2017 Summer Conference
August 3-4, 2017
Kalahari Resort & Convention Center
1305 Kalahari Drive
Wisconsin Dells, WI 53965

Program Chair:
Christine Rice
Simpson & Deardorff, S.C.

8.0 CLE Credits have been approved.
The following attorneys are recognized for Excellence in the field of Alternative Dispute Resolution

Hon. Mike Brennan
Milwaukee

Michael Crooks
Madison

Hon. Patrick Fiedler
Madison

Timothy Hawley
De Pere

Terry Lyons
Janesville

Robert McCracken
Manitowoc

Jim Smith
Brookfield

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 900+ top neutrals at www.NADN.org

NADN is administrator for the DRI Neutrals Database
www.DRI.org/neutrals

* The National Academy of Distinguished Neutrals is an invitation-only professional association of over 900 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
Table of Contents

Program Agenda .................................................................................................................. 4

Speaker Biographies ............................................................................................................. 7

Sponsors ............................................................................................................................... 11

Deposition Strategies, Tactics and Uses Before and at Trial
Attorney Michael W. Gill, Hale, Skemp, Hanson, Skemp, & Sleik ...................................... 13

Cars without Drivers and Other Technologies Ahead
David M. Cades, Ph.D., Exponent, Inc. .............................................................................. 22

Cyber Law: A Primer from the Roundtable
Attorney Sally Fry Bruch, Crivello Carlson, S.C.
Attorney Randy Guse, ACUITY, A Mutual Insurance Company
Attorney Mark D. Malloy, Meissner Tierney Fisher & Nichols, S.C.
Attorney Joseph Sarmiento, Meissner Tierney Fisher & Nichols, S.C.
Attorney Ariella Schreiber, Rural Mutual Insurance Company
Timothy Zeilman, The Hartford Steam Boiler Inspection and Insurance Company .......... 35

Bad Faith, Duty to Defend, and a Restatement of Law: Recent Developments
Wisconsin Insurance Practitioners Should Know
Attorney Mark D. Malloy, Meissner Tierney Fisher & Nichols, S.C. ................................. 63

Practical Evidence: The Simplification, Interconnection, and Application of
Evidentiary Rules at Trial
Attorney James H. Gordon, Ansa Assuncao, LLP, DRI-Sponsored Speaker ..................... 119

We The People: How To Overcome Blindspots, Biases and Stereotypes
Michelle Silverthorn, Illinois Supreme Court Commission on Professionalism ............... 122

Mild Traumatic Brain Injury: Medical-Legal Applications of Clinical Findings
Terence John Young, Psy.D., Neuropsychological Services, S.C. ...................................... 132
Thursday, August 3rd

8:00 a.m. - 9:00 a.m.
Continental Breakfast & Registration
Sponsored by Borgelt, Powell, Peterson & Frauen, S.C.

9:00 a.m. - 9:50 a.m.
Deposition Strategies, Tactics and Uses Before and at Trial
Attorney Michael W. Gill, Hale, Skemp, Hanson, Skemp, & Sleik

This presentation will review the Wisconsin Rules of Civil Procedure applicable to the taking and uses of depositions in civil litigation. It will also address practical topics and provide tips on who to depose, when to conduct depositions, where they can be conducted and how to get maximum use out of the deposition testimony to benefit your case.

9:50 a.m. - 10:00 a.m.
Break
Sponsored by Minnesota Lawyers Mutual Insurance Company

10:00 a.m. - 10:50 a.m.
Cars without Drivers and Other Technologies Ahead
David M. Cades, Ph.D., Exponent, Inc.

Vehicle technology is changing and with it, what it means to drive a car necessarily will also and opportunities for distraction may increase. With the advent of Advanced Driver Assistance Systems (ADAS), as well as semi- and fully autonomous driving, the role of the human operator will shift from an active controller to more of a passive supervisor. While these technologies and changes are all in support of a safer surface transportation environment, we know that the introduction of any new technology will come with challenges as the general public begins to use these new vehicles and systems. The increased technology will also come with more functionality, displays, and new avenues of engagement with the vehicles. Understanding the new and changing role of the human behind the wheel is becoming ever more complex and important when evaluating the causes of an incident.

This presentation will offer insight into the human factors of the changing role of the driver, ADAS technologies and driver distraction. Topics covered will include:

- Human attention, vision and perception and effects on behavior
- Driver distraction implications for driving
- ADAS and autonomous vehicle technology
- Potential influences on the future of claims and litigation
- Exponent ADAS research program

Anyone who drives a car (or has a child who drives a car), insurance claims adjusters involved in vehicle collisions and premises liability, litigators handling motor vehicle collisions, pedestrian incursions or handling cases where human behavior/human error is relevant will benefit from participating.

10:50 a.m. - 11:00 a.m.
Break
Sponsored by S-E-A, Ltd.

11:00 a.m. - 11:50 a.m.
Cyber Law: A Primer from the Roundtable
Attorney Sally Fry Bruch, Crivello Carlson, S.C.
Attorney Randy Guse, ACUTY, A Mutual Insurance Company
Attorney Mark D. Malloy, Meissner Tierney Fisher & Nichols, S.C.
Attorney Joseph Sarmiento, Meissner Tierney Fisher & Nichols, S.C.
Attorney Ariella Schreiber, Rural Mutual Insurance Company
Timothy Zeilman, The Hartford Steam Boiler Inspection and Insurance Company

The term cyber law encompasses a broad range of technology-related areas that affect our daily lives, our businesses and the businesses of the clients we serve. The roundtable will introduce and briefly discuss topics including insurance coverage for cyber/data breaches, autonomous vehicles, the Internet of Things (IoT), the Industrial Internet of Things (IIoT) and how cyber issues are impacting the insurance industry. This session will set the table for more in-depth presentations on individual topics.

11:50 a.m. - 1:00 p.m.
Lunch and Annual Business Meeting
Featuring Past President Recognition and Awards Presentation

1:00 p.m. - 1:50 p.m.
Bad Faith, Duty to Defend, and a Restatement of Law: Recent Developments Wisconsin Insurance Practitioners Should Know
Attorney Mark D. Malloy, Meissner Tierney Fisher & Nichols, S.C.

This presentation will provide an update on current trends in Wisconsin bad faith and duty to defend law. Additionally, the presentation will provide a detailed review of the American Law Institute’s Restatement of the Law, Liability Insurance. Topics will include an overview of the history of the Restatement, discussion on the most controversial provisions of the project, comparison of the Restatement to Wisconsin insurance law, and suggestions on what the Restatement could mean for insurers, policyholders, and practitioners moving forward.

1:50 p.m. - 2:00 p.m.
Break
Sponsored by Morrison Sund PLLC

2:00 p.m. - 2:50 p.m.
Practical Evidence: The Simplification, Interconnection, and Application of Evidentiary Rules at Trial
Attorney James H. Gordon, Ansa Assurances, LLP, DRI-Sponsored Speaker

In this 50 minute presentation, national trial counsel Jim Gordon will share a practical approach to enhancing the trial lawyer’s comfort level with the Rules of Evidence. Using the Federal Rules of Evidence as a benchmark, Jim will begin by highlighting the limited number of evidentiary rules which the trial lawyer should master in order to freely operate at trial. Next, Jim will explore the interconnection amongst these rules, and how this interconnection strengthens understanding. Ultimately, this understanding will be addressed within the context of admitting evidence as well as making and meeting objections at trial.

2:50 p.m. - 3:00 p.m.
Break
Sponsored by Jardine, Logan & O’Brien, PLLP
Program Agenda – August 3-4, 2017

3:00 p.m. - 4:00 p.m.
Committee Meetings

4:00 p.m. - 5:00 p.m.
Panel Counsel Meetings and Reception
Reception Sponsored by Acuity

Friday, August 4th

8:00 a.m. - 9:00 a.m.
Continental Breakfast & Registration

9:00 a.m. - 10:30 a.m.
We The People: How To Overcome Blindspots, Biases and Stereotypes
Michelle Silverthorn, Illinois Supreme Court Commission on Professionalism

This highly interactive program starts out by simulating the experience of being on the outside group looking in. Participants then engage in a group discussion on why many Americans find it difficult to engage in subjects of difference, particularly racial difference, and how that difficulty is reflected in the ongoing diversity and inclusion challenges in the workplace. Finally, through the use of large and small group activities, participants will recognize how implicit biases and stereotypes affect how they perceive people who are different, practice how to speak with their peers about difference, and learn crucial skills to resolve conflicts that can arise when different perspectives are given equal space.

By the end of the course, participants will have:
1. Recognized the key role diversity and inclusion play in today's workplace.
2. Implemented strategies to challenge biases and stereotypes.
3. Cultivated conflict resolution skills to utilize in the workplace.

This 90-minute course will be customized for the practicing lawyer.

10:00 a.m. - 10:15 a.m.
Break
Sponsored by Weiss Law Office, S.C.

10:45 a.m. - 11:45 a.m.
Mild Traumatic Brain Injury: Medical-Legal Applications of Clinical Findings
Terence John Young, Psy.D., Neuropsychological Services, S.C.
Sponsored By: Medical Systems, Inc.

This presentation will provide an overview of current scientific findings related to concussion/mild traumatic brain injury. There will be a review of the onset and anticipated clinical course associated with these injuries. Further, there will be a discussion of factors associated with persistence of symptoms beyond the expected timeframe for recovery. This review will address pre-existing conditions, injury related factors, the medical-legal context and symptom exaggeration and feigning; and their potential contribution to persistence of symptoms.

11:45 a.m.
Adjourn

10:30 a.m. - 10:45 a.m.
Break
Sponsored by Weiss Law Office, S.C.

10:45 a.m. - 11:45 a.m.
Mild Traumatic Brain Injury: Medical-Legal Applications of Clinical Findings
Terence John Young, Psy.D., Neuropsychological Services, S.C.
Sponsored By: Medical Systems, Inc.
Call (414) 585-0650

Enjoy the benefits of a new mediation experience.

Providing the flexibility and willingness to approach each mediation in the format most likely to produce the best result.

Scheduling one mediation per day, guaranteeing that time will never be an obstacle to fruitful settlement discussions.

Leaving time in the weekly schedule to guarantee availability even on short notice.

Jim Mathie brings his 30 years of litigation experience and varied mediation training together with a considerate and informed approach to his fulltime mediation practice from offices in downtown Milwaukee or traveling to mediate. If you haven’t already mediated with Jim, now is the time.

And when you’re preparing for mediation, be sure to read his On Mediation column in the Wisconsin Law Journal.

Mathie Mediation Services LLC
757 North Water Street, Suite 350
Milwaukee, WI 53202
Email: jmathie@mathiemediation.com

Website: www.mathiemediation.com
Michael W. Gill is a partner in the La Crosse law firm of Hale, Skemp, Hanson, Skemp & Sleik. He practices exclusively in the area of civil litigation, including insurance defense, coverage litigation, personal injury, business litigation and ADR. He is a 1982 graduate of the University of Minnesota and is admitted in the State and Federal Courts in both Wisconsin and Minnesota. He is a past President of the Wisconsin Defense Counsel, a current Board Member of the Litigation Section of the Wisconsin Bar, and a member of ABOTA, ADTA, ORI and a past member of the IADC.

Dr. David M. Cades received his Ph.D. in Human Factors and Applied Cognition from George Mason University in 2011. He specializes in human factors investigations of vehicle operator behavior, including perception response time, visual perception, nighttime visibility, advanced driver assistance systems (ADAS), and distractions.

Dr. Cades has expertise in the testing and analysis of how interruptions and distractions affect performance. He has investigated the negative effects of distractions in environments, including, but not limited to, driving, commercial aviation, healthcare, offices, and classrooms. He has applied this knowledge to see how distractions can cause errors that lead to accidents. With respect to aviation, specifically, he has collected over forty hours of data from airline pilots performing safety critical flight tasks with interruptions and distractions. Recently, Dr. Cades has performed on-road evaluation of ADAS including auto braking, collision mitigation and warning, blind spot indication, and lane departure warning.

Dr. Cades also has expertise in evaluating and designing graphical user interfaces including devices for use in automobiles and aircraft. He has previously been employed in the field of usability and user experience digital product design. He has investigated the effects of manual and voice-activated infotainment devices in automobiles. He also designed a dashboard display to assist drivers in maintaining safe speeds while driving in adverse conditions and explored how aging and glare affect people’s driving ability. For commercial aircraft, he has worked with pilots, air traffic controllers, and airline operations in support of FAA’s NextGen initiative.

In Dr. Cades’s graduate work, he has utilized and presented on various statistical methods and has authored papers on driver behavior with respect to in-vehicle displays and devices, flight deck performance with novel systems and interruptions, the effects of glare on human vision, how attributes of interruptions affect task performance, ways to improve how people handle distractions, interruptions’ effects in different environments, and various statistical approaches for predicting and understanding research outcomes.

Since joining Exponent, Dr. Cades has investigated vehicle operator behavior of automobiles, commercial trucks, bicycles, motorcycles, and aircraft. He has evaluated the adequacy of warnings on products and in their manuals and he has applied his experience to projects involving safety- and health-related user behaviors of industrial equipment, kitchen appliances, video game entertainment systems, home theater products, and personal protective equipment.

Sarah “Sally” Fry Bruch is a shareholder with Crivello Carlson, S.C. Sally represents businesses, insurance companies and individuals in Civil Trial and Appellate Practice matters. She is admitted to practice in Wisconsin, the Eastern and Western District of Wisconsin Federal Courts and the Seventh Circuit Court of Appeals. Her areas of practice include appellate practice, insurance defense, insurance coverage, municipal law, civil rights litigation and personal injury defense.

Sally is a member of the State Bar of Wisconsin, Defense Research Institute (DRI), Wisconsin Defense Counsel, and the Association for Women Lawyers. She is serving a 3rd 3-yr. term on the Office of Lawyer Regulation (OLR) District 2 Committee, and previously served a 3-yr. term on the Board of Directors, Wisconsin Trust Account Foundation (WisTAF). From 2003-2012, she was a member of the State Bar of Wisconsin’s Diversity Outreach Committee, where she served terms as Chair and Vice-Chair. Sally was previously an Assistant D.A. in
Portage County, WI, where she prosecuted criminal felony and misdemeanor cases to successful verdicts before juries.

Sally serves as Treasurer of the Board of Directors, Prevent Blindness Wisconsin (PBW), whose mission is to prevent blindness and preserve sight by advocating for public policies that improve health systems and provide better access to eye health care. PBW provides free vision screening to children and adults, works to connect patients to appropriate eye care, and distributes vouchers from industry partners for free or reduced cost eye exams and glasses to low income families in need. She also serves as V.P. Foundation for Milwaukee Alumni of Delta Gamma Fraternity. Sally previously served as a volunteer Attorney Coach for the State Bar of Wisconsin High School Mock Trial Competition at Pewaukee H.S. (2013 to 2016) and Brookfield East H.S. (2007-2011).

Randall R. Guse is the Litigation Program Director at ACUITY, A Mutual Insurance Company where he works with ACUITY Claims Representatives to manage the company’s litigation program through its operating territory. Mr. Guse was previously staff counsel at American Family Mutual Insurance Company and also spent five years in private practice.

Mr. Guse earned his J.D. in 1995 from Marquette University Law School and his B.S. in Criminal Justice in 1992 from the University of Wisconsin-Milwaukee. He is a member of the Wisconsin Defense Counsel, the State Bar of Wisconsin, the American Bar Association, the Defense Research Institute and the Trucking Insurance Defense Association.

Timothy J. Zeilman is a vice president with The Hartford Steam Boiler Inspection and Insurance Company. Hartford Steam Boiler, a member of Munich Re’s Risk Solutions family since 2009, provides a range of specialty insurance coverages for business, home and farm.

Mr. Zeilman works in the Strategic Products Group, where he leads HSB’s cyber insurance efforts including the management of its HSB Total Cyber™, HSB Cyber Suite, HSB Home Cyber Protection™ and Identity Recovery products. Prior to joining the Strategic Products Group, he spent 13 years as an attorney in HSB’s Law Department where he focused on corporate and transactional matters and served as the legal liaison to the Strategic Products Group.

Mr. Zeilman holds a Bachelor of Arts degree from Dartmouth College and a Juris Doctor degree from George Washington University.

Mark D. Malloy is a shareholder with the law firm of Meissner Tierney Fisher & Nichols S.C. in Milwaukee, Wisconsin. His practice primarily focuses on insurance coverage and extra-contractual litigation, including insurance bad faith. In addition, Mr. Malloy practices in the area of professional liability and all types of commercial litigation matters. He is licensed to practice law in Wisconsin, Illinois, and Minnesota; and represents companies across the county in all aspects of commercial litigation.

Joe Sarmiento is an associate with the firm of Meissner Tierney Fisher & Nichols S.C., in Milwaukee, Wisconsin. His practice focuses primarily on insurance coverage litigation and appeals. He has litigated multiple types of insurance policies including commercial general liability, Bermuda Form, and professional liability. Mr. Sarmiento’s practice also includes various forms of commercial litigation. He is licensed in Wisconsin and Illinois and has represented clients nationally and internationally.

James H. Gordon is the Managing Partner of Ansa Assuncao LLP’s Ohio office. He is a trial lawyer and mediator. As a trial lawyer, he represents individuals and national and global corporations. He tries cases throughout the country in state and federal courts. As a mediator, Mr. Gordon provides unbiased, informed, and creative solutions to parties willing to resolve their conflicts without the cost and uncertainty associated with jury trials.

Mr. Gordon’s foundation as a lawyer, leader, and problem solver was built during his nine years of active service in The United States Marine Corps. While on active duty, Mr. Gordon served as a prosecutor in Courts’ Martial,
a Special Assistant to the United States Attorney, and an evidence instructor at the Naval Justice School. Mr. Gordon’s reputation as one of the Department of the Navy’s foremost experts on evidentiary issues led to frequent consultation with lawyers and commanders throughout the Department of Defense.

Before leaving the Marine Corps as a Major, Mr. Gordon led over 40 international missions throughout the Middle East, Africa, Eastern Europe, and Southeast Asia. These missions included: training of Iraqi Special Tribunal (IST) investigators in anticipation of the trials of Saddam Hussein and other Baath Party officials; training investigators for Iraq’s Ministerial Commission on Public Integrity; development of Standing Rules of Engagement with the Iraqi Army; and development of criminal procedure and disciplinary codes with the Afghan National Army.

In addition to his litigation and mediation practices, Mr. Gordon continues to lecture throughout the country on a variety of topics related to trial advocacy and has served as an adjunct professor of trial practice at Villanova University’s School of Law.

Michelle Silverthorn is a recognized leader in diversity, education, and inter-generational dynamics. As the Diversity & Education Director for the Illinois Supreme Court Commission on Professionalism, Michelle expands the Commission’s national presence through blogs, social networking sites, and online discussion groups on legal education, diversity and young lawyers.

Michelle is also the chief instructional designer for the Commission’s numerous educational offerings, including our new hour-long series of online interactive courses. In addition, Michelle works with law schools, law students and other legal groups, developing interactive and dynamic education courses and workshops. She writes and speaks frequently on inter-generational issues in the workplace. She is certified both in instructional design and intercultural competency.

Prior to joining the Commission, Michelle worked as a litigation associate with Schiff Hardin in Chicago and Latham & Watkins in New York City. She also previously worked as an arts and entertainment journalist in Trinidad and Tobago, a legal researcher in Puno, Peru and Geneva, Switzerland, and a volunteer teacher in Gaborone, Botswana and Almaty, Kazakhstan.

Michelle grew up in the Caribbean and now lives in Chicago with her husband Daniel and their two daughters. She volunteers in her local and professional community, including serving as Co-Chair of the Michigan Law Alumni Club of Chicago, Director for the Princeton Club of Chicago, and an elected Community Representative for her Local School Council. Michelle received her undergraduate degree from Princeton University and her law degree from the University of Michigan Law School.

Dr. Terry Young is a board certified clinical neuropsychologist with a specialization in adult and child neuropsychology. His experience includes years of providing direct services for persons with developmental disorders, neurological conditions, and traumatic brain injury; and he has also provided medical-legal neuropsychological services for adults and children with traumatic brain injury, concussion, PTSD and related conditions. He is in private practice at New Life Resources in Waukesha, Wisconsin, is a consulting neuropsychologist at the Wellspring Brain Injury Program serving persons with moderate to severe brain injury, anoxia and related neurotrauma, and is on staff at the Children’s Hospital of Wisconsin and the Wheaton Franciscan Healthcare System. He is adjunct faculty at Marquette University with teaching and supervision responsibilities, and is serving as Director of Assessment Services for the Marquette University Interdisciplinary Autism Clinic.
You can trust 30+ years of experience protecting lawyers.

Proud Corporate Sponsor
Visit our table in the Expo Hall.

Put your trust in the carrier created by lawyers, run by lawyers, exclusively serving lawyers.

- Works exclusively with lawyers professional liability insurance
- Defense Program discounts for qualifying defense attorneys
- Specializes in solo to mid-size firms
- Returned over $49 million in profits to policyholders since 1988
- Offers an array of services to mitigate risks

Protecting Your Practice is Our Policy.™

Get a fast quote today!
www.mlmins.com
or contact Chad Mitchell-Peterson
612-373-9681
or chad@mlmins.com
Summer Conference Sponsors
• Acuity
• Borgelt, Powell, Peterson & Frauen, S.C.
• Jardine, Logan & O’Brien, PLLP
• Minnesota Lawyers Mutual Insurance Company
• Morrison Sund PLLC
• S-E-A, Ltd.
• Weiss Law Office, S.C.

Legal Sponsors
• Acuity
• Bell, Moore & Richter, S.C.
• Borgelt, Powell, Peterson & Frauen, S.C.
• Corneille Law Group, LLC
• Everson, Whitney, Everson & Brehm, S.C.
• Mathie Mediation Services LLC
• Minnesota Lawyers Mutual Insurance Company
• Nash, Spindler, Grimstad & McCracken, LLP
• One Law Group, S.C.
• Rural Mutual Insurance Company
• Simpson & Deardorff, S.C.
• West Bend Mutual Insurance Company

Corporate Sponsors
• Brown & Jones Reporting, Inc.
• Crane Engineering
• CTLGroup
• ESI
• Exponent, Inc.
• National Academy of Distinguished Neutrals (NADN), WI Chapter
• S-E-A, Ltd.
• Skogen Engineering Group, Inc.
Exponent works on a variety of litigation matters including:

- Product Liability
- Personal Injury
- Construction Defect/Delay
- Patent Infringement
- Environmental/Toxic Tort
- Insurance Claim
- Food Safety

For more information, contact:

**John Straus**
Client Services Manager
312.999.4214 • jstraus@exponent.com

Exponent is certified to ISO 9001

**Proud Sponsor of the Wisconsin Defense Counsel**
Deposition Strategies, Tactics and Uses Before and at Trial

Michael W. Gill and Nicholas J. Korger, Hale, Skemp, Hanson, Skemp & Sleik

INTRODUCTION

Almost all civil trial attorneys are well versed in taking and defending depositions. The cost of preparing for and attending depositions is very substantial for our clients, so conducting depositions in an efficient and effective manner is important. Many of us have our own unique styles and approaches when it comes to conducting depositions. There is no one "right way" to conduct a deposition, and it is not the intent of this presentation to tell you how to conduct your depositions in the future. The purpose of this presentation is to simply discuss tactics and methods that you may be able to use going forward in your practices.

DEPOSITION BASICS - WHEN, WHO, WHERE, HOW, AND WHY

I. When - Depositions are commonly taken after a lawsuit is commenced. The Rules allow for perpetuating testimony before the commencement of a lawsuit. See §804.02(1), Stats..

1. Pre-suit depositions cannot be taken as a matter of right. A party who desires to take a pre-suit deposition must petition the Court for an Order allowing the petitioner to take the deposition prior to the commencement of an action. The petition must show:

1. If the petitioner expects to be a party to an action;
2. The subject matter of the expected action and the petitioner's interest therein;
3. The facts which the petitioner desires to establish by the proposed testimony and the petitioner's reasons for desiring to perpetuate it;
4. The names or description of the persons the petitioner expects will be adverse parties and their addresses so far as known; and
5. The names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each.

The petitioner is obligated to notify an expected adverse party. Twenty days notice of the hearing on the petition is to be provided pursuant to §804.02(b), Stats..

Practice tip - Some plaintiff's attorneys have used the pre-suit deposition statute to search for potential adverse parties rather than perpetuate the testimony of a dying person or an individual relocating to a distant locale. The testimony is then used as the basis for an action subsequently filed, rather than proof in support of an existing claim. If opposing counsel fails to notify potential adverse parties of the petition for a pre-suit deposition,
consider a Motion to strike the deposition testimony based upon a failure to comply with the notice provisions of §804.02(b).

2. After suit is commenced - Generally speaking, depositions can be taken freely by any party after the commencement of suit. Please note that there are limits on discovery in prisoner lawsuits pursuant to §804.015 that may be applicable if you are defending a State court action brought by an incarcerated individual who is not represented by counsel.

The Rules only require “reasonable notice” to the other parties to the litigation. Hopefully, most depositions can be taken by Stipulation under §804.04, Stats., to avoid disputes about the logistics.

If a party deponent is requested to produce documents or tangible things at the time of the taking of the deposition, the procedures under §804.09, Stats., are applicable.

Practice tip - A party responding to a document production under §804.09, Stats., is allowed 30 days to respond to the Request for Production and 45 days if the Request is served with the Summons and Complaint. There is an argument that if the deposition notice is served with less than 30 days notice, the obligation to produce documents demanded pursuant to the Notice is not timely and need not be honored. To be absolutely safe, a Protective Order could be requested under those circumstances.

3. Pending appeal - Depositions can be taken after an appeal has been filed pursuant to §804.02(2), Stats. As with pre-suit depositions, the party seeking to perpetuate testimony must petition the Court and provide reasons for perpetuating testimony in the action while an appeal is pending.

II. Where? Sec. 804.05(3), Stats., controls where depositions may be taken. The permissible location for a deposition varies, depending upon whether or not the deponent is a plaintiff, a defendant, a non-party witness or a non-resident of Wisconsin.

Plaintiff - A plaintiff can always be deposed in the county where the action was commenced. Any party, including a plaintiff, may be compelled by notice to give a deposition at any place within 100 miles from the party's residence, place of employment or site where he or she transacts business in person. The Court may also fix by Order a convenient location for the deposition of a party deponent. A non-resident plaintiff may also be compelled by notice to come to the county where the action was commenced or is pending for his or her deposition. A non-resident plaintiff can also be compelled to attend a deposition at any place within 100 miles from the plaintiff's residence, place of employment or site where the plaintiff transacts business in person.

Practice tip - Although the deposition of a resident or non-resident plaintiff will most often be conducted either in the county of the plaintiff's residence or in the county where the action is pending, defense counsel has the option of compelling the deponent to come to a more convenient location for defense counsel if it can be established that the deponent
regularly transacts business in that county, i.e., a sales representative from Superior who routinely makes sales calls in Milwaukee could be compelled to give a deposition in Milwaukee County.

Defendant - A defendant cannot be compelled to come to the county where the action is pending unless the defendant resides, is employed, or transacts business in person within 100 miles of the county where the action is pending. This rule is sometimes overlooked. For the convenience of the insured/client, defense counsel may wish to require compliance with this rule to prevent your client being dragged from one corner of the state to another to give a deposition in a minor accident case.

Nonparty deponent - a nonparty deponent can be subpoenaed to appear for a deposition within 100 miles of his or her residence, place of employment, or place where he or she regularly transacts business, or within 100 miles of the location where the subpoena is served. Unlike a party defendant, a nonparty deponent can be compelled to travel more than 100 miles from their residence, place of employment, or place of regular business transactions, if you are fortunate enough to get them served within the 100 mile radius. Keep in mind that under §814.67 of the Statutes, you are obligated to pay the witness mileage from his or her residence or from the point where he or she crosses the state line, if the nonparty deponent is a non-resident.

