heard testimony on the corollary Assembly Bill 458. Attorney Nicole Marklein of Cross Jenks Mercer & Maffei LLP testified on behalf of WDC in support of the measure. In their testimony, Attorneys Gerbitz, Pinzl and Marklein emphasized the legislation's role in promoting fairness and consistency in Wisconsin courts.

On November 18, 2025, the Wisconsin Senate unanimously approved Senate Bill 459 and immediately messaged it to the Wisconsin Assembly for action.

I. What SB 459/AB 458 Does

For more than fifteen years, Wisconsin Statute § 907.02(1) has required judges to act as gatekeepers, ensuring expert testimony admitted in court is reliable and grounded in sound methodology. In accordance with federal law, SB 459/AB 458 builds on that foundation by clarifying two key points:

1. **Burden of Proof –** The party seeking to admit expert testimony must demonstrate its reliability before it reaches a jury.

2. **Opinion-by-Opinion Review –** Each expert opinion must individually meet reliability standards, rather than relying on a blanket qualification.

These changes reflect current law in Wisconsin courts. By codifying them, SB 459/AB 458 aims to ensure consistent application, eliminate ambiguity and streamline judicial decision-making.

The proposed amendment reads as follows:

SECTION 1. 907.02 (1) of the statutes is amended to read:

Your Trusted Partner in Complex Dispute Resolution

- Data-Driven Engineering & Scientific Expert Opinions
- Defect & Damage Assessments: Root Cause & Reparability
- Expertise in Large-Scale Claims & Catastrophic Failures
- Precise forensic analysis to uncover causes of structural failures and vulnerabilities
- Immediate damage assessment and evidence preservation for objective investigation
- Expert insights for litigation, arbitration, and mediation

CONTACT
Tom Palansky, P.E.
tpalansky@ctlgroup.com

Scan here to explore CTLGroup's expertise

CTLGROUP

Engineers • Architects • Scientists

CTLGroup.com | 847-965-7500

907.02 (1) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if the proponent demonstrates to the court that it is more likely than not that the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the ~~witness has applied~~ witness's opinion reflects a reliable application of the principles and methods ~~reliably~~ to the facts of the case.

SECTION 2. Initial applicability.

(1) This act first applies to actions or special proceedings that are commenced on the effective date of this subsection.

II. Why It Matters

- **Alignment with Federal Law**: Wisconsin's current statute was modeled after Federal Rule of Evidence 702, which was amended in 2023 to include similar clarifications. SB 459/AB 458 ensures state and federal standards remain consistent.

- **Guidance for Judges and Litigants**: Clear rules reduce disputes over admissibility and help attorneys prepare cases with confidence.

- **Efficiency and Fairness**: When expectations are clear, litigation moves more smoothly, saving time and resources for courts and parties alike.

III. WDC's Role in Advancing the Bill

WDC has been proactive in monitoring and supporting legislation that impacts civil litigation in Wisconsin. Working closely with Hamilton Consulting Group, WDC identified the adoption of amended FRE 702 as a priority early in the legislative process. Hamilton provided strategic guidance and coordinated outreach to ensure lawmakers understood the practical benefits of the bill.

IV. Key Advocacy Actions by WDC

- **Early Engagement**: Flagged adoption of amended FRE 702 as a priority and worked with Hamilton Consulting to develop a legislative strategy.

- **Member Outreach**: Solicited feedback and examples from WDC members to illustrate the need for clarity in expert testimony standards.

- **Testimony Coordination**: Prepared and delivered testimony through experienced members.

- **Legislative Education**: Shared written materials and talking points with lawmakers to explain the bill's benefits for courts and litigants.

- **Ongoing Monitoring**: Continues to track the bill's progress and update members on developments.

V. Looking Ahead

To date, SB 459/AB 458 has enjoyed widespread bipartisan support. If adopted, this legislation will reinforce Wisconsin's commitment to reliable expert evidence and fair trials. The bill represents a modest but meaningful step toward greater clarity in civil litigation—a win for judges, attorneys, and the public.

Author Biography:

Nicole Marklein is an experienced trial attorney and employment law practitioner based out of Baraboo, Wisconsin. She is a longtime member of WDC, having served as its President and now serving as WDC representative to the Wisconsin Civil Justice Council (WCJC) and as the Wisconsin State Representative to DRI.

Celebrating 25 years

Digital Intelligence®

mastering the science of digital forensics

Digital Forensics & eDiscovery Services

Preservation
Hosted Review
Expert Testimony
Professional Training

Visit us:
1841 N Prospect Ave
Milwaukee, WI

Call us:
(414)404-8800

Write us:
info@di4n6.com

2025 DRI International Day of Service

by: Heather L. Nelson, Everson, Whitney, Everson & Brehm, S.C.

This year, the DRI Foundation held its fourth annual International Day of Service. DRI is the largest international membership organization of attorneys defending the interests of business and individuals in civil litigation. The DRI Foundation's mission is to provide financial, educational, and volunteer aid to those in need.

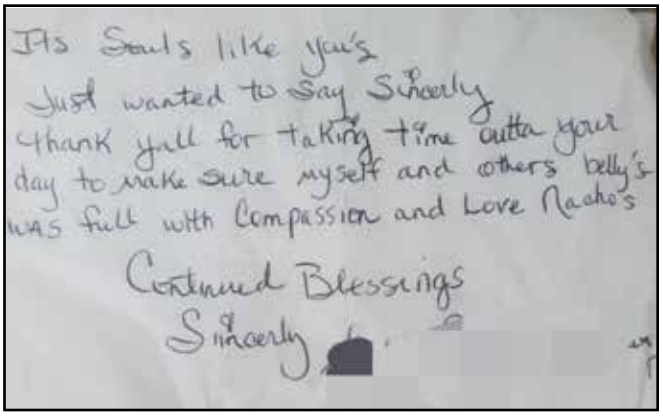
The DRI Foundation asked state and local defense organizations (SLDOs) to hold a service project of their choice anytime during the month of September. Participation in the DRI International Day of Service gives SLDOs an opportunity to give back to the community and strengthen relationships. The International Day of Service is one of the first steps the Foundation is taking to expand, better coordinate, and streamline the holistic betterment of the civil defense bar.

On September 17, 2025, WDC members Heather Nelson and Ryan Johnson of The Everson Law Firm, along with one of Everson's paralegals, Kelly, and her daughter, Ivy, served meals at the New Community Shelter in support of DRI's International Day of Service.

The New Community Shelter, Inc. is a non-profit organization which provides shelter and supportive services to people experiencing homelessness from Brown County. The New Community Meal Program is open to any child or adult in need of a meal, whether residents of the facility or not. Dinner is served 365 days a year.

To learn more about the New Community Shelter, visit https://newcommunityshelter.org/.

The adults and children at the New Community Shelter were very grateful for Heather, Ryan, Kelly, and Ivy's service. At the end of the meal, a woman who they served handed them the following note:



Thank you to The Everson Law Firm for representing WDC and the Women in the Law Committee in participation of DRI's fourth annual International Day of Service!

Stay tuned to hear about other volunteer events taking place throughout the state as part of this and other initiatives!


HILLS
LEGAL GROUP
Protecting you at every turn.
INDIVIDUALS ◆ BUSINESSES ◆ INSURANCE COMPANIES
(262) 347-0167
WWW.HILLSLEGAL.COM
SQUIRES III, SUITE 333, N19W24075 RIVERWOOD DRIVE, WAUKESHA, WI 53188

Serving as Local Counsel: The Responsibilities, Duties and Limitations of Wisconsin Attorneys Assisting *Pro Hac Vice* Counsel

by: Alexander Z. Gordon, Bell, Moore & Richter, S.C.

Wisconsin courts routinely permit out-of-state lawyers to participate in litigation through the process of *pro hac vice* admission. In almost every instance, the procedure is viewed as routine: a nonresident attorney submits the proper materials, pays the statutory fee, and continues under the sponsorship of Wisconsin-licensed counsel. However, the practice brings with it an important set of duties that some serving as local counsel do not fully understand or, on occasion, underestimate. Those obligations are mandatory, enforceable, and carry potential serious consequences if ignored.

This article describes the rules that create and define the role of local counsel in *pro hac vice* representation and explains the enforcement mechanisms used by Wisconsin courts, which include sanctions, revocation of *pro hac vice* status, and referral to the Office of Lawyer Regulation (OLR). While there is limited case law supporting local counsel being sanctioned for failure to fulfill their duties, the rules make clear that such consequences are both possible and enforceable. Understanding this authority is critical for practitioners who agree to serve as sponsoring counsel. It is far broader than just signing documents prepared by a non-resident lawyer.

I. The Admission Process of *Pro Hac Vice*

The Wisconsin Court System details the process surrounding *pro hac vice* admission and provides helpful questions and answers for practitioners.[1] The non-resident attorney must complete the application and pay the $250 fee to the State Bar of Wisconsin. This may be done online on the State Bar of Wisconsin's website.[2]

A non-resident lawyer seeking admission *pro hac vice* must follow the applicable procedure set forth in SCR 10.03(4).[3] After the attorney has applied online and paid the fee, the Wisconsin attorney sponsoring the admission must file a motion with the state court or tribunal before which *pro hac vice* admission is sought. The motion must be accompanied by the application, proof of payment, and any additional materials required by local rule. Proof of payment is provided from the State Bar of Wisconsin's application website processing.

Some Wisconsin circuit courts and administrative agencies have their own local rules, forms, and requirements regarding *pro hac vice* admission. If so, practitioners should follow these rules and/or use those forms.[4]

The amount of participation required of local counsel is decided by each court on a case-by-case basis. However, there are some exceptions to a required association with a Wisconsin attorney for nonresident military counsel, appearances in certain agency proceedings, and for nonresident counsel seeking to appear for the limited purpose of participating in a child custody proceeding pursuant to the Indian Child Welfare Act of 1978 while representing a tribe.[5]

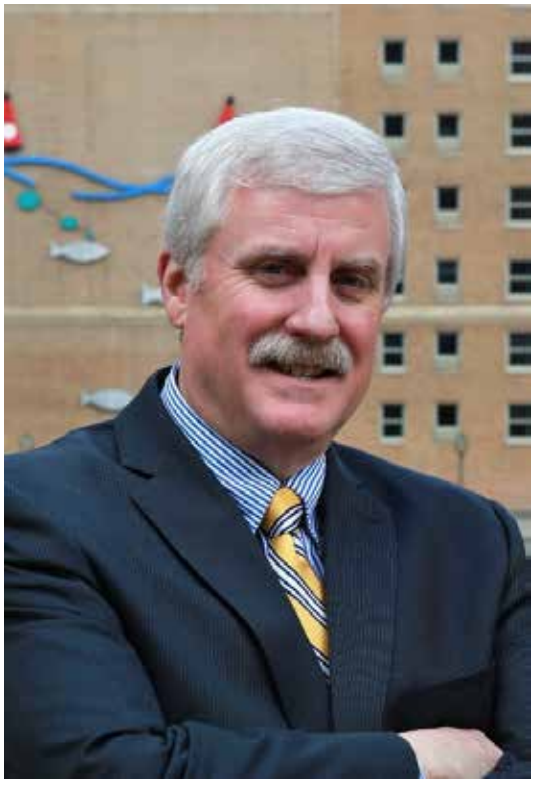
II. The Source of Local Counsel's Obligations: SCR 10.03(4)

The duties of Wisconsin local counsel derive directly from Wisconsin Supreme Court Rule 10.03(4),

Mathie Mediation Services LLC

Take Advantage of Everything that Mediation Has to Offer.

Call: (414) 429-2400
Email: jmathie@mathiemediation.com



Jim Mathie has been mediating full-time for almost 10 years. He has been retained by hundreds of attorneys to mediate their disputes. In addition to mediation via Zoom videoconference, Jim travels statewide – at no travel expense – to mediate in-person.

Before mediating full-time 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 in addition to nearly three decades in private practice. Jim is a past president of WDC.

Mathie Mediation Services LLC
242 North Hartwell Avenue
Waukesha, WI 53186

which governs the appearance of nonresident lawyers. The rule provides that a nonresident attorney "shall associate with" a Wisconsin-licensed attorney and that the Wisconsin attorney must actively participate in the matter. What does this mean?

Local counsel must:

- Sign all pleadings, motions, and other filed documents;
- Be responsible to the client, the court, and opposing counsel for the conduct of the nonresident attorney;
- Appear at hearings unless excused by the court; and
- Maintain the professional capacity to take over the representation if necessary.

These requirements are conditions of permitting an out-of-state lawyer to practice in Wisconsin and part of the Wisconsin Supreme Court's regulatory authority over state courts and the practice of law. It is arguable that Wisconsin's approach is stricter than other jurisdictions; local counsel may not operate as a mere "mailbox" or "signature only" attorney. By signing pleadings, local counsel accepts responsibility for their contents under Wisconsin's equivalent of FRCP Rule 11, Wis. Stat. §802.05, and the relevant local court rules.

The supreme court's commentary and rulemaking materials make clear that active participation is expected and enforceable.

III. Enforcement Tools Available to Wisconsin Courts

Even though there is limited caselaw holding local counsel in contempt, three enforcement mechanisms exist and are well-supported by Wisconsin law: (1) contempt under Wis. Stat. ch. 785; (2) sanctions under Wisconsin's pleading rules and local rules; and (3) referral to the Office of Lawyer Regulation.

a. Contempt Under Wis. Stat. Ch. 785

Wisconsin's contempt statutes authorize courts to address intentional disobedience of court orders or rules by parties or counsel. Under Wis. Stat. § 785.01, contempt may be remedial (designed to force compliance) or punitive (punishing past misconduct). Local counsel who fails to attend a hearing, ignores an order requiring their participation, or permits an out-of-state attorney to appear without authorization could fall within the scope of contempt.

The leading cases governing contempt procedure are *State v. Levin*,[6] *State v. Simmons*,[7] and *Gower v. Marinette County Circuit Court*.[8] These cases establish several principles highly relevant to local counsel disputes, including:

- Summary contempt is limited to acts observed directly by the judge;
- Most attorney-conduct issues require non-summary contempt proceedings, including notice and a hearing; and
- Contempt cannot be imposed for mere negligence; it requires intentional or knowing disobedience.

