WDC

Wisconsin Defense Counsel

Defending Individuals and Businesses in Civil Litigation

#WDCAnnual2025

2025 Annual Conference

August 14-15, 2025

Kalahari Resort and Convention Center
1305 Kalahari Drive
Wisconsin Dells, WI 53965

Program Chair:
Chester Isaacson
American Family Insurance Co.

Program Agenda & More Information inside!

Approved for 8.0 WI CLE Credits, including 1.0 EPR.

Wisconsin Defense Counsel
Defending Individuals and Businesses in Civil Litigation

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Thursday, August 14, 2025

Friday, August 15, 2025

Schedule of Events

Thursday, August 14, 2025

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

8:55 - 9:00 AM
Opening Remarks

9:00 - 9:50 AM
Lessons in Leadership from Ted Lasso
Elizabeth Sorenson Brotten, Foley Mansfield and Laura Emmett, SBA Lawyers

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

10:00 - 10:50 AM
Succeeding in Mediation: Avoiding the Common Failures
Michael Crooks, von Briesen & Roper, S.C. and Mike Jassak, Martin Law Office, S.C

10:50 – 11:00 AM
Break

11:00 - 11:50 AM
The Plaintiff's Evolving Trial Tactics - An Interactive Discussion
Frederick Strampe, Borgelt, Powell, Peterson & Frauen, S.C.

11:50 AM - 1:00 PM
Lunch & Annual Business Meeting
Sponsored by Don Engels, Ringler Associates in WI

1:00 PM - 1:50 PM
Trial Tactics: Preparing Your Client for Deposition with an Eye Towards the End Game
Mark Budzinski, Corneille Law Group, LLC

1:50 – 2:00 PM
Break

2:00 PM - 2:50 PM
Nuclear Verdicts from the Perspective of a Plaintiff's Attorney: How They Happen and How to Avoid Them
Steve Caya, Nowlan Law, LLP

2:50 – 3:00 PM
Break
Sponsored by Corneille Law Group, LLC

3:00 - 4:00 PM
Committee Meetings

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

Friday, August 15, 2025

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

9:00 - 9:50 AM
Event Data Recorders in Passenger Vehicles
Noel Manuel, ESi

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

10:00 - 10:50 AM
A View from the Bench: A Trial Judge's Thoughts, Perceptions and Observations About Civil Jury Trials
Heather Nelson, Everson, Whitney, Everson & Brehm, S.C. and Judge Marc Hammer, Circuit Court of Brown County

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

11:00 AM - 11:50 AM
Crossing the Line: Dealing with Difficult Opposing Counsel and the Ethical Perils and Pitfalls that can Occur
Brian Anderson, Everson, Whitney, Everson & Brehm, S.C. and Matt Beier, Wisconsin Lawyers Mutual Insurance Company

11:50 AM
Adjourn

Speaker Biographies

Brian Anderson is an experienced trial attorney who defends insurance companies and insureds, litigates insurance coverage issues, and practices appellate advocacy in state and federal courts. He also defends physicians and hospitals in civil litigation and administrative actions. Prior to joining The Everson Law Firm, Brian was an Assistant Professor of Law teaching international and comparative law subjects, courses in legal research, and a required first-year course at the College of Law at Ohio Northern University. He was also engaged in law reform projects as a rule of law advisor in Eastern Europe, the Balkans, and sub-Saharan Africa.

Brian is a native of Milwaukee, Wisconsin, and a graduate with high honors from the Claude W. Pettit College of Law at Ohio Northern University, where he was Editor-in-Chief of the Law Review, a member of the Moot Court Board of Advocates, and was inducted into the Willis Society, the highest academic honor society at the College of Law. As a law student, he was a judicial extern to the Honorable Edmund A. Sargus, Jr., Federal Judge in the United States District Court for the Southern District of Ohio. He also spent two summers working as a law clerk at a defense litigation firm in West Virginia.

He began his legal career as the law clerk and legal advisor to the Chief Justice of the Supreme Court of Rwanda. He spent one year living in Kigali and working at the Supreme Court, and supporting a USAID-funded project supporting promoting reforms to laws and legal institutions in Rwanda.

Matt Beier is the Senior Vice President and Director of Business Development Wisconsin Lawyers Mutual Insurance Company (WILMIC).

Prior to joining WILMIC in November 2016, Matt was a civil litigation attorney in Madison with experience before state and federal courts as well as Wisconsin administrative agencies. He has broad experience in diverse areas of the law, including personal injury, employment law, contract law, business law, commercial law, and debtor/creditor law.