Non-resident defendant - a non-resident defendant can only be compelled to appear for a deposition within this state if they are subpoenaed within Wisconsin, and then only if the place of service is within 100 miles of the location of the deposition.

Third party plaintiffs - Third party plaintiffs are treated as plaintiffs with respect to depositions requested by a third party defendant. Therefore, if the defendant/insured files a Third Party Complaint against another party, he or she can be compelled to appear in the county where the action is pending for a deposition, at least with respect to the third party claim.

Corporate officers, directors and managing agents - Corporate officers, directors and managing agents of corporate litigants are treated as “defendants” or “plaintiffs” for the purpose of determining where their depositions may be taken.

How? - Almost all depositions are taken by oral examination pursuant to §804.05 of the Wisconsin Statutes. Such depositions may be taken stenographically or by videotape, or by other means that the Court may order pursuant to §805.05(2)(c), Stats.

Sec. 804.06, Stats., does allow for depositions to be submitted upon written questions. This is a procedure that is rarely, if ever, utilized. Questions are served in written form upon 30 days notice. The opposing party then has 10 days to serve cross-examination questions and the requesting party then has an additional 10 days to submit redirect questions. The witness is then asked these questions in the presence of an “officer before whom the deposition is to be taken”.

15
Videotape depositions - Videotape depositions are routinely used to perpetuate the testimony of medical experts and witnesses that are unavailable at the time of the trial. The videotape procedure is set forth in Section 885.40 through 885.47 of the Wisconsin Statutes.

Any deposition can be videotaped, regardless of whether or not it is for discovery purposes or use at trial. The rules do not require a stenographic transcript.

Practice tip - Most judges, and certainly most official court reporters, are not happy if there is no stenographic transcript of the videotaped deposition. The lack of a transcript makes pretrial motions and pretrial evidentiary rulings more difficult. Perhaps with the advent of digital filing in the Wisconsin Courts digitally recorded testimony will be more easily handled by the Court and the litigants. Most judges will likely continue to prefer to be directed to specific testimony in a transcript, however, rather than play through portions of a video to locate relevant portions of the testimony.

Pursuant to §885.44(14), Stats., objections not waived or previously raised and ruled upon, must be ruled upon before the videotape deposition is presented to the jury. Most judges will request or require that this be done in advance of trial to avoid unnecessary delays for evidentiary rulings during the trial itself. It is wise for trial counsel to address these issues with the Court at a pretrial conference, or at a minimum before the commencement of the trial, to avoid judicial wrath.

III. Who? - Literally, any person who can be compelled to appear for a deposition within or outside of Wisconsin can be deposed. The potential deponent must have information which is within the scope of permissible discovery under §804.01(2) of the Wisconsin Statutes. The Court has the authority to enter Protective Orders limiting or disallowing a deposition if the criteria under §804.01(3) for a Protective Order exists.

Witnesses have the right to be represented at a deposition by counsel and may seek Protective Orders from the Court just like a party. Counsel for a deponent may also move to terminate or eliminate an examination which is being conducted in bad faith, or in such manner as unreasonably to annoy, or embarrass, or oppress the deponent or a party pursuant to §804.05, Stats.

Practice tip - If you are dealing with an opposing attorney who is engaging in prohibited conduct under §804.05(5), Stats., it may be worth trying to reach the judge in their chambers for a ruling before simply terminating the deposition or instructing your client not to answer improper questions. The mere threat of judicial intervention will sometimes have a sobering effect upon opposing counsel. You will also have a record indicating that you attempted to reach the Court before aborting the deposition and running the risk of an adverse ruling with the assessment of costs from the Court at a later date.
IV. What? - The matters that may be inquired about at a deposition are the same as with other methods of discovery. The deposition questions must be potentially relevant or reasonably calculated to lead to the discovery of admissible evidence. As a practical matter, the examining attorney has wide latitude with respect to the scope of the examination, so long as it does not cross into the types of questioning prohibited under §804.01(3) and 804.05(5), Stats..

Privileged information is not subject to discovery. Counsel can instruct his or her own client to refuse to answer questions on the basis of privilege. Nonparty deponents must assert the privilege on their own behalf, or by their own counsel. It is unwise for counsel to instruct a nonparty witness to refuse to answer a question based upon privilege or other grounds but the witness can be safely advised to seek their own legal counsel on privilege matters, self-incrimination, etc..

Expert witnesses - There are special rules set forth in §804.01(2)(d), Stats., regarding discovery of expert witnesses. There are also testimonial privileges that may be asserted by experts based upon Burnett v. Alt, 224 Wis. 2d 72, 89, 589 N.W.2d 21 (1999) and its progeny.

An expert who has been identified as an opposing party as one who may be called to present opinions at trial may be deposed under §804.01(2)(d)1. This section of the Statutes authorizes discovery depositions of the opposing party’s experts. The usual custom is that the party seeking the deposition will pay a reasonable fee for the expert’s time spent giving the deposition, although conference time and prep time are usually borne by the party who disclosed the expert. Technically, under §804.01(2)(d)3, there is no requirement that the party seeking discovery pay a fee for the expert’s testimony.

Medical experts present special problems on several fronts. Most plaintiffs and some defendants will designate treating physicians as expert witnesses in personal injury cases. If it is anticipated that these witnesses will provide opinions at trial, discovery under 804.01(2)(d)1 is permitted. Keep in mind, however, that the deposition of a medical expert may be used by “any party for any purpose”. See §804.07(1)(c)2.

Some plaintiff’s attorneys now take the position that there is “no such thing” as a discovery deposition of a medical witness, even a medical expert retained by plaintiff’s counsel. They then attempt to conduct their direct examination for use at trial at the end of the discovery deposition to avoid the cost and inconvenience of taking a second deposition for use at trial at a later date. This, in effect, eliminates discovery of the medical expert, as it forces defense counsel to prepare for the trial testimony of the expert at the time of the discovery deposition. It also precludes defense counsel from having the opportunity to consult with defense experts before performing a cross-examination of plaintiff’s expert at trial or at a later video deposition.
Practice tip - If you anticipate that plaintiff’s counsel intends to convert your discovery deposition into a trial deposition, you should seek relief from the Court in advance of the deposition by asking the Court to limit the examination to discovery questions that you wish to propound to plaintiff’s expert. At a minimum, the Court should order the plaintiff’s counsel to share in the cost of the expert’s deposition if he or she will be permitted to ask direct examination questions for use at trial, as opposed to mere “clarification”.

On an increasingly frequent basis, treating physicians are refusing to provide opinion testimony based upon *Burnett v. Alt*. This is frequently detrimental for the plaintiff, but can be harmful to the defense as well when it appears from the records that the most credible and cost effective defense medical witness will be a treating physician.

*Alt* does not allow a physician or other expert witness to simply refuse to testify in a given case. *Alt* merely allows the expert to refrain from offering opinions that have not already been formulated or expressed based upon prior analysis (*Alt* was a medical negligence case where one physician was essentially asked to express standard of care opinions against another physician who had been named as a defendant in the lawsuit. There is some current debate about whether or not *Alt* was ever intended to allow treating physicians to refuse to express opinions regarding their patients’ injuries, care and prognosis.).

Practice tip - If, as defense counsel, you are interested in deposing a treating physician and you receive an *Alt* letter from the medical facility legal department, carefully review the records to determine whether or not the information and comments contained within the records are sufficient to justify the cost of the deposition. Because some physicians who assert *Alt* fail to even review or bring the records to the deposition, be prepared to have specific records that you want the witness to talk about with you.

V Why? - Deciding whether or not to depose a certain witness is somewhat of an art form. As defense lawyers, sometimes the decision whether or not to depose a witness will be made by our clients. In most instances, however, defense counsel is expected to at least make recommendations regarding the number and type of witnesses to be deposed in a given case. This requires some strategic analysis and judgment on the part of counsel. Taking unnecessary depositions increases the cost of litigation and inconveniences individuals who are asked to participate in the case without bona fide grounds.

In determining whether or not to conduct a deposition, the following question should be considered: Do I need discovery from this person in order to adequately prepare my case for trial?

The answer to this question is almost always “yes” if we are talking about a party deponent. If there is no dispute about liability in a given case, plaintiff’s counsel may be in a position to forego the deposition of a defendant driver or other tort-feasiar, but for the most part it is standard operating procedure to depose the parties.
If there are disputed facts on liability, witnesses to the accident/incident usually should be deposed, especially if they have not given a prior statement to law enforcement or one of the parties. In many instances, depositions can be eliminated if the potential witnesses are contacted by an office paralegal or investigator and it is determined that the witness has little to offer.

Discovery depositions of expert witnesses should be scheduled judiciously, as the cost associated with these depositions is usually substantial. If an expert has prepared a detailed report or detailed notes and you are familiar with the witness from past cases, a discovery deposition may prove unnecessary. Sometimes the discovery deposition will help the expert to prepare for cross-examination at trial, as much as it helps counsel to prepare for cross-examination. If you are going to conduct a discovery deposition of an opposing expert, you should do so to prepare for your cross-examination at trial, not to conduct it.

Depositions taken for trial use - Keep in mind that under many circumstances a so-called “discovery” deposition may be used as evidence at trial under §804.07 of the Wisconsin Statutes. If a witness dies between the date of his or her deposition and the trial, the deposition may be used at trial. If the witness resides more than 30 miles from the place of trial or hearing, or is out of state and will not return before the termination of the trial or hearing, the deposition can be used at trial unless the absence of the witness has been procured by the party offering the deposition. A deposition of a witness that is unable to attend or testify because of age, illness, infirmity or imprisonment is also available for use at trial. Finally, if a party can establish that they have been unable to procure the attendance of a witness by subpoena, the deposition can be used at trial.

Practice tip - Keep in mind that when you are dealing with elderly, terminally ill, or transient witnesses that there is a reasonable chance that the deposition you are taking for discovery purposes will end up being trial testimony. At least initially, you may wish to narrow the scope of your examination of such a witness to the issues that are essential to your position in the case.

Also, keep in mind that if a witness moves more than 30 miles away from the place of the trial or hearing, the deposition may be used at trial by opposing counsel, even though it was initially anticipated that the witness would appear at the trial to testify. If necessary, be prepared to subpoena a witness that is more than 30 miles away from the place of trial or hearing if you need to examine the witness beyond the deposition testimony.

Taking a deposition for tactical reasons - Infrequently, but occasionally, it is appropriate to take a deposition for purely tactical reasons. If, as defense counsel, you are aware of favorable liability witnesses that plaintiff’s counsel either does not know about, or does not appreciate, you may wish to schedule and take their depositions for the sole purpose of opening opposing counsel’s eyes to a potential problem with the case. If you anticipate that the case will have to be tried and is not susceptible to settlement, exposing such a witness to a deposition may be tactically unwise. If your objective, however, is to soften
the plaintiff’s settlement position for potential settlement at mediation, scheduling such depositions may make sense.

Miscellaneous - a quick list of do’s and don’ts

1. Don’t interpose objections unnecessarily and for the purpose of trying to exert control or influence over the proceeding. Most objections can be raised after the deposition and are not waived by failing to interpose them during the deposition. Objections to relevancy rarely are meaningful at a deposition. Objections based upon the form of the question, privilege and repetition are appropriate to raise during the deposition.

2. Be prepared and be concise, especially with video depositions of experts. No attorney realizes how boring they are until they are forced to listen to their own direct or cross-examination of an expert witness on a video.

3. Avoid noticing depositions without first contacting opposing counsel in an effort to accommodate their schedule. Try to reach as many stipulations as possible regarding discovery and do not resort to noticing depositions without consultation unless you are dealing with a totally unresponsive or uncooperative opposing attorney.

4. Know the rules in Chapter 804 for depositions and in Chapter 885 for video depositions. Too many lawyers make assumptions about the court rules pertaining to depositions and it is to your advantage to actually know the rules.

5. Be respectful of the witness and opposing counsel. You can be adversarial without being rude and hostile. Clients rarely benefit from counsel’s overbearing behavior.
TRIAL ATTORNEYS AND CIVIL LITIGATION SPECIALISTS

INSURANCE DEFENSE   INSURANCE COVERAGE

PROFESSIONAL LIABILITY DEFENSE

William R. Wick       John F. Mayer
Christopher R. Bandt  Jeremy T. Gill
Terri L. Weber        Ryan R. Graff
Justin F. Wallace     Katelyn P. Sandfort
Nicole R. Radler      Joshua M. Greatsinger
Shannon L. Alberts    Sean A. Bukowski

MANITOWOC OFFICE:   1425 Memorial Drive, Manitowoc, WI  54220
                    920-684-3321

WAUKESHA OFFICE:    N14 W23777 Stone Ridge Dr., Ste. 170 53188
                    1-262-408-5515

NORTHWOODS OFFICE:  920-242-4525

WWW.NASHLAW.COM
Drivers and the Driverless Vehicle Revolution: Understanding the Changing Role of the Driver

David M. Cades, Ph.D.\(^1\), Caroline Crump, Ph.D.\(^2\), Christina Cloninger, Ph.D.\(^1\) & Douglas Young, Ph.D.\(^2\)

\(^1\)Exponent, Chicago, Illinois
\(^2\)Exponent, Los Angeles, California

*Vehicle technology is advancing at a whirlwind pace. How are regulators, insurers, litigators, and drivers going to keep up?*

On May 7, 2016, a Tesla Model S, while operating in the semi-autonomous “autopilot” mode, struck the broad side of the trailer portion of a tractor-trailer that had turned left in front of its path on a clear and sunny day. The driver of the Tesla was killed, in the first reported fatality involving a self-driving car. In this case, neither the driver of the vehicle nor the automatic braking system applied the brakes: the technology had reached a limit condition in which its sensors could not differentiate the trailer from its background, and the driver was reportedly watching a movie. This situation demonstrates a critical mismatch between the driver’s expectations and understanding of what his role should be in the automated vehicle, and the vehicle’s requirements for driver oversight and intervention.

The advent of the automobile has forever changed the way people move around, where they live, and how they travel. The introduction of advanced vehicle technologies and autonomous vehicles is set to reshape transportation yet again. As with the introduction of any new technology, there will undoubtedly be (and already have been) hurdles and challenges to the industry as the public begins to consume and use these new vehicles and systems. The effect of these new technologies on both the driver and the task of driving are discussed in the context of what these systems do to facilitate the driving task, and the challenges and opportunities they pose for research, development, and reactive claims.

**Available Technologies and Market Integration**

The components of the autonomous vehicle, Advanced Driver Assistance Systems (ADAS), have already hit the market, and these “high-tech” devices are becoming more widely available with each new model manufactured. One can simply look at current vehicle advertisements to find that many manufacturers are now focusing significant marketing efforts on introducing these technologies to the public. Although the available technology differs among manufacturers, several systems are already prevalent, including:

- **Electronic Stability Control.** This system monitors the steering input from the driver relative to the direction of vehicle to maximize the control of the vehicle. If there is a mismatch, the vehicle will selectively apply the brakes or reduce engine power to avoid a loss of control.

- **Adaptive Headlights.** This technology functions to illuminate turns and curvatures on the road in dark environmental conditions. The headlights swivel in the direction of the turn by monitoring the speed, steering and yaw of the vehicle.

- **Adaptive Cruise Control.** This advanced speed control system is a modified version of traditional cruise control, which controls headway distance as well as desired vehicle speed through autonomous braking and acceleration. The system uses radar or LIDAR systems to scan the distance to lead vehicles when cruising, and is one of the most common ADAS technologies.

- **Rearview Back-Up Camera.** This technology displays the conditions behind a vehicle and includes areas that are not otherwise visible when backing up. The view is usually provided from a wide-angle camera mounted on the back center of a vehicle, generally displayed to the driver in the rearview mirror, center console, or in the instrument cluster, and is activated when the vehicle is in reverse.
In addition to the more widely available ADAS technologies described above, there are other systems, which are more recent innovations that exert independent control over certain driving functions. These include:

- **Park Assist.** As indicated by the name, this system uses optical and other sensor technology to automatically park the car without any interaction from the driver. Some systems can parallel park or park in a perpendicular spot.

- **Lane Departure Warning and Lane-Keeping Systems.** These technologies warn the driver when the car is drifting out of its lane, and can either inform the driver or control vehicle heading so that the car remains in the lane of travel. Warnings for these systems consist of auditory (e.g., series of tones), visual (e.g., blinking light in dashboard), and/or haptic (e.g., steering wheel vibrations) stimuli, and are triggered when the vehicle nears or crosses edge lines without the activation of a turn signal.

- **Collision Warning and Autonomous Emergency Braking.** These technologies utilize LIDAR and radar systems to scan the path ahead of the vehicle and calculate time and distance to impact a lead vehicle or other objects. If the driver is approaching an impending obstacle and does not respond prior to reaching a certain time-to-collision threshold, the forward collision warnings will activate. The vehicle will further prime the brakes to enhance braking power for driver response, and tighten seatbelts in case of collision. If the vehicle continues toward the collision point without driver response and passes a time-to-collision threshold, the vehicle will apply full braking power to bring the vehicle to a stop in order to reduce the magnitude of a collision forces.

Finally, automated, specialized “self-driving systems” are currently available in select vehicles manufactured by Tesla. Those presently available for use on the roadway include:

- **“Summon.”** This technology utilizes a form of Park Assist that allows the operator to summon the car to a specific location without being in the vehicle. This function is currently limited to driving a distance of 39 feet, and requires the operator to be within 10 feet to activate (Tesla release notes 7.1).

- **AutoPilot.** This technology affords autonomous or “self-” driving in many situations, using a system of technological advances, that merge computers, electronics, cameras and sensors for active lane-keeping, adaptive cruise control, lane changing, self-parking and other functions. It is presently only available for use at highway speeds, and functions for limited traffic maneuvers (e.g., matching traffic speed and lane changing).

While some ADAS components are becoming part of standard vehicle packages, it remains uncertain as to when these technologies will be accepted by consumers and thus how quickly regulators, insurers, and litigators need to address the safety associated with them. Historically, the progression of technology has been relatively slow. For example, electronic stability control systems were introduced in the late 1990s (NHTSA, 2008) but were not required as standard in passenger cars and light trucks until model year 2012 (49 CFR Parts 571 and 585 – Federal Motor Vehicle Safety Standards; Electronic Stability Control Systems; Controls and Displays). However, there is evidence to suggest that the pace of adoption is substantially increasing. For example, rearview back-up cameras were introduced in the early 2000s (“Toyota History of Safety Technology”), and by 2014, the U.S. Department of Transportation’s National Highway Traffic Safety Administration (NHTSA) issued a rule requiring rear viewing technology to be included as standard in all vehicles under 10,000 pounds by 2018 (49 CFR Part 571 – Federal Motor Vehicle Safety Standards; Rear Visibility; Final Rule). Furthermore, an automotive manufacturers group, representing more than 99 percent of the U.S. vehicle market (NHTSA, 2016), has committed to speed the pace of adoption for autonomous technologies; specifically, these automakers agreed with NHTSA and the Insurance Institute for Highway Safety (IIHS) to make autonomous emergency braking standard by 2022.
This agreement is a novel approach to broadly and quickly introduce ADAS technology to a wide consumer base. While the deadline for autonomous emergency braking integration is 2022, many of these manufacturers have already begun offering this feature as at least in option in their fleets. With respect to fully-autonomous vehicles, various companies (e.g., Uber, Google and Tesla) have been working to be the first to bring fully-autonomous vehicles to the marketplace with the more traditional automobile manufacturers also pledging to bring these vehicles to public roadways in the near future. Volvo, for example, pledges to test self-driving cars on public roads in multiple countries by 2017 (https://www.ft.com/content/5b76aba2-0bc4-11e6-9456-444ab5211a2f).

Historically, there has typically been a time lag of two to three decades between technology introduction and large scale adoption or regulatory mandate. During this time period, the technologies were often refined by the manufacturers, and the technologies’ benefits to performance and safety were often studied in detail before any type of regulatory mandate was ordered. In addition, by the time a regulatory mandate came to fruition, the system in question was actually already standard in many vehicles or was provided at least as an option in most (e.g., rearview back-up cameras). This period of time – between introduction and regulation – further allowed insurers, litigators, and researchers to observe issues with the technologies and develop strategies on how to best handle them. In marked contrast, the introduction and inclusion of autonomous vehicle technology has taken a different path. For example, the autonomous emergency braking systems as well as fully autonomous vehicles are currently available to the public in various forms, and have not experienced any hold back for regulatory orders. As these and other similar ADAS technologies are developed and introduced, a trend of shorter time periods, from introduction to widespread inclusion may continue and thereby reduce the time available for the industry and public to react.

**Challenges with Integration**

There are a number of hurdles that manufacturers, consumers, researchers, and regulators face before such technologies are truly accepted and integrated into mainstream transportation. One set of challenges relates to the interaction between vehicles with various levels of autonomous technology on roadways. As an example, according to Google’s Self Driving Car Reports (https://www.google.com/selfdrivingcar/reports), of the 25 reported accidents between May 2010 and July of 2016, six occurred while the Google car was in manual mode and the other involved vehicle driver was deemed to be at fault in all but one of the 19 that occurred while the Google cars were in autonomous mode. It is likely that this trend will continue as long as there are human drivers acting in sometimes unpredictable or atypical ways. Similarly, there are challenges related to cost barriers for ownership of an autonomous or semi-autonomous vehicle, as well as cost barriers to improving infrastructure that can better accommodate such vehicles. Discussions of the future of autonomous driving and connected vehicles often refer to fleets of vehicles that can communicate with each other and with the infrastructure, allowing for faster speeds, less separation between vehicles on the road, and a more efficient utilization of the roadway system. However, that level of investment in infrastructure will be substantial.

Other challenges relate to the acceptance of these technologies by consumers. If consumers do not prefer or trust the technologies, they will not want to purchase vehicles equipped with the technologies. For example, consumers report dissatisfaction with lane departure warning systems and regularly disable them (IIHS, 2016; Reagan & McCartt, 2016). We have also conducted a survey of naïve and experienced driver perceptions and desire to own autonomous vehicle technologies (Crump et al., 2016). We found that only 1 in 5 consumers surveyed was interested in fully-autonomous vehicles, and that 44% of consumers surveyed would prefer vehicles with no self-driving capability (Crump et al., 2016). Poor acceptance of existing technologies may be related to the expectations of drivers and the extent to which they trust the systems. For example, there have been a number of incidents with currently-available ADAS technologies, including the Tesla fatality mentioned above, wherein the operator thought the
vehicle was in one mode and would take one action, only to find the vehicle was actually in another mode and took a different action (e.g., did not brake when the operator thought it would). This mismatch between a user’s understanding of how a system does or should function, and how that system actually functions, has led users to either not use or misuse the technologies. Historically, research has shown that humans are quite sensitive when it comes to trusting and accepting automated systems, and that even infrequent violations of their expectations can have a lasting impact on their acceptance of automated systems (Schaefer et al. 2016). Thus, consumer expectations of system functioning are intimately related to acceptance and trust. Trust can be degraded when users experience too many false alarms or find that the product fails to perform in expected conditions. For example, we found that younger drivers (< 46 years old) in particular generally rated lane departure warning and adaptive cruise control systems unfavorably after three driving sessions using the systems (Crump et al., 2016). Further, these drivers were also more likely to state that the systems did not behave as expected, and 100% of young drivers reported that they were not interested in purchasing a “self-driving” vehicle after their experience. While we did not obtain a measure of baseline interest in autonomous vehicle ownership, these findings are consistent with the idea that drivers will not want autonomous technologies and ADAS if they do not immediately behave as naïve consumers expect. Thus, there is a danger that introducing technologies before they can meet consumer expectations could result in users rejecting autonomous technologies entirely.

The Role of the Driver with “Self-Driving” Vehicles

One of the most crucial challenges relating to driver acceptance is the behavioral shift that drivers must make to operate a vehicle with autonomous or semi-autonomous technologies. Specifically, the role and importance of active control over vehicle functions has been reduced and made less demanding with assistive technology (e.g., power steering), or removed from the driver’s purview completely (e.g., automatic transmissions). As a result of these technologies, less is required of the human driver when operating a vehicle. Instead, the responsibility for safe navigation of a vehicle is distributed between the driver and the vehicle itself. The primary hope is that increasing automation will reduce or eliminate driver error, and thus prevent a large number of accidents (Brookhuis et al., 2001). However, the driver is still required to operate at least some aspects of the driving task. The driver in a semi- or fully-automated vehicle becomes a less-active operator, who performs fewer movements that govern the vehicle and, instead, monitors the outcome information of the systems. As such, a driver’s attention shifts from processing the environmental stimuli outside the vehicle to performance-related characteristics available inside the vehicle. For example, in ADAS technologies that monitor the environment for pedestrians, the driver’s attention is directed to the vehicle’s alert system (e.g., auditory warnings) and in-vehicle display only when a pedestrian becomes a hazard. In this way, the change in the driver’s role and responsibilities while driving introduces a variety of issues, which are discussed in turn below.

Acceptance and Trust: A major hurdle to a driver’s transition to a less active role when operating a vehicle is acceptance. On the one hand, drivers with too little trust in the systems are unlikely to use them, rendering the systems useless or even interrupting their function. For example, forward collision warning and mitigation systems can respond faster to an impending collision than most human drivers can (Muhrer et al., 2012). Yet, the system’s response can be interrupted by driver intervention, such as braking or movement of the steering wheel. Drivers who do not sufficiently trust that the vehicle will perform as intended can interfere with the systems, and consequently interfere with the safety benefits. While this behavioral pattern is not typically observed in scientific investigations, many studies, in fact, suggest the opposite – consumers exhibit too much trust when interacting with the systems. In particular, drivers often expect that they do not need to be as vigilant when only monitoring the state of the vehicle, compared to when they are actively driving the vehicle. For example, drivers naïve to the limitations of automated vehicle technologies perform secondary tasks as much as 261% more frequently in “self-driving” vehicles as compared to a vehicle without ADAS (Jamson et al., 2013; Carsten et al., 2012; De
Another related issue in drivers with too much trust in ADAS technologies is that they may operate the vehicle at its limits and assume he (or she) remains protected by the vehicle, a concept known as “risk compensation.” Consistent with this, drivers in partially-automated vehicles have sometimes been observed to drive at increased speeds with decreased headways, and exhibit less control of lane position (Muhrer et al., 2012; Brookhuis et al., 2001; Merat et al., 2012). It should be noted that scientific studies indicate that behavior is moderated by experience, such that drivers with increasing experience generally demonstrate more reasonable expectations and levels of trust (e.g., Xiong et al., 2012; Kidd et al., 2010; Gold et al., 2015).

Loss of Situational Awareness/Automation Handoff: Studies of driver interaction with autonomous systems in vehicles indicate that the systems are very effective in improving performance for simple driving tasks, such as driving straight on highways. However, when the systems break down or reach their limits, drivers are often unable to take over control of the vehicle in a timely manner (Onnasch et al., 2013; Merat & Lee, 2012). This may be related to a driver’s inattention to the driving task and/or performance of secondary tasks when driving a partially- or fully-automated vehicle (Jamson et al., 2013; Carsten et al., 2012). Disengagement from the driving task makes it difficult for the driver to respond in sudden emergencies because they are “out-of-the-loop” (i.e., they have lost awareness of their environment and situation) (Endsley & Kiris, 1995). Findings from simulator (e.g., Carsten et al., 2012) and on-road, closed course (Crump et al., 2017) studies indicate that drivers spend less time gazing at the road ahead when utilizing adaptive cruise control and that they exhibit increased reaction times to emergent situations when various parts of the driving task are automated as compared to when they are not (Brookhuis et al., 2001). Further, when drivers in ADAS-equipped vehicles are presented with an emergency situation without warning, their responses to the emergency tend to be more aggressive and less controlled than if they had been driving manually (Louw et al., 2015). Consequently, NHTSA (2013) has recommended a warning signal be put in place to notify drivers when they will need to take over for the vehicle. Studies of the effects of such a warning signal indicate that it is generally effective in encouraging smooth takeover by the human driver, but may require some training for the driver to achieve smooth takeover (Clark & Feng, 2015). We have similarly found that drivers engaged in a secondary task (namely, mental arithmetic problems administered over a cell phone) show a benefit in terms of reaction times following visual and auditory forward collision warnings that alert them to impending obstacles as compared to drivers who do not receive such warnings (Crump et al., 2015). However, we have also found that drivers engaged in a mental arithmetic task do not benefit from lane departure warnings (Cades et al., 2016); thus, warnings may be selectively effective in redirecting driver attention depending on factors such as the significance of the warning (e.g., imminent collision versus a more innocuous lane drift) and exposure to the warning (i.e., effects of habituation).