If a Wisconsin judge has ordered local counsel to personally appear, to sign filings, or to be available to assume primary responsibility, and the lawyer willfully fails to do so, the contempt statutes are a viable enforcement tool at the court's disposal.

b. Sanctions Under Wis. Stat. § 802.05 and Local Rules

Far more common, and arguably more effective, are sanctions imposed under Wisconsin's FRCP Rule 11 analog, Wis. Stat. § 802.05. Due to local counsel's requirement to sign any filing by the nonresident attorney, a filing that is frivolous, improper, or violates a court order exposes local counsel to sanctions. Unlike contempt, sanctions under § 802.05 do not require proof of willful disobedience. Rather, they require objective reasonableness.

MSI

MEDICAL SYSTEMS, INC.

At MSI, we pride ourselves on being one of the few locally owned and operated regional vendors in the Midwest, serving clients for their IME and Record Review needs.

Contact us today to experience the exceptional service that sets us apart!

MedicalSystemsUSA.com
Scheduler@MedicalSystemsUSA.com
(800)261-3278

Rapid solutions - Proactive Communication - Industry Expertise

Likewise, many circuit courts (notably Milwaukee County under its First Judicial District Rule 1.18(C)) explicitly authorize judges to require personal appearances of local counsel and to impose sanctions if the Wisconsin attorney attempts to abdicate that responsibility.

In *Glaeske v. Shaw* (an unpublished case),[9] a litigation surrounding a trust, the Wisconsin Court of Appeals upheld sanctions against local counsel (along with lead out-of-state counsel) because the undue influence claim that their client pursued was ultimately found to be frivolous. The court found there was no longer a reasonable factual basis to support a claim of undue influence after the deposition of a key witness.[10]

Importantly, the court noted that under Wisconsin statutes (Wis. Stat. §§ 802.05 and 814.025), a signatory of pleadings warrants that, after reasonable inquiry, their claim is well grounded and supported by law or a good faith argument for change. Since Shaw's counsel, both local and *pro hac vice*, continued to press the undue influence theory even after the factual basis collapsed, the court imposed $25,880 in attorneys' fees as a sanction.[11] The court apportioned those fees among Shaw, his Florida-based lead counsel, and his local counsel, recognizing that, while local counsel had "less direct control" over the litigation, they still bore some responsibility.[12]

In short, the local counsel was sanctioned not because the claim, while not frivolous from the start became frivolous after discovery, and violated the professional-certification obligations under Wisconsin law.

Glaeske demonstrates that courts view local counsel obligations as enforceable and failure to comply as sanctionable. The case demonstrates that lack of oversight from local counsel on the actions of *pro hac vice* counsel can have dire consequences for all counsel.

c. Revocation of *Pro Hac Vice* Status

Although not a sanction directed at local counsel personally (but perhaps reputationally), revoking *pro hac vice* status is one of the most frequent enforcement tools available when the non-resident attorney fails in his/her duties to the court. Wisconsin courts hold that *pro hac vice* admission is a privilege, not a right. If local counsel is not actively supervising, or if the out-of-state lawyer is violating Wisconsin rules, a judge may revoke the nonresident attorney's permission and require Wisconsin counsel to proceed alone. Local counsel should remain mindful of that possibility. Per Wis. Stat. § 809.85(2)(c), for good cause, the court may revoke the privilege granted herein of any counsel admitted *pro hac vice* to appear in any proceeding.

d. Referral to the Office of Lawyer Regulation

When an issue involves ethics and case management, courts may refer local counsel to the OLR and have done so. Potential violations include:

- Permitting unauthorized practice of law (SCR 20:5.5);
- Failing to supervise a subordinate or associated lawyer (SCR 20:5.1); and
- Signing filings without appropriate review (SCR 20:3.3, 20:3.1, and Wis. Stat. § 802.05).

In *Disciplinary Proceedings Against Joan M. Boyd*,[13] the Wisconsin Supreme Court found local counsel in violation of the Rules of Professional Conduct. A criminal case, Attorney Boyd represented J.R. in post-conviction proceedings arising from his 2002 felony conviction in Brown County circuit court. Among other misdeeds, Attorney Boyd asserted judicial bias, which was unsupportable by any facts or existing law. Attorney Boyd failed to investigate whether any bias or judicial misconduct actually supported the allegation. The judge reacted in a strongly negative manner, observing that had Attorney Boyd done her homework, she would not have made these allegations.[14] Attorney Boyd's acts

YOUR LAWYERS ON THE LAKESHORE

SPECIALIZING IN: TRIAL • CIVIL LITIGATION • INSURANCE DEFENSE & COVERAGE • LIABILITY

William R. Wick
PARTNER

Christopher R. Bandt
PARTNER

Jeremy T. Gill
PARTNER

Christopher L. Lambrecht
SR. ASSOCIATE

Arthur J. Krafft
ASSOCIATE

NASH NASHLAW.COM

Super Lawyers

AV PREEMINENT™

LexisNexis Martindale-Hubbell PeerReview Rated
FOR ETHICAL STANDARDS AND LEGAL ABILITY™

CONTACT US TODAY!

With our main office in Manitowoc, WI and satellite offices throughout, our coverage area can assist clients in all legal matters.

also led to a time bar for an appeal of the underlying criminal conviction.

The referee concluded Attorney Boyd's handling of J.R.'s post-conviction matter gave rise to five counts of misconduct:

> Count 1: By filing a post-conviction motion alleging a presumed acquaintance between her client's former wife and the trial judge, without investigating whether such a relationship existed or there was a basis for any bias, and by filing a motion for an extension of time to take a post-conviction relief appeal that was not allowed under existing Wisconsin law, Attorney Boyd violated SCR 20:1.1.2;
>
> Count 2: By failing to proceed with an appeal on J.R.'s behalf, when her fee agreement stated she would represent J.R. in his post-conviction motion and appeal, and by failing to properly terminate her representation and protect J.R.'s interests while the matter was pending, Attorney Boyd violated SCR 20:1.3.3;
>
> Count 3: By failing to inform J.R. that Attorney Boyd's motion to extend the time to appeal was denied until after the time for filing an appeal had expired, and by failing to explain to J.R. the significance of the dismissal of the motion or that J.R. still had the option of filing an appeal at the time the motion to extend was denied, Attorney Boyd violated former SCR 20:1.4(a)4 and SCR 20:1.4(b)5;
>
> Count 4: By failing to refund to J.R. a minimum of $1,000, which Attorney Boyd acknowledges she did not earn, Attorney Boyd violated former SCR 20:1.16(d).6; and
>
> Count 5: By asserting as a part of the post-conviction motion unsupportable allegations challenging the integrity of a judge without properly investigating the truth or falsity of such allegations, including asserting a presumed acquaintance between the trial judge and the defendant's former wife as cause for bias, without investigating whether such a relationship existed, Attorney Boyd violated SCR 20:8.2(a)7.

The Court revoked Boyd's license for pervasive misconduct. This decision makes clear that serving as local counsel does not excuse failures such as neglect, fee improprieties, or lack of communication, all of which are bases for OLR discipline.

IV. Contempt Relating to Local Counsel

If the rules are clear and the authority to hold local counsel in contempt exists, why have Wisconsin courts not discussed a contempt finding in a published opinion?

First, most disputes are resolved informally. Judges typically issue a warning or require immediate compliance. Local counsel, motivated by reputational and ethical concerns, often corrects the issue without further litigation.

Second, appellate opinions arise only when a contempt sanction is appealed. Because many local counsel issues involve revocation of *pro hac vice* status or lesser sanctions than contempt, there is little opportunity for appellate review.

Third, local counsel may avoid contempt by withdrawing from the case. Wisconsin judges generally allow withdrawal if local counsel refuses to accept continued responsibility, preventing the issue from reaching the contempt stage.

PHOTOFAX™

Expert Investigations, ***Built on Results***

Privately Owned

WBE Certified

35+ Years Experience

Unmanned Surveillance

Desktop Investigations

W-2 Investigators

Custom Surveillance Vehicles

National Coverage

Why PhotoFax? **Integrity. Experience. Results.**

With over 35 years of experience, our team delivers tailored solutions with a focus on results. We uphold the highest standards for investigative work, using custom surveillance vehicles, W-2 investigators, and the latest technology to ensure every investigation is thorough and professional. Count on PhotoFax for a quality investigation from start to finish.

Services:

*Manned Surveillance *Unmanned Surveillance *Medical Canvassing

*Social Media Investigations *SIU *Other Desktop Investigations

Assign with us today!

Julie Elkins
Account Coordinator
800.659.9351
jjelkins@photofax.com

As out-of-state firms increasingly engage in Wisconsin litigation, the likelihood of local counsel being "local in name only" may increase. As this trend grows, so does the probability that Wisconsin circuit courts, and eventually appellate courts, will confront cases where contempt or disciplinary sanctions are appropriate.

V. Practical Considerations for Wisconsin Local Counsel

Local counsel most commonly faces exposure in the following scenarios:

- Failure to appear when required;
- If the court orders Wisconsin counsel to attend a hearing and the attorney fails to appear without leave, contempt becomes a realistic remedy; and
- Improper delegation of filings.

All filings must be signed by local counsel. If an out-of-state attorney files a document without Wisconsin counsel's signature, the court may treat it as unauthorized practice and hold local counsel responsible. Moreover, local counsel must do more than just sign the pleadings. They are responsible for ensuring that the matters contained therein comply with the law.

VI. Conclusion: Local Counsel Is Not a Formality

Wisconsin's *pro hac vice* system works because the courts rely on Wisconsin counsel to ensure compliance with local rules, ethical norms, and litigation standards. This job should be taken seriously, since the legal framework clearly supports contempt, sanctions, revocation, and disciplinary referral when local counsel abdicates their responsibility. In other words, agreeing to serve as local counsel is not a ministerial act; it is an active and serious professional undertaking. Wisconsin lawyers who accept this role must monitor filings, appear in court, supervise out-of-state attorneys, respond to court orders, and be ready to step in at any stage.

With increased interstate litigation, courts may soon confront situations where a Wisconsin attorney's nonperformance requires the imposition of formal contempt. For Wisconsin practitioners, the message is simple: If you serve as local counsel, take the role seriously. Wisconsin law certainly does.

Author Biography:

Alexander (Alex) Gordon joined Bell, Moore & Richter, S.C. as an associate in 2024. Alex's practice focuses on civil defense litigation, working primarily on general liability, insurance defense, and medical malpractice. He is licensed to practice law in the State of Wisconsin. Alex grew up in Detroit, MI and earned his Bachelor of Arts degree from the University of Michigan in 2017 with a double major in Political Science and Spanish. Before moving to Madison for law school in 2021, Alex taught middle school Language Arts for 4 years. His time as a teacher provides him with a unique approach to understanding clients of a variety of backgrounds. While at the University of Wisconsin Law School, Alex worked as a teaching assistant for the undergraduate legal studies program. Alex was the Vice President of Outreach for the Mock Trial team and the Executive Director of the Black Law Students Association. Alex is currently co-chair of the DEI Committee for Wisconsin Defense Counsel. Outside of work, Alex enjoys playing soccer, basketball, and spending time outdoors.

References

1 https://www.wicourts.gov/services/attorney/prohacvice.htm.

2 http://www.wisbar.org/prohacvice.

3 In relevant part, SCR 10.03(4) states:

> (4) (a) No individual other than an enrolled active member of the state bar may practice law in this state or in any manner purported to be authorized or qualified to practice law.
>
> (b) A court or judge in this state may allow a nonresident counsel to appear and participate in a particular action or proceeding in association with an active member of the state bar of Wisconsin who appears and participates in the action or proceeding. An order granting nonresident counsel permission to appear and participate in an action

MDD
A Davies Company

Litigation Support

We are a global forensic accounting firm that regularly provides litigation support services and expert witness testimony in courts and arbitrations. We also frequently provide assistance during the discovery process, mediations and during settlement discussions.

Time and again, our assessments have stood up to the scrutiny of cross-examination, making us the choice of both plaintiff and defense counsel around the world.

Our professionals' expertise spans 500 industries and the below practice areas:

Damages Quantification

- Anti-trust
- Business & Shareholder Disputes
- Class Action – both Certification & Defense
- Construction Defect/Delay
- Environmental Damages/ Toxic Tort
- Intellectual Property/Patent Infringement
- 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
- Fidelity & Embezzlements

Corruption

- Regulatory Investigations including Foreign Corrupt Practices and UK Bribery Acts
- Anti-Corruption Program Review
- Internal Investigations/Risk Assessment

We have a global workforce of accountants ready to assist, many of whom are Certified Public Accountants (US), Chartered Professional Accountants (Canada), Chartered Business Valuators and Certified Fraud Examiners.

With more than 40 offices on 5 continents, and extensive language capabilities, our exceptional dedication and uniquely qualified professionals are the hallmarks of our firm. For litigation support or expert witness testimony, hire MDD.

or proceeding shall continue through subsequent appellate or circuit court actions or proceedings in the same matter, provided that nonresident counsel files a notice of the order granting permission with the court handling the subsequent appellate or circuit court action or proceeding.

[. . .]

(f) Counsel not admitted to the practice of law in this jurisdiction but admitted in any other U.S. jurisdiction or foreign jurisdiction, who is employed as a lawyer in Wisconsin on a continuing basis and employed exclusively by a corporation, association, or other nongovernmental entity, the business of which is lawful and consists of activities other than the practice of law or the provision of legal services, shall register as in-house counsel within 60 days after the commencement of employment as a lawyer or if currently so employed then within 90 days of the effective date of this rule, by submitting to the Board of Bar Examiners the following:

1. A completed application in the form set forth in Appendix B to this rule;

2. A nonrefundable fee of two hundred and fifty dollars ($250) to the Board of Bar Examiners;

3. Documents proving admission to practice law in the primary jurisdiction in which counsel is admitted to practice law; and

4. An affidavit from an officer, director, or general counsel of the employing entity attesting to the lawyer's employment by the entity and the capacity in which the lawyer is so employed.