Matt is a 1996 graduate of South Dakota State University, with a degree in Political Science, and graduated from the University of Wisconsin Law School in 2000. He is a member of the State Bar of Wisconsin, Wisconsin Defense Counsel, Milwaukee County Bar Association and the Dane County Bar Association. He also serves as a board member on the State Bar of Wisconsin's Solo/Small Firm and General Practice Section.

Mark Budzinski is the Managing Member of the Corneille Law Group, with offices in Madison and Green Bay. He has tried more than 70 cases to verdict in multiple states including bad faith, product liability, commercial trucking, professional liability and malpractice cases. He has represented Fortune 500 companies as well as Am Law 100 law firms in large exposure matters. He has been admitted Pro Hac Vice in multiple states from Nevada to New Jersey to serve as lead trial counsel in commercial trucking and product liability cases, and is licensed in both Wisconsin and Michigan.

Mark is a Fellow of the American College of Trial Lawyers (ACTL), the American Board of Trial Advocacy (ABOTA), and the Federation of Defense and Corporate Counsel (FDCC).

He is a Board-Certified Trial Attorney by the National Board of Trial Advocacy (NBTA). He has been given the highest possible peer review rating by Martindale Hubbell (A/V), has been selected as a Wisconsin Super Lawyer every year since 2013, and has been recognized by the Wisconsin Law Journal as one of Wisconsin's "Leaders in the Law".

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Speaker Biographies continued

Steve Caya has been practicing exclusively in the area of personal injury for 36 years.

He is a partner with the Nowlan Law Firm located in Janesville, WI and leads the firm's personal injury practice group.

His practice is devoted to representing plaintiffs and he also provides mediation services.

He is a member of the Wisconsin Chapter of the American Board of Trial Advocates (ABOTA).

He has been named a Wisconsin Super Lawyer in the area of Plaintiff's Personal Injury every year since 2009 and is listed in the Best Lawyers in America.

He has tried numerous cases throughout the State of Wisconsin and has obtained multiple seven figure and six figure verdicts.

Mike Crooks is a Shareholder in the von Briesen's Litigation and Risk Management Practice Group. He focuses his practice on commercial litigation, legal malpractice and other professional negligence claims, accounting malpractice, insurance defense and coverage issues, bad faith litigation, product liability work, premises liability, breach of contract, personal injury defense and third-party recovery. Mike is also an experienced mediator and is frequently called upon to resolve disputes.

Mike is a frequent lecturer for many organizations including the State Bar of Wisconsin, the Wisconsin Judicial College, the Wisconsin Defense Counsel and the University of Wisconsin Law School.

Laura Emmett is a Partner at SBA Lawyers in London, Ontario. She has a diverse practice where she focuses on bodily injury claims, cyber liability, and privacy law. Laura is a Past President of the Canadian Defence Lawyers and was the youngest person to hold the position. She is a Bencher for the Law Society of Ontario, which governs all lawyers and paralegals in the Province.

Judge **Marc Hammer** graduated from the University of Illinois at Urbana-Champaign in 1986. He secured his Bachelor of Arts with a major in political science and double minors in history and psychology.

Hammer graduated from the University of Missouri Columbia School of Law in 1989 where he was a member of the University of Missouri Law Review.

Hammer practiced law from 1989 to 2008 in Green Bay and De Pere. He focused primarily on civil litigation and family law matters. He was appointed to the Circuit Court bench in 2008, and was re-elected to the Circuit Court in 2009, 2015, and 2021. He has taught business law, media law and trial advocacy at St. Norbert College since 1995. He also served as a pre-law advisor to undergraduate students on campus.

Hammer has served as the presiding judge for the Brown County Drug Treatment Court for the past 15 years. He was named by the American Board of Trial Advocates as Trial Judge of the Year in 2025.

Michael J. Jassak received his Bachelor of Arts degree from Marquette University in 1975, and his Juris Doctor degree, Cum Laude, from Marquette University Law School in 1978.

Michael is certified by NBLSC as a Board Certified Trial Lawyer and Pretrial Advocate and has been selected for inclusion in the Wisconsin Super Lawyers Edition from 2005 to present. He has been recognized by Best Lawyers in America annually since 2013. Michael has extensive civil jury trial

Speaker Biographies continued

experience and has successfully negotiated thousands of personal injury claims throughout the State of Wisconsin.