Training: The efficacy of a new technology ultimately relies on the user’s ability to understand its purpose and interact with it appropriately. For example, vehicles with forward collision mitigation systems generally work most effectively when the driver remains passive and does not interfere with the system’s sophisticated braking mechanism. In these situations, drivers need to inhibit their trained response (i.e., depressing the brake) because it interrupts the vehicle’s optimal performance capability. We have previously shown that drivers naïve to forward collision warning and mitigation systems do not rely on them when presented with a surprise lead vehicle braking event; instead, drivers are likely to activate the brakes, which is the result of training and many years of experiences in non-ADAS-equipped vehicles (Crump et al., 2015). While this is an appropriate response in many cases, interrupting the vehicle system’s emergency response process can purposefully or inadvertently result in unexpected vehicle movements and handling. For example, in early 2016, one Tesla driver inadvertently pressed the brake and interrupted the vehicle’s emergency response, resulting in a rear-end accident on a highway (http://arstechnica.com/cars/2016/05/another-driver-says-teslas-autopilot-failed-to-brake-tesla-says-otherwise/). Therefore, proper training on best practices for responding with the vehicle systems, rather than against them, is necessary. Furthermore, drivers may need training to search and respond to new
information provided by the vehicle. Information provided in a heads-up display can be confused with relevant road features, such as traffic lights and signage (Kim et al., 2012). In the case of audible warning alarms, such as those associated with lane departures or backing, observer must be able to detect the warnings and identify their meaning (e.g., Young et al., 2005; Khan et al., 2009). It is difficult for consumers to learn to associate abstract sounds with the warnings they intend to convey (Leung et al., 1997); thus, training and experience are required to encourage proper interaction with the alarm. Studies of driver interaction with automated vehicle technologies indicate that even limited experience with the systems appears to help drivers understand how to best utilize and interact with the systems (Xiong et al., 2012; Kidd et al., 2010; Larsson, 2012; Crump et al., 2016).

As people become more familiar with and better trained on new automated vehicle technology, they will be faced with the prospect of having to switch between roles depending on the level of technology present in the vehicle they operate. Specifically, drivers may become familiar with automated technologies in their primary vehicle, but drive a secondary vehicle without the technologies. Reliance on a new technology may re-train attention to work with the technology, at the expense of older habits required in non-automated vehicles. For example, rearview back-up cameras encourage visual search behaviors toward the display, rather than turning around to look behind the vehicle when reversing (Kim et al., 2012). Such training may show persistent effects, changing patterns of driver gaze behavior over time. Consistent with this, intermittent removal of a lane departure warning system in one study was not associated with worse lane-keeping behavior, suggesting that the effects of the lane departure warning system continued in its absence (Breyer et al., 2010). While this is a positive effect for lane departure systems, it could be catastrophic for rearview back-up camera systems. This issue would present most saliently in situations wherein drivers are driving other vehicles temporarily, as with rental cars.

**Individual Differences:** It is generally expected that certain populations, such as elderly drivers, will disproportionately benefit from partially- or fully-autonomous systems (e.g., Ahtamad et al., 2015; Davidse, 2006; Rakotonirainy & Steinhardt, 2009). We have found some support for this contention in a large online survey of naïve and experienced driver preferences, as well as in a post-test survey of driver preferences after initial exposure to forward collision warning and mitigation systems (Crump et al., 2016). Older drivers who already have high levels of experience with ADAS generally report that they like the systems. Somewhat surprisingly, older drivers are more likely than younger drivers to report that they would purchase similar technologies, even after a single exposure to forward collision warning and mitigation. However, older drivers were also more likely to report difficulty understanding the forward collision warning and mitigation system than were younger drivers. Consistent with this, older drivers do not show an overall benefit from technologies such as heads-up display systems (e.g., Gish & Staplin, 1995). Furthermore, older naïve drivers report lower preferences for more automated vehicles (Schoettle & Sivak, 2015). Thus, it is unclear how and whether older drivers will experience the intended safety benefits, perhaps due to the well-established apprehension of naïve users to use and rely on new products.

**Benefits of ADAS and Autonomous Vehicle Technologies**

ADAS technologies are designed to increase safety, reduce driver workload, reduce crashes (and by proxy injuries and fatalities), and increase the overall efficiency of vehicle performance on the roadway. Initial reports suggest that ADAS technologies are successful in their aims. One study from IIHS ([https://www.sbdautomotive.com/en/us-insurers-say-adas-prevent-crashes](https://www.sbdautomotive.com/en/us-insurers-say-adas-prevent-crashes)) found that vehicles equipped with automatic braking showed a reduction in rear-end crashes of about 40% as compared to vehicles without the technology. The Highway Loss Data Institute (HLDI) reported reductions of about 10% in property damage claims and reductions of approximately between 20-45% in bodily injury claims in vehicles equipped with forward collision warning and lane departure warning systems as compared to vehicles without these ADAS features (IIHS, 2016).
Other benefits to the proliferation of ADAS technologies in consumer vehicles include advances in the data collected on driving behavior, vehicle operation in different circumstances, and information on what the vehicle and driver were doing in the moments surrounding an accident. Data from sources such as the airbag control module, electronic data recorder, crash data recorder or the vehicle’s controller area network (CAN) BUS continue to improve and track the state of more vehicle systems. Tesla, for example, has used data it has collected to show the state of its Autopilot and Summon features at the time of incidents, allowing investigators insight in to the role of those systems during incidents (http://money.cnn.com/2016/07/14/technology/tesla-autopilot-crash-pennsylvania/; http://www.theverge.com/2016/5/11/11658226/tesla-model-s-summon-autopilot-crash-letter). Specifically, on more than one occasion, Tesla has shown that in crashes where the driver thought these systems were active, they were in fact not and the vehicle was under the control of the driver and not the automated system. As discussed above, these incidents highlight the importance of an operator’s understanding of an automated system and the necessity of vehicle performance data that details the activity of both the operator and system technologies.

Another benefit associated with increased data collection comes in the form of rate adjustment for vehicle insurance. Traditionally, rate determination may have had to do with a specific driver’s demographics and personal driving history and only partly about the vehicle that person drives. As vehicles become more automated, however, the driver may play less of a role in this determination. Insurers will be faced with entirely new questions and issues to help them determine insurance risk, but will also have the benefit of additional data to help understand the risks. These benefits may be passed on to consumers; for example, at least one insurer in the United Kingdom is offering incentives to its customers who have vehicles with assistive technologies and has plans to offer further rate adjustments as the demonstrated safety increases and thus risk of loss decreases (https://www.theguardian.com/business/2016/jun/07/uk-driverless-car-insurance-policy-adrian-flux).

Conclusions

While the safety-related data are certainly encouraging, there continue to be reports of accidents involving automated technologies, including those previously described. Given the nature of these accidents, it is possible that any number of issues may arise, including: vehicle did not have a particular ADAS as “standard equipment,” a particular ADAS did not work as expected, ADAS produced false alarms, and that ADAS was confusing, not understood, or impaired driver’s ability to operate the vehicle. In light of these issues, it is imperative that the proper tools are used to evaluate those incidents. For original equipment manufacturers, 3rd party component makers, researchers, insurers and litigators alike, there is a clear need to stay abreast of current scientific findings and real-world examples of incidents and accidents. A thorough understanding of the ever-changing role of the driver in the context of using ADAS is one essential step in staying prepared to meet these challenges.

The automotive experience is moving towards an eventual end state of fully autonomous vehicles. If perfectly implemented, full autonomy means zero crashes and thus zero fatalities and injuries from crashes, faster commutes, greater efficiency on the roadway and more time given back to the riders to engage in other activities. However, given that the current fleet of non-autonomous, non-connected vehicles on the roadway will be around for many more years, that the retrofitting of the infrastructure to accommodate autonomous and connected vehicles is lagging behind the development of the vehicles themselves, and that there are still a number of technical challenges that need to be worked out with the vehicles themselves before full connectivity and autonomy can be released, substantial advances across multiple domains must be completed before we have wide-spread autonomous and connected vehicles on the road. What is clear, however, is that we have to meet these challenges and continue to prepare for the almost driverless revolution.
REFERENCES


CREATIVE SOLUTIONS TO COMPLEX PROBLEMS IN ENGINEERING AND MATERIALS SCIENCE

Litigation & Insurance

CTLGroup offers technical support for cases that range from functional failures to catastrophic structural collapse:

- Professional standards of care
- Construction delays & defects
- Structural & materials failures
- Natural disasters

Services

- Expert witness testimony
- Field investigations
- Mediation & arbitration support
- Failure simulations & modeling
- Code & specification compliance assessments
- Failure analysis & resolution
- Document review
- Claim & schedule review
- Mock-ups & animations
- Laboratory analysis

www.ctlgroup.com

CONTACT
Richard Kaczkowski
RKaczkowski@CTLGroup.com
847.972.3346

CORPORATE OFFICE
5400 Old Orchard Road
Skokie, Illinois 60077

Chicago, IL | Austin, TX | Washington, DC
Bradenton, FL | Horsham, PA | Naperville, IL
Doha, State of Qatar
Vehicle technology is changing and with it, what it means to drive a car necessarily will also and opportunities for distraction may increase. With the advent of Advanced Driver Assistance Systems (ADAS), as well as semi- and fully autonomous driving, the role of the human operator will shift from an active controller to more of a passive supervisor. While these technologies and changes are all in support of a safer surface transportation environment, we know that the introduction of any new technology will come with challenges as the general public begins to use these new vehicles and systems. The increased technology will also come with more functionality, displays, and new avenues of engagement with the vehicles. Understanding the new and changing role of the human behind the wheel is becoming ever more complex and important when evaluating the causes of an incident.

This presentation will offer insight into the human factors of the changing role of the driver, ADAS technologies and driver distraction. Topics covered will include:

- Human attention, vision and perception and effects on behavior
- Driver distraction implications for driving
- ADAS and autonomous vehicle technology
- Potential influences on the future of claims and litigation
- Exponent ADAS research program

Anyone who drives a car (or has a child who drives a car), insurance claims adjusters involved in vehicle collisions and premises liability, litigators handling motor vehicle collisions, pedestrian incursions or handling cases where human behavior/human error is relevant will benefit from participating.
Being known for experience and expertise begins with seeking these qualities in the professionals you engage.

Wisdom means knowing what you don’t know, and who to call to find out. That’s why you should know about S-E-A. Our expertise in scientific evaluation and forensic analysis covers many specialties—all focused on finding real answers. S-E-A’s court-qualified engineers and scientists have been doing this important work since 1970.

To find out more, call Anthony Barker at 888-597-5084 or visit www.SEAlimited.com.

THE ENGINEERING & SCIENCE BEHIND THE ANSWERS SINCE 1970

© 2015
Electronic Discovery in Wisconsin and the Seventh Circuit - “Nuts and Bolts.”

August 3-4, 2017

Presented by:

Sarah “Sally” Fry Bruch, Crivello Carlson, S.C.

Written Materials Prepared by:

Sarah “Sally” Fry Bruch, Crivello Carlson, S.C.
Jasmyne M. Baynard, Crivello Carlson, S.C.
Jane E. Howard, Crivello Carlson, S.C.
# TABLE OF CONTENTS

## Contents

I. Introduction ................................................................................................................................... 4  
   A. What is eDiscovery? .................................................................................................................... 4  
   B. The eDiscovery Process ............................................................................................................. 4  

II. Federal Discovery Rules and Electronic Evidence ........................................................................... 5  
   A. The 2006 Amendments to the Federal Rules of Civil Procedure (“FRCP”) .............................. 5  
      1. FRCP 16: Pretrial Conference; Scheduling; Management .................................................. 5  
      2. FRCP 26: General Discovery; Duty of Disclosure ................................................................. 5  
      3. FRCP 33: Interrogatories to Parties ......................................................................................... 6  
      4. FRCP 34: Production of Documents and Electronically Stored Information .................... 6  
      5. FRCP 37: Failure to Make Disclosures and Sanctions ......................................................... 7  
      6. FRCP 45: Subpoena of A Nonparty to Produce ESI – the Rules Protect the Responding Party from Undue Burden/Expense ................................................................. 8  

III. Rules of Evidence and Electronic Documents ............................................................................ 10  

IV. Ethics Rules Regarding eDiscovery Standards ........................................................................... 10  
   A. ABA Rule 1.1: Competence. “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” ....................................................................................................... 10  
   B. Wisconsin SCR 20:1.1: Competence. “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” ..................................................................................... 10  
   C. ABA Rule 1.6: Preventing Inadvertent Disclosure ..................................................................... 11  
   D. Wisconsin SCR 20:1.6: The Duty of Confidentiality – Preventing Unauthorized Disclosure .. 12  

V. Wisconsin: Law, Statutes & Relevant Case Law ........................................................................... 12  
   A. Wis. Stat. 804.01(2)(e). Specific limitations on discovery of electronically stored information.... 12  
   B. Court Orders For Discovery of ESI. In determining whether to issue an order relating to discovery of electronically stored information, the circuit court may compare the costs and potential benefits of discovery. Vincent & Vincent, Inc. v. Spacek, 102 Wis. 2d 266, 306 N.W.2d 85 (Ct. App. 1981). 13  
   C. 2011 Amendments to Wisconsin eDiscovery Statutes............................................................. 13  

VI. ESI Issues Arising Prior to Litigation ............................................................................................. 17  
   A. Creation and Management of ESI .............................................................................................. 17  
   B. Recovering Lost Information ..................................................................................................... 17  
   C. Preservation of ESI. .................................................................................................................... 18  
   D. Spoliation, Sanctions and Metadata ........................................................................................... 19
E. Cost & Cost Shifting. ............................................................................................................. 23
F. Form of Production. ............................................................................................................... 24
V. Best Practices and Current Trends. ........................................................................................ 24
   A. Seventh Circuit E-Discovery Pilot Program. ....................................................................... 24
   B. The Sedona Principles. ....................................................................................................... 24
   C. 2015 Changes To Proportionality and E-Discovery. ............................................................. 25
I. Introduction.

A. What is eDiscovery?

1. Electronic Discovery (eDiscovery) is discovery in civil litigation where electronically stored information is identified, collected, and stored with the intent of using it as evidence in a civil case.

2. Electronically Stored Information (ESI) and eDiscovery are fast becoming the norm in large civil cases and, in the near future will become the norm in most litigation.

3. Computer technology is revolutionizing the way attorneys gather information, research and write about the law, draft and exchange documents, and communicate with clients and other attorneys.

4. Attorneys conducting discovery must be aware that a comprehensive approach to research of databases involves different formats and approaches.

5. The Federal Rules of Civil Procedure were amended in 2006 to address the unique issues that arise in connection with discovery of ESI.

6. Most of the issues that lawyers conducting eDiscovery face revolve around a firm’s lack of document retention and destruction policy.

B. The eDiscovery Process.

1. Information Management: Create and retain ESI according to an enforceable electronic records retention policy and electronic records management (ERM) program.

2. Identification: Identify the relevant ESI, preserve any so it cannot be altered or destroyed, and collect all ESI for further review.

3. Preservation: Protect ESI from being altered or destroyed.

4. Processing, Review and Analysis: Process and reduce the volume of ESI by date, eliminate duplicates, and identify which ESI is relevant or privileged. Continue to evaluate and analyze ESI throughout the litigation process.

5. Production: Deliver relevant, non-privileged ESI in response to discovery requests.

6. Presentation: Display ESI at depositions, hearings, and trials.
II. Federal Discovery Rules and Electronic Evidence.


1. FRCP 16: Pretrial Conference; Scheduling; Management.
   a. 16(b)(3)(B)(iii): a scheduling order may include provision for disclosure and discovery of ESI;
   b. 16(b)(3)(B)(iv): a scheduling order may include agreed upon procedures for post-production privilege and work product claims.

2. FRCP 26: General Discovery; Duty of Disclosure.
   a. 26(a)(1)(A)(ii): ESI is specifically included within the scope of initial disclosures under this rule.
   b. 26(a)(1)(B): ESI is specifically included in the list of what each party must disclose to the other during the opening stages of a case.
   c. 26(b)(2)(B): ESI need not be produced if the source is not reasonably accessible because of undue burden or undue cost. However, upon a showing of good cause, and considering the limitations on the “frequency and extent” of discovery set forth in 26(C)(i-iii), the court may order the discovery.
   d. 26(b)(5)(B): “Clawback Provision” provides process whereby the producing party may inform the other side that privileged material has been produced and, moreover, the requester must "promptly return, sequester, or destroy the specified information and any copies it has" and "take reasonable steps to retrieve" any information already distributed. However, the producing party must preserve the information until the claim is resolved.
   e. 26(f): “Meet and Confer” requires the parties to discuss electronic evidence; the parties’ 26(f)(3) Discovery Plan must state the parties’ views and proposals on:
      i. issues relating to disclosure, discovery or disclosure of electronically stored information, including the form in which it should be produced, (26(f)(3)(C)); and
      ii. issues regarding claims of privilege or of protection as trial preparation material, including whether to ask the court to include their agreement under FRE 502 on non-waiver of privilege in an order, (26(f)(3)(D)).
3. **FRCP 33: Interrogatories to Parties.**
   a. 33(d): permits a responding party to “produce” ESI in answer to an interrogatory if the burden of deriving or ascertaining the answer will be substantially the same for both parties, by:
   
   i. specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and,
   
   ii. giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

4. **FRCP 34: Production of Documents and Electronically Stored Information.**
   a. 34(a)(1)(A): Provides a working definition of ESI and indicates that ESI, within the “scope and limits” of Rule 26(b), is subject to production and discovery:
   
   i. A party may serve on any other party a request within the scope of Rule 26(b):
   
   (1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party’s possession, custody, or control:
   
   “(A) any designated documents or electronically stored information – including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations – stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; . . . .”

   ii. Rule 26(b) Discovery Scope and Limits, provides:
   
   “. . . Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.”
b. 34(b)(1)(C): Permits a requesting party to specify the “form or forms” in which ESI is to be produced.

c. 34(b)(2)(D): Response to a request for ESI may contain an objection, and if that objection is to the requested “form,” the responding party must state in which “form” it intends to respond.

d. 34(b)(2)(E)(i): ESI will be produced as it is kept in the usual course of business, or as organized and labeled to respond to specific discovery request.

e. 34(b)(2)(E)(ii): ESI may also be produced in a “reasonably usable form,” if the request does not specify a “form.”

f. 34(b)(2)(E)(iii): A party need not produce the same ESI in more than one “form.”

g. 34(c): Nonparties maybe compelled by subpoena under Rule 45 to produce documents and tangible things or to permit an inspection. Thus, ESI in the possession of nonparties is discoverable, subject to the “scope and limits” of Rule 26(b).

5. FRCP 37: Failure to Make Disclosures and Sanctions.

a. 37(e): “Safe Harbor Rule” provides that a court may not impose sanctions under the rules on a party for failing to provide electronically stored information that was lost as a result of the routine, good-faith operation of an electronic information system. However, the court may “order measures no greater than necessary to cure the prejudice,” where the ESI “should have been preserved in the anticipation or conduct of litigation” and was lost “because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery.”

b. Sanctions may be ordered only where the party “acted with the intent to deprive another party of the information’s use in the litigation”; upon finding prejudice, the court may:

i. presume that the lost information was unfavorable to the party;

ii. instruct the jury that it may or must presume the information was unfavorable to the party; or

iii. dismiss the action or enter a default judgment.
6. **FRCP 45: Subpoena of A Nonparty to Produce ESI – the Rules Protect the Responding Party from Undue Burden/Expense.**

   a. “Third Party Responsibility.” While nonparties may be compelled by subpoena to produce ESI that falls within the “scope and limits” of Rule 26(b), they are protected from some of the costs or burdens that parties typically have to pay or endure.

   b. 45(d)(1): The party or attorney issuing the subpoena must take reasonable steps to avoid imposing undue burden or expense on the nonparty subject to the subpoena.

   c. 45(d)(2)(B): The nonparty may serve a written objection to producing the ESI in the form or forms requested.

   d. 45(d)(3)(A)(iv): Where a timely motion is filed, the court must quash or modify a subpoena that “subjects a person to undue burden.”

   e. 45(e)(1)(B): A person responding to a subpoena that does not specify a form for producing ESI, must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

   f. 45(e)(1)(C): A person responding does not need to produce the same ESI in more than one form.

   g. 45(e)(1)(D): A person responding does not need to produce ESI that is not reasonably accessible because of undue burden or cost. On a motion to compel, the court may order the discovery if the requesting party shows good cause, subject to 26(b)(2)(C) (ESI sought must not be cumulative/duplicative, no other opportunity to obtain the information exists, ESI is within the scope and limits of 26(b)(1).)

   h. In summary, a court may modify or quash a subpoena for relevant information if it finds that there is an undue burden on the non-party, evaluating several factors:

   i. relevance;
   
   ii. the party's need for the documents;
   
   iii. the breadth of the request;
   
   iv. the time period covered by the request;
   
   v. the particularity with which the documents are described;
vi. the burden imposed; and

vii. the recipient's status as a non-party.

i. Examples of an overly broad subpoena for ESI to non-parties include:

i. Requesting all written, electronic, and other records created by a non-party from 1990 to present was unduly burdensome, particularly since non-party was a non-profit trade association with only eight employees. *In re Auto. Refinishing Paint*, 229 F.R.D. 482, 496 (E.D. Pa. 2005).

ii. Requesting five years worth of emails spanning 23 post offices was unduly burdensome—despite offer by party seeking discovery to pay for cost of discovery—upon showing by IT employee that response would require eighteen weeks of manpower to reconstruct email accounts from backup tapes. *United States v. Amerigroup Illinois, Inc.*, 02 C 6074, 2005 WL 3111972 (N.D. Ill. Oct. 21, 2005).

j. Non-party recipients of subpoenas must be mindful of the unique ownership and privacy issues posed by ESI.

i. For example, email and internet service providers maintain information about users’ online searches, payment information, and potentially private communications.

ii. The Electronic Communications Privacy Act prohibits electronic communication service providers from disclosing the “contents of a communication while in electronic storage by that service.” 18 U.S.C.A. § 2702.

iii. This prohibition applies to the contents of email and text message communications, not the subject lines, parties, or date of the communication, and applies notwithstanding the issuance of a subpoena. *Doe v. City of San Diego*, 12-CV-0689-MMA DHB, 2013 WL 2338713 (S.D. Cal. May 28, 2013) (finding the Electronic Communications Privacy Act prohibited Verizon from responding to subpoenas seeking the content of text messages).

iv. Non-parties may also satisfy their privacy concerns by redacting confidential information.
k. As with requests for written discovery, attorneys wishing to use the subpoena power to obtain ESI from a non-party should narrowly tailor the items requested.

III. Rules of Evidence and Electronic Documents.
A. FRE 502(b): “Inadvertent Disclosures” protects the attorney-client privilege and provides some protection against waiver by inadvertent disclosure, if disclosing party promptly takes reasonable steps to correct the mistake, including those steps required under 26(b)(5)(B).

B. FRE 901: “Authentication Requirement” requires that ESI, like physical evidence, be authenticated to verify that it is what it claims to be. Metadata may be used to authenticate an ESI.

IV. Ethics Rules Regarding eDiscovery Standards.
A. ABA Rule 1.1: Competence. “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”
   1. Maintaining Competence. Comment [8]: “To maintain the requisite knowledge and skill a lawyer should keep abreast of changes to the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal requirements to which a lawyer is subject.”
   2. Comment 8 was amended to add the phrase “including the benefits and risks associated with relevant technology” after “keep abreast of changes in the law . . .”

B. Wisconsin SCR 20:1.1: Competence. “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”
   1. Note: Sup Ct. Order No. 13-10 states that “the Comments to SCRs … 20:1.1, … are not adopted, but are published and may be consulted for guidance in interpreting and applying the rule.”

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

2. Though Comment [8] was not adopted in Wisconsin, it may be argued that SCR 20:1.1 imposes a substantially similar standard to Model Rule 1.1, that requires counsel to acquire a strong understanding of technology surrounding the preservation, processing, and production of ESI.

C. ABA Rule 1.6: Preventing Inadvertent Disclosure.
   1. Attorneys who handle litigation cannot ignore the requirements and obligations of electronic discovery.
   
   2. Lawyer must take reasonable precautions to prevent the unintended disclosure of information to unintended recipients:

   “1.6 (c). A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”

   3. Comment [18]: factors to be considered in determining the reasonableness of the lawyer’s efforts, include:

      a. the sensitivity of the information;
      b. the likelihood of disclosure if additional safeguards are not employed;
      c. the cost of employing additional safeguards;
      e. the difficulty of implementing the safeguards; and,
      f. the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).
      g. Comment [18] provides: “…. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule …. ”

   “Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized
access to, electronic information, is beyond the scope of these Rules.”


1. Wisconsin utilizes the same standard in its confidentiality provision as ABA Model Rule 1.6, as well referencing, though not adopting, the ABA Comment [18]:

“20:1:6(d). A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”

V. Wisconsin: Law, Statutes & Relevant Case Law.

A. Wis. Stat. 804.01(2)(e). Specific limitations on discovery of electronically stored information.

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

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

b. Preservation of electronically stored information pending discovery;

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

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

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

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

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

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

Note: The rule does not require parties to confer before commencing discovery under ss. 804.05 (Depositions upon oral examination), 804.06 (Depositions upon written questions), 804.08 (Interrogatories to parties); or 804.11 (Requests for admission). These discovery devices, if employed before serving a request for production or inspection of electronically stored information, may lead to more informed conferences about the potential scope of such discovery.

B. Court Orders For Discovery of ESI. In determining whether to issue an order relating to discovery of electronically stored information, the circuit court may compare the costs and potential benefits of discovery. Vincent & Vincent, Inc. v. Spacek, 102 Wis. 2d 266, 306 N.W.2d 85 (Ct. App. 1981).

1. Judicial Council Note—2010: In determining whether to issue an order relating to discovery of electronically stored information, it is also appropriate to consider the factors specified in the Advisory Committee notes to Fed. R. Civ. P. 26(b)(2)(B): (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

C. 2011 Amendments to Wisconsin eDiscovery Statutes.

1. Wis. Stat. 802.10(3). Scheduling and planning. Except in categories of actions and special proceedings exempted under sub. (1), the circuit court may enter a scheduling order on the court's own motion or on the motion of a party. The order shall be entered after the court consults with the attorneys for the parties and any unrepresented party. The scheduling order may address any of the following:
(jm) The need for discovery of electronically stored information.

Note: In discharging this duty, courts may turn to outside experts for assistance. The Judicial Council also noted in its petition that “[p]ursuant to Wis. Stat. § 805.06, the court may also appoint a referee to report on complex and/or expensive discovery issues, including those involving electronically stored information.”


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

a. WIREdata, Inc. v. Vill. of Sussex, 2008 WI 69, was an open-records case involving electronically stored real-estate-tax-assessment data. The decision presents a sophisticated discussion of the mechanics of storing, retrieving, and reviewing electronically stored information and cautions that confidential data not subject to disclosure may be viewed, copied, or destroyed if parties are given unlimited access to electronically stored information.