A lawyer registered under this subsection may provide pro bono legal services without fee or expectation of fee as provided in SCR 20:6.1

4 http://www.wisbar.org/Directories/CourtRules/Pages/Circuit-Court-Rules.aspx.
5 https://www.wicourts.gov/services/attorney/prohacvice.htm.
6 146 Wis. 2d 166, 430 N.W.2d 718 (Ct. App. 1988).
7 150 Wis. 2d 178, 441 N.W.2d 308 (Ct. App. 1989).
8 154 Wis. 2d 1, 452 N.W.2d 354 (1990).
9 2005 WI App. LEXIS 4, 2005 WI App 38, 279 Wis. 2d 516, 279 Wis. 2d 516 (unpublished).
10 *Id*. at ¶ 15.
11 *Id*. at ¶ 6.
12 *Id*. at ¶ 36.
13 2009 WI 59, 318 Wis. 2d 281, 767 N.W.2d 226.
14 *Id*. at ¶ 7.

Statewide Legal Representation For Business & Insurance

320 East Buffalo Street, Suite 300
Milwaukee, WI 53202
414-273-8550
www.simpsondeardorff.com

PROUD SPONSOR OF WISCONSIN DEFENSE COUNSEL

Help Me Help You: Mediators' Must Haves for Successful ADR

by: Heather L. Nelson, Everson, Whitney, Everson & Brehm, S.C. and Kristen S. Scheuerman, Weiss Law Office, S.C.

We have all been to conferences where we are told how to prepare for a successful mediation: work up your case ahead of time, be prepared, and submit your materials in a timely fashion. We do not disagree with any of that advice but shouldn't we all know that by now? Having mediated several hundred cases collectively, both while representing litigants and acting as mediators, we think the most important secrets to successful mediations are in the fine details.

I. Create a Mediation Submission Template

This might sound simple, but creating an organized template that covers all the relevant topics and issues will not only force you to really think about the aspects of your case, but it will help your mediator get much better acclimated with the case too.

Example: A. CASE INFO AND PARTIES
B. QUICK SUMMARY
C. ACCIDENT AND LIABILITY
D. SPECIAL DAMAGES
E. CLAIMED INJURIES AND MEDICAL TREATMENT
F. PERMANENCY AND IMPACTS ON PLAINTIFF
G. EXPERT REPORTS
H. DEPOSITIONS

Appellate judges often remind us that although we may live and breathe our case and know it inside and out, when they first see a brief, they have absolutely no idea who any of the parties are, what the issues are, or what the important facts are, and why those facts matter to the case at hand. Do not assume that a mediator has any clue what your case is about. At the same time, get to the point and share just the necessary facts and details. Unless the time of an accident is of critical import, you do not need to go into the weeds describing the day of the week or the hour and minute of the impact.

This is a general outline that gets to the relevant information in an easy-to-consume manner for a mediator.

MEDIATOR'S PREFERENCE POINT: If you are savvy enough to include hyperlinks to additional information, please do so. It is much more efficient to review one single document than to have to read a submission and click and open twelve different attachments. To that end, also think about what a mediator *really* needs to review. Does the mediator actually need the crash report, or can you succinctly summarize the nature of the accident within your submission? (Hint: most often it is the latter.)

II. Just the Facts, Ma'am

We might be stealing Joe Friday's thunder on this one, but often, less really is more. No mediator wants to review thousands of pages of medical records to try and figure out what are the plaintiff's claimed injuries. Similarly, billing records are honestly useless unless you provide a summary;

Otjen Law Firm, S.C.

Attorneys at Law • Founded 1881

20935 Swenson Drive, Suite 310
Waukesha, WI 53186

Contact
Phone: (262) 777-2200
https://otjen.com/

and if you provide the summary, the billing records are just not necessary. Parties often provide much more than they need to, but we also find that parties neglect to include the stuff we really need most to be as effective in the other room when talking to the plaintiff and their counsel.

To highlight what we think is the most impactful information to include in your mediation submission, we will work off the template outline provided with some suggestions on what to highlight within each section to help your mediator be as prepared as she or he can be for your mediation session.

CASE INFO AND PARTIES: This should be a high level, down and dirty summary of the case and players; where is the case venued, what are the names of the parties and who represents each party. It is (as odd as this sounds) also helpful to include the date and time of the scheduled mediation to make sure everyone is planning to be at the same place on the same date and time.

Please do not forget about subros! If there are subrogated parties, although plaintiff's counsel should be identifying those folks, it is not going to hurt to hear about them from defense counsel too so the mediator can be prepared at mediation to include all the relevant players.

QUICK SUMMARY: Keeping in mind that the mediator knows nothing about your case, this is an excellent opportunity to provide a nutshell style summary for the mediator. This should include what the case is about, what's at issue, what's contested, and the procedural posture of the case.

Example: This is a low speed, minor damage chain-reaction rear-end case. Although we will likely stipulate to liability, plaintiff's claimed injuries are being contested, both in light of the nominal amount of property damage and due to a significant prior history of similar complaints.

At this time, both plaintiff and defendant have been deposed. Both parties have named experts; please note that on behalf of my client, we have named a biomechanical expert who will testify about the forces of this impact and the lack of velocity present in this accident to produce the injuries claimed. Plaintiff has no similar expert. Plaintiff claims permanent injury and a lifetime of chiropractic care, despite being 55 years old with a 40+ year history of chiropractic care for neck pain.

If we are unsuccessful at mediation, this case is set for trial in front of Judge Johnson in Dane County from June 1-5, with a pretrial set for April 20.

ACCIDENT AND LIABILITY: If liability is contested, it is helpful to know what specific facts are the basis for your defense. It is also helpful to include jury instructions that support your position or defense; not all plaintiffs are represented by counsel who really prepare them for the reality that just because bad things happen does not necessarily mean someone is legally liable for the same. When you include specific jury instructions (preferably cut and pasted right into your submission) it allows us as mediators to educate the plaintiff on what a jury will be told and how that legal instruction may then cause a jury to apportion fault (and of course what impact that has on damages).

SPECIAL DAMAGES: If possible, just include dollar amounts by category of damages.

Example: *Past specials $50,000*
Mileage: $1,000
Wage loss: $5,000
Future specials: $250,000

It is incredibly helpful to also know within this section what is being claimed in terms of any amount plaintiff may pursue for future damages (injections? chiropractic care? medication?). When it comes to futures, we also know that more often than we would like to see, defense counsel is first learning about claims for large amounts of future medical care at the time of mediation. Although this might require an extra email, we would *strongly* encourage you to reach out to your mediator early on, long before submissions are due, if you have any suspicion that a plaintiff is going to include last-minute big-

Engineering and Technical Consulting Services

Rimkus is a leading firm providing engineering and technical consulting services from more than 110 offices worldwide. For more than 40 years, our professional engineers, architects, scientists, and technical specialists have offered an array of significant knowledge and experience to support clients spanning a broad range of industries.

We provide comprehensive investigations related to property losses, product liability, building sciences, premises liability, biomechanics, human factors, and construction claims and disputes, among other matters. Utilizing proven, scientific methods and cutting-edge technology for digital intelligence, materials testing, computer animation, trial graphics, and video, our experts help clients and juries understand complex matters.

Rimkus consultants also provide architecture, engineering, and construction services for the built environment, including restoration design, facilities risk assessments, and due diligence property condition assessments. We also specialize in human factors and product safety analysis for consumer, industrial, and healthcare-related products.

FORENSIC ENGINEERING, TECHNICAL CONSULTING, AND SOLUTIONS FOR THE BUILT ENVIRONMENT

- Agricultural Property and Equipment
- Biomechanical
- Building Consulting
- Construction
- Digital Intelligence
- Environmental
- Fire and Explosion Science
- Human Factors
- Industrial and Renewable Energy
- Legal Nurse Consulting
- Marine
- Materials Science and Engineering
- Mechanical, Electrical, and Plumbing
- Meteorology
- Premises Liability and Security
- Property Loss
- Quantum Surveying and Scheduling Delay Analysis Services
- Toxicology and Food Safety
- Transportation
- Visual Media and Technology
- Life Sciences
  - Biomedical Engineering
  - Human Factors
  - Medical Devices
  - Sports Science
- Laboratory Services
  - Human Performance
  - Failure Analysis
  - Materials Testing
  - Product Testing
  - Quality Assurance/Quality Control

dollar futures at the time of the mediation. Why? A good mediator can solicit this information from plaintiff's counsel and pass the same along to you well in advance of actual mediation so that at least you can educate your claims professional or client as to what plaintiff's position is going to be.

Having a straightforward section in your mediation submission dedicated to just the "blackboarded specials" is incredibly helpful in allowing a mediator to start to put pen-to-paper and understand the scope of the claims made.

One of *the most* helpful things you can include in your submission if you are contesting some of the claimed injuries, and to that end, some of the claimed specials, is to break that down for the mediator in terms of dollars and cents. If your IME cuts off treatment after twelve weeks, what does that mean you will tell a jury in terms of the reasonable specials? You may be in a position where you have little defense to one injury claimed (for sake of example, let's say a broken leg) but you contest the majority of treatment related to a whiplash injury: provide the mediator your position by the numbers.

Example: The bills related to the broken leg are $35,000 but our IME will support just $2,500 of the bills related to chiropractic care claimed for treatment of the whiplash injury.

Providing concrete numbers related to your position gives a good mediator a much more tangible set of talking points to use when helping a plaintiff understand why the defense is negotiating from a certain point; if the plaintiff is claiming $50,000 in specials, but you have an IME that says just $10,000 of those bills are reasonably related to injuries sustained in the accident, when you make an opening offer of $15,000, the mediator will be able to diffuse some of the anger we would expect to hear from a plaintiff who believes that all of the bills should be paid and the opening offer should be something more than $50,000.

CLAIMED INJURIES AND MEDICAL TREATMENT: It is also helpful to have a high-level summary of the claimed injuries and a clear delineation of the injuries you contest.

Example: Plaintiff claims the following injuries: broken left leg, bruised sternum, 3 broken ribs on the left, sprain/strain injury to her neck and upper back, and multiple abrasions to her left leg and face.

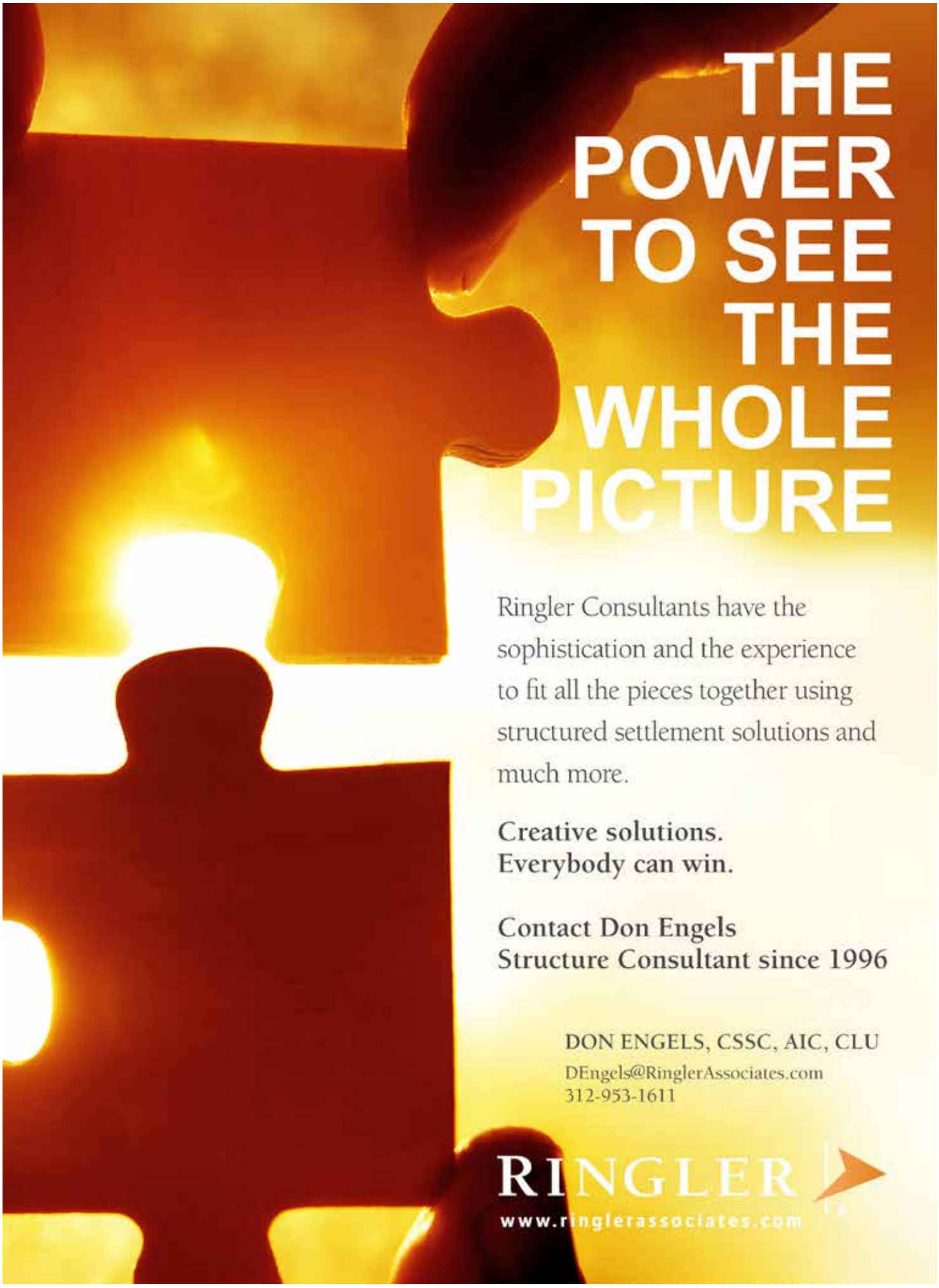
For the purpose of mediation, we are not contesting the injuries to Plaintiff's leg, sternum, or ribs; however, our IME does not believe the injuries claimed to the Plaintiff's back or upper back are as significant as what Plaintiff claims.

From there, it is very helpful to have a summary by the numbers of the nature of Plaintiff's treatment. In other words, how many office visits did Plaintiff attend? How many injections? How many surgeries? How many chiropractic adjustments? How many PT sessions? We have all done this for long enough to know that sometimes, just the nature of and frequency of treatment matters. Understanding the type of treatment the plaintiff had and the amount of treatment plaintiff had is often more helpful than reading fifty pages describing every appointment the plaintiff attended.

If there were significant gaps in care, it is also helpful to clearly identify those gaps.