Michael was an Adjunct Professor of Law at the Marquette University Law School where he taught Remedies from 1988 to 2015. In 2019, Michael began to transition his practice from litigation to mediation. He now practices full-time as a civil litigation mediator. Michael is committed to using his experience and expertise to help the civil litigation litigants who utilize his services as a mediator to resolve their claims in a fair and reasonable manner.

Emmanuel (Noel) Manuel is a Senior Consultant with ESi in the Aurora, Illinois office. Mr. Manuel has a Bachelor of Science in Mechanical Engineering from the University of Texas at San Antonio. With 10 years of experience, his principal areas of professional activity include accident investigation, documentation and reconstruction, vehicle dynamics, low and high-speed vehicle impact analysis, vehicle dynamic simulation, event data recorder analysis, automotive research, videogrammetry, instrumentation, and testing. The vehicles involved range from passenger, commercial, rail, and recreation. The videos analyzed range from surveillance style static cameras to dashcam style moving cameras.

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

Elizabeth Sorenson Brotten is a Partner in Foley Mansfield's Minneapolis office, a member of the firm's Executive Committee, and chair of the firm's Products Liability practice group. She defends clients in product liability and toxic tort cases throughout the United States. She currently serves as President of the Minnesota Defense Lawyers Association.

Prior to accepting an appointment as a Circuit Court Judge for Waukesha County, **Frederick Strampe** was a Shareholder and President of Borgelt, Powell, Peterson & Frauen, S.C. in Milwaukee. As a circuit court judge he was responsible for over 600 active cases and conducted evidentiary hearings, motion hearings and pre-trial conferences. He presided over civil, misdemeanor and felony trials. He also ruled on dozens of motions and sentenced hundreds of defendants. He has now returned to Borgelt, Powell, Peterson & Frauen and resumed an active litigation practice. He litigates cases throughout Wisconsin in state and federal court. He concentrates on high value complex litigation with a focus on defending assisted living facilities and brain injury cases. He also conducts some mediations.

Thank You to Our 2025 WDC Sponsors!

Lessons in Leadership from Ted Lasso

Elizabeth Sorenson Brotten, *Foley Mansfield* and Laura Emmett, *SBA Lawyers*

Outline:

This presentation will explore the future of leadership from a unique and entertaining perspective, focusing on how we can apply the leadership approach of the entertaining sports comedy, Ted Lasso, to our workplaces.

I. We will first examine current generational challenges in the workplace, by reviewing:

A. The five generations currently in the workplace, and general characteristics of each; and
B. Views of the workplace from each generation's lens.

II. We will then delve into how Ted's "be a good person, respect others, and judge no one" philosophy can help your organization not just survive, but thrive, in changing and challenging times, by:

A. Analyzing entertaining examples from Lasso, the fictional English soccer coach; and
B. Reviewing the top ten ways organizations can apply Lasso's unique style to build success and satisfaction.

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Michael@martin-law-office.com
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1

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After winning the stare down contest,
he knew the negotiation would go his way.

2

2

von Briesen

Introduction

Mediation failures are often both predictable and avoidable. Proper timing, good choices, knowledge of the law and expectations are key ingredients to settlements. When one or more go away – the outlook for resolution can diminish quickly. This presentation discusses the common causes of mediation failure and how to avoid them.

3

3

von Briesen

"Just to get the negotiation off on the right foot,
I don't intend to concede anything."

4

4

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Cases That Work Well for Mediation

- Personal injury claims
- Business disputes/divorces
- Real estate disputes
- Family law matters
- Insurance coverage matters

5

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6

6

Mediation Rules

- Formal
- Non-Formal
- Written
- Contracts
- The Statutes

7

7

"We have an agreement in principle. The question is, do we all have the same principles?"

8

Common Causes of Mediation Failure

9

Setting the Stage

- Mediator selection
- Location
- The wrong form of ADR
  - (*See* Wis. Stat. § 802.12)
- Timing: the risk of mediating too early

10

Preparation: Calls & Contacts

- No clear pre-ADR communications, i.e., no idea if opponent will negotiate in good faith
- No contact with subrogation carrier before mediation – contact during mediation
- Failure to prepare/education client for mediation
- Wrong decision maker in control – e.g., non-party
- No one present with authority to settle

11

Knowledge of Case

- Unrealistic lawyer expectations
- Unrealistic client expectations
- Insufficient knowledge of area of law, for e.g.
  - Admissibility of punitive damages
  - Reliance on summary judgment
  - Caps and other statutory limitations
  - Special problems posed by complex multi-party mediations