3. Wis. Stat. 804.09(1) and (2). Treating electronically stored information the same as paper documents; selecting the format in which to produce electronically stored information:

804.09(1) SCOPE. A party may serve on any other party a request within the scope of s. 804.01 (2):

(a) to produce and permit the requesting party or its representative to inspect, copy, test or sample the following items in the responding party’s possession, custody, or control:
1. any designated documents or electronically stored information, including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any other medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

2. any designated tangible things; or …

(b) to permit entry onto designated land or property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.”

804.09(2) PROCEDURE. (a) Except as provided in s. 804.015, the request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party, and shall describe with reasonable particularity each item or category of items to be inspected. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

(b)1. The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form, or if no form was specified in the request, the party shall state the form or forms it intends to use.

(c) The party submitting the request may move for an order under s. 804.12(1) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.
804.09(2)(b)2. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

“a. A party shall produce documents as they are kept in the usual course of business or shall organize and label them to correspond to the categories in the request;

“b. If a request does not specify a form for producing electronically stored information, a party shall produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

“c. A party need not produce the same electronically stored information in more than one form.”

4. **Wis. Stat. 804.09. Production Responsibilities.** Producing attorneys must be aware of all forms in which electronically stored information is stored on a client’s system. Electronically stored information includes native files and everything that may be associated with those files, such as metadata. Even deleted files are discoverable, and a producing party can be compelled to produce such files if they can be restored without unreasonable expense or effort.

5. **Wis. Stat. 804.09(2)(a). Form of Production.** The discovering party may specify the form in which electronically stored information is to be produced. A responding party may object to the form and offer an alternate form of production. If the discovering party does not specify a form, then before actually producing electronically stored information the responding party must specify the form that will be used. Attorneys for a producing party are required under the terms of Wis. Stat. section 804.09 (2)(b)2.a., “to produce documents as they are kept in the usual course of business or shall organize and label them to correspond to the categories in [a section 804.09] request.”

6. **Wis. Stat. 804.12(4m). Safe Harbor.** A party is immunized from spoliation sanctions if the information was deleted or otherwise destroyed as the result of the routine operation of the computer system.
VI. ESI Issues Arising Prior to Litigation.

A. Creation and Management of ESI.
   1. Individuals at companies of all sizes create and store electronic data as a routine business practice, for example:
      a. i.e. every time an employee sends an email with an attachment;
      b. creation if Microsoft word, Excel, PowerPoint, and many other forms of documents;
      c. Metadata of emails;
      d. saving such documents to external hard drives, CD:s, DVSs, zip drives, or any external storage source;
      e. automatic copying of such ESI onto computer backup tapes done to preserve ESI for emergency disaster recovery.
   2. While many companies have document retention polices that apply to paper documents, the cost of storing ESI is so low that most companies do not have equivalent polices for ESI.
      a. Emails are the only for ESI that usually have a formal policy addressing how long they should be kept.
      b. Companies often recycle back-up takes on a prescheduled basis and ESI on the tapes are overwritten with new ESI.

B. Recovering Lost Information
   1. Recovering information or “computer forensics” is used in complex litigation and is generally expensive and often requires an expert.
      a. Data is hard to destroy and often times just as hard to preserve.
      b. Deleting a computerized document merely renames the time, making it available for overwriting if the space is needed.
   2. A forensic mirror copy of the hard dive will pick up any deleted file or files that remain.
      a. Examination of a hard drive requires an expert for both the producing and receiving party.
      b. This may result in the generation of massive amounts of irrelevant ESI, as well as potentially privileged information.
c. Courts often impose complex and expensive protocols to screen ESI that should not be part of discovery. See e.g., Playboy Enters. v. Welles, 60 F. Supp.2d 1050, 1054 (S.D. Cal 1999).

C. Preservation of ESI.

1. The duty to preserve ESI begins when the client reasonably anticipates litigation, receives pre-litigation correspondence, or receives service of a complaint, answer, or a discovery request. See Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003).

2. “Every party or potential litigant is duty-bound to preserve evidence essential to a claim that will likely be litigated.” Am. Family Mut. Ins. Co. v. Golke, 2009 WI 81, ¶ 21, 319.

3. An issue with ESI, as opposed to paper discovery, is that many forms of the ESI may exist and it may be stored in multiple places (i.e. on personal email/home computer).

4. The duty to preserve is an active one that must be discharged by senior corporate officers. Danis v. UNS Communications, 53 Fed. R. Serv. 3d 828 (N.D. Ill. 2000).

5. The most basic duty in preserving ESI is the litigation hold: once a party anticipates litigation, it must “suspend routine document retention/destruction policies and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.” Zubulake, at 218.

   a. In Zubulake, the court stated that as a general rule, a party need not preserve all backup tapes. Id. at 217. Put simply, the litigation hold does not extend to difficult to access backup tapes.

   b. However, when parties anticipate litigation, they do have a duty to preserve “unique, relevant evident that might be useful to an adversary.” Id.

6. Whose ESI must be preserved?

   a. ESI and tangible documents of any person likely to have discoverable information as well as any person who prepared information for that person. Id. 217-218; China Ocean Shipping (Group) Co. v. Simone Metals Inc., 1999 WL 966443 (N.D.Ill.1999).

7. **What must be retained?**

   a. “[A]ll relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches, and any relevant documents created thereafter.” *Zubulake*, at 218.

D. **Spoliation, Sanctions and Metadata.**

1. Spoliation is the destruction of significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.


   a. That party must show that:

      i. “the party having control over the evidence ... had an obligation to preserve it at the time it was destroyed;”

      ii. that the evidence was “destroyed with a culpable state of mind;” and

      iii. that the destroyed evidence was “relevant” to the party's claim or defense.


   a. Sanctions serve two main purposes: “(1) to uphold judicial system’s truth-seeking function and (2) to deter parties from destroying evidence.” *Golke* at ¶ 21 (citing *Insurance Co. of N. Am. v. Cease Elec. Inc.*, 2004 WI App 15, ¶ 16, 269 Wis.2d 286, 674 N.W.2d 886).

4. No sanctions or adverse jury instruction for unintentional, automatic deletion of web history and related information were entered when where Plaintiff failed to establish that the lost information could not be restored or replaced through additional discovery or that the failure to preserve was prejudicial or intentional. *Eshelman v. Puma Biotech., Inc.*, No. 7:16-CV-18-D, 2017 WL 2483800 (E.D.N.C. June 7, 2017).
5. Close questions of intentional spoliation are sent to the jury. In Cahill v. Dart, No. 13-cv-361, 2016 WL 7034139 (N.D. Ill. Dec. 2, 2016), sanctions/adverse jury instruction were ordered as follows:

   a. Following Plaintiff’s arrest for driving on a suspended license, an officer claimed he observed Plaintiff dropping a small package of cocaine while at a “County lockup” and charged him with felony possession. Although defense counsel acted quickly to ensure preservation of surveillance video that Plaintiff believed would prove his innocence (because he claimed that he did not drop the package), only a portion of the video—which began after the package was on the floor—was available.

      i. The magistrate judge found that the failure to preserve was grossly negligent and caused substantial prejudice, and recommended that Defendants be barred from making arguments or presenting evidence that the lost portion of the tape showed Plaintiff dropping the cocaine; and,

      ii. Plaintiff would be allowed to argue that the destruction was intentional and that the jury would be instructed that if they agreed, they must presume that the lost evidence was unfavorable to the defendants.


   a. The Court in Pension Comm. concluded that it was gross negligence for a party on notice of a potential claim, to fail to:

      i. Issue a written litigation hold;

      ii. Identify all key players and ensure preservation of electronic evidence;

      iii. Preserve and discontinue the deletion of records of former employees that are in a party’s possession, custody, or control; or

      iv. Preserve back-up tapes that are the sole source of relevant information or relate to key players, if not otherwise obtainable from readily accessible sources.
7. Whether sanctions are warranted requires a court to consider both the level of spoliating party’s culpability and the level or prejudice to the party seeks discovery. Rimkus Consulting Group, Inc. v. Cammarata, 688 F. Supp. 2d 598, 607 (S.D. Tex. 2010).

   a. Plaintiff filed motion for sanctions, alleging the defendants intentionally destroyed relevant e-mails by instituting a two-week electronic retention policy after the duty to preserve attached. Id. at 642.

   b. Court recognized the difficult burden in requiring a party to show that information lost through spoliation was both relevant and prejudicial. Id. 616.

   c. However, court observed that in many cases, at least a portion of the spoliated evidence can be obtained or pieced together from other courses, including circumstantial evidence and deposition testimony. Id.

8. Failure to preserve the original may not lead to sanctions, but may lead to an adverse inference jury instruction.

   a. The culpable state of mind for purposes of a spoliation inference includes ordinary negligence.

   b. In Vagenous v. LDG Financial Services, LLC, No. 09-CV-2672(BMC), 2009 WL 5219021, at *1–2(E.D.N.Y. Dec. 31, 2009), the court found that a plaintiff and his counsel had breached their duty to preserve evidence when the attorney re-recorded a voicemail that the plaintiff planned to use as evidence and then allowed the plaintiff to delete the original recording.

   c. An adverse inference instruction was not warranted for developer's negligent destruction of a hard drive and a server, when the developer did not have a duty to preserve its daily back-up tapes. Automated Sols. Corp. v. Paragon Data Sys., Inc., 756 F.3d 504(6th Cir. 2014).


a. The new “safe harbor” provision in FRCP 37(e) provides that a party will not be subject to sanctions as a result of the destruction of information, “absent exceptional circumstances, “as a result of the routine, good-faith operation of an electronic information system.”


10. Wife Found Liable for Husband’s Intentional Deletions.

a. In this copyright infringement case, the court found that Defendants “spoiled evidence, committed perjury, and failed to discharge their duties to conduct discovery reasonably and in good faith” and recommended default judgment. *Malibu Media, LLC v. Tashiro*, No. 1:13-cv-00205-WTL-MJD, 2015 WL 2371597 (S.D. Ind. May 18, 2015).

11. Metadata Spoliation.

a. Typically defined as “data about data,” Metadata is the data that underlies the ESI in a document.

b. Metadata includes information about the author of the data, the time and date of its creation, modifications, changes, standards used, and embedded tracked changes.

c. By searching for metadata, it is possible to identify changes that have been made to a document, including information that has been added or deleted. Examples of metadata include tracked changes on Word documents, internet browsing histories, and properties’ features on document management systems.

d. Metadata often contains significant evidentiary data, that unfortunately is subject to destruction through negligence or intentional manipulation.

e. Metadata is often discussed in regards to electronic spoliation because it is very easy to inadvertently spoil metadata; for example, simply opening a document changes metadata.
f. It is not required by the Rules that metadata always be produced. It depends on the circumstances and how relevant the metadata may be. Some courts have not required production of metadata, citing limited usefulness. See Wyeth v. Impax Laboratories, Inc., 2006 WL 3091331 (D. Del. October 26, 2006).

E. Cost & Cost Shifting.

1. The general rule is that the cost of responding to discovery presumably is borne by the responding party. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978).

2. However, a party's cost of responding to electronic discovery requests can sometimes be shifted to the requesting party, including costs incurred by a subpoenaed third party.

3. The Zubulake court held that cost shifting is only appropriate where a party requests inaccessible information that imposes an undue burden or expense on the responding party. Zubulake, at 318.

a. The Zubulake court outlined a seven factor tests to determine the applicability of cost-shifting:

i. The extent to which the request is specifically tailored to discover relevant information;

ii. The availability of such information from other sources;

iii. The total cost of production, compared to the amount in controversy;

iv. The total cost of production, compared to the resources available to each party;

v. The relative ability of each party to control costs and its incentive to do so;

vi. The importance of the issues at stake in the litigation; and

vii. The relative benefits to the parties of obtaining the information.

Id. at 322.

4. If data is within a Defendant’s possession, custody or control, Court may decline to shift costs to requesting party. Williams v. Angie’s List, No. I:16-00878-WTL-MJD, 2017 WL 1318419 (S.D. Ind. April 10, 2017).
F. Form of Production.


A. Seventh Circuit E-Discovery Pilot Program.
1. The Seventh Circuit’s E-discovery “Pilot Program” (2009-2010) is designed to reduce the costs and burden of electronic discovery in federal litigation. The Pilot Program is broken into phases and focused on three major areas:
   a. Preservation;
   b. Early Case Assessment; and
   c. Education.
2. The main goal of the Pilot Program was to “assist courts in the administration of Federal Rule of Civil Procedure, to secure the just, speedy, and inexpensive determination of every civil case, and to promote, whenever possible, the early resolution of disputes regarding the discovery of [ESI] without Court intervention.”

B. The Sedona Principles.
1. Electronic data and documents are potentially discoverable under Fed. R. Civ. P. 34 or its state law equivalents (in Wisconsin, Wis. Stat. section 804.09(1)). Organizations must properly preserve electronic data and documents that can reasonably be anticipated to be relevant to litigation.
2. When balancing the cost and burden of and need for electronic data and documents, courts and parties should apply the balancing standard embodied in Fed. R. Civ. P. 26(b)(2) and its state law equivalents.
3. Parties should confer early in discovery regarding the preservation and production of electronic data and documents.
4. Discovery requests should make as clear as possible what electronic documents and data are being asked for.
5. Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronic data and documents.

6. The primary source of electronic data and documents for production should be active data and information purposely stored in a manner that anticipates future business use and permits efficient searching and retrieval:
   a. Resort to disaster recovery backup tapes and other sources of data and documents requires the requesting party to demonstrate that the need and relevance outweigh the cost, burden, and disruption of retrieving and processing the data from such sources.

7. Absent a showing of special need and relevance, a responding party should not be required to preserve, review, or produce deleted, shadowed, fragmented, or residual data or documents.

8. A responding party should follow reasonable procedures to protect privileges and objections to production of electronic data and documents.

9. A responding party may satisfy its good faith obligation to preserve and produce potentially responsive electronic data and documents by using electronic tools and processes, such as data sampling, searching, or the use of selection criteria, to identify data most likely to contain responsive information.

10. Sanctions, including spoliation findings, should only be considered by the court if, upon a showing of a clear duty to preserve, the court finds that there was an intentional or reckless failure to preserve and produce relevant electronic data and that there is a reasonable probability that the loss of the evidence has materially prejudiced the adverse party.

C. 2015 Changes To Proportionality and E-Discovery.

1. 2015 Amendments to Federal Rules of Civil Procedure 26(b)(1) and 37(e) elevated the importance of proportionality as the guiding principle of the discovery process:
   a. Amended Rule 26(b)(1), “parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case…” (emphasis added). Rule 26(b)(1) also now includes the considerations that bear on proportionality, which were moved from the previous Rule 26(b)(2)(C)(iii), rearranged and expanded. The proportionality factors are as follows:

      (1) the importance of the issues at stake;
      (2) the amount in controversy;
(3) the parties’ relative access to relevant data;
(4) the parties’ resources;
(5) the importance of discovery for resolution; and
(6) the burden or expense relative to benefit.

b. **Amended Rule 37(e)** provides guidance on the scope of the preservation effort that the court expects from litigants. The amendments affected judicial analysis of sanctions for the loss of ESI (1) that “should have been preserved” in the anticipation or conduct of litigation (2) because a party failed to take “reasonable steps” to preserve it and (3) that cannot be restored or replaced through additional discovery. Upon making this finding, a court has to conduct additional analysis, the goal of which is to differentiate “bad faith” conduct from mere negligence, and order sanctions in accordance with the level of egregiousness. Courts will focus on a party’s intent to deprive its opponent of the benefits of the lost ESI and the resulting prejudice to the opponent. Where the court finds “bad faith” conduct, it may order the harsher sanctions, including adverse inference instruction, default judgment or dismissal. However, only measures limited to curing the prejudice are appropriate for cases where culpability is lacking.

2. “What will change—hopefully—is mindset. No longer is it good enough to hope that the information sought might lead to the discovery of admissible evidence. In fact, the old language to that effect is gone. Instead, a party seeking discovery of relevant, non-privileged information must show, before anything else, that the discovery sought is proportional to the needs of the case.” *Gilead Sciences, Inc. v. Merck & Co, Inc.*, 2016 WL 146574, at *1 (N.D.Cal., 2016).

REFERENCES


http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=90&Issue=1&ArticleID=25320#


https://www.americanbar.org/.../litigation-pretrial-spring10-pilot-program.authcheckd

http://www.ca7.uscourts.gov/e-discovery.htm


§ 14:14.

The Sedona Conference, 8 Wis. Prac., Civil Discovery § 14:14 (2d ed.)


For decades, clients have counted on us to provide expert, multi-disciplined forensic engineering and consulting services for insurance claims, subrogation, manufacturing defects, product liability litigation and industrial applications.

BEST-IN-CLASS ENGINEERING SERVICES

Biomechanical Engineering
Building Science
Collateral Damage Assessment
Consulting Engineering & Lab Services
Data Forensics
Electrical Engineering
Fire & Explosion Investigation
Fire Protection & Fire Science
Hazard & Risk Assessment
Large Loss Case Management
Litigation Support
Mechanical Failures & Analysis
Vehicle Investigations
Vehicle Testing & Instrumentation

Call 800-538-2797  For more information and expert profiles visit www.CraneEngineering.com
Cyber Issues and Insurance Coverage  
Mark D. Malloy and Joseph J. Sarmiento  
Wisconsin Defense Counsel Summer Conference 2017  

Businesses of all shapes and sizes face myriad theft and other risks from a wide variety of sources and methods. Con artists may embark on a phishing or social engineering expedition posing as a trusted executive or customer in order to have a business voluntarily send money to a false account as part of the scheme. Hackers may infiltrate a business’s computer systems, steal personal (or other) information for sale on the black market, or hold it for ransom. Faced with significant response costs, businesses often look to their insurers for coverage of these costs.

The coverage landscape is undulating and varies on whether such costs are covered. This is due in part to the wide variety of “problems” presented by insureds and the multiple distinct types of insurance policies available and owned by businesses. Unsurprisingly, there is no simple answer to whether such costs are covered by insurance in general. Over the past twenty years, courts have shaped how insurance companies draft insurance policies. Further, the courts and the increased number of security breaches have opened the door to new types of computer fraud and cyber coverages. These policies and their interpretation are in their infancy and there is little to no direct precedent on these types of cases/policies. This paper provides a brief overview of where the courts started, where we are now, and perhaps where we will go in the future.

I. Loss of Data was Damage to the Computer

The initial cases dealing with data loss did not address losses caused by nefarious hackers, but losses caused by power outages.1 In these cases, the insured businesses relied heavily on their computer systems to operate.2 As a result of the power outages, the businesses lost their data or programing on their computers and had to suspend their operations.3 The businesses sought coverage for their lost income under their respective property policies.4 Their insurers denied coverage on the basis that there was no “physical damage” to the insureds’ property, in part because the computers remained operational after the power was restored.5

The courts disagreed and held that the insurers’ view of “physical damage” was too narrow. The courts, noting and accounting for the different context, looked to state and federal statutes that defined damage to computers in various ways, including “any impairment to the integrity or availability of data, a program, a system, or information.”6 Thus, the courts concluded that the loss of data and programing constituted damage to the computers, which in turn caused significant business interruptions.7

Notably, these courts focused on the damage to the computers, not the question
of whether or not the data was physically damaged or “property damage.”

II. Loss of Data may not Constitute Property Damage, but if Personal Information is Made Available on the Internet, it may Constitute “Personal Injury”

As technology progressed, many insurers began to explicitly exclude electronic data from the definition of “property damage” in CGL policies. However, many CGL policies included coverage for liability stemming from the publication of individuals’ personal information—often, but not always, defined as “personal injury.” When an entity has lost individuals’ private information (regardless of how), the coverage disputes have turned on whether or not that private information was published.

For example, in Travelers Indemnity Company of America v. Portal Healthcare Solutions, LLC, Portal provided electronic safekeeping for medical records for hospitals, clinics, and other medical providers. Two patients “Googled” themselves and, to their surprise, their medical records popped up in the search results. They then filed a class action lawsuit. Travelers argued that the patients’ information was not published because the entire point of Portal’s business was to keep the patients’ information private and confidential. This may have been the point, but it was not the reality. Essentially, anyone with access to the internet could pull up the patients’ medical records. The court found that this access on the Internet constituted “publication.”

The key appears to be access to the information. In Recall Total Info. Mgmt., Inc. v. Federal Ins. Co., a transportation company was moving a number of computer tapes that contained sensitive information about IBM employees, including their social security numbers. Some of these tapes fell off the truck on a highway ramp. The transportation company was able to recover some of the tapes, but the others went missing. IBM incurred significant costs protecting its employees from identity theft and fraud, which it recovered from the transportation company, who in turn, sought recovery from its insurer arguing that the costs were the result of “personal injury.” Again, the issue was whether the private information was “published.” No one knew what happened to the missing tapes. There were no allegations that anyone had accessed the information on them. Therefore, because there was not even an allegation of access, let alone proof of it, the court held that the personal private information had not been “published.”

III. Computer Fraud Requires Unauthorized Access to the Insured’s Computer System

Hacks of data theft and phishing schemes are an ever-present risk to any business with a computer connected to the Internet. Some businesses own policies with some sort of computer fraud coverage. The distinction between a hack and a
phishing scheme may tip the scale on whether or not there is coverage under these policies.

In 2005, hackers used DSW’s wireless networks in its stores to gain access to DSW’s computer systems to steal customers’ credit card and debit card numbers, among other things. In response, DSW spent $6.8 million dealing with customer communications, relations, and lawsuits, as well as various state suits and an FTC action and sought coverage under its blanket crime policy with a computer fraud rider. There was no dispute that the hack and theft of customer data constituted “theft of any Insured property by Computer Fraud.” However, the debate was whether DSW’s damages “resulted directly from” the computer fraud. The Sixth Circuit predicted that the Supreme Court of Ohio would adopt the proximate cause theory of causation over the “direct-means-direct” theory, in part because the “phrase ‘resulting directly from’ does not unambiguously limit coverage to loss resulting ‘solely’ or ‘immediately’ from the theft itself.” Construing the ambiguity against the insurer, the court found coverage. This could have implications both as to other computer fraud coverages as well as first-party property policies, depending on the wording.

Computer fraud, in a few words, usually is defined as a fraudulent entry/access into a computer system or a fraudulent transfer of money using a computer. Interestingly, claims that would fall within or similar to the category of phishing, do not appear to constitute computer fraud. A few examples include:

- Where a healthcare insurer granted healthcare providers access to the insurer’s automated billing system and the healthcare providers submitted $18 million of fraudulent bills paid by the insurer, this was not computer fraud because there was no unauthorized access to the insurer’s computer system, the access was expressly permitted.

- Where insured granted access to its checking account to a third-party payroll company and the payroll company paid the employees but not payroll taxes, the fraudulent activity was not “computer fraud” because the insured had granted the payroll company access to the checking account.

- Where insured requested an official letter from a “customer” in order to change payment bank accounts and the “customer/thief sent a letter via email, the use of email to send the letter was not use of a computer to commit “computer fraud.”

IV. “Cyber Policies” May Provide Coverage for Hacks and Phishing Losses

One of the closely-watched cases right now is *P.F. Chang’s China Bistro, Inc. v.*
Fed. Ins. Co. There, P.F. Chang’s computer system was hacked, the thieves stole 60,000 credit card numbers, and posted them on the Internet. P.F. Chang’s faced two types of liability: (i) costs for conducting forensic investigations into the data breach as well as defending against suits filed by customers who had their credit card numbers posted on the Internet and a suit filed by a bank who had issued card information that was stolen and (ii) liability to MasterCard related to fees MasterCard was required to pay to banks and clearinghouses as a result of the breach. The insurer had issued a “cybersecurity” policy to P.F. Chang’s. The insurer did not dispute that the policy covered the category (i) costs. Instead, the insurer argued, and the court agreed, that the policy did not cover the contractually-assumed MasterCard liability. Thus, while it remains to be seen whether cyber policies will ultimately cover the costs a company must pay to credit cards and credit card clearinghouses as the result of a breach, the costs related to investigating a breach and the costs related to protecting/indemnifying the insureds/insureds’ customers appear to be covered by cyber policies.

V. Conclusion

The landscape of risks businesses face and insurers attempt to underwrite is ever-changing and likely changes more rapidly each day. Hacking, phishing schemes, and other cyber risks continue to develop constantly. When the EU’s General Data Protection Regulation goes into effect, this may open a Pandora’s Box of issues, covered and uncovered. Courts have had very little opportunity to address cyber and other developing policies. This area of insurance coverage law remains uncharted territory, which creates unpredictable risks to both insureds and insurers.

2 Ingram Micro, 2007 WL 726789 at *1; Se. Mental Health Center, 439 F. Supp. 2d at 833–34.
3 Ingram Micro, 2007 WL 726789 at *1; Se. Mental Health Center, 439 F. Supp. 2d at 838.
4 Ingram Micro, 2007 WL 726789 at *2; Se. Mental Health Center, 439 F. Supp. 2d at 834.
5 Id.
6 Ingram Micro, 2007 WL 726789 at *2–3; Se. Mental Health Center, 439 F. Supp. 2d at 838.
7 Ingram Micro, 2007 WL 726789 at *3; Se. Mental Health Center, 439 F. Supp. 2d at 838–9.
10 Id. at 768.
11 Id.
12 Id. at 770.
13 Id. at 771–72; see also Evanston Ins. Co. v. Gene by Gene, Ltd., 155 F. Supp. 3d 706, 710–11 (S.D. Tex. 2016). Allegations that a genetic genealogy website put a customer’s DNA information on the website without his permission alleged “personal injury,” “oral or written publication of material that violates a person’s right of privacy.”

Recall Total Info. Mgmt., 83 A.3d at 667.


Id. at 824–25.

Id. at 827.

Id. at 831–32.

Id.


Pestmaster Servs., Inc. v. Travelers Cas. & Sur. Co. of Am., 656 F. App’x 332 (9th Cir. 2016) ("Pestmaster II"); Pestmaster Servs., Inc. v. Travelers Cas. & Sur. Co. of Am. 2014 WL 3844627 (C.D. Cal.). The district court decision provides the facts.

Apache Corp. v. Great Am. Ins. Co., 662 F. App’x 252 (5th Cir. 2016).


Id. at *2.

Id.

Id.

Id. at *4–7.
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, Minnesota and South Dakota

1243 N. 10th Street, Milwaukee, WI 53205 (414) 276-3600
131 West Wilson Street, Madison, WI 53701 (608) 258-1711
7825 3rd Street North Oakdale, MN 55128 (651) 256-5000
Cyber Insurance Coverages Today
First Party Coverages

- Data Breach
- Attack & Interruption
- Cyber Extortion

Cyber Insurance Coverages Today
Third Party Coverages

- Data Breach Liability
- Network Security Liability
- Electronic Media Liability
Hot Topics and Emerging Trends

- Cyber Crime
- Physical Consequences of Virtual Events
- Personal Lines

Cyber Crime
Extortion and Fraud

1. Extortion
   - Targeted extortion
   - Automated extortion – Ransomware

2. Fraud
   - CEO fraud
   - Supplier fraud
   - Using an insured’s own system to deceive customers, financial institutions and others.
   - Big Data
Cyber Attacks with Physical Consequences

- Attacks that cause connected equipment to malfunction and break - Stuxnet
- Attacks that cause connected equipment to operate properly with consequences not intended by the owner – Bowman Avenue Dam
- The Commercial Internet of Things

Personal Cyber

Attacks that damage data and systems
- Extortion
- Fraud
- Data Breach
- Identity Theft
- Cyber Bullying
- Third Party Liability
- The Personal Internet of Things

© 2017 The Hartford Steam Boiler Inspection and Insurance Company. All rights reserved.
Benefits of Mediation and Arbitration

- Fair and Neutral Process
- Saves Time and Money
- Confidential
- Avoids Uncertainties
- Improves Communication
- Helps Discover the Real Issue
- Design Your Own Solution
- Mutually Satisfactory Outcomes

National Academy of Distinguished Neutrals

Wisconsin Association of Mediators

Martindale-Hubbell AV Rated 17+ years

Timothy A. Hawley JD, CPCU
thawley@onelawgroupsc.com
I. RECENT DEVELOPMENTS IN WISCONSIN BAD FAITH LAW AND DUTY TO DEFEND

a. Wosinski et al. v. Advance Cast Stone et al., 2017 WL 2954721 (a.k.a. the O’Donnell Park Case)

i. Brief History and Procedural Background

1. The case arose out of the O’Donnell Park tragedy on June 24, 2010 when a concrete panel fell off of the parking garage, killing Jared Kellner and injuring two members of the Wosinski family. A jury found that the company that installed the concrete panel, Advance Cast Stone (“ACS”), was primarily responsible for the incident.