Finally, if you have a case where plaintiff had significant priors, please help your mediator understand that history. Ideally, this is not done by providing a medical summary and asking the mediator to review the entire thing (medical summaries do serve a purpose, but they also have a lot of unnecessary information to sift through). If the plaintiff is claiming a back injury, and the plaintiff has treated for this in the past, here is what is most helpful:

Example: This accident occurred on May 1, 2020. In the five years before the accident, Plaintiff had at least 75 appointments with various doctors to specifically address complaints with her back. Most notably is the following:


THE POWER TO SEE THE WHOLE PICTURE
Ringler Consultants have the sophistication and the experience to fit all the pieces together using structured settlement solutions and much more.
Creative solutions.
Everybody can win.
Contact Don Engels
Structure Consultant since 1996
DON ENGELS, CSSC, AIC, CLU
DEngels@RinglerAssociates.com
312-953-1611
RINGLER
www.ringlerassociates.com

4/30/2020 (day before accident): Treated with Dr. Feelgood and reported "10/10 back pain that has been debilitating for at least 6 months."

April 2020 (month before the accident): 2 injections to her back, 12 chiropractor adjustments to her back, filled a prescription for Oxycodone prescribed by PCP specifically for back pain

Jan-March 2020: 10 PT sessions specific to back pain, 1 ER visit related to "excruciating back pain," and 30 chiropractic adjustments specific to plaintiff's back.

Having a chronological summary with quotes or excerpts from records is an incredibly helpful tool for a mediator who has to help a plaintiff understand what his or her injuries look like on paper *prior* to an accident and why that may cause a jury some consternation. A word of caution: do not set your mediator up to fail. If the plaintiff is claiming an injury to her upper back, and you lead a mediator to believe there are a bunch of priors when in fact the prior records specify an SI joint or the lumbar spine, avoid the temptation to blur these lines. A mediator will lose credibility with a plaintiff and his or her counsel if the mediator is given bad information. You may also lose credibility with your mediator. It's a long game and career and your credibility is gold.

PERMANENCY AND IMPACTS ON PLAINTIFF: Summarize the injuries the plaintiff claims are permanent, and in what way they are permanent. If there is treatment the plaintiff claims is necessary because of these allegedly permanent injuries, it is okay to repeat that for the mediator in this section.

If you do not agree the plaintiff suffered a permanent injury, this is a great place to tell the mediator why that is and share any evidence you plan to use to support your position. Sometimes your permanency-attacking evidence is just the plaintiff's prior records; sometimes that is an IME report; and sometimes that may include confidential surveillance footage. Make it **abundantly clear** if you share with a mediator that you have surveillance video (or any other evidence of which you believe plaintiff's counsel may not be aware) that you do not want that fact shared with the plaintiff. It may be helpful to have the video available at mediation to share with the mediator so that he or she can understand how plaintiff's credibility may be impacted at trial. Set very clear and explicit boundaries for your mediator as to what you would like the mediator to do with this information, if anything. There can be a fine line of laying your cards on the table to effectuate a settlement or deciding to hold cards for trial, this strategy should be discussed with your client prior to and during mediation.

It is also helpful to have a bullet point list, from the defense perspective, of how Plaintiff claims any permanent injuries continue to impact his or her life. If there were significant impacts on plaintiff's life in the past as a result of the injuries claimed, it is also helpful to have a succinct summary of those allegations.

EXPERT REPORTS: It is helpful to know *if* reports exist and if so, who wrote them, and who is that person. For example, Plaintiff's treating chiropractor is Dr. Crunch and Dr. Crunch has written a report supporting Plaintiff's claim that she needs chiropractic care every week for the rest of her life. You can find that report **here** (ideally link to the report).

If an IME report is fifty pages long, consider including just the conclusions that support your position. Again, it is tempting to just ask a mediator to read an entire report, and not summarize any prior treatment yourself, but the reports provided by experts usually dive much deeper into the weeds than what a mediator needs to really do his or her job most effectively.

DEPOSITIONS: Summarize who has been deposed and cut-and-paste the most critical portions of those deponents' testimony. Ideally, do not send full transcripts of everyone who has been deposed and just ask the mediator to read every transcript. While we do not always read every page of every

Protect what you value most

For over 90 years, Rural Mutual Insurance has been protecting Wisconsin families, farms, and businesses. As the state's #1 farm insurer and a leading commercial insurance provider, we understand local needs because we live and work here too. Backed by an A+ rating from A.M. Best and named a Top 50 U.S. insurance company for 17 years, we're proud to earn your trust—year after year.

See why more Wisconsinites are choosing local protection—get your quote today.

Rural Mutual Insurance Company

Learn more

Home | Auto | Farm | Business | Life

RuralMutual.com

deposition presented—in the interest of time efficiency and cost-effectiveness—other mediators may settle in and read it all. Even for those of us who will word-search or flip and skim for relevant and helpful information, providing just transcripts with no overview or highlights of that deponent's relevant testimony is sigh-inducing.

III. Send Important Documents Ahead of Time

If your client requires a particular Release and/or Medicare documentation or Addendum, consider sending that plaintiff's counsel and the mediator ahead of time. A good mediator can address concerns about any required release language while all the parties are captive to ensure that if a deal is struck, there are no waves to navigate after the mediation session has concluded.

If the plaintiff is a Medicare recipient, communicate with plaintiff's counsel at least sixty days in advance of mediation to ensure that plaintiff's counsel is prepared to have his or her ducks in a row (including a current Conditional Payment Letter from both Medicare and Part C plans, if unrepresented by counsel) that anything your client requires to issue a settlement check is addressed before and during mediation. Any terms or requirements specific to Medicare should be incorporated into the mediation agreement as well.

IV. Show Me The Money

Rod Tidwell said it best. Make sure you have access at the time of mediation to whomever has the authority to actually make decisions about settlement authority. It is also helpful to understand what your client's internal process is for securing additional authority if that becomes critical during mediation.

V. Conclusion

Whether a case settles or not is usually not in our control. However, what we can control can make a difference, both to the mediator and to our client. Presenting the mediator with clear understandable information and documentation can help them do their thing in the other room. If the case doesn't settle, your preparation will have instilled confidence in your client that you have a firm grasp of the case and are ready to defend it at trial if settlement isn't in the cards. Solid, thoughtful mediation preparation is a win-win regardless of the outcome.

Author Biographies:

Heather Nelson is current Past President and Shareholder of Everson, Whitney, Everson & Brehm, S.C., in Green Bay. She currently serves as WDC President, having served on the Board of Directors and Executive Committee as well. Heather is an experienced trial attorney, having successfully tried cases before juries in state and federal courts throughout Wisconsin and Illinois. She obtained her J.D. from DePaul University College of Law in Chicago and launched her legal career in the Chicago area. Heather became licensed to practice law in Wisconsin in 2000, defending cases in both Illinois and Wisconsin. Joining The Everson Law Firm in 2016 brought Heather back home to her Green Bay roots. Her practice areas include motor vehicle accident, premises liability, wrongful death, and insurance coverage. Heather has been active in presenting CLE topics at WDC conferences, for the State Bar of Wisconsin, and at the North Central Region Trial Academy.

Kristen S. Scheuerman joined Weiss Law Office, S.C., in October 2022 after spending more than a decade at a large Fox Valley law firm, where she practiced as a Shareholder. Kristen's practice has always been focused on personal injury and civil litigation, and before joining Weiss Law Office, she also served as a municipal prosecutor. Throughout her career, Kristen's practice has also included appellate work in a variety of practice areas. Kristen earned her bachelor's degree from Lawrence University and her law degree from Marquette University Law School. She is admitted to practice in all Wisconsin state courts and both district courts.

2025 Members

THE NATIONAL ACADEMY OF DISTINGUISHED NEUTRALS

WISCONSIN CHAPTER

www.WisconsinMediators.org

The following attorneys are recognized for

Excellence in the field of Alternative Dispute Resolution

Emile Banks
Milwaukee

Danielle Carne
Madison

John Claypool
Appleton

Hon. Jeffrey Conen
Milwaukee

Michael Crooks
Madison

Hon. Mark Frankel
Madison

Timothy Hawley
Green Bay

Michael Jassak
Oak Creek

Hon. David Jones
Milwaukee

Hon. James Kieffer
Brookfield

Terry Lyons
Janesville

Robert McCracken
Manitowoc

Hon. Richard Sankovitz
Milwaukee

Jim Smith
Brookfield

Jill Sopha
Pewaukee

Check preferred available dates or schedule your appointments online directly with Academy Members!

WisconsinMediators.org is free, funded by our members

Visit our national roster of 1000+ top neutrals at www.NADN.org

NADN is administrator for the DRI Neutrals Database

www.DRI.org/neutrals

dri Lawyers Representing Business.™

* The National Academy of Distinguished Neutrals is an invitation-only professional association of over 1000 litigator-rated mediators & arbitrators throughout the US and a proud partner to both the DRI and AAJ. For more info, please visit www.NADN.org/about

What to Make of Wisconsin's Pleading Standard After *Hubbard v. Neuman*

by: Caleb Gerbitz, Meissner, Tierney, Fisher & Nichols, S.C.

The word "plausibility" is conspicuously absent from SCOW's recent ruling that patient's complaint stated a viable informed-consent claim against physician.

Crack open any civil procedure textbook, and odds are you won't get too far before seeing references to the U.S. Supreme Court's *Twombly* (2007) and *Iqbal* (2009) decisions. In those two cases, the Court held that, to survive a motion to dismiss, a complaint must allege facts which would "plausibly" entitle the plaintiff to relief—jettisoning *Conley v. Gibson*'s (1957) more liberal "no set of facts" standard.

Though lesser known, Wisconsin has its own "*Twiqbal*" decision. In *Data Key Partners v. Permira Advisers LLC*,[1] the Wisconsin Supreme Court declared that "a party challenging the decision of a director must plead facts sufficient to plausibly show that he or she is entitled to relief." In reaching this conclusion, the court remarked, "The Supreme Court's decision in *Twombly* is consistent with our precedent." Since *Data Key*, the standard governing motions to dismiss in Wisconsin has generally mirrored the federal courts' plausibility standard.

Enter the Wisconsin Supreme Court's 2025 decision in *Hubbard v. Neuman*,[2] which *might* be read to cast some doubt on the continued viability of the plausibility standard in Wisconsin. Not only does the court's five-justice majority opinion not utter the word "plausibility," it cites pre-*Data Key* case law for the proposition that courts "are required to liberally construe the complaint and dismiss only if it is clear that under no circumstances can the claimant recover." That articulation of the motion-to-dismiss standard sounds a lot more like *Conley v. Gibson*'s "no set of facts" standard than *Twiqbal/ Data Key*'s plausibility standard.

Hubbard involved an alleged violation of Wisconsin's informed consent statute, Wis. Stat. § 448.30. That statute provides, "Any physician who treats a patient shall inform the patient about the availability of reasonable alternate medical modes of treatment and about the benefits and risks of these treatments." The fight in this case was about who qualifies as a "physician who treats a patient."

The patient's complaint alleged that her OB/GYN diagnosed her with endometriosis and advised her to consider removal of her ovaries—though the patient did not consent to that procedure. The OB/GYN then referred the patient to a surgeon and recommended that the surgeon remove the patient's ovaries, which the surgeon did. The patient then sued the OB/GYN who made the referral, alleging that the OB/GYN violated Wisconsin's informed consent statute by failing to obtain the patient's consent for the removal of her ovaries.

The OB/GYN filed a motion to dismiss the complaint, arguing that because she did not actually perform the surgery and remove the patient's ovaries, she was not a "physician who treats a patient" under the informed consent statute. In the OB/GYN's view, the informed consent statute only reached the physician who actually performed the surgery.

In a 5-2 decision authored by Chief Justice Ann Walsh Bradley, the Wisconsin Supreme Court

A Step Above.

We take pride in being a Wisconsin-based law firm. With more than 200 professionals, von Briesen provides unparalleled service and recognized expertise with practical legal advice at a competitive value. Our lawyers are recognized by Best Lawyers® and Super Lawyers® and our firm is recognized as a Top Workplace and a Best Place to Work – making us a law firm that is A Step Above℠.

To learn more about us, please visit vonbriesen.com or contact Susan E. Lovern, President & CEO, at susan.lovern@vonbriesen.com.

von Briesen

vonbriesen.com

Milwaukee • Madison • Neenah • Waukesha
Green Bay • Chicago • Eau Claire • Naples

disagreed. The court held that the complaint included sufficient allegations that the OB/GYN's referral to the surgeon and involvement with the planning of the surgery sufficed to allege that the OB/GYN was a "physician who treats a patient" in this context. The court explained:

> Taking Hubbard's allegations as true and drawing all reasonable inferences from a required liberal construction of those allegations leads us to conclude that Dr. Neuman could be a 'physician who treated' Hubbard, even though she did not actually remove Hubbard's ovaries herself.
>
> . . .
>
> We need not determine whether any of Hubbard's allegations standing alone would be sufficient to state an informed consent claim. Instead, we conclude only that the sum of Hubbard's allegations is sufficient to survive Dr. Neuman's motion to dismiss. Therefore, we conclude that Hubbard could be entitled to relief under § 448.30.[3]

Justice Ziegler dissented in an opinion joined by Justice Rebecca Grassl Bradley. The dissent offered an interpretation of the informed consent statute that would have warranted a dismissal of the complaint. It explained:

> To be a treating physician under § 448.30, the physician needs to either provide the treatment at issue himself or formally order the treatment at issue. This follows from the text of the statute, its history, and the decisions of courts across the country that have addressed who qualifies as a treating physician. Hubbard does not make such allegations, so her complaint fails to state a claim upon which relief may be granted.[4]

No doubt this decision has significant implications for medical malpractice law in Wisconsin. As the dissent points out, it leaves unresolved questions about how much involvement a physician must have in a patient's care before triggering the informed consent statute. For example, if a physician consults with a colleague before recommending a particular treatment, is there a degree of involvement after which the colleague could face liability under the informed consent statute?

However, setting those questions to the side, it is the handling of the motion-to-dismiss standard that intrigues the author most about this case. The majority did not overrule *Data Key*, suggesting that *Data Key*'s articulation of the plausibility standard remains in effect. However, the language it employed—"dismiss only if it is clear that under no circumstances can the claimant recover"—sounds a lot more like *Conley v. Gibson*'s pre-*Twiqbal* (and pre-*Data Key*) "no set of facts" standard.