2. Liberty Mutual insured ACS for policy limits of $10 million. Liberty provided a defense for ACS throughout the litigation subject to a reservation of rights regarding coverage. Additionally, Liberty allowed ACS to select counsel of its own choosing. Liberty, in turn, was represented by separate counsel on coverage issues.

3. Liberty Mutual did not seek bifurcation of coverage and liability issues. Additionally, at the request of ACS, Liberty did not file a dispositive motion on coverage because of the interplay between the statute of repose and portions of Liberty’s coverage arguments (i.e. application of the intentional acts exclusion could trigger the fraud and concealment exception to the ten-year statute of repose).

ii. The Circuit Court’s Finding of Breach of Duty to Defend and Bad Faith

1. Coverage issues rose to the forefront following the exchange of pre-trial reports. Liberty submitted proposed special verdict questions to address coverage issues. Those questions concerned whether, if the jury concluded ACS had improperly installed the panel in question, whether ACS acted with intent. This led the Circuit Court to conclude that Liberty was attempting to subvert ACS’s defense. As a result, the Circuit Court concluded that Liberty would not be permitted to participate in the trial, but noted a later coverage trial would be held.

2. Following the trial, the Circuit Court asserted that the merits trial had established coverage as a matter of law and concluded that Liberty had waived its right to a
coverage trial by failing to seek bifurcation and submitting the verdict questions. Moreover, the Circuit Court ruled that Liberty had breached its duty to defend and/or committed bad faith against ACS. The court concluded that Liberty’s decisions evidenced a plan to undermine ACS’s defense and rendered ACS’s entire defense a “sham.” Thus, the court concluded that Liberty had breached its duty to defend and/or committed bad faith against ACS.

3. Finally, though acknowledging that Liberty had not been able to carry out its scheme because it had not been permitted to participate at trial, the Circuit Court concluded that Liberty was automatically liable for the entire excess verdict and/or the excess verdict flowed from its breach of the duty to defend or bad faith. The net result was that Liberty was found responsible for the entire $39 million verdict, well in excess of its $10 million limits.

iii. Appellate Arguments

1. Unsurprisingly, the case led to a variety of appeals on both the merits and insurance issues. Liberty argued on appeal that there had been no breach of the duty to defend, citing the fact that (1) it had issued a reservation of rights nearly three years before trial; (2) it had paid more than $2 million in defense costs for the matter; and (3) ACS had been represented by counsel of its own choosing throughout the litigation. Liberty also argued that no court had ever concluded that the failing to seek bifurcation was bad faith or breach of the duty to defend. Rather, insurers could avail themselves of several methods to seek a determination of coverage issues, including—as in the case at hand—defending subject to a reservation of rights. Finally, Liberty maintained that the Circuit Court had impossibly comingled duty to defend and bad faith principles. It noted that no cause of action had been raised for bad faith and the Circuit Court had, essentially, created a cause of action and simultaneously ruled on the cause of action against Liberty.

2. The respondents maintained that the Circuit Court had correctly ruled, and even if the court had combined duty to defend and bad faith principles, any mistake was harmless. They argued that bifurcation was required under Wisconsin law and echoed the reasoning of the Circuit Court that Liberty had provided a sham defense by virtue of its litigation decisions.
iv. The Court of Appeals’ Decision

1. The Court of Appeals reversed the Circuit Court’s breach of the duty to defend and bad faith rulings. Regarding the duty to defend, the court noted that an insurer has several options to protect its own interests. One of those options—indeed the preferred option—is to seek a bifurcated trial on coverage issues. However, the Wisconsin Supreme Court also permits insurers to seek a declaratory ruling or provide a defense subject to a reservation of rights. *Id.* ¶ 126. The court noted that none of these procedures are absolute requirements. Rather, the court reasoned that case law involving the duty to defend focused on the procedural steps taken—or not taken—by an insurer. *Id.* ¶ 129. The Court of Appeals concluded the Circuit Court had erred by focusing its analysis on a “sense of fairness” rather than the procedural steps discussed in Wisconsin case law. *Id.* ¶ 130.

   The focal point of the trial court's finding of a breach of the duty to defend revolves around the actions of Liberty that the trial court found objectionable; in particular, Liberty's “strategic” decision not to move for bifurcation, and its purported attempt to undermine ACS's defense with its proposed special verdict questions regarding intent. Yet, the binding legal precedent for this issue does not provide support for such a finding; instead, it focuses on whether an insurer followed the proper procedure in providing a defense. As a result, we reverse the trial court's determination that Liberty breached its duty to defend ACS.

   *Id.* ¶ 131.

2. Turning to bad faith, the Court of Appeals concluded that no cause of action for bad faith had ever been raised in the litigation. The Court disagreed with the Respondents that the Circuit Court had not found bad faith, but rather breach of the implied duty of good faith and fair dealing. The court noted that there was nothing in the record to support that a tort claim had been raised by ACS against Liberty. *Id.* ¶ 136. As such, the question was not before the Circuit Court and thus could not be upheld. *Id.* ¶¶ 137–138.

3. Petitions for Review by the Supreme Court must be filed by August 11, 2017.
b. Select Recent Wisconsin Duty to Defend and Bad Faith Cases

i. **Burgraff v. Menard**, 2016 WI 11 (Damages Arising From Breach of Duty to Defend)

1. The insured, Menard, Inc., successfully argued that its insurer had breached its duty to defend when it withdrew its defense after settling its claimed portion of liability (short of policy limits) arising from a personal injury accident. However, the Wisconsin Supreme Court also took the occasion to clarify the available damages arising out of the breach of the duty to defend.

2. Tension had arisen in the law whether an insurer was automatically liable for the entire judgement or settlement, or whether the damages were limited to those that flowed from the breach. Failure to defend cases had produced language that suggested to some that a breach of the duty to defend always resulted in an insurer being liable for the entire judgment or settlement.

3. The Supreme Court clarified that the proper damages are only those that flow from the breach of the duty to defend. The court summarized the test as follows: “The insurance company must pay damages necessary to put the insured in the same position he would have been in had the insurance company fulfilled the insurance contract. *Id.* ¶ 60

   a. The court noted that in failure to defend scenarios, the insured’s would not have been responsible for the verdicts at issue except for the insurer’s refusal to defend and indemnify. By contrast, based on the facts of the case and policy, Menard would have been responsible for the verdict regardless of its insurer’s breach. *Id.* ¶ 67.


1. The insured in *Water Well* was sued for incorrectly installing a well pump, which resulted in significant damage to the pump. Based on the allegations of the complaint, the insurer denied citing the Your Product/Your Work exclusions. The insured argued that, despite the allegations of the complaint, extrinsic evidence supported that property beyond the pump itself was damaged and that a subcontractor had performed some of the pump installation.

2. The Wisconsin Supreme Court reiterated that there was no exception to the four-corner’s rule and declined to consider the extrinsic evidence. However, the court also noted that, in some unique settings, the duty to defend may not be triggered.
but an insurer’s duty to indemnify may still be triggered by the evidence that ultimately arises in a case.

3. See also Marks v. Houston Casualty Co., 2016 WI 53 (concluding insurer’s may rely upon policy exclusions when determining the duty to defend).


1. The case arose out of a proposed class action against Kolbe for allegedly defective windows. Kolbe accused its insurer United State Fire of breach of the duty to defend and bad faith arising out of Fire’s alleged delays in selecting defense counsel and its attempt to impose counsel of its choice rather than allowing Kolbe to select counsel.

2. Kolbe first argued that Fire had delayed in selecting defense counsel. The court appeared to agree, noting that Kolbe had selected its own counsel. However, the court went on to conclude this did not breach the duty to defend because Kolbe had been defended and Fire had subsequently paid its portion of defense costs. Additionally, Fire had withdrawn its attempt to substitute counsel of its choosing. In short, the court concluded that no breach had occurred and—even if it had—Kolbe had failed to explain how it had been prejudiced or harmed by Fire’s allegedly wrongful conduct. In sum, delay in assuming the defense did not result in a breach of the duty to defend where the insured is represented and the insurer agrees to make its decision retroactive and pay past litigation costs.


1. Though not a bad faith claim, per se, claims for interest under Wis. Stat. § 628.46 will often accompany bad faith claims. Moreover, Wis. Stat. § 628.46 interest can be awarded even in the absence of bad faith. A recent case out of the first district court of appeals highlights the tightrope insurer’s may need to walk to avoid such damages.

a. In 2003, the Casper family was rear-ended by a semi-truck while parked at a stoplight. Several members of the Casper family had suffered catastrophic injuries. The truck driver had been under the influence of prescription drugs and had been traveling a distance longer than permitted by federal trucking regulations. However, an off-duty police officer that witnessed the accident
testified that the Casper’s had not accelerated normally after the light changed to green. Similarly, an accident reconstruction expert testified that that the accident could have been avoided had the Casper’s accelerated immediately when the light changed.

The Plaintiffs brought suit against seven defendants. AISIC insured six of those defendants. AISIC’s claim evaluation and litigation notes reflected the understanding that the case was likely to exceed policy limits. AISIC offered to settle for policy limits in return for a release of all defendants, but the Plaintiff’s refused. Ultimately, the parties did settle for policy limits in November 2012 with a release of all defendants. Following the settlement, the parties litigated whether the Plaintiffs were entitled to Wis. Stat. § 628.46 interest. The trial court concluded that the Plaintiffs had met the Knotowicz requirements and AISIC had no reasonable proof of non-responsibility. More specifically, the court concluded that even with an apportionment of liability, no “reasonable apportionment” would bring the claim below policy limits.

i. Under Knotowicz v. American Standard Insurance Co., 2006 WI 48, third parties can be entitled to interest under the statute if (1) there is no question of liability; (2) the damages must be sum certain; and (3) the claimant provides written notice. An insurer must then pay the claim within 30 days unless there is “reasonable proof” that liability is “fairly debatable.”

b. The court of appeals concluded that a plaintiff’s itemization of damages met the “sum certain” amount. It concluded that, although the presently incurred damages did not exceed $500,000, the itemization also claimed future special damages for $19 million. The court also concluded that the written notice requirement was not met by the complaint. However, the court concluded that the combination of the 2005 itemization of damages and the 2007 policy limits demand letter were sufficient to satisfy the “written notice” requirement. Finally, the court concluded there was no question of liability. The court reasoned that even if the driver of the Casper’s vehicle was contributorily negligent, there was no “fairly debatable” question that AISIC’s liability for payment would exceed the “low policy limits” of $1 million.

The court went on to conclude that AISIC had no reasonable proof that it was not responsible for the payment. The court noted that AISIC did not dispute coverage in the matter and, again, noted that no amount of contributory negligence by the Casper’s would have exceeded AISIC’s liability. The court
also relied heavily on the claims notes from AISIC’s adjusters that stated the claim was likely a policy limits matter.

Finally, the court of appeals concluded that the same analysis applied regardless of the fact AISIC was defending multiple insureds. AISIC had argued that Wis. Stat. § 628.46 should not apply in the scenario of multiple insureds. More specifically, AISIC noted that it had offered policy limits subject to a release of all of AISIC’s insureds. In short, AISIC argued it could not settle on behalf of one insured and abandon the others. The court of appeals disagreed. It concluded that the purpose of Wis. Stat. § 628.46 was not to penalize insurers but rather to compensate claimants. This policy, said the court, should apply to single and multiple insured scenarios.

c. Takeaways:

i. The Casper case should serve as a caution to insurer’s, but it is based on unique factual circumstances. Most importantly, there were no coverage defenses presented in the case. A fairly debatable coverage defense should prevent triggering of Wis. Stat. § 628.46 interest. However, it is notable in that the court was not receptive to AISIC’s argument that multiple insureds complicated the Wis. Stat. § 628.46 equation.

c. Other Developing Areas:

i. Declining Limits Policies

1. Declining limits policies, also called “defense within limits,” “burning limits,” or “eroding limits” policies are growing increasingly popular among insurers—especially in the malpractice and professional liability context. However, these policies carry additional risk in the bad faith context. Unlike traditional policies, the policy limits incorporate defense and indemnity costs. Thus, the limits are reduced by defense costs. For example, imagine a policy with $2,000,000 limits. $200,000 in defense costs on a claim would mean the indemnity limit would be decreased to $1,800,000.

2. Declining limits policies have been held unambiguous and enforceable in many jurisdictions. E.g. Nat'l Union Fire Ins. Co. Of Pittsburgh, PA v. W. Lake Acad., 548 F.3d 8, 16 (1st Cir. 2008). However, some states have banned the policies, though many maintain certain exceptions. E.g. Ark. Code Ann. § 23-79-307(5)(A); Minn. Stat. Ann. § 60A.08. Still others have held such policies void


   a. Case arose out of coverage afforded to Admiral Glass by Amerisure and Arch. Arch provided a “Owner Controlled Insurance Program” to Admiral that, by endorsement, stated that “supplementary payments will reduce the limits of insurance” and provided that the duty to defend ended when the applicable limits of insurance had been used on judgments or settlements. Amerisure provided excess coverage over Arch’s policy. Arch had BI/PD limits, general aggregate limits, and products-completed operations limits of $2 million each. Prior to the claim giving rise to the dispute, Arch “paid a settlement of $1,555,000.00 and defense costs of $159,543.15 under the general coverage limit of the [Arch Policy], and paid settlements totaling $1,472,032.61 and defense costs of $527,967.36 under the products-completed operations coverage of the [Arch] policy.” When the next claim arose, Amerisure tendered to Arch, which refused to defend or indemnify under the position it had exhausted limits.

   The district court—adopting a magistrate judge’s ruling—concluded that “expenses” included defense costs and thus eroded the policy limits. However, it found that the policy included two separate limits—one for indemnity and one for the duty to defend. It went on to reason that the duty to defend ended only when the policy limits were exhausted on judgments and settlements (i.e. not including defense costs). Both parties appealed.

   b. The 5th Circuit concluded that the endorsement did in fact modify the Arch policy into an eroding policy. It first concluded that “expenses” included defense costs and attorneys’ fees. The court disagreed with the district court’s conclusion that the policy created separate limits for indemnity and defense. It concluded that “this reads the endorsement out of the policy as, logically, there can never be an end to the duty to defend unless the insurer pays the policy limits in indemnity payments.” Such a construction, reasoned the court, was unreasonable in light of the endorsement converting the Arch policy into an eroding policy.

4. Common Issues
   
   i. Notice of the operation and limits of the Policy
a. Need to be up front with both the insured and the third party claimant that this is a declining limits policy. There is an arguable claim of misrepresentation if you only notify that the limits of the policy are “$1 million.” Gregory S. Munro, Defense Within Limits: The Conflicts of "Wasting" or "Cannibalizing" Insurance Policies, 62 Mont. L. Rev. 131, 147 (2001).

ii. Settlement

a. Very problematic area because there are competing interests. Insured may want to settle early when limits are the highest, but insurer want to investigate before settlement. Most important consideration is that an insurer needs to account for the reduction of limits, and the increase in excess exposure to the insured. This problem is illustrated by Pueblo Country Club v. AXA Corp. Solutions, 2007 WL 951790 (D. Colo. May 31, 2007). In that case, Pueblo’s policy included a $1 million limit reduced by defense costs. AXA spent over $300,000 on defense prior to reaching a $1.5 million settlement. Not surprisingly, Pueblo brought a bad faith suit. In denying AXA’s summary judgment motion, the court determined that, at the very least, a jury should be able to determine if AXA’s failure to settle rose to the level of bad faith.

iii. Practical Pointers:

a. Communication: Need to be advising the insured. That is always key, but especially in declining limits policies because of the increased conflict of interest. If counsel is retained, that counsel needs to be advising the insured.

b. Documentation: Need to document the investigation that led to $X settlement. You can expect that the information will be requested, need to have it ready.

c. Ethical Duties: Defense counsel also need to be cognizant of its ethical obligations to its client even if policy limits—and thus the insurer paid for defense—ends. Under SCR 20:1.16, a lawyer may not be able to withdraw as counsel if it creates a “material adverse effect” on the client.
ii. **High Deductible/High SIR Policies**

1. High deductible and high self-insured retention (SIR) policies are similar but have some variations in their operation. High deductible policies provide that the insurer will pay the defense and indemnity costs for a covered claim, and then charge the policyholder for the applicable deductible. By contrast, SIR policies are written to require the insured to handle the defense and indemnity payments up to a certain amount.

   a. Hypothetical 1:

      i. Policy with a $200,000 self-insured retention (i.e. insured responsible for first $200,000 of defense costs/indemnity). You have a demand in the first three weeks to settle claim for $125,000. You have the case valued at a possible $750,000. Do you as the insurer settle?

   b. Hypothetical 2:

      i. Same $200,000 self-insured retention policy. After two years of litigation, $150,000 in fees (all paid by the insured). Settlement demand from the Plaintiff for $65,000. Insured has paid $200,000; insurer has paid $15,000.

   c. Case Examples:


         a. Liberty mutual insured Roehl under a $2 million general liability policy. *Id.* ¶ 11. Of note, the policy contained a $500,000 deductible for Roehl. *Id.* The policy provided that Liberty would have control over the claims process and the duty to defend. *Id.* ¶ 14. A Roehl truck rear-ended a third party and Liberty undertook claims handling and the defense of the claim. *Id.* ¶ 16. No settlement was reached with the claimant and a jury awarded over $830,000. *Id.* Well within Liberty’s policy limits but exposing the entire $500,000 deductible.

         b. Roehl brought a bad faith suit and argued, *inter alia*, that Liberty could have settled the claim for around $100,000 shortly after the underlying suit commenced. *Id.* ¶ 18. Additionally, Roehl argued
there had been an inadequate investigation, inexperienced claims handling, and high employee turnover had contributed to the underlying jury verdict. *Id.* ¶¶ 18–21. A jury ultimately agreed with Roehl, and awarded $127,000 in compensatory damages. *Id.* ¶ 21.

c. The Wisconsin Supreme Court upheld the jury’s finding of bad faith. “Under the circumstances of the present case in which the insured has a significant deductible, the insurance company’s and the insured’s interests might diverge . . . .” *Id.* ¶ 53. “Roehl Transport’s interest…is not only to avoid liability in excess of its coverage limits but also to limit any personal liability that arises from its deductible.” *Id.* ¶ 76. “Simply put, it is a matter of concern to Roehl Transport whether the insurance company settles for less than policy limits . . . Liberty Mutual, on the other hand, has little concern with the value of a claim below $500,000; its financial interest is in minimizing its costs in investigation and adjusting the claim an in keeping the settlement amount below $500,000.” *Id.* ¶ 77.


a. Liberty insured Walker under a $2 million policy with $500,000 deductible. *Id.* at 180. Walker subsequently was named a defendant in five product defect actions. *Id.* Walker insisted on taking the cases to trial but Liberty settled—within the deductible of the policy. *Id.* Of interest, each of the five actions was settled for less than $500,000. *Id.* at 182. (Interestingly, co-defendants who did not settle ended up facing numerous multi-million dollar verdicts). Walker refused to pay the settlements and the Liberty sued for breach of contract. *Id.* at 180. Walker responded with a counterclaim for bad faith. *Id.* A jury found both parties liable for contract damages and Liberty liable for actual and punitive damages ($12 million). *Id.* The district court refused to award bad faith damages after concluding Walker had failed to prove actual damages. *Id.*

b. The subsequent trial echoed the above facts, but also revealed that Liberty’s adjuster that negotiated the settlements had been unaware of Walker’s deductible at the time of negotiations. *Id.* at 1983.
c. The Fourth Circuit reversed on the bad faith issues. *Id.* Of relevance, the court found that Walker had suffered no actual damages—as the settlement amounts were ultimately less than Walker’s own estimates with regard to defense costs in proceeding to trial. *Id.* at 188. Despite this, the court found that Walker could receive punitive damages in the absence of actual damages and reversed with direction to consider if Walker could be entitled to nominal damages, if so, the district court was to then further analyze the punitive damages question. *Id.* at 190.
II. AMERICAN LAW INSTITUTE’S RESTATEMENT OF LIABILITY INSURANCE

a. Background and Overview

i. The topic has garnered much attention—and concern—in insurance defense circles.

ii. Among other projects, the American Law Institute (“ALI”) creates both “Restatements” and “Principles of the Law.” At least historically, Restatement projects were designed to identify what the law is, and Principles projects were more aspirational, i.e. what the law should be. ALI began the liability insurance project in 2010 as a “Principles” project. As a result, the project featured several “rules” that conflicted with national trends and well established tenants of insurance law.

However, in 2014, ALI came under new leadership, which instituted several notable changes with regard to the liability insurance project and restatements more generally. First, the liability insurance principles project was converted to a restatement (without changes to a vast majority of the provisions). Second, in 2015, ALI modified its style manual, which provides guidance to drafters and now grants them considerably more discretion. The new guidance specifies that, though Restatements are meant to be a codification of existing law, the drafters can vary from a “majority” approach if they determine the rule is outdated or impractical and the “minority” view is the growing trend and better reasoned rule.

i. This shift in philosophy led to a notable rebuke from the late Justice Antonin Scalia:

I write separately to note that modern Restatements . . . are of questionable value, and must be used with caution. The object of the original Restatements was “to present an orderly statement of the general common law.” Over time, the Restatements’ authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be. Section 39 of the Third Restatement of Restitution and Unjust Enrichment is illustrative . . . it constitutes a “novel extension” of the law that finds little if any support in case law. Restatement sections such as that should be given no weight whatever as to the current state of the law, and no more weight regarding what the law ought to be than the recommendations of any respected lawyer or scholar. And it cannot safely be assumed,
without further inquiry, that a Restatement provision describes rather than revises current law.


ii. Criticism of the Restatement of Liability Insurance has not been limited to insurers. Rather, even pro-insurer groups have cautioned that—even though the Restatement would largely benefit their clients—ALI’s change towards describing what the law should be instead of describing what the law is will damage ALI’s reputation. See Letter to ALI President Hon. David F. Levi, dated May 19, 2017, available at https://wlflegalpulse.files.wordpress.com/2017/05/geletterali-restatements-ltr.pdf Additionally, some commentators have noted that the drafters have spoken freely that the Restatement is drafted in such a manner as to incentivize insurers to defend and settle more cases, and have noted that the approach would increase the costs of litigation, which in turn will mean higher premiums for all policyholders. A. Hugh Scott, *ALI’s Proposed Insurance Law Restatement: A Trojan Horse?* Law360.com (February 9, 2017), available at https://www.law360.com/articles/889483.

iii. The drafters for the project have also penned a response to various criticisms. They question how an institution could even determine what a “majority rule” is in the context of state-based common law where rules and approaches vary greatly. Thus they reach the conclusion that “drafters should not give the concept of the majority rule more weight than it is due.” They similarly dispute that the Restatement is “pro-policyholder” but rather opine that the Restatement, all other things being equal, allocate losses to insurers who are in the best position to reduce or eliminate a risk is socially desirable—thus such rules “would also be ‘pro-insurer’ by improving the functioning of liability insurance markets.” Baker & Logue, In Defense of the Restatement of Liability Insurance Law, Research Paper No. 17-15 (April 2017); G. Priest, *A Principled Approach To Insurance Law: The Economics of Insurance And The Current Restatement Project*, available at http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2750&context=faculty_scholarship.
a. The drafters response presents an obvious overriding question: If there is no "majority rule" or consensus as the drafters contend—is that an area of law that should be subject to codification via a Restatement?

iii. Since the projects conversion to a Restatement, insurers and defense-oriented counsel have lobbied extensively for modifications to the draft restatement. On many fronts, they have been successful in at least softening the most controversial provisions. However, the restatement still includes several provisions that conflict dramatically with well-established tenants of insurance law and Wisconsin insurance law.

iv. The Restatement is broken into four sections, discussed below. All of the Chapters have received council approval and the full Chapter 1 has received membership approval. Additionally a majority of Chapters 2 and 3 have been approved. The full Restatement was scheduled for approval in May 2017. However, as criticism for the project escalated leading up the final vote, ALI determined that another year of work was necessary on the project and final approval will likely be sought in May 2018. Nonetheless, though a final draft was not approved the membership did vote to approve the draft of the Restatement.

b. Restatement of Liability Insurance Sections:

- Chapter 1: Basic Liability Insurance Contract Rules
- Chapter 2: Management of Potentially Insured Liability Claims
- Chapter 3: General Principles Regarding the Risks Insured
- Chapter 4: Enforceability and Remedies

Copies of the Proposed Final Draft are available at various locations, including the ALI website. A free copy is also available at: https://www.namic.org/pdf/insbriefs/170524_restatement_of_liability_insurance_-_proposed_final_draft.pdf. A copy of the black letter language (i.e. absent comments) is also provided with this material.

Notable Sections

a. Section 3: Presumption in Favor of the Plain Meaning of Standard-Form Insurance Policy Terms

i. Text: (1) The plain meaning of an insurance policy term is the single meaning, if any, to which the language of the term is reasonably susceptible when applied to
the claim at issue, in the context of the insurance policy as a whole, without reference to extrinsic evidence regarding the meaning of the term.

(2) An insurance policy term is interpreted according to its plain meaning, if any, unless extrinsic evidence shows that a reasonable person in the policyholder's position would give the term a different meaning. That different meaning must be more reasonable than the plain meaning in light of the extrinsic evidence, and it must be a meaning to which the language of the term is reasonably susceptible.

ii. Summary: Sub (1) reiterates the plain meaning rule, which is well established in Wisconsin. Sub (2) represents a significant expansion of the current status of the law. Under Wisconsin law, as in a majority of states, terms in an insurance policy are granted their plain meaning without resort to extrinsic evidence unless those terms are ambiguous. The restatement reshapes this rule because ambiguity would not be a requirement. Rather, the drafters favor a presumption that the plain meaning applies. A policy holder can in turn submit extrinsic evidence that (1) a reasonable person in her position would have given that term a different meaning, and (2) the different meaning is more reasonable than the “plain meaning” in light of the extrinsic evidence.

iii. In the comments section, the drafters conclude that the plain meaning rule is “unduly rigid and sometimes applied in a mechanical fashion.” They also note that the other extreme, the “contextual approach,” does not afford the policy language sufficient weight. Thus, the drafters proposed the middle ground approach of a presumption in favor of the plain meaning. The drafters concede that more jurisdictions apply the plain meaning rule, however they conclude that variations in how courts apply the plain-meaning rule has led them to the conclusion that there is no majority rule. The drafters reason that the rebuttable presumption “has the potential to bring the legal rule more in line with the actual practice of interpretation . . .”

iv. A change from a plain meaning rule to a presumption of plain meaning is one of the most significant proposals of the Restatement.

1. Insurance policies are contracts. To be certain, insurance policies are a unique form of contracts and are thus subject to notable special rules. However, the drafter’s position that one of the core rules of contract interpretation should not apply to insurance contracts has rightly drawn substantial criticism for varying from this well settled majority position.
2. From a practical standpoint, such an interpretation makes summary judgment on coverage issues more difficult for insurers. Though coverage questions (including any extrinsic evidence) are determined as a matter of law, the procedure outlined in the restatement would increase costs by requiring discovery and litigation concerning whether any extrinsic evidence that suggested a meaning more reasonable than the plain meaning.

v. Similarly, though less notable than the shift away from a strict plain meaning rule, the Restatement also abandons the nearly universal rule that insurance policies should be interpreted to avoid redundancies or superfluous language. Rather, the drafters opine that “It must be recognized, however, that insurance policies may consist of components that evolve over time along different paths, are amended or retained because of understandings that develop in the market and in judicial interpretations, or make explicit rights or obligations that the law would imply in any event. As a results, insurance policies frequently contain what might be considered redundancies. Presumably, this distinction means that a policyholder’s alternate meaning could still be “more reasonable” than the plain meaning of a term, even if that interpretation rendered other language redundant or meaningless—provided the policyholder can submit some evidence to explain that the redundancy was the result of some historical change. This could in turn require discovery on the history of a policy’s development—even in straightforward coverage cases.

b. Section 13: Conditions Under Which the Insurer Must Defend

i. (1) An insurer that has issued an insurance policy that includes a duty to defend must defend any legal action brought against an insured that is based in whole or in part on any allegations that, if proven, would be covered by the policy, without regard to the merits of those allegations.

(2) For the purpose of determining whether an insurer must defend, the legal action is deemed to be based on:

   (a) Any allegation contained in the complaint or comparable document stating the legal action; and
   (b) Any additional allegation, not contained in the complaint or comparable document starting the legal action, that a reasonable insurer would regard as an actual or potential basis for all or part of the action.

(3) Unless undisputed facts that are not at issue or potentially at issue in the legal action for which a defense is sought establish as a matter of law that the legal
action is not covered, the insurer must defend until its duty to defend is terminated under § 18.

ii. Section 13 is notable in that it creates an exception to the four-corners rule in that it requires an insurer to defend its insured if, through the course of its investigation or information provided by the insured, the insurer learns of allegations or facts that would support an actual or potential basis for coverage.

1. The Wisconsin Supreme Court rejected this exception just a year ago. *Water Well Solutions Svc. Grp. Inc. v. Consolidated Ins. Co.*, 2016 WI 54. However, the dissent in that opinion, authored by Justice A.W. Bradley, noted that Wisconsin was among “the 14 and ever dwindling number of jurisdictions that have clearly declined to recognize any exceptions to the four-corners rule.” *Id.* ¶ 43. The dissent concluded that 31 states allowed for some exception to the four-corners rule. *Id.* ¶ 53 n.2.

c. **Section 19: Consequences of Breach of the Duty to Defend**

i. (1) An insurer that breaches the duty to defend a legal action loses the right to assert any control over the defense or settlement of the action.

(2) An insurer that breaches the duty to defend without a reasonable basis for its conduct must provide coverage for the legal action for which the defense was sought, notwithstanding any grounds for contesting coverage that the insurer could have preserved by providing a proper defense under a reservation of rights pursuant to § 15.

ii. Section 19 represents a middle ground approach that the drafters adopted after heavy criticism to an earlier draft’s automatic forfeiture rule. Under the original language of the section, an insurer that breaches the duty to defend—even if innocently or by mistake—automatically forfeits all of its coverage defenses. As a result, the drafters added language that the breach of the duty to defend must lack a “reasonable basis.”

iii. However, critics have noted that not only is this not the rule in the majority of jurisdictions (approximately 30 jurisdictions) but no jurisdiction has adopted what one commentator called the “quasi-forfeiture” rule of Section 19. Thus, it is difficult to see how the rule comports with either the majority rule or an emerging trend. Similarly, the rule deviates from the majority approach—also adopted in Wisconsin—that damages for a breach of the duty to defend are those that flow from that breach, not an automatic waiver of coverage defenses. Finally, some critics have cautioned that qualifying the automatic forfeiture rule under a “reasonableness” test
still greatly increases the risk for an insurer because one person’s reasonableness is another person’s unreasonable. In short, there can be little question that the rule would lead to insurer’s defending more claims. A. Hugh Scott, *Why Criticism of ALI’s Insurance Restatement is Valid*, Law360.com, available at https://www.law360.com/articles/922277/why-criticism-of-ali-s-insurance-restatement-is-valid

d. Section 24: The Insurer’s Duty to Make Reasonable Settlement Decisions

i. (1) When an insurer has the authority to settle a legal action brought against the insured, or the authority to settle the action rests with the insured but the insurer’s prior consent is required for any settlement to be payable by the insurer, the insurer has a duty to the insured to make reasonable settlement decisions to protect the insured from a judgment in excess of the applicable policy limit.

(2) A reasonable settlement decision is one that would be made by a reasonable insurer who bears the sole financial responsibility for the full amount of the potential judgment.

(3) An insurer’s duty to make reasonable settlement decisions includes the duty to make its policy limits available to the insured for the settlement of a covered legal action that exceeds those policy limits if a reasonable insurer would do so in the circumstances.

ii. Sections 24 and 27 have drawn substantial criticism, especially earlier versions. See Kim V. Markland, Duty to Settle: Why Proposed Section 24 and 27 Have No Place in A Restatement of the Law of Liability Insurance. 68 Rut. L. Rev. 201, available at http://www.rutgerslawreview.com/wp-content/uploads/2015/12/08_Marrkand.pdf. Though some changes have been made, Section 24 is still notable in that it replaces what is commonly referred to as the duty to settle with a duty to make reasonable settlement decisions. Under this rule, an insurer can be liable for an excess judgment not only for failing to accept a reasonable settlement, but also for failing to make a reasonable offer of settlement when a reasonable insurer would have done so.

e. Section 27: Damages for Breach of the Duty to Make Reasonable Settlement Decisions

i. An insurer that breaches the duty to make reasonable settlement decisions is subject to liability for the full amount of damages assessed against the insured in
the underlying legal action, without regard to the policy limits, as well as any other foreseeable harm caused by the insurer’s breach of the duty.

ii. On its face, Section 27 would appear to comply with the general rule that an insurer that breaches the duty to make reasonable settlement decisions is liable for the potentially excess judgment. However, the Section permits for an insurer to be liable for extra-contractual damages even absent a finding of bad faith. The drafters even noted in a recent article that they intended that “foreseeable consequences” should include damages for emotional distress or loss of business reputation. See Baker & Logue, In Defense of the Restatement of Liability Insurance Law, Research Paper No. 17-15 (April 2017).

iii. The notes section explains that the intended rule deviates from the majority rule favored by courts. For example, when the underlying suit results in punitive damages, the comments note that punitive damages should be included as a “foreseeable consequence” irrespective of policy language or public policy considerations. The drafters note that only a “few” state courts have addressed the question of punitive damages in failure to settle scenarios. Furthermore, they concede that the courts that have addressed the issue have resolved the issue by concluding public policy still prevents coverage for punitive damages. The drafters nonetheless have adopted the reasoning of the “strong dissents” in these few cases because public policy favors encouraging reasonable settlements and a contrary rule would increase the need for independent coverage counsel for insureds.

f. Section 48(4): Remedies Potentially Available

i. The remedies that may be available, depending on the circumstances, in an action determining the rights of parties under a liability insurance policy include:

* * *

(4) When the insured substantially prevails in a declaratory-judgment action brought by an insurer seeking to terminate the insurer’s duty to defend under the policy, an award of a sum of money to the insured for the reasonable attorneys’ fees and other costs incurred in that action;

i. Section 48 governs the remedies available in an action to determine the rights of a party under an insurance policy (i.e. declaratory judgment).

ii. Under § 48(4) an insurer could be liable for an insured’s costs—including attorneys’ fees—in a declaratory judgment action where “the insured substantially prevails.”
a. Within the context of the entire work, this should be very concerning for insurers. On one hand the restatement emphasizes, if not requires, insurer’s to seek declaratory judgment in order to determine the duty to defend. At the same time, insurers that do not “substantially prevail” could be liable for the insured’s costs in disputing coverage.

i. The justification for this rule is described as follows:

a. Policyholders purchase a liability insurance policy that includes the duty to defend or pay defense costs in order to receive a timely and effective legal defense, paid for by the insurer, so that the insured does not have to bear that burden alone. When an insurer brings a declaratory judgment action seeking to terminate its defense of a liability action, the insured is forced to hire a lawyer in order to preserve that defense, significantly frustrating that purpose. In that context, the insured’s attorneys’ fees can be understood to be part of the costs of the insured’s defense.

b. The justification for this rule is somewhat perplexing. The authors explain that only a minority of states award attorneys’ fees in declaratory judgment actions; however, they appear to rely on the fact that a number of states award attorneys’ fees when an insurer breaches the duty to defend. However, the authors also expressly note that subsection (4) is designed to award attorneys’ fees in the scenario where “there has been no breach of those defense duties.”

b. Where Do We Go From Here.

i. Insurance law varies substantially across jurisdictions, and any attempt to codify such a diverse area of the law should draw substantial criticism from both pro-policyholder or pro-insurer commentators. There should be little question that the Restatement of Liability Insurance does not represent the majority rule on several prominent points, and sides with policy holders on a majority of these controversial issues.

ii. The Restatement is unlikely to present a dramatic sea change in Wisconsin or nationwide insurance law. However, it similarly cannot be ignored. As a result of the breadth of the law, every state has some portion of insurance law that has not been addressed, or has been addressed sparingly by courts. The Restatement would likely provide valuable ammunition in addressing such questions, and would certainly be pointed to when appellate courts consider altering existing jurisprudence.
1. For insurers and pro-insurer counsel, the best option is to continue to voice concerns to ALI regarding the Restatement’s deviation from the original mission of such projects. Similarly, it is important for practitioners and scholars to continue to author comprehensive works such that practitioners will be able to effectively support their arguments that the Restatement may not accurately reflect the current status of the law on certain issues.

iii. Many commentators have questioned the impact that implementation of the Restatement would have on insurance markets as a whole. This issue is subject to extensive debate that is beyond the scope of this work. Nonetheless, it is indisputable that the Restatement would lead to increased costs for insurers—and those costs would undoubtedly be passed on to insureds.
Rural Mutual Insurance values what’s important in life. That’s why we have been protecting families, businesses and farms exclusively in Wisconsin for over 82 years. And since Rural Mutual Insurance does business in only one state, premiums paid here, stay here to keep Wisconsin strong.
§ 1. Definitions (T.D. No. 1) (approved 2016) (contains nonsubstantive revisions)

(1) A “condition” in a liability insurance policy is an event under the control of an insured, policyholder, or insurer that, unless excused, must occur, or must not occur, before performance under the policy becomes due under the policy.

(2) A “deductible” is the amount specified in a liability insurance policy by which coverage under the policy is reduced after the coverage amount is finally determined. Unless otherwise stated in the insurance policy, none of the insurer’s duties with respect to defense or indemnification are contingent upon the insured’s payment of the deductible.

(3) An “exclusion” is a term in an insurance policy that identifies a category of claims that is not covered by the policy.

(4) An “insured” is a natural person or entity with a right to coverage under an insurance policy.

(5) An “insuring clause” is a term in a liability insurance policy that grants insurance coverage.

(6) A “legal action” is a demand for redress of the kind that fits within the usual framework of insured liabilities. Which legal actions are insured under any particular liability insurance is defined by that policy.

(7) “Liability insurance” is insurance that exclusively or primarily covers risks related to the liability of an insured to third parties, including the liability insurance coverage part of an insurance policy that includes other forms of coverage.

(8) A “mandatory rule” is a rule of contract law or insurance law that cannot be changed by agreement of the parties.

(9) A “non-mandatory rule,” otherwise known as a “default rule,” is a rule of contract law or insurance law that can be changed by agreement of the parties.

(10) A “policyholder” is the natural person or entity that acquires an insurance policy. In the liability insurance context, the policyholder typically is an insured under the policy, but there often are other persons or entities that also qualify as insureds.
(11) A “policy limit” is a term in an insurance policy that identifies the maximum amount that the insurer is obligated to pay under the policy for the claim or claims to which the policy limit applies.

(12) A “self-insured retention” is the amount specified in a liability insurance policy that the insured must pay for a covered loss before coverage under the policy begins to apply. Unless otherwise stated in the insurance policy, an insurer has no duty to defend or indemnify the insured until the insured has paid any applicable self-insured retention.

(13) A “standard-form term” is a term that appears in, or is taken from, an insurance-policy form (including an endorsement) that an insurer makes available for a non-predetermined number of transactions in the insurance market.

(14) An insurance-policy “term” is a word or set of words in an insurance policy that perform a discrete function in the policy. In the context of this Restatement, “term” typically refers to the word or set of words whose meaning or application is at issue in determining the coverage that is available in relation to a legal action brought against an insured.

§ 2. Insurance-Policy Interpretation (T.D. No. 1) (approved 2016)

(1) Insurance-policy interpretation is the process of determining the meaning of the terms of an insurance policy. Whether those terms as so interpreted are enforceable is determined by reference to other legal rules.

(2) Insurance-policy interpretation is a question of law.

(3) Except as this Restatement or applicable law otherwise provides, the ordinary rules of contract interpretation apply to the interpretation of liability insurance policies.

§ 3. The Presumption in Favor of the Plain Meaning of Standard-Form Insurance-Policy Terms (T.D. No. 1) (approved 2016)

(1) The plain meaning of an insurance-policy term is the single meaning, if any, to which the language of the term is reasonably susceptible when applied to the claim at issue, in the context of the insurance policy as a whole, without reference to extrinsic evidence regarding the meaning of the term.
(2) An insurance-policy term is interpreted according to its plain meaning, if any, unless extrinsic evidence shows that a reasonable person in the policyholder’s position would give the term a different meaning. That different meaning must be more reasonable than the plain meaning in light of the extrinsic evidence, and it must be a meaning to which the language of the term is reasonably susceptible.

§ 4. Ambiguous Terms (T.D. No. 1) (approved 2016)

(1) An insurance-policy term is ambiguous if there is more than one meaning to which the language of the term is reasonably susceptible when applied to the claim in question, without reference to extrinsic evidence regarding the meaning of the term.

(2) When an insurance-policy term is ambiguous, the term is interpreted in favor of the party that did not supply the term, unless the other party persuades the court that this interpretation is unreasonable in light of extrinsic evidence.

(3) A standard-form insurance-policy term is interpreted as if it were supplied by the insurer, without regard to which party actually supplied the term, unless the policyholder has agreed in writing to a contrary interpretive rule, in which case any term actually supplied by the policyholder will be interpreted using that contrary interpretive rule.

§ 5. Waiver (T.D. No. 1) (approved 2016)

A party to an insurance policy waives a right under the policy if

(1) that party, with actual or constructive knowledge of the facts giving rise to that right, expressly relinquishes the right, or engages in conduct that would reasonably be regarded by the counterparty as an intentional relinquishment of that right, and

(2) the relinquishment or conduct is communicated to the counterparty.


A party to a liability insurance policy who makes a promise or representation that can reasonably be expected to induce detrimental reliance by another party to the policy is estopped from denying the promise or representation if the other party does in fact reasonably and detrimentally rely on that promise or representation.
§ 7. Misrepresentation (T.D. No. 1) (approved 2016)

(1) Any statement of fact made by a policyholder in an application for an insurance policy is a representation by the policyholder.

(2) Subject to the rules governing defense obligations, an insurer may deny a claim or rescind the applicable liability insurance policy on the basis of an incorrect representation made by a policyholder in an application for an insurance policy (hereinafter referred to as a misrepresentation) only if the following requirements are met:

   (a) The misrepresentation was material as defined in § 8; and

   (b) The insurer reasonably relied on the misrepresentation in issuing or renewing the policy as specified in § 9.

(3) When the policy is rescinded under subsection (2), the insurer must return all of the premiums paid for the policy.


A misrepresentation by or on behalf of an insured during the application for, or renewal of, an insurance policy is material only if, in the absence of the misrepresentation, a reasonable insurer in this insurer’s position would not have issued the policy or would have issued the policy only under substantially different terms.


The reliance requirement of § 7(2)(b) is met only if,

(1) Absent the misrepresentation, the insurer would not have issued the policy or would have issued the policy only with substantially different terms; and

(2) Such actions would have been reasonable under the circumstances.

§ 10. Scope of the Right to Defend (T.D. No. 1) (approved 2016)

When an insurance policy grants the insurer the right to defend a legal action, that right includes, unless otherwise stated in the policy or limited by applicable law:

(1) The authority to direct all the activities of the defense of any legal action that the insurer has a duty to defend, including the selection and oversight of defense counsel; and
(2) The right to receive from defense counsel all information relevant to the defense or settlement of the action, subject to the exception for confidential information stated in § 11(2).

§ 11. Confidentiality (T.D. No. 1) (approved 2016)

   (1) The provision of information protected by attorney–client privilege, work-product immunity, or other confidentiality protections to an insurer or an insured within the context of the investigation and defense of a legal action does not waive any rights of the insured or the insurer to the confidentiality of that information with respect to third parties.

   (2) An insurer does not have the right to receive any information of the insured that is protected by attorney–client privilege, work-product immunity, or a defense lawyer’s duty of confidentiality under rules of professional conduct, if that information could be used to benefit the insurer at the expense of the insured.


An insurer exercising the right to defend a legal action is subject to liability for the negligence or other breach of professional obligation of defense counsel and related service providers in relation to the action if:

   (1) Defense counsel is an employee of the insurer acting within the scope of employment; or

   (2) The insurer negligently selects or supervises defense counsel, including by retaining counsel with inadequate liability insurance.

(contains new subsection (3)(d))

   (1) An insurer that has issued an insurance policy that includes a duty to defend must defend any legal action brought against an insured that is based in whole or in part on any allegations that, if proven, would be covered by the policy, without regard to the merits of those allegations.
(2) For the purpose of determining whether an insurer must defend, the legal action is deemed to be based on:

   (a) Any allegation contained in the complaint or comparable document stating the legal action; and

   (b) Any information not alleged in the complaint or comparable document stating the legal action, that a reasonable insurer would regard as a basis for adding an allegation to the action.

(3) The insurer must defend until its duty to defend is terminated under § 18 by declaratory judgment or otherwise, unless facts as to which there is no genuine dispute establish as a matter of law that:

   (a) The defendant in the action is not an insured under the insurance policy pursuant to which the duty to defend is asserted;

   (b) The vehicle involved in the accident is not a covered vehicle under the automobile liability policy pursuant to which the duty to defend is asserted and the defendant is not otherwise entitled to a defense;

   (c) The claim was reported late under a claims-made-and-reported policy such that the insurer’s performance is excused under the rule stated in § 36(2); or

   (d) There is no duty to defend because the insurance policy has been properly cancelled.


When an insurance policy obligates an insurer to defend a legal action:

(1) Subject to the insurer’s right to terminate the defense under § 18, the duty to defend the action includes the obligation to provide a defense of the action that:

   (a) Makes reasonable efforts to defend the insured from all of the causes of action and remedies sought in the action, including those not covered by the liability insurance policy; and

   (b) Requires defense counsel to protect from disclosure to the insurer any information of the insured that is protected by attorney–client privilege, work-product immunity, or a defense lawyer’s duty of confidentiality under
rules of professional conduct, if that information could be used to benefit the insurer at the expense of the insured;

(2) The insurer may fulfill the duty to defend using its own employees, except when an independent defense is required; and

(3) Unless otherwise stated in the policy, the costs of the defense of the action are borne by the insurer in addition to the policy limits.

§ 15. Reserving the Right to Contest Coverage (T.D. No. 1) (approved 2016)

(1) An insurer that undertakes the defense of a legal action may later contest coverage for that action only if it provides timely notice to the insured, before undertaking the defense, of any ground for contesting coverage of which it knows or should know.

(2) If an insurer already defending a legal action learns of information that provides a ground for contesting coverage for that action, the insurer must give notice of that ground to the insured within a reasonable time in order to reserve the right to contest coverage for the action on that ground.

(3) Notice to the insured of a ground for contesting coverage must include a written explanation of the ground, including the specific insurance-policy terms and facts upon which the potential ground for contesting coverage is based, in language that is understandable by a reasonable person in the position of the insured.

(4) When an insurer reasonably cannot complete its investigation before undertaking the defense of a legal action, the insurer may temporarily reserve its right to contest coverage for the action by providing to the insured an initial, general notice of reservation of rights, in language that is understandable by a reasonable person in the position of the insured, but to preserve that reservation of rights the insurer must pursue that investigation with reasonable diligence and must provide the detailed notice stated in subsection (3) within a reasonable time.

§ 16. The Obligation to Provide an Independent Defense (T.D. No. 1) (approved 2016)

When an insurer with the duty to defend provides the insured notice of a ground for contesting coverage under § 15 and there are facts at issue that are common to the legal action for which the defense is due and to the coverage dispute, such that the action could
be defended in a manner that would benefit the insurer at the expense of the insured, the insurer must provide an independent defense of the action.


When an independent defense is required under § 16:

(1) The insurer does not have the right to defend the legal action;
(2) The insured may select defense counsel and related service providers;
(3) The insurer is obligated to pay the reasonable fees of the defense counsel and related service providers on an ongoing basis in a timely manner;
(4) The insurer has the right to associate in the defense of the legal action under the rules stated in § 23; and
(5) The insured’s provision of information to the insurer does not waive the confidentiality of the information with respect to third parties.

§ 18. Terminating the Duty to Defend a Legal Action (T.D. No. 1) (approved 2016)

An insurer’s duty to defend a legal action terminates only upon the occurrence of one or more of the following events:

(1) An explicit waiver by the insured of its right to a defense of the action;
(2) Final adjudication of the action;
(3) Final adjudication or dismissal of part of the action that eliminates any basis for coverage of any remaining components of the action;
(4) Settlement of the action that fully and finally resolves the entire action;
(5) Partial settlement of the action, entered into with the consent of the insured, that eliminates any basis for coverage of any remaining components of the action;
(6) If so stated in the insurance policy, exhaustion of the applicable policy limit;
(7) A correct determination by the insurer that there is no duty to defend under § 13(3); or
(8) Final adjudication that the insurer does not have a duty to defend the action.

(1) An insurer that breaches the duty to defend a legal action loses the right to assert any control over the defense or settlement of the action.

(2) An insurer that breaches the duty to defend without a reasonable basis for its conduct must provide coverage for the legal action for which the defense was sought, notwithstanding any grounds for contesting coverage that the insurer could have preserved by providing a proper defense under a reservation of rights pursuant to § 15.

§ 20. When Multiple Insurers Have a Duty to Defend (T.D. No. 1) (approved 2016)

When more than one insurer has the duty to defend a legal action brought against an insured:

(1) The insured may select any of these insurers to provide a defense of the action;

(2) If that insurer refuses to defend or otherwise breaches the duty to defend, the insured may select any of the other insurers with a defense obligation to defend the action; and

(3) The selected insurer must provide a full defense until the duty to defend is terminated pursuant to § 18 or until another insurer assumes the defense pursuant to subsection (4)(a).

(4) If the policies establish an order of priority of defense obligations among them, or if there is a regular practice in the relevant insurance market that establishes such a priority, that priority will be given effect as follows:

(a) An insurer selected pursuant to subsection (1) or (2) may ask any insurer whose duty to defend is earlier in the order of priority to assume the defense; and

(b) An insurer that incurs defense costs has a right of contribution or indemnity for those costs against any other insurer whose duty to defend is in the same position or earlier in the order of priority.

(5) If neither the policies nor the insurance-market practice establish an order of priority:
(a) The duty to defend is independently and concurrently owed to the insured by each of the insurers;

(b) Any nonselected insurer has the obligation to pay its pro rata share of the reasonable costs of defense of the action and the noncollectible shares of other insurers; and

(c) A selected insurer may seek contribution from any of the other insurers for the costs of defense.


Unless otherwise stated in the insurance policy or otherwise agreed to by the insured, an insurer may not seek recoupment of defense costs from the insured, even when it is subsequently determined that the insurer did not have a duty to defend or pay defense costs.


(1) A defense-cost-indemnification policy is an insurance policy in which the insurer agrees to pay the costs of defense of a covered legal action and does not undertake the duty to defend. Typically, such policies also cover settlements and judgments.

(2) When a defense-cost-indemnification policy obligates an insurer to pay the costs of defense on an ongoing basis:

(a) The scope of the insurer’s defense-cost obligation is determined using the rules governing the duty to defend stated in § 13, § 18, and § 20;

(b) To preserve the right to contest coverage for a legal action, the insurer must follow the reservation-of-rights procedure stated in § 15; and

(c) An insurer that breaches this defense-cost obligation loses the right to associate in the defense of the action under § 23, the right to exercise any control in the settlement of the action, and, if the insurer did not have a reasonable basis for the breach, the right to contest coverage for the action.

(3) When a defense-cost-indemnification policy does not obligate an insurer to pay the costs of defense of a covered legal action on an ongoing basis, the insurer’s obligation to pay defense costs is determined based on all the facts and circumstances, unless otherwise provided in the policy.
§ 23. The Right to Associate in the Defense (T.D. No. 1) (approved 2016)

(1) When an insurer has the right to associate in the defense of a legal action, that right includes, unless otherwise stated in the insurance policy:

   (a) The right to receive from defense counsel and the insured, upon request, information that is reasonably necessary to assess the insured’s potential liability and to determine whether the defense is being conducted in a manner that is commensurate with that potential liability, with the exception of information protected by attorney–client privilege, work-product immunity, or a defense lawyer’s duty of confidentiality under rules of professional conduct, if that information could be used to benefit the insurer at the expense of the insured; and

   (b) A reasonable opportunity to be consulted regarding major decisions in the defense of the action that is consistent with the insurer’s level of engagement with the defense of the action.

(2) The provision of information to an insurer pursuant to the right to associate does not waive any confidentiality rights of the insured with respect to third parties.


(1) When an insurer has the authority to settle a legal action brought against the insured, or the authority to settle the action rests with the insured but the insurer’s prior consent is required for any settlement to be payable by the insurer, the insurer has a duty to the insured to make reasonable settlement decisions to protect the insured from a judgment in excess of the applicable policy limit.

(2) A reasonable settlement decision is one that would be made by a reasonable insurer who bears the sole financial responsibility for the full amount of the potential judgment.

(3) An insurer’s duty to make reasonable settlement decisions includes the duty to make its policy limits available to the insured for the settlement of a covered legal action that exceeds those policy limits if a reasonable insurer would do so in the circumstances.
§ 25. The Effect of a Reservation of Rights on Settlement Rights and Duties (T.D. No. 1) (approved 2016)

(1) A reservation of the right to contest coverage does not relieve an insurer of the duty to make reasonable settlement decisions stated in § 24.

(2) Unless otherwise stated in an insurance policy or agreed to by the insured, an insurer may not settle a legal action and thereafter demand recoupment of the settlement amount from the insured on the grounds that the action was not covered.

(3) When an insurer has reserved the right to contest coverage for a legal action, the insured may settle the action without the consent of the insurer and without violating the duty to cooperate or other restrictions on the insured’s settlement rights contained in the policy, provided the following requirements are met:

(a) The insurer is given the opportunity to participate in the settlement process;

(b) The insurer declines to withdraw its reservation of rights after receiving prior notice of the proposed settlement;

(c) It would be reasonable for a person who bears the sole financial responsibility for the full amount of the potential covered judgment to accept the settlement; and

(d) If the settlement includes payments for damages that are not covered by the liability insurance policy, the portion of the settlement allocated to the insured component of the action is reasonable.


(1) If there are multiple legal actions brought against an insured that would count toward a single policy limit, the insurer has a duty to the insured to make a good-faith effort to settle the actions in a manner that minimizes the insured’s overall exposure.

(2) The insurer may satisfy this duty by interpleading the policy limits to the court, naming all known claimants, and, if the insurer has a duty to defend or a duty to pay defense costs on an ongoing basis, continuing to defend or pay the defense costs of its insured until:
Appendix

(a) Settlement of the legal actions;
(b) Final adjudication of the actions; or
(c) Adjudication that the insurer does not have a duty to defend or to pay the defense costs of the actions.


An insurer that breaches the duty to make reasonable settlement decisions is subject to liability for the full amount of damages assessed against the insured in the underlying legal action, without regard to the policy limits, as well as any other foreseeable harm caused by the insurer’s breach of the duty.


An excess insurer has an equitable right of subrogation for loss incurred as a result of an underlying insurer’s breach of the duty to make reasonable settlement decisions.