Still, it seems unlikely the court intended to silently overrule *Data Key*. When *Data Key* was decided in 2014, Justice Ann Walsh Bradley joined then-Chief Justice Abrahamson's dissent, which argued, "No Wisconsin case has adopted the rule as stated in *Twombly* and *Iqbal*." Perhaps as the majority author in this case, Chief Justice Ann Walsh Bradley simply did not want *Hubbard* to be read as reaffirming *Data Key*'s embrace of *Twiqbal* and therefore declined to repeat the plausibility standard.

Author Biography:

Caleb Gerbitz is an attorney in Meissner, Tierney, Fisher & Nichols, S.C.'s litigation practice group. He focuses on assisting clients in complex commercial, insurance, employment, and appellate matters. Caleb brings to his work a dedication to client service and a focus on providing skillful representation throughout a dispute—from pre-litigation, to trial, and through appeal if necessary.

We erase the speculation.

We analyze the could've beens.

We investigate the maybes.

We explain away the what-ifs.

To take note of the facts.

S-E-A™

Know.

Precisely revealing the cause of accidents and thoroughly testing to mitigate risk. Doing both at the highest level is what sets us apart. From our superior forensics talent, technology, and experience to the visualization expertise of our Imaging Sciences team, we dig past the speculation to find and convey the truth about what happened like no one else.

Forensic Engineering, Investigation and Analysis

(847) 354-4720 | SEAlimited.com | Since 1970

SUBMIT AN ASSIGNMENT

In addition to his legal practice, Caleb makes a point of closely monitoring Wisconsin's appellate courts. He authors a Substack column, Appellate Approach, which features regular updates on civil cases before the Wisconsin Supreme Court and Court of Appeals. Caleb also co-hosts a monthly "Up for Review" segment on the MTFN Podcast in which he and a colleague discuss the latest developments in Wisconsin's appellate system. In practice, Caleb leverages his expertise in Wisconsin's appellate system to secure successful outcomes for his clients, both at the trial court level and on appeal.

Before joining Meissner Tierney, Caleb clerked for Justice Brian Hagedorn of the Wisconsin Supreme Court from 2020 to 2022. He graduated summa cum laude from Mitchell Hamline School of Law, where he also earned a certificate in conflict resolution and served as head managing editor of the Mitchell Hamline Law Review. Caleb previously served as a policy advisor in the Wisconsin State Senate and as a master-at-arms in the United States Navy Reserve.

References

1 *Data Key Partners v. Permira Advisers, LLC*, 2014 WI 86, 356 Wis. 2d 665, 849 N.W.2d 693.

2 *Hubbard v. Neuman*, 2025 WI 15, 416 Wis. 2d 170, 20 N.W.3d 720.

3 *Id*. ¶¶ 19, 23.

4 *Id*. ¶ 29.

EXPERT WITNESSES

SKOGEN
ENGINEERING GROUP, INC.

5972 Executive Drive, Suite 200
Madison, WI 53719

Areas of Expertise

- **Motor Vehicle Accident Reconstruction**
- **Truck Accidents Reconstruction**
- **Heavy Truck ECM Imaging**
- **Vehicle Airbag Sensing Systems**
- **CDR - Crash Data Retrieval**
- **Vehicle Defect Analysis**
- **Mechanical Defect Analysis**
- **Low Speed Impact Analysis**
- **Seat Belt Restraint Analysis**
- **Product Liability**
- **Slip/Trip and Fall Analysis**
- **Farm and Industry Accidents**
- **Computer Simulations**
- **Environmental Analysis**
- **Electrical Systems**
- **Structural Failure Analysis**
- **Construction Analysis**
- **Highway/Street Design Analysis**
- **Drone Mapping**
- **FARO 3D Scanning**

608-442-7321 – Telephone
office@skogenengineering.com

Over 100 Years of Combined Experience
Dennis D. Skogen, MSME, PE
Jeffery J. Peterson, MSME, PE
Robert J. Wozniak, MSME, PE
Paul T. Erdtmann, MSME, BSEE, PE
Zachary R. Bingen, MSME, PE
Stephen L. Hanko, BSME, EIT
Andrew C. Knutson, PE, SE, MS
Mary E. Stoflet, AS - James W. Torpy, BS

Using a Section 805.06 Referee To Resolve Coverage Disputes

by: Monte E. Weiss, Weiss Law Office, S.C.

The existence and extent of insurance coverage can be the single most determinative factor of whether a case can be resolved. When coverage is contested, the plaintiff, the insured and all others who have an interest in the existence or non-existence of coverage allocate significant resources to resolve the question of coverage.[1] Insurance coverage disputes can be complex, fact intensive, and difficult to resolve. These disputes occupy a fair amount of the court's time and effort.

An option available to the court and litigants is the use of a referee. A circuit court has the authority under Wis. Stat. § 805.06 to issue an Order of Reference to appoint a qualified individual to serve as a referee (often referred to as a special master in the federal court system)[2] to assist, but not decide, the insurance coverage dispute.

This article explores the benefits and drawbacks of using a referee to help the circuit court to resolve insurance coverage disputes. First, however, an introduction to what a referee is, and the scope of the referee's power is necessary to understand how a referee can assist in a coverage dispute.[3]

I. What Is a Referee?

Under Wis. Stat. § 805.06, a referee is an individual who has "such qualifications as the court deems appropriate" for the task at hand.[4] The use of referees is not an unusual occurrence in Wisconsin, but according to the statute, it is to be "the exception and not the rule."[5]

Referees can provide a significant benefit to the court and the litigants. "Used properly, a circuit court's power to appoint and assign functions to a referee is not unconstitutional and allows circuit courts to provide more efficient dispute resolution to litigants."[6]

Referees are used in the attorney disciplinary process. According to the Wisconsin Court System website: "A court-appointed attorney or reserve judge hears the discipline cases and makes disciplinary recommendations to the Supreme Court, approves the issuance of certain private and public reprimands, and conducts hearings on petitions for reinstatement of a license to practice law."[7] In a disciplinary proceeding, "the function of the referee is that of a special master appointed to conduct a hearing under the jurisdiction of this court."[8]

Referees have been used to value a corporation's assets and liabilities[9] as well as the amounts due to partners of a law firm that left the partnership.[10] Referees have been used in a dispute between a successor corporation and the former corporation's salesman regarding commissions due.[11] Referees have been used in divorce matters regarding the issue of property division[12] and placement.[13] In cases where the Wisconsin Supreme Court has taken original jurisdiction, the court "may refer issues of fact or damages to a circuit court or referee for determination."[14]

Perhaps the most prevalent use of a referee, however, is the resolution of discovery disputes in complicated matters. The use of referees in discovery-related

ESi

Engineering Consulting and Forensic Investigation

ESi's expertise spans dozens of industries and specializations organized across several practice groups, each staffed by in-house experts with the technical knowledge, hands-on expertise, and courtroom experience required to execute projects for and with our clients from start to finish.

- **Multidisciplinary Approach**
- **Industry Expertise**
- **Powerful Insights**

www.engsys.com

matters can be helpful: "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" is beneficial.[15] The use of a referee to resolve discovery[16] and other disputes "allows circuit courts to provide more efficient dispute resolution to litigants."[17]

II. Legal Authority for the Use of a Referee

The use of a referee is governed by Wis. Stat. § 805.06. The statute sets forth how and when a referee can be used.

a. The Appointment of the Referee

The court can choose to appoint a referee. The referee must have the qualifications as is appropriate for the subject matter of the task that the referee is to handle. The circuit court makes the decision as to whether the individual has the requisite qualifications. The decision to grant or refuse to grant an order of reference is committed to the sound discretion of the circuit court.[18]

In general, the referral to a referee should be done sparingly.[19]An order of reference can only be issued where issues are complicated (for jury actions)[20] and excluding "matters of account and of difficult computation of damages") where there is "some exceptional condition" (for non-jury actions).[21] The issuance of an order for reference in the absence of a complicated issue or some exceptional condition will be reversed as the circuit court will have exceeded its authority.[22]

The services of the referee are charged to the parties or, if appropriate, out of the subject matter of the action.[23] While the referee is to be paid, the referee cannot use the report that is generated as security for compensation. The referee must provide the report regardless of payment. If payment is not forthcoming, the referee is entitled to a writ of execution against the "delinquent party." The entitlement to the writ of execution is conditioned upon the court ordering that the fee be paid within a certain time period and notice being provided of the amount and the date due.[24]

b. The Order of Reference

To have a referee appointed, the court must issue an "Order of Reference."[25] The Order of Reference specifically details the scope of the work and the power that a referee is able to exercise to accomplish that which the circuit court has ordered. Once the Order of Reference is issued, the clerk is to "forthwith" provide a copy of the Order of Reference to the referee. Parties have the opportunity to object to the Order of Reference and if an objection is made, it must be in the form of a motion to revoke the reference.[26]

If no objection is made, then under statute, the referee is to set a time and place for the parties or their counsel to meet within twenty days of the issuance of the Order of Reference.[27] However, if the Order of Reference provides for a different time period within which a meeting between the parties (or their counsel) and the referee is to take place, then the Order of Reference controls.

As noted, the Order of Reference is the controlling document. The Order of Reference sets forth the scope of the work that the referee is to perform. This order can be broad or narrow. It can provide for the referee's scope of work to a certain issue or certain task or to address a multitude of issues or tasks.[28] The referee can only perform the work specified in the Order of Reference.[29] If the referee exceeds the scope of the Order of Reference, that portion of the Order of Reference that has been exceeded is to be disregarded.[30] If the parties stipulate, however, that the referee may exceed the scope of the Order of Reference, then that referee's determination will be binding on the parties.

The statute sets forth additional procedures available to the referee if the subject matter of the Order of Reference relates to "matters of accounting."[31] In such matters, the referee is authorized "to prescribe

WE'VE GOT YOU COVERED

A dedicated team of experienced trial attorneys handling personal injury, insurance coverage, insurance defense, and subrogation matters.

Attorney Monte Weiss and **Attorney Kristen Scheuerman** also provide ADR services, including mediation and special master/referee involvement.

WEISS LAW OFFICE

INJURY & INSURANCE ATTORNEYS

MEQUON

1025 W. Glen Oaks Lane
Suite 212
Mequon, WI 53092

APPLETON

620 E. Longview Drive
Suite B
Appleton, WI 54911

weissinjurylaw.com

(262) 240-9663

the form in which the accounts shall be submitted" and in some cases, "require or receive in evidence a statement by a certified public accountant who is called as a witness."[32] Parties are permitted to object to the CPA's statement as well as any other items that are submitted to the referee. In response, the referee can require the CPA statement in a different form, or obtain information through alternative methods, including oral testimony or responses to written interrogatories.

In order to perform the work as directed by the circuit court, the referee is entitled to hold a hearing and place people under oath to obtain sworn testimony which includes the referee's ability to examine witnesses and parties.[33] The referee can receive other forms of evidence, including requiring the production of "books, papers, vouchers, documents, and writings"[34] applicable to the scope of work set forth in the Order of Reference. The referee need not make a record of the evidence received or excluded unless a party requests that the referee do so.[35] If requested, then the referee will make the record in a manner as "a court sitting without a jury."[36]

c. The Referee's Report

Once the referee's work is completed, a report must be generated. That report must be submitted to the court.[37] If the Order of Reference requires that the referee make findings of fact and conclusions of law, the report must contain those findings and conclusions. If the matter for which the Order of Reference is one that is to be tried without a jury, then the transcript of any of the proceedings held before the referee and all original exhibits must be provided to the court as well. The clerk must then mail a notice of the filing of the report and its constituent parts to the parties.

However, given the mandatory electronic filing system, it would seem that the referee can simply efile the report, the exhibits and the transcript(s) which would obviate the need for the clerk to "mail" or otherwise provide a notice to the parties of the filing. The electronic filing system will generate a notice advising the parties of the filings.

Once the report is filed, the parties have ten days after service of the notice of the filing of the report to file any written objections to the report. The objections must be served on all parties. Again, filing through the court's electronic filing system will result in service of the objections on all parties. The circuit court must then compare the evidence considered by the referee to the factual findings.[38] If the parties stipulate to the referee's findings of fact, then those facts will be deemed final and will not be reviewed. Rather, only questions of law will be addressed by the court.[39] If the parties do not stipulate to the referee's findings of fact, then those facts will be reviewed under a "clearly erroneous" standard.[40]

In order to have the court take any action on the referee's report, including any timely filed objections to the report, a motion must be filed.[41] After a hearing, the court will have decisions to make. The court can accept the report in total as well as reject the report in total.[42] The court can accept parts of the report and reject other parts.[43] Generally, once the report is issued, it is not contemplated that additional evidence will be received.[44] However, if the court feels that additional evidence is needed, it can receive the evidence directly without involving the referee or it can "recommit" the issue or issues to the referee with additional instructions of what tasks or issues the referee is to address.

Once the report and findings of the referee have been accepted by the court, then in an action tried with a jury, the referee's findings of fact on the issues decided by the referee are deemed admissible.[45] The referee cannot be directed to report upon the evidence considered in order for the referee to have reached the findings of fact.[46] This makes sense given that the findings are deemed admissible. The referee's findings will be read to the jury subject to any ruling by the court on any objections interposed to the legal conclusions as expressed in the report.[47]

III. Issues Associated With the Use of a Referee

Perhaps the most significant issue with the use of a referee is to ensure that the scope of work of the referee is not to supplant the role of the court. That is, the court may not delegate to a referee any issue that is properly within the constitutional obligations of the circuit court.

For example, if the Order of Reference delegates to the referee to decide dispositive motions it will impermissibly delegate the circuit court's constitutional judicial power to a referee.[48] Likewise, a referee cannot conduct a trial or determine fundamental rights.[49] As noted by the Wisconsin Supreme Court, while the referee may "share in judicial labor and lighten it"[50] the referee cannot assume the place of a judge. Thus, to the extent that the Order of Reference seeks to have the referee decide a dispositive motion or otherwise replace the circuit court, that Order of Reference may contravene the circuit court's constitutional duties by impermissibly delegating judicial power to a referee.

Another significant issue with the use of a referee is the expense to the parties. This issue was also addressed in *State ex rel. Universal Processing Servs. of Wisconsin, LLC v. Cir. Ct. of Milwaukee Cnty.*[51] The Wisconsin Supreme Court noted that Article I, Section 9 of the Wisconsin Constitution provides that, "Every person is entitled to a certain remedy… without being obligated to purchase it… ."[52] There is a cost to the use of a referee. Often that cost is determined by the referee but must be approved by the court that issued the Order of Reference.[53] The court can issue an Order of Reference regardless of whether the parties consent to the reference.[54] Thus, the use of a referee will have an added expense to the litigation.

IV. Opposing the Order of Reference

If a court issues an Order of Reference and your client does not want a referee, then an objection should be made immediately. A motion must be filed to revoke the reference.[55] Three potentially fruitful areas for an objection involved the basis for the reference, its scope, and the cost.

As noted *supra*, an Order of Reference is to be exception and not the rule. As such, the first issue that should be examined is the basis for the reference. The statute requires a sufficient basis in order to comply with the "exception" requirement. If the issues are not complicated (for actions to be tried before a jury)[56] or there is a lack of some exceptional condition (for actions to be tried without a jury),[57] then parties should focus on the basis for the reference. If there is an insufficient basis for the reference, then the reference should be vacated.

The language of the Order of Reference should also be scrutinized. If the Order of Reference seeks to substitute the referee for the circuit court, then the reference may be vacated or modified. Careful attention should be paid to the scope of the referee's tasks in order to ensure that there is no impermissible delegation of the judicial role of the circuit court.[58]

The cost of the Order of Reference is an appropriate basis for an objection. As noted *supra*, the judicial system should not devolve into a "pay for justice" model. "The Wisconsin Constitution embodies the principle that courts are an essential and integral part of Wisconsin's government, open to the people, and the cost thereof is borne as a public expense."[59] An Order of Reference requires that certain litigants pay for the court system twice – once with tax dollars and the other for direct payment to the referee. While the reference is an available option, courts should be mindful of issuing such orders. The statute creates requirements that must be met in order for the issuance of a valid order of reference.

V. The Benefit of an Order of Reference in a Coverage Case

While there is a cost, an Order of Reference may, in the right case, be a good mechanism to address a significant insurance coverage issue. The selected referee would be someone with an extensive background in insurance coverage. The parties

The Wisconsin Insurance Alliance is the state's leading property and casualty insurance trade association. Members play a crucial role in safeguarding Wisconsinites.

- **VITAL INSURANCE COVERAGE ENSURING FINANCIAL PROTECTION FOR INDIVIDUALS BUSINESSES AND COMMUNITIES ACROSS THE STATE IN TIMES OF NEED.**
- **FINANCING AND RESOURCES TO HELP RESIDENTS RECOVER FROM UNFORESEEN EVENTS.**
- **CONTRIBUTING TO THE RESILIENCE AND WELL-BEING OF WISCONSIN FAMILIES AND BUSINESSES BY OFFERING ESSENTIAL PROTECTION AND SUPPORT.**

WIA
Wisconsin Insurance Alliance

Website:
www.wisinsalliance.com

will benefit from the referee's knowledge and experience with complex insurance coverage issues. Furthermore, the referee's calendar may be more flexible than the circuit court's calendar in order to provide a faster resolution of the insurance coverage issue than that which the circuit court could provide.

a. The Right To Object Remains

The referee's report and recommendation will be subject to objections by the parties and review by the circuit court. The circuit court would have the ability to accept the report and recommendation in whole or in part or reject the report entirely. If the court accepts the report and recommendation, then the court will, upon motion of a party, issue an order concerning the subject of the report.

Unlike an arbitration, where the ability to object to the arbitrator's ruling is extremely narrow, the referee's report, including any factual findings and legal conclusions, are subject to objection by the parties. Those objections may result in the circuit court rejecting the report's recommendations in total or in part. Those objections may compel the circuit court to "recommit" the matter with specific instructions, or the circuit court may decide to address the matter in its entirety.[60]

Thus, it is important to review the Order of Reference when it is first issued in order to ensure that the scope of the referee's tasks set forth is what is needed by the parties. The parties themselves can file a motion for an Order of Reference and can provide the circuit court with a proposed order setting for the scope of the referee's tasks. Such an agreement will help to avoid issues with the referee's report and recommendations later one.

b. The Right To Appeal Remains Intact

Once the referee's report and recommendation are filed, the parties will be provided with their statutory time frame to object to the factual findings, if any, as well as the legal conclusions. The party that has "won" will be required to bring a motion before the circuit court to accept the report and recommendations.

As noted, the report and recommendations should include a detailed analysis of the facts and the law. The report can become an order of the court. Wis. Stat. § 805.06 provides that the circuit court can adopt the referee's report in whole.[61] While the referee's conclusion on the legal issues are recommendations, the referee's findings of fact are to be accepted unless "clearly erroneous."[62] "A factual finding is clearly erroneous if it is against the great weight and clear preponderance of the evidence."[63]

Assuming that the circuit court accepts the report and recommendations, then the circuit court will issue an order. That order will be part of the court record and if it is a final order, it would be subject to appellate review. This point is perhaps the most significant benefit of the use of a referee as opposed to an arbitrator – the right of appeal. The circuit court's order, if a final order, allows for an appeal as a matter of right.[64] Even if not a final order, depending upon the issue raised, a permissive appeal may be possible.[65]

While the referee process will add a layer of expense in a complicated/complex insurance coverage dispute, the parties will have the benefit of an experienced insurance coverage counsel reviewing the motion record and providing a detailed report and recommendation. The parties will receive what is expected to be a well-reasoned analysis of the coverage issues. It is possible that the analysis may even militate against an appeal by the "losing" party. That is, even though a party may have "lost" the issue, the analysis may be sufficient for the "losing" to accept the result as the odds of prevailing on appeal may be small.

Generally, the referee will be in a better position to address the coverage issue in a more expeditious manner than the circuit court simply due to the vast and varied workload that exists with the circuit courts. Most importantly, the parties will not lose

THE Everson Law Firm

EVERSON | WHITNEY | EVERSON | BREHM S.C.

CIVIL LITIGATION DEFENSE

At The Everson Law Firm, we treat insurance litigation like a profession, not a business. Our attorneys provide continual legal analysis and strategic recommendations to our clients regarding liability and damages issues and take multiple insurance defense litigation cases to trial each year. We have the experience and tenacity to give your case the personalized attention it deserves, whether litigation ends with a victorious dispositive motion, through negotiation/mediation or in the courtroom.

Visit eversonlaw.com to connect with an experienced lawyer. We're open and ready to serve clients in Greater Green Bay, Northeast Wisconsin and beyond.

Peter J. Hickey | Gabriel G. Siehr | Heather L. Nelson | Todd C. Dickey | Ryan M. Johnson | Brian D. Anderson

their appellate rights. If the parties were to select arbitration of the coverage dispute, then their review rights are greatly circumscribed.[66] That is not the case with a section 805.06 referee. Since the entire process is court ordered and court reviewed, the parties' appellate rights remain intact.

c. The Downsides of a Referee

As noted, one significant downside to the use of a referee is the cost. If the coverage issue is resolved exclusively by the circuit court without the assistance of a referee, then there is no extra cost to the parties. An Order of Reference, however, will force the parties to incur the cost of the referee. However, depending on the complexity of the issues and the case value, it may be worth the extra expense.

Another downside to the use of a referee is where the parties do not agree to use one. While the circuit court has the authority in the right case to issue an Order of Reference without the consent of the parties, the party that does not consent will have options to vacate or limit the scope of the reference, adding further cost and delay to the resolution of the coverage dispute.

Furthermore, while the order might still be issued in spite of the objections, the propriety of the reference's issuance will likely be subject to post report and recommendation challenges at both the circuit court and appellate levels. Thus, it would be best for the parties to agree to the reference, the scope of the reference and the referee.

Finally, the selection of the referee is a potential issue. While the referee must be fair and objective, a referee who generally represents one side of coverage disputes may be perceived as disadvantageous to one or more of the parties. Thus, again, it would be best if the parties could agree on the referee and submit a joint motion before the circuit court that sets forth the content of the order of reference as well as the referee who is agreeable to the parties. It is likely that the circuit court will approve the joint motion.

d. The Importance of Maintaining the Proper Roles of the Referee and the Circuit Court

A key to the benefit of the use of the referee is to ensure that the referee does not supplant the work of the circuit court. Rather, the referee is to assist the circuit court. Thus, the referee will not decide certain issues as that is the constitutional responsibility of the circuit court.

For example, assume that the parties seek a referee with regard to a motion for summary judgment. The referee will review the factual submissions and make a recommendation as to whether the motion should be granted in whole or in part or denied. The circuit court will then make the decision on whether to grant the motion for summary judgment in whole or in part or to deny the motion, based on the submissions of the parties[67] and aided by the referee's review.

Assume a different scenario: perhaps there is a complicated issue involving the known loss doctrine for a number of insurers over several decades. A referee could be appointed to receive testimony and other evidence and provide a report with factual findings as to when the insured knew of the loss and a recommendation as to which policies were triggered based on those facts and for which policies the known loss doctrine would apply to preclude coverage based on the common law doctrine as well as the individual insurer's policy language. The report's factual findings would be subject to a clearly erroneous standard.[68] If, after submission of the report, the parties stipulate to the factual findings, then those findings would be final and only the report's legal conclusions would be addressed by reviewing courts.[69]

VI. Conclusion

The use of a section 805.06 referee can be helpful to expediting the resolution of an insurance coverage issue. An appropriately qualified referee will have the knowledge base to understand the complex and

Classic Strength and Support

With a national network of more than 1,200 attorneys, including those in our Milwaukee office and others licensed to practice in Wisconsin, Wilson Elser brings together a formidable team of seasoned industry veterans and respected trial lawyers. Backed by 45 years of experience, we safeguard our clients' interests, assets, and reputations through strategic risk management, skillful negotiation, arbitration, mediation, and, when necessary, litigation from inception to trial.

wilsonelser.com

43 Offices Nationwide

WILSON ELSER
WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

complicated coverage issues and can provide the court and the parties with a well-reasoned report with appropriate recommendations.

Importantly, since the entire process is part of the circuit court action, the report and recommendations, as accepted by the circuit court, can become an order of the circuit court which is subject to appellate review. However, in order for the parties to reap the benefit of the use of section 805.06 referee, care must be taken in preparing the content of the Order of Reference to properly set for its scope so as to avoid costly challenges to the referee's work.

Author Biography:

Monte E. Weiss, Case Western Reserve Univ., 1991, of Weiss Law Office, S.C., Mequon, practices primarily in the defense of bodily injury, property damage, and professional negligence claims for insurance companies and self-insured companies. In conjunction with this area of practice, he has drafted several personal lines insurance policies, including homeowner and automobile policies. He routinely represents insurance companies on insurance contract interpretation issues and is a frequent lecturer and author on insurance topics. He also represents policyholders dealing with coverage denials from their carriers. He is a former President of the Wisconsin Defense Counsel. Attorney Weiss can be reached at via his firm's website at www.mweisslaw.net.

References

1 After all, the plaintiff and others are interested parties under Wis. Stat. § 806.04(11) in a declaratory judgment action involving insurance coverage. Absent intervention into the existing dispute, the plaintiff and any other party in the underlying lawsuit who has brought a claim against the insured are required to be joined in the separate declaratory judgment proceeding as interested parties under Wis. Stat. § 806.04(11). *Fire Ins. Exch. v. Basten*, 202 Wis. 2d 74, 97, 549 N.W.2d 690, 699 (1996).

2 The process for appointing a referee is similar to the appointment of a special master under Rule 53 of the Federal Rules of Civil Procedure. *Ehlinger v. Hauser*, 2010 WI 54, ¶ 77, 325 Wis. 2d 287, 785 N.W.2d 328.

3 There are very few cases that address this statute and the role of a referee. To complicate matters, of these cases, many are rather old and therefore, may not be applicable to the current iteration of the statute (previously Wis. Stat. § 270.35) whereas other cases are unpublished and therefore, of limited assistance. *See* Wis. Stat. § 809.23(3)(a), (b). Since Wis. Stat. § 805.06 is somewhat similar to Rule 53 of the Federal Rules of Civil Procedure, citation to federal cases can be helpful in addressing disputes involving referees. Unpublished cases are cited here as the courts' expressions of role and scope of the referee are helpful to understanding the function of the referee.

4 Wis. Stat. § 805.06(1).

5 Wis. Stat. § 805.06(2).

6 *State ex rel. Universal Processing Servs. of Wisconsin, LLC v. Cir. Ct. of Milwaukee Cnty.*, 2017 WI 26, ¶ 59, 374 Wis. 2d 26, 892 N.W.2d 267.

7 https://www.wicourts.gov/services/public/lawyerreg/system.htm (last visited Nov. 6, 2025).

8 *In re Sedor*, 73 Wis. 2d 629, 637, 245 N.W.2d 895 (1976); *see also* SCR 22.09(2); SCR 22.12(3); SCR 22.15; SCR 22.16.

9 *Tillman v. Tillman*, 175 Wis. 2d 624, 502 N.W.2d 283 (Ct. App. 1993).

10 *Hannan v. Godfrey*, 2000 WI App 186, 238 Wis. 2d 446, 617 N.W.2d 906 (unpublished).

11 *Dunham v. Howard Industries*, 253 Wis. 347, 34 N.W.2d 140 (1948).

12 *Krueger v. Krueger*, 105 Wis. 2d 756, 315 N.W.2d 728 (Ct. App. 1981) (unpublished); *see also Feinauer v. Feinauer*, 2013 WI App 128, 351 Wis. 2d 223, 838 N.W.2d 865 (unpublished) (*per curiam*).

13 *Rose v. Rose*, 2017 WI App 7, 373 Wis. 2d 310, 895 N.W.2d 104 (unpublished).

14 Wis. Stat. § 751.09.

15 Wis. Stat. Ann. § 804.01(2)(e)(1r)(f).

16 *Harold Sampson Childrens Tr. v. Linda Gale Sampson 1979 Tr.*, 2004 WI 57, 271 Wis. 2d 610, 679 N.W.2d 794 (referee used to evaluate waiver of attorney client privilege in document production); *see also Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2004 WI 112, 275 Wis. 2d 1, 683 N.W.2d 58 (referee used to resolve numerous discovery disputes); *George M.S. v. Hida (In re Ethel K.)*, 2006 WI App 20, 289 Wis. 2d 218, 709 N.W.2d 111 (unpublished) (same).