§ 29. The Insured’s Duty to Cooperate (T.D. No. 1) (approved 2016)

When an insured seeks liability insurance coverage from an insurer, the insured has a duty to cooperate with the insurer. The duty to cooperate includes the obligation to provide reasonable assistance to the insurer:

(1) In the investigation and settlement of the legal action for which the insured seeks coverage;
(2) If the insurer is providing a defense, in the insurer’s defense of the action; and
(3) If the insurer has the right to associate in the defense of the action, in the insurer’s exercise of the right to associate.


(1) An insured’s breach of the duty to cooperate relieves an insurer of its obligations under an insurance policy only if the insurer demonstrates that the failure caused or will cause prejudice to the insurer.
(2) If an insured’s collusion with a claimant is discovered before prejudice has occurred, the prejudice requirement is satisfied as long as the collusion would have caused prejudice to the insurer had it not been discovered.

§ 31. Insuring Clauses (T.D. No. 1) (approved 2016)
(1) An “insuring clause” is a term in a liability insurance policy that grants insurance coverage.
(2) Whether a term in a liability insurance policy is an insuring clause does not depend on where the term is in the policy or the label associated with the term in the policy.
(3) Insuring clauses are interpreted broadly.

§ 32. Exclusions (T.D. No. 1) (approved 2016)
(1) An “exclusion” is a term in an insurance policy that identifies a category of claims that is not covered by the policy.
(2) Whether a term in an insurance policy is an exclusion does not depend on where the term is in the policy or the label associated with the term in the policy.
(3) Exclusions are interpreted narrowly.
(4) Unless otherwise stated in the insurance policy, words in an exclusion regarding the expectation or intent of the insured refer to the subjective state of mind of the insured.
(5) An exception to an exclusion narrows the application of the exclusion; the exception does not grant coverage beyond that provided in the insuring clauses in the insurance policy.

§ 33. Timing of Events That Trigger Coverage (T.D. No. 1) (approved 2016)
(1) When a liability insurance policy provides coverage based on the timing of a harm, event, wrong, loss, activity, occurrence, claim, or other happening, the determination of when that harm, event, wrong, loss, activity, occurrence, claim, or other happening took place is a question of fact.
(2) A liability insurance policy may define a harm, event, wrong, loss, activity, occurrence, claim, or other happening that triggers coverage under a liability insurance
Appendix

policy to have taken place at a specially defined time, even if it would be determined for other purposes to have taken place at a different time.

§ 34. Conditions in Liability Insurance Policies (T.D. No. 1) (approved 2016 as § 35)

(1) A “condition” in a liability insurance policy is an event under the control of an insured, policyholder, or insurer that, unless excused, must occur, or must not occur, before performance under the policy becomes due under the policy.

(2) Whether a term in a liability insurance policy is a condition does not depend on where the term is located in the policy or the label associated with the term in the policy.

(3) The failure of an insured to satisfy cooperation conditions, under the rules stated in § 30, and notice-of-claim conditions, under the rules stated in § 36(1), does not relieve the insurer of its obligations under the policy unless the failure caused prejudice to the insurer.

§ 35. Consent or Approval of the Insurer as a Condition (T.D. No. 1) (approved 2016 as § 36)

When a liability insurance policy makes the consent or approval of the insurer a condition of the insurer’s duty under the policy, the condition is satisfied if the insured seeks to obtain the consent or approval of the insurer and no reasonable insurer would refuse to consent or approve in the circumstances.

§ 36. Notice and Reporting Conditions (was § 37 in T.D. No. 1)

(1) Except as stated in subsection (2), the failure of the insured to satisfy a notice-of-claim condition excuses an insurer from performance of its obligations under a liability insurance policy only if the insurer demonstrates that it was prejudiced as a result.

(2) With respect to claims first reported after the conclusion of the claim-reporting period in a claims-made-and-reported policy, the failure of the insured to satisfy the claim-reporting condition in the policy excuses an insurer from performance under the policy without regard to prejudice, except when:

(a) The policy does not contain an extended reporting period;

(b) The claim at issue is made too close to the end of the policy period to allow the insured a reasonable time to satisfy the condition; and
(c) The insured reports the claim to the insurer within a reasonable time.

§ 37. Assignment of Rights Under a Liability Insurance Policy (T.D. No. 1) (approved 2016 as § 38)

(1) Except as otherwise stated in this Section, rights under a liability insurance policy are subject to the ordinary rules regarding the assignment of rights under a contract.

(2) Rights of an insured under an insurance policy relating to a specific claim that has been made against the insured may be assigned without regard to an anti-assignment condition or other term in the policy restricting such assignments.

(3) Rights of an insured under an insurance policy relating to a class of claims or potential claims may be assigned without regard to an anti-assignment condition or other term in the policy restricting such assignments, provided the following requirements are met:

   (a) The assignment accompanies the transfer of financial responsibility for the underlying liabilities insured under the policy as part of a sale of corporate assets or similar transaction;

   (b) The assignment takes place after the end of the policy period; and

   (c) The assignment of the rights does not materially increase the risk borne by the insurer.

§ 38. Policy Limits (T.D. No. 1) (approved 2016 as § 39)

(1) A policy limit is a term in an insurance policy that identifies the maximum amount the insurer is obligated to pay under the policy for the claim or claims to which the policy limit applies.

(2) A per-occurrence, per-accident, per-claim, per-person, or other per-circumstance policy limit identifies the maximum amount the insurer is obligated to pay under the policy for a single occurrence, accident, claim, person, or other specified circumstance.

(3) An aggregate policy limit identifies the maximum amount the insurer is obligated to pay under the policy for a specified set of circumstances, regardless of the
number of occurrences, accidents, claims, persons, or other specified circumstances. An insurance policy may have an aggregate limit that applies to all claims covered by the policy or it may have one or more aggregate limits that apply only to a defined set of claims. Not all liability insurance policies contain an aggregate limit.

§ 39. Number of Accidents or Occurrences (T.D. No. 1) (approved 2016 as § 41)

For liability insurance policies that have per-accident or per-occurrence policy limits, retentions, or deductibles, the number of accidents or occurrences is determined by reference to the cause(s) of the bodily injury, property damage, or other harm that forms the basis for the claim, unless otherwise stated in the policy.

§ 40. Excess Insurance: Exhaustion and Drop Down (T.D. No. 1) (approved 2016 as § 42)

When an insured is covered by an insurance policy that provides coverage that is excess to an underlying insurance policy, the following rules apply, unless otherwise stated in the excess insurance policy:

(1) The excess insurer is not obligated to provide benefits under its policy until the underlying policy is exhausted.

(2) The underlying policy is exhausted when an amount equal to the limit of that policy has been paid to claimants for a covered loss, or for other covered benefits subject to that limit, by or on behalf of the underlying insurer or the insured.

(3) If the underlying insurer is unable to perform, whether because of insolvency or otherwise, the excess insurer is not obligated to provide coverage in the place of the underlying insurer.

§ 41. Indemnification from Multiple Policies: The General Rule (T.D. No. 1) (approved 2016 as § 43)

(1) When more than one insurance policy provides coverage to an insured for a legal action, the insurers are independently and concurrently liable to the insured under their policies, subject to the limits of each policy, except as otherwise provided in subsection (2) and § 42.
(2) When an insurance policy contains a term that alters the default rule stated in subsection (1), that term will be given effect, except to the extent that the term cannot be harmonized with an allocation term in another policy and provided that there is no more allocation to the insured than there would have been under the applicable policy that is most favorable to the insured with regard to allocation.

(3) When multiple insurers have a duty to defend an insured, the insurers’ defense obligations are governed by § 20.

§ 42. Allocation in Long-Tail Harm Claims Covered by Occurrence-Based Policies (was § 44 in T.D. No. 1)

(1) Except as stated in subsection (2), when indivisible harm occurs over multiple years, the amount of any judgment entered in or settlement of any liability action arising out of that harm is subject to pro rata allocation as follows:

   (a) For purposes of determining the share allocated to any occurrence-based liability insurance policy that is triggered by harm during the policy period, the amount of the judgment or settlement is allocated equally across years, beginning with the first year in which the harm occurred and ending with the last year in which the harm would trigger an occurrence-based liability insurance policy; and

   (b) An insurer’s obligation to pay for that pro rata share is subject to the ordinary rules governing any deductible, self-insured retention, policy limit, or exhaustion terms in the policy.

(2) When an insurance policy contains a term that alters the default rule stated in subsection (1), that term will be given effect, except to the extent that the term cannot be harmonized with an allocation term in another policy that provides coverage for the claim.

(3) Defense obligations relating to multiple triggered policies are subject to the rules in § 20.

§ 43. Contribution (was § 45 in T.D. No. 1)

(1) An insurer that indemnifies an insured for a legal action has a right of contribution against any other insurer with an indemnification obligation to that insured for that action to the extent that:
Appendix

(a) The first insurer has paid more than its share of the costs;
(b) The other insurer has not settled with and been released by the insured;
and
(c) The other insurer has paid less than its share of the costs.

(2) In determining the insurers’ share of the costs, principles of restitution and unjust enrichment apply, subject to any consistent allocation terms contained in the liability insurance policies at issue.

§ 44. The Effect of Partial Settlements on Amounts Owed by Non-Settling Insurers

In determining the declaration of rights and amount of any judgment to be entered against a liability insurer with respect to the insurer’s obligation to provide coverage for a legal action brought against an insured, the amount of the insured’s losses that are the subject of the declaration or judgment are reduced by the amount paid for those losses by any insurers that settled with and were released by the insured with respect to that legal action.

§ 45. Implied-in-Law Terms and Restrictions

(1) A term that is required by law to be included in a liability insurance policy is so included by operation of law notwithstanding its absence in the written policy.

(2) A liability-insurance-policy term is unenforceable on public-policy grounds if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such term.

§ 46. Insurance of Liabilities Involving Aggravated Fault (T.D. No. 1) (approved 2016 as § 34)

(1) Except as barred by legislation or judicially declared public policy, a term in a liability insurance policy providing coverage for defense costs incurred in connection with any legal action is enforceable, including but not limited to defense costs incurred in connection with: a criminal prosecution; an action seeking fines, penalties, or punitive damages; and an action alleging criminal acts, expected or intentionally caused harm, fraud, or other conduct involving aggravated fault.
(2) Except as barred by legislation or judicially declared public policy, a term in a liability insurance policy providing coverage for civil liability arising out of aggravated fault is enforceable, including civil liability for: criminal acts, expected or intentionally caused harm, fraud, or other conduct involving aggravated fault.

(3) Whether a term in a liability insurance policy provides coverage for the defense costs and civil liability addressed in subsections (1) and (2) is a question of interpretation governed by the ordinary rules of insurance-policy interpretation.

§ 47. Insurance of Known Liabilities

(1) Unless otherwise stated in the policy, a liability insurance policy provides coverage for a known liability only if that liability is disclosed to the insurer during the application or renewal process for the policy.

(2) For purposes of the rule stated in subsection (1), a liability is known only when, prior to the inception of the policy period, the policyholder knows that, absent a settlement, an adverse judgment establishing the liability in an amount that would reach the level of coverage provided under the policy is substantially certain.

§ 48. Remedies Potentially Available

The remedies that may be available, depending on the circumstances, in an action determining the rights of parties under a liability insurance policy include:

(1) An award of damages under § 49;

(2) A declaration of the rights of the parties;

(3) Court costs or attorneys’ fees to a prevailing party when provided by legislation;

(4) When the insured substantially prevails in a declaratory-judgment action brought by an insurer seeking to terminate the insurer’s duty to defend under the policy, an award of a sum of money to the insured for the reasonable attorneys’ fees and other costs incurred in that action;

(5) If so provided in the liability insurance policy or otherwise agreed by the parties, an award of a sum of money due to the insurer as recoupment of the costs of defense or settlement;
(6) Collection and disbursement of interpleaded policy proceeds;
(7) Payment or return of premiums;
(8) Indemnification of the insurer by the insured when state law permits
recovery from highly culpable insureds; and
(9) Prejudgment interest.

§ 49. Damages for Breach of a Liability Insurance Policy
The damages that an insured may recover for breach of a liability insurance policy
include:

(1) In the case of a policy that provides defense coverage, all reasonable costs
of the defense of a potentially covered legal action that have not already been paid
by the insurer, subject to any applicable limit, deductible, or self-insured retention
of the policy;

(2) All amounts required to indemnify the insured for a covered legal action
that have not already been paid by the insurer, subject to any applicable limit,
deductible, or self-insured retention of the policy;

(3) In the case of a breach of the duty to defend or to pay defense costs on an
ongoing basis, the reasonable attorneys’ fees and other costs incurred in the legal
action establishing the insurer’s breach, which sums are not subject to any limit,
deductible, or self-insured retention of the policy;

(4) In the case of a breach of the duty to make reasonable settlement
decisions, the damages stated in § 27; and

(5) Any other loss, including incidental or consequential loss, caused by the
breach, provided that the loss was foreseeable by the insurer at the time of
contracting as a probable result of a breach, which sums are not subject to any limit
of the policy.
§ 50. Liability for Insurance Bad Faith

An insurer is subject to liability to the insured for insurance bad faith when it fails to perform under a liability insurance policy:

(a) Without a reasonable basis for its conduct; and

(b) With knowledge of its obligation to perform or in reckless disregard of whether it had an obligation to perform.

§ 51. Damages for Liability Insurance Bad Faith

Damages for liability insurance bad faith include:

(1) The reasonable attorneys’ fees and other costs incurred by the insured in the legal action establishing the insurer’s breach;

(2) Any other loss to the insured proximately caused by the insurer’s bad-faith conduct; and

(3) If the insurer’s conduct meets the applicable state-law standard, punitive damages.
Bell, Moore & Richter, S. C. takes great pride in providing the best legal services and is very fortunate to offer the excellent work and encyclopedic knowledge of Sheila Sullivan to all its clients. Sheila conducts civil litigation in both state and federal courts, primarily focusing on insurance coverage, insurance defense and appellate litigation. She has written innumerable motions and appellate briefs on issues of statutory interpretation, insurance policy construction and complex procedural questions. She has argued four cases before the Wisconsin Supreme Court.

Sheila is also the lead author of *Anderson on Wisconsin Insurance Law*, an insurance treatise published by the State Bar of Wisconsin. In deciding a significant duty to defend case in June 2016, the Wisconsin Supreme Court cited Sheila four separate times as authority for its decision.

Consider putting Sheila’s cutting-edge knowledge of insurance coverage and appellate law to work for you.
Practical Evidence: The Simplification, Interconnection, and Application of Evidentiary Rules at Trial.

I. Only 4 Types of Evidence
   a. Real
   b. Documentary
   c. Testimonial
   d. Demonstrative

II. Foundations for Each Type
   a. Real
      i. Relevance
      ii. Authenticity
   b. Documentary
      i. Relevance
      ii. Authenticity
      iii. Hearsay
      iv. Best Evidence
   c. Testimonial
      i. Factual
         1. Relevance
         2. Competence
         3. Hearsay
      ii. Opinion/Conclusion
         4. Expert
         5. Lay
   d. Demonstrative
      i. Relevance

III. Rule, Function, Interconnectivity
   a. Relevance
      i. 401 – Does the information speak to a claim, defense, or the credibility of information?
      ii. 404 – Does the information beg the jury to decide an issue based on who someone is rather than what they did or did not do?
iii. 403 – Does the information invade the province of the court, arguably offend the purpose behind another rule, or is it unnecessarily cumulative?

b. Competence of a Lay Witness
   i. Personal Knowledge
   ii. Limited Opinions Based on Personal Knowledge

c. Competence of an Expert Witness
   i. Right Person
   ii. Right Stuff
   iii. Right Process

d. Hearsay
   i. Is it even a statement?
   ii. Why is it relevant?
   iii. Depositions
   iv. Party statements
   v. Common exceptions

e. Authenticity
   i. Witness With Knowledge
   ii. Affidavit
   iii. Discovery Responses

f. Best Evidenc
What Kids Can Teach Lawyers About Diversity and Representation
Michelle Silverthorn

Remember that Cheerios commercial from a few years ago? It starred a black dad, a white mom, and their biracial daughter. You might have heard about it, and the reactions to it. Many Americans were indifferent, some Americans were disgusted, and me? I was ecstatic. At that ad, and so many other ads, from State Farm, Swiffer, and Old Navy, that feature inter-racial couples and multi-racial families. I feel joy, actual joy, because I see a family portrayed in the media that looks just like mine. (Well, somewhat. We are less model-esque.) “Finally,” I think. “We are part of the mainstream narrative. We are represented.”

The Power of Representation

It’s a powerful thing, representation. The realization that people like you are part of a narrative larger than yourself. And it struck me recently as to how early that feeling takes hold, and how it can impact the rest of your life, including, say, your tenure at a law firm.

My children, like the children in those ads, are half-black and half-white. Because of that, and considering only 7% of the country identifies as multiracial, they almost never see people who look like them represented in media. So imagine my four-year-old daughter’s delight when she saw just that.

A few weeks ago, we were at a supermarket in Chicago. All of a sudden, my daughter leaps out of her stroller and shouts, “Look mama! It’s me!” She was right. There in front of us was a box of Pampers diapers with a boy on it, who really did look just like her. Light brown skin, hazel eyes, and a curly blond afro. She was delighted.

Representation Matters for Self-Esteem

See, people like to see people who look just like them. “Just like me” is even the basis of one of the strongest implicit biases we have, in-group bias. We prefer people who look like us, who belong to our “tribe” so to speak. We do it for trust, protection, safety, and belonging. But most crucially, according to research, we do it for self-esteem. Seeing someone who looks like us increases our own self-esteem. We have a more positive impression of people who look like us, increasing our own positive impression of ourselves.

So what does this have to do with representation? Because self-esteem, I think, is a slightly different rationale for increasing diversity and encouraging inclusion, and another explanation of why our efforts keep stalling. If you want diverse people to be a part of your organization, then there must be people at the top who look like the people you want to attract, and who, in
turn, can build up that self-esteem and sense of belonging for the diverse people joining your
organization. If those people aren’t at the top, then the people coming in at the bottom are less
likely to stay because they don’t see a space for them above. It’s a catch-22 that even children
understand.

**Children Understand Why Representation Matters**

Here’s one study that remains famous, and rightfully so – it played a key role in *Brown v. Board of Education*. In 1947, two researchers gave a group of three to seven-year-old black children [black and white dolls and asked which they preferred](#). Overwhelmingly, the children preferred the “good” white doll to the “bad” black doll. One experience that a researcher found particularly troubling: Interesting fact about the test. The researchers couldn’t find any black dolls in 1947. They had to use white dolls painted brown.

Decades later, the lessons of the study still resound. Five years ago, researchers studied 396 [white and black pre-teens](#). The study found that television exposure predicted a decrease in self-esteem among black girls, black boys and white girls. However television led to an increase in self-esteem among white boys. Why? Because for women, preteen shows often show one-dimensional, sexualized depictions of them. Meanwhile, black people, if shown, are often criminalized or shown as hoodlums and buffoons. For white boys on the other hand, it’s a very different story. If you’re a white male, the researchers explained, “[y]ou tend to be in positions of power, you have prestigious occupations, high education, glamorous houses, a beautiful wife, with very little portrayals of how hard you worked to get there.” What kid wouldn’t want to be that?

**The Legal Profession Needs Increased Leadership Representation**

We know the legal profession is not doing well in diversity, particularly at the leadership level. According to NALP’s [2016 Diversity Report](#), minorities constitute 22.72% of associates in large law firms but only 8.05% of partners. The number for minority women is even starker: only 2.76% of partners are minority women. Meanwhile, women account for 45% of associates at law firms. However they only account for 22.13% of law firm partners. Crucially, among non-equity partners who graduated law school in 2004 and later, 62% were men and only 38% were women.

We know the many, many, many reasons for the continued lack of diverse leadership in the legal profession. Increasing representation isn’t an easy task, but the reality is, if we want to increase diversity in our profession, we have to increase the representation of our leadership as well. It’s a cycle, vicious and unending. And it makes a difference, particularly since our lack of diversity seems to exclude the many groups who aspire to belong to our profession. From the [2010 ABA Next Steps Report](#):

“The legal profession has ... historically provided access to income and wealth commensurate with the “American Dream.” Historically, racial and ethnic groups,
women, and other marginalized groups have recognized that a law degree accelerates their social and economic mobility. If any part of our profession—especially the vast and powerful fields of private practice—fails to be diverse and inclusive, we are sending meaningful symbolic messages to members of underrepresented groups, especially those of lower socioeconomic status.”

“Meaningful symbolic messages.” The children in those research studies understand exactly what those are. So does my 4 year-old daughter. Representation matters. Self-esteem matters. We all want to see ourselves represented, no matter how old we are, whether in a law firm board room, or on a box of Pampers diapers. So if you remain frustrated as to why our profession’s diversity numbers are stalled, even after all the time and money and effort spent on diversity initiatives, look at how many women and minorities are represented in the positions of power. How many are on compensation committees and management committees? How many are recognized as powerful sponsors? How many are given credit for high-profile clients? How many are marketed as the key partners for the firm? How many are even there in the first place? Kids understand why representation matters. So should we.
How to Debate Politics and Win a Moral Argument
Michelle Silverthorn

A few weeks ago, a friend sent me an article called, How To Win Your Next Political Argument. It had some great takeaways. It pointed out that people rely more on emotions than fact, that belittling someone’s opinion will lead to them ignoring yours, and that it’s far better to have someone see the fallacies in their own argument than have you point it out to them. I found those points interesting. But there was one last point that I found absolutely fascinating, that completely changed how I view the opinions of people I disagree with. It’s called the Moral Foundations Theory (MFT), and it might be one way to get past the intractable divisiveness facing our country today.

The Five Moral Foundations of Ethics

Moral Foundations Theory proposes that humans have “universally available psychological systems” that form the foundations of human ethics. Each human culture, and sub-culture, then constructs virtues, narratives, and institutions on top of these foundations, creating their own unique moralities. According to Moral Foundations Theory, the five foundations of human ethics are care/harm, fairness/cheating, loyalty/betrayal, authority/subversion and sanctity/degradation.

When you’re done reading this blog post, take the Moral Foundations quiz. It’ll ask you to self-identify, if you choose, as a liberal and conservative. Then it’ll ask you questions that will help you identify where you fall on a range of moral questions. At the end of the quiz, you’ll see how your score compares to tens of thousands of self-identified liberals and conservatives who have also taken the quiz. You’ll see that, across the board, liberals and conservatives score very, very differently on the five different moral foundations.

1. Care/Harm. We are mammals with attachment systems and an ability to feel and dislike the pain of others. Kindness, empathy, protection, nurture, those are all built on the foundation of care/harm. Liberals score far higher than conservatives do on care/harm. It doesn’t mean that conservatives don’t care; it means that the moral matrix of liberals rests much more heavily on the care foundation than it does for conservatives.

2. Fairness/Cheating. Fairness is justice rendered according to shared rules; cheating is the opposite of that. Liberals score higher than conservatives do on fairness and cheating, which might explain why conservatives and liberals can see equality differently. In the book Strangers in Their Own Land: Anger and Mourning on the American Right, the author
talks about conservative, white, lower-income Americans who believe that other groups—minorities, women, immigrants, LGBTQ people—are getting ahead with help from the government, while they themselves, who do not cheat, are being left behind. For liberals, of course, the formulation is different. As the MFT authors point out, on the left, fairness implies equality. On the right, fairness means proportionality, people should be rewarded in proportion to what they contribute, even if that guarantees unequal outcomes.

3. **Loyalty/Betrayal.** This is essentially your own devotion to your own in-group. Human beings, according to Moral Foundations Theory, are tribalist by nature and have survived over the millennia because of that tribalism. It’s a moral foundation that can lead to some very heated political debates, whether concerning standing for the National Anthem or refusing to recite the Pledge of Allegiance. As the MFT authors point out, in *Dante’s Inferno*, the innermost circle of Hell is reserved for the worst group of all—traitors. And here again is a difference between how liberals perceive morality and how conservatives do. Liberals score a 2.2 on the loyalty spectrum; conservatives, a 3.1. It might be why one of the most provocative insults a conservative can use against a liberal is “traitor.”

4. **Authority/Subversion.** This foundation focuses on anything that is construed an act of obedience, disobedience, respect, disrespect, submission, or rebellion, with regard to authorities perceived as legitimate. How much do you respect the police? The military? Your parents? Are you more in favor of Black Lives Matter, or Blue Lives Matter? Do you find it awkward to call older people by their first names? How much of a moral value do you place on obeying authority, and how much do you place on rebelling against it? Again, in the Moral Foundations Quiz, conservatives scored significantly higher on this foundation than liberals did.

5. **Sanctity/Degradation.** This is yet another evolutionary benefit that kept humans away from eating rotting or disgusting food, or consorting with diseased and dying persons. The resulting “disgust” forms part of our behavioral immune system. The modern equivalent, according to Moral Foundations Theory, is that humans treat certain objects (flags, crosses), places (Mecca, The Holy Land), people (saints, heroes) and principles (liberty, equality) as though they were of infinite value. Conservatives, who score higher than liberals on this foundation, are more likely to talk about issues such as “sanctity of life” or “sanctity of marriage”, or chastity and virginity, and consider those that oppose them (abortion, same-sex marriage, promiscuity) as degrading and disgusting.
Moral Foundations Based Negotiation

So, conservatives and liberals think differently of morality. What’s the point? See, what I like about Moral Foundations Theory is that it moves a step beyond the usual interest-based negotiation. People have different positions that they believe are mutually exclusive. But if you focus on the interests behind those positions, you are more likely to get to a satisfactory outcome than if you focus on the positions themselves.

Let’s take an all too typical example now. There’s a speaker for an event that an organization is hosting. She makes a very controversial statement. The president of the organization wants to keep her around because they’ve already sold the tickets and advertised the event, and really what she said wasn’t too bad. The vice-president wants to uninvite her because what she said was horrible and does not adhere to the values of the organization.

If they focus on positions, then their two positions are diametrically opposed. One wants to invite the speaker, the other wants to uninvite her. However, what are their interests? The vice-president has an interest in not aligning their organization with the controversial views of the speaker. The president has an interest in ensuring that the organization not backtrack from a commitment. By focusing on interests over positions, the two are more likely to negotiate to a successful outcome.

And here’s why I like MFT. It takes that discussion a step further because at the end of the day, one person still thinks the speaker’s statement isn’t that bad, and the other person still thinks it’s horrible. Yes, we have interests, but in order to appeal to other people’s interests, we need to recognize the moral values underlying those interests. Have some doubts over whether this idea works? Go back to the article at the beginning and read the example from a Moral Foundations Theory experiment on same-sex marriage. The study’s authors were able to get conservatives to say they approved of same-sex marriage at a higher rate when they described gay Americans as proud and patriotic (loyalty/subversion). Similarly, MFT experimenters were also able to get liberals to support expanded military spending when they said it would provide career opportunities to low-income young people (fairness/cheating).

So take the Moral Foundations Quiz. See where you score. Then, the next time you have a debate with your grandchild or uncle or the person sitting next to you on the train, see if you can identify what moral foundations they are holding strongly to, compared to the ones you are. If you really want them to see your side of the argument, try appealing to their moral foundations instead. It’s worked for me. Let me know if works for you as well.
In my four and a half years of working at the Commission on Professionalism, and speaking around the state and country, absolutely nothing has gotten my audience as engaged (read: riled up) as talking about millennials in the workplace.

As regular readers of our blog, and students of our online course on intergenerational communication, know, I talk and write a lot about millennials in the workplace, those 16-36 year-olds who have so engaged our social narrative. And I typically begin with the same story that many millennial speakers around the country do. I explain that millennials generally are young, self-promoting, purpose-driven, team-oriented and job transient. They want more technology in their organizations. They seek leadership opportunities from Day 1. They want more control over the direction of the company. They live in cities not suburbs. They’re not as religious as their parents. Money is not the driving force in their lives. Many in this “boomerang generation” can and do rely on their parents for support.