17 *State ex rel. Universal Processing Servs. of Wis., LLC v. Circuit Court*, 2017 WI 26, ¶ 59, 374 Wis. 2d 26, 892 N.W.2d 267.

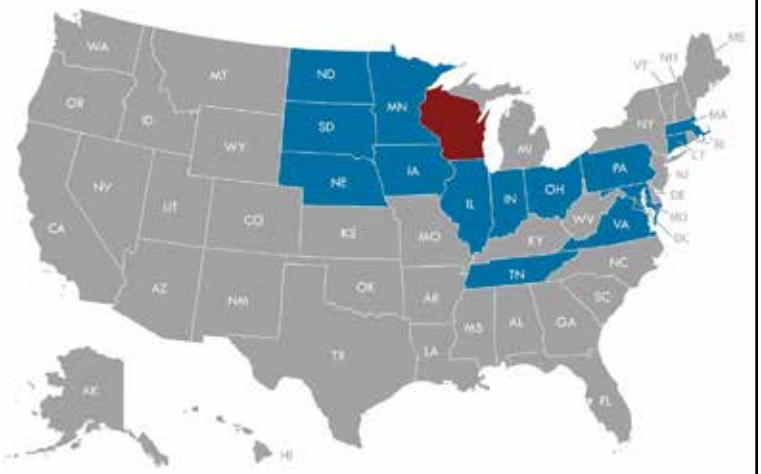
18 *Hart v. Godkin*, 122 Wis. 646, 100 N.W. 1057, 1058 (1904) (the use of the word "may" left the decision to issue an order of reference to the circuit court's discretion).

19 Wis. Stat. § 805.06(2).

20 *Ehlinger v. Hauser*, 2010 WI 54, ¶ 76, 325 Wis. 2d 287, 785 N.W.2d 328 (quoting *Patricia Graczyk*, The New Wisconsin Rules of Civil Procedure, Chapters 805-807, 59 Marq. L. Rev. 671, 683-84 (1976)) ("The role of a referee is to help the court in cases where the expertise of the referee is needed" to assist the court in obtaining facts and arriving at a correct result in complicated litigation.").

MINNESOTA LAWYERS MUTUAL
INSURANCE COMPANY

MLM Insures Law Firms in 15 States, Including Wisconsin.



Proud Corporate Sponsor of the WDC
Visit our table in the Expo Hall.

- First Dollar Defense
- Defense Program discounts for qualifying defense firms/attorneys
- Returned over **$83 million** in profits to policyholders since 1988
- 3 Free MLM CLEs per year for each insured, $195 value per insured

Get a fast quote today!
www.mlmins.com
Chris Siebenaler, Esq.
612-373-9641
chris@mlmins.com

Protecting Your Practice is Our Policy.®

21 Wis. Stat. § 805.06(2).
22 *Pappathopoulos v. Pappathopoulos*, 2018 WI App 45, 383 Wis. 2d 601, 918 N.W.2d 127 (unpublished) (absence of exceptional condition).
23 *See*, *e.g.*, *Willenson v. Estate of Bailey*, 173 Wis. 2d 907, 499 N.W.2d 300 (Ct. App. 1993) (unpublished) (*per curiam*) (referee fees assessed against the estate).
24 Wis. Stat. § 805.06 (1).
25 *Ehlinger v. Hauser*, 2010 WI 54, ¶ 77, 325 Wis. 2d 287, 785 N.W.2d 328 ("The court order appointing a referee and describing the referee's powers is called a 'reference.'").
26 *Id.* (citing 3A Jay E. Grenig, *Wisconsin Practice Series: Civil Procedure* 35 (3d ed. 2003) (citing *La Buy v. Howes Leather Co.,* 352 U.S. 249 (1957)) ("If a party wishes to contest the reference, it should move the court to revoke the reference.").
27 Wis. Stat. § 805.06 (4)(a).
28 Wis. Stat. § 805.06 (3).
29 *Parcher v. Dunbar*, 118 Wis. 401, 95 N.W. 370, 371 (1903) ("The referee could do no more than the order prescribed.").
30 *Id.* at 404.
31 Wis. Stat. § 805.06(4)(c).
32 Wis. Stat. § 805.06(4)(c).
33 Wis. Stat. § 805.06(3)(4)(b). The parties are specifically authorized to subpoena witnesses to present to the referee. A failure of the witness to abide by the subpoena can result in the penalties provided for under Wis. Stat. §§ 885.11 and 885.12.
34 Wis. Stat. § 805.06(3)
35 Wis. Stat. § 805.06(3) ("When a party so requests the referee shall make a record of the evidence offered and excluded… .").
36 Wis. Stat. § 805.06(3).
37 If the process is taking too long, the parties can file a motion with the circuit court to require the referee to "speed the proceedings and to make the report." Wis. Stat. § 805.06(4)(a).
38 *Associated Bank, N.A. v. Brogli*, 2018 WI App 47, ¶ 38, 383 Wis. 2d 756, 917 N.W.2d 37.
39 Wis. Stat. § 805.06(5)(d).
40 Wis. Stat. § 805.06 (5)(b).
41 Wis. Stat. § 805.06 (5)(b); *see also Pappathopoulos*, 383 Wis. 2d 601 (citing *State ex rel. Universal Processing Servs. of Wis., LLC v. Circuit Court*, 2017 WI 26, ¶ 64, 374 Wis. 2d 26, 892 N.W.2d 267) ("the referee's report may not be 'self-executing,' but requires an order from the circuit court for it to have the force of law.").
42 *Kleinstick v. Daleiden*, 71 Wis. 2d 432, 439, 238 N.W.2d 714 (1976) (stating that Wis. Stat. § 270.35 (the predecessor to Wis. Stat. § 806.05) "envisions a review by the trial court of the referee's report, and a decision whether to accept, reject, or modify this report… .").
43 *Feinauer v. Feinauer*, 2013 WI App 128, ¶ 17, 351 Wis. 2d 223, 838 N.W.2d 865 ((unpublished) (*per curiam*) ("court was 'not satisfied' with the special master's explanation for his recommendations and declined to adopt many of those recommendations. * * * court properly adopted those parts of the special master's recommendations that it determined were supported by the record.").
44 *Kleinstick*, 71 Wis. 2d at 439.
45 Wis. Stat. § 805.06 (5)(c).
46 Wis. Stat. § 805.06(5)(c).
47 Wis. Stat. § 805.06 (5)(b).
48 *State ex rel. Universal Processing Servs. of Wisconsin, LLC v. Cir. Ct. of Milwaukee Cnty.*, 2017 WI 26, 374 Wis. 2d 26, 892 N.W.2d 267.
49 *FDIC v. Old Republic Ins. Co.*, 2018 U.S. Dist. LEXIS 166320, at *8 (E.D. Wis. 2018) (citing *State ex rel. Universal Processing Servs. of Wis., LLC v. Circuit Court*, 2017 WI 26, ¶ 76, 374 Wis. 2d 26, 892 N.W.2d 267).
50 *Universal Processing Servs. of Wisconsin*, 374 Wis. 2d 26, ¶ 75 n.41; *see also Van Slyke v. Trempealeau Cnty. Farmers' Mut. Fire Ins. Co.*, 39 Wis. 390, 396 (1876).
51 *Universal Processing Servs. of Wisconsin*, 374 Wis. 2d 26, ¶ 89.
52 Wis. Const. art. I, § 9.
53 Wis. Stat. § 805.06(1).
54 Wis. Stat. § 805.06(5)(d).
55 *Universal Processing Servs. of Wisconsin*, 374 Wis. 2d 26, ¶ 52 (citing *Ehlinger v. Hauser*, 2010 WI 54, ¶ 77, 325 Wis. 2d 287, 785 N.W.2d 328).
56 Wis. Stat. § 805.06(2); *see also Horst Distrib. v. Timm*, 91 Wis. 2d 849, 284 N.W.2d 120 (Ct. App. 1979) (unpublished) (determination of complexity and need for a referee subject to circuit court's discretion).
57 Wis. Stat. § 805.06(2).
58 As an example, the reports and recommendations of special masters in the federal courts do not decide the dispositive motion for the circuit court. Rather the special master provides a recommendation to the circuit court for consideration.
59 *Universal Processing Servs. of Wisconsin*, 374 Wis. 2d 26, ¶ 98.
60 *Associated Bank, N.A. v. Brogli*, 2018 WI App 47, ¶ 41, 383 Wis. 2d 756, 917 N.W.2d 37 (circuit court must address objections raised to the referee's report and recommendations).
61 Wis. Stat. § 805.06(5)(b).
62 *Associated Bank, N.A. v. Brogli*, 2018 WI App 47, ¶ 36, 383 Wis. 2d 756, 917 N.W.2d 37 (citing *Kleinstick v. Daleiden*, 71 Wis. 2d 432, 439, 238 N.W.2d 714 (1976)).
63 *Id*.
64 Wis. Stat. § 808.03(1).
65 Wis. Stat. § 808.03(2).
66 Wis. Stat. § 788.10(1).
67 *Brogli*, 383 Wis. 2d 756, ¶ 37 (Circuit court cannot review the referee's factual findings under the clearly erroneous standard without reviewing the evidence presented to the referee.).
68 Wis. Stat. § 805.06(5)(b).
69 *Id*.

BMR BELL MOORE & RICHTER SC


William A. Abbott


William D. Bolte


Ann C. Emmerich


Alexander Z. Gordon


David E. McFarlane


Melita M. Mullen


Edward J. Minser


Megan A. Phillips


Patricia J. Putney


David G. Ress


Aaron M. Stroede


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.

BMR PRACTICE AREAS:

- Alternative Dispute Resolution
- Appellate Practice
- Business/Corporate Planning/Litigation
- Civil Rights/Municipal Litigation
- Commercial/Contract Disputes
- Commercial Collection
- Construction Law/Litigation
- Contracts
- Employment Law
- Environmental Law/Litigation
- Estate Planning/Elder Law/Probate
- Family Law/Marital Property/Pre-Nuptial
- 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
- Real Estate
- Real Estate Agent/Broker Litigation
- Regulation/Licensing
- Securities Law
- Subrogation Claims
- Tax Advice/Planning/Litigation
- Workers' Compensation Defense

FOR YOUR LEGAL NEEDS CONTACT US AT:
345 W. Washington Ave. | Suite 302 | Madison, WI | 53703-3007
(608) 257-3764 | www.bmrlawyers.com

Bell, Moore & Richter, S.C., is a majority women-owned law firm. Providing legal services since 1851.

An Overview: Who Has Standing To Bring a Wrongful Death Claim in Wisconsin?

by: Aaron M. Stroede, Bell, Moore & Richter, S.C.

The question of who may bring a wrongful death claim in Wisconsin often arises at one of the most emotionally volatile moments of a family's life. When tragedy strikes, multiple relatives may feel the loss deeply and believe they have a right to seek justice. Yet, Wisconsin law takes a surprisingly rigid and technical approach, one that can elevate or exclude family members in unexpected ways. The statutory structure is intentional and enforced by decades of case law with few narrow exceptions. Understanding how this statutory hierarchy works is essential not only for legal practitioners but for anyone attempting to navigate the aftermath of a death. Defense counsel should always ensure that the plaintiffs named in a litigation actually have legal standing to bring the claim and must do the necessary discovery to flesh out and confirm that the plaintiffs actually have standing.

I. The Statutory Framework

Wrongful death actions in the state are entirely statutory, meaning courts do not have broad discretion to adjust the order of potential beneficiaries.[1] Determining who has standing to bring a wrongful death claim in Wisconsin begins with the strict hierarchy created by Wis. Stat. § 895.04(2).[2] The statute identifies and prioritizes beneficiaries in a specific order. The first class of beneficiaries is the surviving spouse or domestic partner.[3] When a spouse or domestic partner exists, that person holds exclusive ownership of the wrongful death claim, which includes the right to recover damages.[4] However, the statute also understandably seeks to protect minor children of the decedent, even if there is a surviving spouse or domestic partner. If minor children survive the decedent, the statute requires that up to half of the net recovery, after costs of collection, be set aside for their benefit.[5] When no minor children exist, the entire recovery must be paid to the spouse or domestic partner.[6] Courts treat the statute's use of the word "shall" as mandatory language, reinforcing that this priority is not discretionary.[7] The Wisconsin Court of Appeals' decision in *Bowen v. American Family Insurance Co.* reaffirmed that the spouse's right of recovery is exclusive and cannot be displaced by other potential claimants.[8]

If no surviving spouse or domestic partner exists, the right to recovery passes to the decedent's lineal heirs governed by Chapter 852.[9] These typically include the decedent's children, and if none survive, the right progresses upward or downward through the family line to parents or other lineal heirs.[10] Just as with spouses, this class holds exclusive ownership once it becomes the highest class with living members.[11] This exclusivity prevents siblings, distant relatives, or non-lineal heirs from asserting wrongful death claims when a higher-priority class exists. The hierarchy is intended to be orderly, predictable, and mandatory.

II. Exclusive Ownership and Its Consequences

The principle of exclusive ownership has significant implications for those who may recover damages under Wis. Stat. § 895.04. When a spouse or domestic partner survives, no other category of potential beneficiaries may bring a claim. Adult children, siblings, or other relatives cannot file a

efi global

The leader in independent origin and cause investigations

FORENSIC ENGINEERING

FIRE INVESTIGATION

ENVIRONMENTAL CONSULTING

parallel or competing action, nor can they recover damages for loss of society and companionship when the spouse owns the claim. The same rule applies when lineal heirs become the primary class; if adult children survive and no spouse exists, they possess exclusive ownership of the action, thereby excluding siblings or other next of kin.

Attempts to circumvent this exclusivity have been generally rejected by Wisconsin courts. For example, a surviving spouse cannot "disclaim" or waive their statutory right so that children may bring the action instead.[12] The right belongs to the statutory class itself, not to an individual acting in a personal capacity. Because the structure is imposed by statute, beneficiaries cannot reorganize or reassign the priority by agreement or preference.[13] This reflects the legislature's intent to maintain a unified and orderly approach to wrongful death litigation, avoiding conflicts among claimants and ensuring that only one wrongful death claim arises from each decedent.

Exclusive ownership also dictates who may recover specific types of damages. Loss of society and companionship damages, for example, follow the same hierarchical structure.[14] Courts have consistently held that when one class of beneficiaries holds the wrongful death claim, other classes are *not* entitled to recover those damages.[15] Because different categories of damages attach to the wrongful death beneficiary class itself, the statutory hierarchy governs both standing and recovery.

III. Caselaw: Exceptions and Narrow Deviations

Although the statutory structure is rigid, Wisconsin courts have recognized narrow exceptions in extraordinary circumstances. These exceptions are grounded either in public policy, the need to protect minor children, or to avoid unjust or absurd results when rigid application of the statute would undermine its purpose.

One of the most significant exceptions appears in *Force v. American Family Mutual Insurance Co.*[16] In *Force*, The Wisconsin Supreme Court addressed a situation in which the decedent and his spouse had been estranged for over a decade and had no meaningful relationship.[17] The parties in that case were separated after just six months and did not have any contact during the five years before the decedent's death.[18] The decedent left behind minor children. The Court reasoned that strict application of the statute would have the absurd result of preventing the decedent's *minor dependent children* from recovering while funneling recovery to a spouse who neither sought it nor had a functional relationship with the decedent.[19] Under these circumstances, the Court held that the estranged spouse did not qualify as a "surviving spouse" within the meaning of Wis. Stat. § 895.04(2).[20] The Court emphasized, however, that its holding was limited to the *unique facts of the case* and was *not* a broad redefinition of the statute.[21] The decision reflects the Court's reluctance to allow the statute to create outcomes that defeat its broader remedial purpose, especially when minor children would otherwise be left without compensation. Of note, no similar holding exists to date where the decedent leaves behind adult children.

The Wisconsin Court of Appeals has recognized the concept of a putative spouse in the context of wrongful death claims. A putative spouse is a person who believed in good faith that they were married to the decedent, even if a technical defect rendered the marriage invalid. In *Xiong ex rel. Edmondson v. Xiong*, the court of appeals concluded that a good-faith belief in the validity of a marriage is sufficient to confer surviving-spouse status under the wrongful death statute.[22] The parties in *Xiong* participated in a traditional Hmong marriage ceremony in Laos and lived together as husband and wife for several decades.[23] The *Xiong* Court reasoned that equity supports protecting the expectations of individuals who reasonably believed they were legally married and who relied on that belief.[24] As such, the putative spouse was entitled to bring a claim for wrongful death.[25]

Another notable exception arises when the surviving spouse intentionally kills the decedent. In *Steinbarth v. Johannes*, the Court held that a spouse who feloniously and intentionally kills their

partner is treated as having predeceased the victim for purposes of the wrongful death statute.[26] This principle ensures that no one may benefit financially from their intentional wrongdoing and is consistent with Wisconsin's longstanding public policy.[27] Once the intentional killer is disqualified, the right to bring the wrongful death action transfers to the next statutory class.[28]

Although these exceptions are important to be aware of when defending a wrongful death lawsuit, they remain exceedingly rare. Courts remain committed to applying the statutory hierarchy except in circumstances where its application would clearly undermine the legislative intent to protect minor children, produce outcomes that conflict with public policy, and introduce uncertainty into wrongful death litigation. For most cases, the hierarchy remains strict and controlling.

IV. Practical Considerations for Evaluating Standing

Evaluating standing in a wrongful death claim requires careful examination of the decedent's surviving family relationships. The first inquiry must always be whether a spouse or domestic partner survives, as this determines whether any other individual has standing at all. Attorneys must also evaluate whether unique circumstances, such as those outlined above, might remove or elevate a claimant within the statutory hierarchy. Misunderstanding the statutory model can lead to conflicts among beneficiaries, uncertainty in settlement authority, and challenges to the legitimacy of the action.

V. Conclusion

Wisconsin's wrongful death statute establishes a clear and mandatory hierarchy for determining who may bring a wrongful death action. The surviving spouse or domestic partner is the primary beneficiary, followed by lineal heirs if no spouse exists. Courts have allowed deviations from this structure only in rare and highly fact-specific situations to prevent injustice or to enforce public policy, such as disqualifying an intentional killer or recognizing a good-faith putative spouse. Understanding this hierarchy and the limited exceptions to it is essential for identifying the proper claimant, managing family expectations, and effectively pursuing or defending a wrongful death action in Wisconsin.

Author Biography:

Aaron Stroede is an Associate Attorney at Bell, Moore & Richter, S.C. He is a graduate of the University of Wisconsin, where he completed both his undergraduate studies and his law degree (2021). A lifelong Wisconsin resident, Aaron grew up in Wisconsin Dells. The majority of his practice focuses on civil defense litigation, including general liability and insurance defense. Outside of work, Aaron enjoys fishing and spending time with his dogs.

References

1 *See Cogger v. Trudell*, 35 Wis. 2d 350, 353, 151 N.W.2d 146 (1967).

2 Specifically, the wrongful death statute, Wis. Stat. § 895.04(2), provides in pertinent part as follows:
(2) If the deceased leaves surviving a spouse or domestic partner under ch. 770 and minor children under 18 years of age with whose support the deceased was legally charged, the court before whom the action is pending, or if no action is pending, any court of record, in recognition of the duty and responsibility of a parent to support minor children, shall determine the amount, if any, to be set aside for the protection of such children after considering the age of such children, the amount involved, the capacity and integrity of the surviving spouse or surviving domestic partner, and any other facts or information it may have to receive, and such amount may be impressed by creation of an appropriate lien in favor of such children or otherwise protected as circumstances may warrant, but such amount shall not be in excess of 50 percent of the net amount received after the deduction of costs of collection. If there are no such surviving children, the amount recovered shall belong and be paid to the spouse or domestic partner of the deceased; if no spouse or domestic partner survives, to the deceased's lineal heirs as determined by s. 852.01; if no lineal heirs survive, to the deceased's brothers and sisters. If any such relative dies before judgment in the action, the relative next in order shall be entitled to recover for the wrongful death. A surviving nonresident alien spouse or a nonresident alien domestic partner under ch. 770 and minor children shall be entitled to the benefits of this section. In cases subject to s. 102.29 this subsection shall apply only

Independent Medical Examinations

Experience. Objectivity. Results.

IME services tailored for:
• **Insurance Defense • Risk Management • Workers' Comp • Personal Injury**

Trusted by carriers, TPAs, and firms nationwide —
with Midwest roots, national reach, and custom workflows that adapt to your needs. We understand what's at stake.

midwest_IME@corvel.com
608.662.8220


Lisa Haugen


Jennifer Jopek


Jenni Prena


Gretchen Myers


Caroline Ward-Kniaz

to the surviving spouse's or surviving domestic partner's interest in the amount recovered. If the amount allocated to any child under this subsection is less than $10,000, s. 807.10 may be applied. Every settlement in wrongful death cases in which the deceased leaves minor children under 18 years of age shall be void unless approved by a court of record authorized to act hereunder.

3 *Id.*

4 *Id*.

5 *Id*.

6 *Id*.

7 *See*, *e.g.*, *Borreson v. Yunto*, 2006 WI App 63, 292 Wis. 2d 231, 713 N.W. 2d 656; *Heritage Farms, Inc. v. Markel Insurance Co.,* 2012 WI 26, 339 Wis. 2d 125, 810 N.W. 2d 465.

8 *See Bowen v. American Fam. Ins. Co.*, 2021 WI App 29, ¶ 12.

9 Wis. Stat. § 895.04(2).

10 *See Anderson v. Westfield Ins. Co.*, 300 F. Supp. 2d 726, 729 (W.D. Wis. 2002) ("[T]he ability to recover under Wisconsin's wrongful death statute is similar to intestate succession, namely, a claimant has standing only if no other beneficiary higher in the hierarchy has standing.")

11 Wis. Stat. § 895.04(2).

12 *Bowen*, 2021 WI App 29, ¶ 14.

13 *Id*.

14 *Id*. at ¶ 12.

15 *Id.*

16 2014 WI 82, 356 Wis. 2d 582, 850 N.W.2d 866.

17 *Force ex rel. Welcenbach v. Am. Fam. Mut. Ins. Co.*, 2014 WI 82, ¶ 8, 356 Wis. 2d 582, 850 N.W.2d 866 ("[W]e construe the statutes under the unique facts of the instant case to allow the minor children to recover even though the deceased's spouse in the instant case is alive and does not . . . recover any damages for the deceased husband's wrongful death").

18 *Id.* at ¶¶ 23-24.

19 *Id.* at ¶ 8.

20 *Id.* at ¶ 127.

21 *Id.* at ¶ 101.

22 *Xiong ex rel. Edmondson v. Xiong*, 2002 WI App 110, 255 Wis. 2d 693, 648 N.W.2d 900.

23 *Id.* at ¶¶ 6-10.

24 *Id.* at ¶ 22.

25 *Id*.

26 *Steinbarth v. Johannes*, 144 Wis. 2d 159, 423 N.W.2d 540 (1988).

27 *Id.* at 166.

28 *Id*.

News from Around the State: Trials and Verdicts

The WDC regularly publishes notable trial verdict results in the Wisconsin Civil Trial Journal and on its website. If you or someone you know has had a civil trial recently, we would like to include information about the results in our next issue. We are looking for all results, good or bad. Submissions can be published anonymously upon request. Please submit your trial results directly to the WDC Journal Editor, Attorney Vincent Scipior, at vscipior@cnsbb.com. Please include the following information:

- Case caption (case name and number);
- Trial dates (month and year);
- Brief summary of the background facts;
- Issues for trial (was liability contested, did the parties stipulate to damages, etc.);
- At trial (what happened, who testified, what did the parties ask for, what did the jury award, etc.);
- Plaintiff's final pre-trial demand;
- Defendant's final pre-trial offer;
- Verdict amount; and
- Any other interesting information, issues, rulings, etc.

Shelia Martin, et al. v. American Family Mutual Insurance Company, S.I., et al.
Milwaukee County Case No. 23-CV-7590
Trial Date: October 20, 2025

Facts: This case arises from a 2020 slip-and-fall incident at a McDonald's restaurant in Greenfield, Wisconsin. The plaintiff, Ms. Martin, allegedly fell in the vestibule area of the store. Surveillance footage showed Ms. Martin and her daughter entering and exiting the vestibule multiple times prior to the incident, raising questions about whether the fall was intentional. It was a rainy day, and wet footprints were visible in the vestibule. As a result of the alleged fall, the plaintiff claimed soft tissue injuries to her back, knee, and head.

Issues for Trial: Liability, causation, and damaged were contested. Plaintiff's witnesses included the McDonald's manager, the plaintiff's daughter, and the plaintiff herself. The parties stipulated to treatment on the date of loss and three follow-up visits; therefore, no experts were called to authenticate medical records. However, the causal relationship between the plaintiff's claimed medical expenses and the incident remained disputed. The McDonald's manager testified that the store adhered to its unwritten procedure for maintaining the floors throughout the day and appropriately used caution signage. In contrast, the plaintiff and her daughter testified that the plaintiff slipped on a wet floor and that no caution signage was present in the vestibule. During cross-examination, several inconsistencies in the plaintiff's account were identified. The defense did not call any witnesses.

At Trial: In closing arguments, plaintiff's counsel argued that the jury should award $11,000 for past medical expenses and $10,000-$20,000 for past pain and suffering. Defense counsel suggested the Plaintiff should be awarded zero damages.

After approximately 1.5 hours of deliberation, the jury awarded $5,701 for past medical expenses and $0 for past pain and suffering, indicating they did not accept the plaintiff's injury claims. The jury apportioned liability equally, finding each party 50% at fault.

Plaintiff's Final Pre-Trial Demand: $12,500
Defendant's Final Pre-Trial Offer: $1,000
Verdict: $2,850 (After applying comparative fault)

For more information, contact Alex H. Koritzinsky at akoritzi@amfam.com

---

Anthony Marsden, et al. v. William E. Canfield, et al.
Waukesha County Case No. 23-CV-1958
Trial Date: November 18-20, 2025

Facts: This matter arose from a motor-vehicle-versus-pedestrian accident on the evening of December 18, 2020, at the intersection of Highway 164 and Skyline Avenue in Big Bend. The plaintiff was a tow truck driver called to the scene of a motor vehicle accident at the same intersection earlier that evening. The first accident had partially blocked the northbound lanes on Highway 164, and police on scene had set up a temporary traffic lane to route northbound traffic gently around the accident scene through the center of the intersection. The plaintiff arrived via southbound Highway 164 and parked his truck across the street. There are no crosswalks at this intersection. The plaintiff attempted to cross the street and was struck by Canfield's vehicle, which was travelling northbound on Highway 164 and was using the temporary traffic lane setup by police.

Issues for Trial: Liability and damages. Before trial, the court found the plaintiff was causally negligent as a matter of law for jaywalking and answered those special verdict questions accordingly, with the issue of defendant's negligence left to the jury.

The plaintiff sustained a severe right tibial plateau fracture and had about $198,000 in past medical expenses for objectively accident-related injuries. The plaintiff was claiming permanency but did not itemize any future medical expenses, past wage loss, or future loss of earning capacity. There was a failure to mitigate damages issue as the plaintiff had elected to indefinitely defer a hardware removal procedure recommended by his medical expert. The plaintiff's spouse also asserted a loss of consortium claim.

At Trial: In closing arguments, plaintiff's counsel argued for 90/10 liability apportionment in favor of the plaintiff and asked for past medical expenses of approximately $198,000, along with $500,000 for past pain and suffering and $500,000 for future pain and suffering.

The defense argued that defendant was not negligent and that if the jury found any negligence on the defendant, it should apportion 95/5 in defendant's favor. The defense did not explicitly dispute the past medical expenses and suggested that the jury award $50,000 for past pain and suffering and $0 for future pain and suffering based on failure to mitigate.

The jury found that defendant was not negligent and awarded $0 for past medical expenses, $0 for past and future pain and suffering, and $0 for the spouse's loss of consortium claim.

Plaintiff's Final Pre-Trial Demand: $375,000
Defendant's Final Pre-Trial Offer: $100,000
Verdict: $0

For more information, contact Attorney Joseph Mirabella at mirabella@simpsondeardorff.com.

Wisconsin Defense Counsel
Defending Individuals and Businesses in Civil Litigation
6737 W. Washington Street
Suite 4270
Milwaukee, WI 53214

Calendar of Events

December 12, 2025
2025 Winter Conference
Marriott Milwaukee West
Waukesha, WI

April 23-24, 2026
2026 Spring Conference
American Club
Kohler, WI