That’s the traditional narrative. Read books about millennials, articles about millennials, stories about millennials, that’s pretty much what you’ll find.

The Brief Millennial Caveat

Now when I talk about millennials, I always briefly mention a caveat. And it is this: not all millennials are the same. There are 76 million millennials in the country. They are the most diverse American generation in history. And while they have shared experiences as an age cohort, those shared experiences are complicated by a number of factors, including income, geography, gender and race. The experience I had as a black female millennial raised in a large city in the Caribbean is both similar to and different from the experience my husband had as a white male millennial raised in a small town in the Midwest.

But as the millennial conversation has grown louder and more insistent, I often wonder if we’ve done the analysis a disservice by focusing so much on the similarities, and less so on the differences. I think about myself as a black millennial lawyer. I think about many of my black millennial lawyer friends. And I realize that mentioning a brief caveat, and not fully exploring that caveat, leaves out an important piece of the narrative.
How Are Black Millennials Different?

How can the narrative of black millennials diverge from the traditional millennial narrative described above? Take money, for example. The traditional narrative goes that millennials are less concerned with money than older generations because they are more concerned with purpose-driven work. Even those with substantial amounts of debt (and there are a lot of us) can use their parents as fallback options.

But look closer. Black millennials carry seven times more student debt than white millennials – 68.2% to be precise. Moreover, while young adults from wealthy white families hold significantly less debt than their less affluent counterparts, in black families, not only is the debt higher, but there is no difference between wealthy black families and less affluent black families.

Partly because of that, white millennials are more likely to be able to rely on parents for financial help, particularly financial help that leads to upward social mobility. Black millennials, on the other hand, have the opposite problem. They often have to give money to their family members, rather than receive money from them. One researcher reported that when he asked white interviewees if they were lending financial support to family members, “I almost always get laughter. They’re still getting subsidized.” Moreover, the financial disparity can continue even after death. Across the board, white Americans are five times as likely to inherit money as black Americans. When both groups inherit money, white Americans received around ten times more.

Where Do Black Millennials Live?

Millennials like to live in cities (for now). And yet, here again, a different perspective changes the dialogue. Due to the racial segregation in many cities, especially here in Chicago, black millennial professionals might not have grown up or may not currently live in the same neighborhoods as white millennial professionals, potentially including their bosses and supervisors. And others’ opinions of their neighborhoods might lead them to be excluded from conversations and activities.

If you have a moment, read this story about a Washington DC journalist who served on a criminal jury. All the jurors, save for him, were either white or black. The defendant was black and the incident had taken place in a primarily black neighborhood. At one point, one white juror lamented that she would always lock her doors in the neighborhood the crime took place because it was just so dangerous. Three of her fellow jurors lived in that neighborhood.

Adding the Narrative of Black Millennials

Those are only a few examples. Religion is another one: millennials are less religiously engaged than previous generations; black millennials might be an exception. And black millennials, of course, aren’t the only way to break down the 76 million strong millennial
cohort. Women millennials, for example, add a whole new perspective to the discussion. They are better educated than male millennials and have a smaller pay gap than their predecessors. What different and challenging perspective do millennial women bring to the workplace?

See, the reason we talk about millennials in the workplace is because we want to ensure that employers and employees both understand the perspectives, perceptions and values each generation brings to the workplace. We want to share how to successfully communicate across generations by understanding those perspectives, perceptions and values.

That discussion, however, doesn’t exist in a vacuum. For black professionals, the workplace discussion almost always turns to diversity and inclusion. And the considerations for improving inclusion for black professionals in the workplace — evaluating resource access, feedback process, compensation, work allocation, mentoring and sponsorship among a host of other issues — should also include the considerations for millennials as well.

We shouldn’t consider being millennial in the workplace separate from being black in the workplace, nor should we consider being black in the workplace separate from being millennial in the workplace. I think about me, a black female millennial lawyer. I left my large law firm in 2012. I was 29 years-old. You could analyze me leaving from a number of different perspectives — as a millennial, as a woman, and as a black attorney. But if you take each of those separately, then you miss out on a fuller part of the story.

So let’s continue to fill out the narrative. When we talk about in the workplace, let’s remember that we’re talking about the most diverse generation in history, on multiple levels. No, we can’t talk about each of the 76 million, but we can do better than mentioning the internal differences as a caveat. At the very least, it will give people even more to argue about when someone mentions millennials in the workplace.
Over 300,000 individuals, families, and businesses trust Acuity to protect what matters most and help them rebuild and recover if disaster strikes.

96% claims satisfaction

We want the claims process to be a calming one. Your satisfaction is extremely important to us. So when a claim comes in, we'll put your mind at ease and make sure you know you're covered.

8.8/10 Rating
As rated by verified customers.
Wisconsin Defense Counsel

Course Objectives

- Understand the advances and limitations in the current identification of the mechanisms and pathophysiological processes following mild traumatic brain injury.
- Understanding of the various diagnostic and treatment guidelines associated with mTBI injury.
- Identify factors contributing to recovery and complicated recovery following mTBI.
- Recognize pre-existing factors, somatoform reactions and potential hormonal influences on the trajectory of recovery following mTBI.
- Understand the role psychology and neuropsychology play in the care of persons subject to mTBI and throughout the recovery process.
- Understand the interaction between mTBI and the medical-legal context.
A “Bump on the Head”

It’s much more complicated than we thought.

Incidence of Concussion (mTBI)

- 1.6 million new cases per year (General Population)
- 600 per 100,000
- ~1.7 – 3 million sports-recreation per year
  - Twice rate of TBI rate in general public
- ~40% unreported and/or untreated
- 75% of all TBI hospitalizations
- 90%+ without LOC

Occupational Incidence

- Mining
- Construction
- Driving
- Agriculture
The Legal Landscape

- Labrecque v. Leimbeckner, 2007
- Clemens, 2014

Terms

- Mild Head Injury
- Concussion
- Mild Brain Injury

Concussion & mTBI

- It is an injury to the brain caused by biomechanical forces. These forces can be direct or indirect.
- It results in regional and temporal cellular alterations and may produce cell death.
- It produces a state of energy crisis and subsequent metabolic diaschisis.
- It changes the priorities for fuel (energy crisis)
mTBI: Pathophysiology

No two injuries are alike!

mTBI: Diagnosis

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Mild</th>
<th>Moderate</th>
<th>Severe</th>
</tr>
</thead>
<tbody>
<tr>
<td>Loss of Consciousness</td>
<td>0-30'</td>
<td>&gt;30' - &lt;24'</td>
<td>&gt;24h</td>
</tr>
<tr>
<td>Alteration of Consciousness</td>
<td>Moment</td>
<td>&gt;24h</td>
<td>&gt;24h</td>
</tr>
<tr>
<td>Posttraumatic Amnesia</td>
<td>0-1 day</td>
<td>&gt;1d - &lt;7d</td>
<td>&gt;7d</td>
</tr>
<tr>
<td>Glasgow Coma Scale</td>
<td>13-15</td>
<td>9-12</td>
<td>&lt;9</td>
</tr>
<tr>
<td>Imaging</td>
<td>Normal</td>
<td>Normal or Abnormal</td>
<td>Normal or Abnormal</td>
</tr>
</tbody>
</table>

Context of mTBI

<table>
<thead>
<tr>
<th>Impact</th>
<th>Nonimpact</th>
</tr>
</thead>
<tbody>
<tr>
<td>Axonal damage</td>
<td>Pre-existing conditions</td>
</tr>
<tr>
<td>Axollema damage</td>
<td>Alcohol abuse</td>
</tr>
<tr>
<td>Breakdown of internal neuronal structures</td>
<td>Resilience</td>
</tr>
<tr>
<td>Not axotomy</td>
<td>Vulnerability</td>
</tr>
<tr>
<td></td>
<td>Anxiety &amp; depression</td>
</tr>
<tr>
<td></td>
<td>Misattribution</td>
</tr>
<tr>
<td></td>
<td>Injured worker treatment</td>
</tr>
</tbody>
</table>
Pathophysical Components

- Rotation > Linear Injury
- Neck Injury
  - Cone of Vulnerability
    - Frontal lobe pathways
    - Thalamus / Hypothalamus / Fornix
    - Corpus callosum
    - Cortical cell bodies

Impact Events
**Corona Radiata & Corpus Callosum**

**Structural Characteristics of mTBI**

- Shear & tensile strain
  - Areas of vulnerability
    - Corona radiata
    - Grey-white matter juncture v white matter
    - Corpus callosum
    - Brainstem
  - Microhemorrhages
  - Neuroinflammatory processes
    - Hemosiderin

**Neurometabolic Cascade**

- Breakdown of sodium-potassium mechanism
- Glutamate dysregulation ➔ neuroexcitability
- Hyperglycolosis ➔ reduction of oxidative metabolism followed by a relative increase of anaerobic glycolysis to maintain energy supply
  - Less efficient source of energy production than adenosine triphosphate (ATP)
- Cellular energy crisis
- Axonal injury (Inflammation/swelling), myelin damage, and/or cell death
Concussion / mTBI

- After blow to head, disruption of normal brain cellular activity commonly causes rapid onset of neurologic dysfunction
- Physical Signs/Acute Injury Characteristics: LOC/AOC, PTA
- Clinical Symptoms
  - headache
  - dizziness
  - dazed/confused
  - poor concentration
  - feeling in a fog
  - nausea
- Neurobehavioral Changes:
  - irritability, mood changes, etc.
  - Sleep Disturbance: drowsiness, insomnia, hypersomnia

Symptoms of Concussion

"Red Flags"

- Loss of Consciousness
- Pupils are Unequal
- Decreasing Level of Consciousness
- Brain Function Deteriorating
- Difficulty Breathing
- Mental Status Changes
- Seizures

Source: Goldstein et al, 2004
Neuroimaging and mTBI

- Cranial CT
- Cranial MRI
  - SW 1
  - Flair
- Diffusion MRI (Diffuse Tensor Imaging)

DTI

- CT v MRI
- Axon Integrity
- mTBI v normal
  - Corpus callosum
  - Hemosiderin & Inflammation
  - Default Mode Network (DMN)
  - Microbleeds
- Differential diagnosis with DTI (…and Daubert)
- DTI & Outcome

Biomarkers for mTBI

- Proteins
  - S100B
  - Neuron Specific enolase
  - Protein breakdown products
  - Glial fibrillary acidic protein
  - Myelin basic proteins
A Problem of Diagnosis

Outcomes

Babe Ruth

- 1920 Spring Training
  - Ran into a palm tree with LOC
  - 54 HR, Batted .376

- 1924 Game
  - Run into concrete wall to catch a ball with 5’ LOC
  - Got up & did not leave the game
  - Hit two more hits
  - Played second game of double header

Wisconsin Defense Counsel  Dr Terry Young  gnyt@aol.com
After blow to head, there is development of……

- Headache
- Photo- & phonophobia
- Dizziness
- Nausea
- Fatigue
- Visual blurriness
- Etc……..
- …but so does…..

When things happen...

- People who drown after falling out of a fishing boat correlates with marriage rates in Kentucky (.95)
- US crude oil imports from Norway correlates with drivers killed in collisions with railway train (.95)
- Age of Miss America correlates with murders by steam, hot vapours and hot objects (.87)
- US spending on science, space and technology correlates with suicides by hanging, suffocation, and strangulation (.99)

- Depression
- Anxiety
- Allergies
- Chronic Pain
- Normal
Post Hoc Propter Hoc

Providers (Silver, 2012)
- mTBI & specificity
- PCS Checklists
- Misattribution without clinical discernment
- Repeated & unnecessary contacts – new symptoms

Sources of Error
- Medical attention equals disorder
- Education creates memory (Loftus, 2003)
- Diagnosis with staying power
- Effort and symptom reporting (Mooney, 2005)
Causes of Vestibular Disorders

- Benign Paroxysmal Positional Vertigo
- Central gaze instability
- Oculomotor conditions
- Migraine related dizziness
- Peripheral vestibular lesion
- Labyrinthine concussion
- Cervicogenic
- Anxiety

Anatomy of the Inner Ear

Functions of the Vestibular System

- Detection of linear & angular motion
- Postural stability
- Gaze stability
Linear Acceleration

- Utricle
- Saccule
- Otoconia

Angular Acceleration

- Semicircular Canals
  - Vertical Plane (2)
  - Horizontal Plane (1)
- Endolymph

Peripheral v Central Vestibular Dysfunction

- Peripheral
  - Abnormal input from vestibular labyrinth or nerve
  - Unilateral or asymmetric input from inner ear
- Central
  - Brainstem
  - Cerebellum
  - Thalamus
Labyrinth Concussion

- Membranous structures

- Vestibular hypofunction

Temporal Bone Fracture

- Damage to the vestibular labyrinth

- Associated Injuries

Perilymphatic Fistula

- Rupture of the round or oval windows
Benign Paroxysmal Positional Vertigo
- Displaced Otoconia
- Vertigo & Ataxia

Visual Deficits following Concussion/mTBI
- Visual Field
  - Versional
    - Saccades
    - Fixation
    - Smooth Pursuit
  - Vergence
    - Blurred vision
    - Diplopia

Visual & Auditory “Pain”
- Photophobia/Photosensitivity
- Hyperacusis
- Tinnitus
Central Processing

Vision & Vestibular Reflexes
- Vestibulo-ocular reflex (VOR)
- Opticokinetic reflex (OKR)
- Cervico-ocular reflex (COR)
- Vestibulocolic reflex (VCR)

Visual Disturbances following Concussion/mTBI
- Visual Field Defects
- Blurred Vision
- Diplopia
- Versional
  - Saccades
  - Fixation
  - Smooth Pursuit
Posttraumatic Headache (PTHA)

- 90%
- Chronic PTHA 42%
- PTHA @ 4 years 20%
- mTBI in Lithuania
  - Same as non-mTBI injured persons
  - Persons with mTBI underreport prior headache
  - @ 3 months, same as non-injured

Common PCS (Guskiewicz)

<table>
<thead>
<tr>
<th></th>
<th>Headache</th>
<th>Dizziness</th>
<th>Irritability</th>
<th>Memory</th>
<th>Concentration</th>
</tr>
</thead>
<tbody>
<tr>
<td>College Students</td>
<td>36</td>
<td>18</td>
<td>36</td>
<td>17</td>
<td>42</td>
</tr>
<tr>
<td>Chronic Pain</td>
<td>80</td>
<td>67</td>
<td>49</td>
<td>33</td>
<td>63</td>
</tr>
<tr>
<td>Depressed</td>
<td>37</td>
<td>20</td>
<td>52</td>
<td>25</td>
<td>54</td>
</tr>
<tr>
<td>Non-TBI PI Claimants</td>
<td>77</td>
<td>41</td>
<td>63</td>
<td>46</td>
<td>71</td>
</tr>
<tr>
<td>mTBI</td>
<td>42</td>
<td>26</td>
<td>28</td>
<td>36</td>
<td>25</td>
</tr>
</tbody>
</table>

Nonpatients have “PCS” symptoms:
Symptom rates in non-injured controls (Paniek et al, 2002)

- Visual problems 40%
- Poor concentration 35%
- Balance 14%
- Forgetful 47%
- Headaches 58%
- Temper outbursts 30%
- Dizziness/vertigo 22%
- Anxiety 60%
- Light Sensitive 30%
- Depression 33%
- Word finding 47%
Recovery & Outcome
- 90% recover to baseline in hours to weeks
- The “miserable minority” (Fahidy, 2012)
  - Normals (Gouvier, 1988)
  - Chronic pain (McCracken, 1997)
- Persistent postconcussion syndrome (PCS)
  - PCS & nonclinical populations
  - The methodology problem
  - Diagnosis threat
- Chronic Traumatic Encephalopathy (CTE)

Recovery
- McCrea et al (2012)
  - >80% recover fully within 7-10 days
  - 10% take >10d to recover
  - <5% take >45d
    - Associated with LOC
  - Severity predicts recovery
  - Abnormal brain connectivity x 45d (Post et al)
  - Abnormalities correlate with clinical findings (cognition, balance)
  - Physiological recovery takes longer than clinical recovery, normal by 45d.

Course of Recovery from mTBI
- Index Incident
- Functional Recovery (Hours to Weeks)
- Physiological Recovery (45 days)
Chronic Traumatic Encephalopathy

- CTE
- Clinical Presentation
- Cerebral Protein – Tau
- Tau & Normal Aging
- Tau Phosphorylation & Disease

Factors That May Modify the Risk of Concussion and Duration of Recovery (Doughy, 2014)

- Symptoms
  - Number
  - Duration (10d)
  - Severity
- Signs
  - Prolonged loss of consciousness (1 min)
  - Amnesia
- Sequelae
  - Concussive Convulsions
- Temporal
  - Frequency: Repeated concussions over time
  - Injuries close together in time
  - Recency

Factors That May Modify Risk of Concussion & Duration of Recovery (cont.)

- Threshold
  - Repeated concussions with lesser impact, force or slower recovery
- Age
  - Child or Adolescent (<18y)
- Comorbidities & Premorbidities
  - Migraine
  - Depression or other mental health conditions
  - ADHD, LD
  - Sleep Disorders
- Culture of Achievement & Stress
- Medications
  - Psychoactive drugs
  - Anticoagulants
- Behavior
  - Risk taking
MILD TRAUMATIC BRAIN INJURY

“…..folks look for less stigmatizing and physical explanations for very real psychological injuries”

Avoiding Stigma

- WWI – Shell Shock
- WWII – Battle Fatigue
- Viet Nam – PTSD
- Gulf War – Gulf War Illness
- Gulf War II – Blast Injury/mTBI

Ingredients of An Epidemic

- Vulnerable population
- Important figures (physicians, scientists)
- Sociocultural support (media, politicians)
Factors Influencing Outcome

- "Diagnosis Threat"
- Somatoform / Cogniform Disorders
- Factitious Disorder
- Malingering

Somatization (Donnell et al, 2012)

- mTBI – 32%
- Somatization – 91%
- Uninjured - Majority

A Case in Point!

https://youtu.be/mWR085_x9rc
A Case and Point

- Jury awarded 21.5 million
- Holland America appealed
- Federal judge tossed finding after Mr. Hausman’s assistant came forward & revealed incredibility actions.

*James Hausman
• Hit in head by sliding door on cruise ship
• Finished 280-day world cruise
• Ship doctor: facial contusion, chipped tooth & concussion
• Complaints of seizures, vertigo, memory loss

Fraudulent Claims: Incidence & Costs

- Social Security ~ 53%
  - Adult mental Disorders ~ $20.02 billion (2011)
  - Auto insurance fraud ~ $3 billion (1981)
  - Insurance industry ~ 15% of all claims (1986)
  - $.23 on the dollar (1990)
  - Total insurance fraud (1988) ~ $66 billion annually

Types of Malingering (Lipman, 1962)

- Invention
- Perseveration
- Exaggeration
- Transference
### Frequency of PCS by Dx

<table>
<thead>
<tr>
<th>Dx</th>
<th>Frequency of PCS by Dx</th>
<th>Odds Ratio Risk PCS by Dx</th>
<th>Odds Ratio Headache</th>
<th>Odds Ratio Dizziness</th>
</tr>
</thead>
<tbody>
<tr>
<td>mTBI</td>
<td>27%</td>
<td>2.47</td>
<td>2.31</td>
<td>2.14</td>
</tr>
<tr>
<td>PTSD</td>
<td>19%</td>
<td>4.36</td>
<td>2.65</td>
<td>2.41</td>
</tr>
<tr>
<td>Generalized Anxiety Disorder (GAD)</td>
<td>41%</td>
<td>4.76</td>
<td>1.80</td>
<td>2.27</td>
</tr>
<tr>
<td>Depression</td>
<td>55%</td>
<td>8.39</td>
<td>1.96</td>
<td>2.05</td>
</tr>
<tr>
<td>Depression and mTBI</td>
<td>74%</td>
<td>19.76</td>
<td>3.85</td>
<td>7.10</td>
</tr>
<tr>
<td>PTSD and mTBI</td>
<td>75%</td>
<td>20.45</td>
<td>6.16</td>
<td>6.90</td>
</tr>
<tr>
<td>GAD and mTBI</td>
<td>80%</td>
<td>27.26</td>
<td>7.64</td>
<td>8.77</td>
</tr>
<tr>
<td>Somatization</td>
<td>91%</td>
<td>64.74</td>
<td>10.79</td>
<td>37.28</td>
</tr>
</tbody>
</table>

Donnell et al., 2012

### Predictors of Atypical Recovery

- Protracted self-reporting of symptoms
- Date of Injury
- Loss of Consciousness
- Performance and symptoms validity

### Full Recovery from mTBI Extends to Psychological and Psychiatric Factors

- Effect size of 0.05 in meta-analytic study for measures of depression, anxiety, coping and psychosocial disability with no domain significantly different from zero

(Panayiotou et al., 2010, 463-473)
Psychological Characteristics of Persons with Poor Effort in Secondary Gain Context (Patrick et al, 2017)

- Neurological complaints
- Externalizing behaviors
- Antisocial
- Lack of constraint

Risk factors for prolonged PCS

- “It is not only the kind of injury that matters, but the kind of head.” Symonds, 1937, Proceedings of the Royal Society of Medicine, 30, 1081-1092.
- WWII flying personnel, pre-selected for mental and physical fitness, were four times more likely to return to pre-injury duty than non-flying personnel after all grades of TBI (Symonds & Russell, 1943, The Lancet, 1, 7-10)

Anxiety & Somatization

- Preinjury anxiety and depression predicted the development of PCS. mTBI did not predict PCS. (Meares et al, 2011, Neuropsychology, 25, 454-465)
- Symptoms and somatization were measured at baseline. Somatization was best predictor of prolonged symptoms in a sample of 2055 athletes, mostly college age and some HS age, who recovered quickly from concussions. When recovery required > 45 days, pre-injury somatization score was the only significant predictor (Nelson, L. et al, 2016, Neurology, 86, 1856-63)
Lithuania (Obeliene, 1999)

- 47% reported acute or subacute (1-3 days) of neck and/or headache.
- Neck pain: median duration 3 days. Maximum 17 days.
- Headache: median duration 4.5 hours. Maximum 20 days.
- No gender difference for neck pain. Headache more common in women.
- At one year, compared with controls, severe headache, neck pain, and Only a minority insured for personal injury, at the time of the study
- Little expectation of extensive healthcare following whiplash neck mobility not significant.

Malingering in the Medical-Legal Context

- Initial promotion of cognition
- Federal v State Worker's Compensation
- Money Matters
- Worker's Compensation v Child Custody
- Disability Determination Service Claimants

Detection of Malingering (Rogers, 2008)

- Rare symptoms
- Quasi-rare symptoms
- Improbable symptoms
- Symptom combinations
- Spurious patterns
- Indiscriminant symptoms
- Symptom severity
- Obvious symptoms
- Reported v observed
- Erroneous endorsement
Treatment

- Fairly Linear Expectations
  - Neurology/Concussion Specialist
  - Vestibular Physical Therapist
  - Neuropsychology

- Early accurate assessments & diagnostics
- Early rest
- Education of the injured
- Manage stressors
- Work with employer
- Anxiety management
- Exercise and controlled exertion
- Management of somatoform/cogniform secondary gain concerns

---

Rest

- Horror Stories
- Iatrogenic Effect – Somatoform/cogniform development
- “Motivate recovery”
- CONCLUSION by Silverson and Iverson (2012)

  “The best available evidence suggests that complete rest exceeding three days is probably not helpful, gradual resumption of preinjury activities should begin as soon as tolerated (with the exception of activities that have a high mTBI exposure risk), and supervised exercise may benefit patients with persistent symptoms”.

---
Rest

- Heavy exertion and no exertion prolonged recovery (Symptomatic & Neurocognitive) (Majerske et al)
- Moderate activity (non-contact) performed best
- What is rest?
- What is exertion? Vigorous physical and mental effort
- Exertion leading to symptoms – may reveal neurometabolic vulnerability or……
- Subthreshold activity worked well to facilitate recovery

Exercise as Treatment

- Exercise facilitates molecular markers of neuroplasticity and promotes neurogenesis in the healthy rodent brain and the injured brain
- Associated with changes in neurotransmitter systems (Chaouloff, 1989; Molteni et al 2002)
- Improved mood and lower stress (Callaghan, 2004; Conn, 2010)
- Improved sleep quality (Youngstedt, 2005)
- Positive effects on self-esteem (Ekeland, Heian, Hagen, Abbott, & Nordheim, 2004)

Rest

- After 3-6 days of bed rest, some people complain of headache, restlessness, and difficulty sleeping. (Fortney, Schneider, and Gintert 2011)
Management of Subacute Symptoms

Early intervention with CBT had positive effects on PCS (more rapid, and more complete recovery) as compared with control condition (Mittenberg et al., 1996).

Update Consensus on mTBI (2017)

- Rest
- Second Impact
- Biomarkers
- DTI
- Chronic Traumatic Encephalopathy
- Neurodegenerative diseases
- Suicide

The Medical Legal Context

- Establishing Prognosis and End of Healing
- Permanent Partial Disability
- Return to work & establishing restrictions
## The Medical Legal Context

- How to address malingering.
- How to challenge and overcome malingering.
- When should an IME be considered?
- Return to functional status barriers and how to overcome them.
- What type of testing or diagnostics should be considered in the diagnosis of mTBI?
- Constant headaches & dizziness, sometimes pain management and/or chiropractic gets involved, is that appropriate or not?
- Would referrals to TBI clinics from chiropractors or general practitioners be appropriate?
- Red flags, what should we look for as indicators of a questionable diagnosis of a mTBI?
Statewide Representation for Business & Insurance

MILWAUKEE OFFICE
311 E. Chicago St., Ste. 410
Milwaukee, WI 53202
Phone: 414-273-8550
Fax: 414-273-8551

GREEN BAY OFFICE
P.O. Box 11097
Green Bay, WI 54307
Phone: 920-770-4087
Fax: 920-544-4110

www.simpsondeardorff.com

Proud Sponsor of Wisconsin Defense Counsel
EXPERT WITNESSES

5972 Executive Drive – Suite 200
Madison, WI  53719

Areas of Expertise
• Motor Vehicle Accident Reconstruction
• Truck Accidents
• 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
• CDR - Crash Data Retrieval
• Environmental Analysis
• Electrical Systems
• Vehicle Airbag Sensing Systems

608-442-7321 – Telephone
office@skogen.com
www.skogen.com

Over 100 Years of Combined Experience
Dennis D. Skogen, MSME, PE – Jeffery J. Peterson, MSME, PE
Robert J. Wozniak, MSME, PE –Christopher J. Damm, PhD
John S. Ma, MSME – Paul T. Erdtmann, BSEE, PE
James W. Torpy, BS – Mary E. Stoflet, AB

Excellence in Accident Reconstruction Engineering
With West Bend's Association Plus program, you get our exceptional Home and Highway® policy which protects your valuable property, along with a variety of terrific coverages, benefits, and discounts, including:

• A group discount just for members of an attorneys’ association.

• Coverage for just about everything you own: home, condo, or rental unit, as well as cars, truck, boat, motorcycle, snowmobile, and jewelry ... all on one policy with one premium and one deductible.

• Getting a portion of your annual premium back – in cash – if you don’t have a claim all year!

• Guaranteed replacement cost with no cap so if your home is destroyed by a fire or a tornado, West Bend will pay what it costs to replace it, even if it's more than your policy's limits.

• Automatic coverage for some of the costs you may incur, including most veterinarian expenses, if a beloved family pet is the victim of a covered accident.

To find out more, contact an official supplier of the Silver Lining. For the name of an agency near you, visit thesilverlining.com.
Engineering Consulting and Forensic Investigation

Over our 30-year history, ESI clients have turned to us to help with many of their high stakes and complex claims. These clients know they can rely on us to provide clear answers to their most challenging technical questions.

- Multidisciplinary Approach
- Industry Expertise
- Powerful Insights

www.engsys.com