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Insights and Perceptions

- Failure to perceive risk
- Lawyer working against mediator
- Lawyer supporting mediator too much (*See* Model Rules for Mediation (ABA), Sections II and III, Mediatory Impartiality, Conflicts)
- No knowledge of judge or jurisdiction, i.e. rural county = low verdict

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Law and Legal Practice

- No knowledge of policy limits/coverage issues
- Impact/usefulness of "expert opinions" incorrectly valued
  - Permanency
  - Economic Loss
  - IME's
- Posturing mediator as expert whose opinion/evaluation stays in the new case (*see admissibility restrictions*, Wis. Stat. § 904.85)
- "Real issue" (i.e., what client wants and needs is not addressed)
- No understanding of litigation cost

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Law and Legal Practice

- **Mediation roulette: overreliance on strategies and judgment calls vs. facts and law, e.g.**
  - **Strategic bluffs: "settlement talk stops today"**
  - **Assumptions – opposition cannot/will not try – opposition unprepared**
  - **Let's take a chance and ring the bell**
  - **I have better witnesses; reliance on past verdicts**
  - **This jury will be conservative**

15

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Getting Off Course

- Outcomes: plaintiff correlates to financial needs, not case value
- Inappropriate motivations
  - Punishment
  - Financial ruin

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When to Quit

- Failure to recognize a truly "final offer," i.e. when to say "yes"

17

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They had a tendency to talk past one another.

18

Concluding Mediation Correctly

Wis. Stat. § 807.05

No agreement, stipulation, or consent between the parties or their attorneys, in respect to the proceedings in an action or special proceeding shall be binding unless made in court or during a proceeding conducted under Section 807.13 or 967.08 and entered in the minutes or recorded by the reported, *or made in writing and subscribed by the party to be bound thereby or the party's attorney.*

19

- An oral contract reached by stipulation in the course of court proceedings is unenforceable unless formalized in the way required by sec. 807.05." *Kocinski v. Home Ins. Co.,* 154 Wis. 2d 56, 67-68, 452 N.W.2d 360 (1990).
- The purpose of this rule is "to prevent disputes and uncertainties as to what was agreed upon." *Adelmeyer v. Wis. Elec. Power Co.,* 135 Wis. 2d 367, 372, 400 N.W.2d 473 (Ct. App. 1986).

20

21

No Duty to Mediate In Good Faith

- Wis. Stat. § 802.12, the alternative-dispute-resolution-referral statute, "does not require the parties to participate in settlement efforts in good faith, nor permit the court to sanction or otherwise burden any party for insisting on trial. *Gray v. Eggert,* 2001 WI App 246, ¶ 13, 248 Wis. 2d 99, 635 N.W.2d 667 (*quoting* Eva Soeka & James Fullin, *The New ADR Referral Statute: Resolving Conflicts Outside Wisconsin Courtrooms,* 67 Wis. Law. 12, 15 (1994)).

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- It is an error for a court to conclude, based on a settlement offer of zero, that a mediation process was a sham or perfunctory, for purposes of imposing sanctions for failure to comply with a scheduling order. *Gray v. Eggert,* 2001 WI App 246, 248 Wis. 2d 99, 635 N.W.2d 667.
- But see, *Lee v. Geico*, 321 Wis. 2d 698 (Ct. App. 2009), court imposed sanction for not attending mediation with claim representative.

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Plaintiff's Evolving Trial Tactics
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During voir dire can the Plaintiff's attorney discuss the value of the case?

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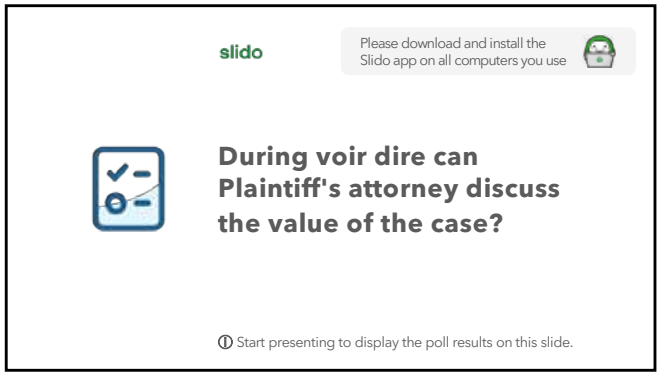
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During voir dire can Plaintiff's attorney discuss the value of the case?
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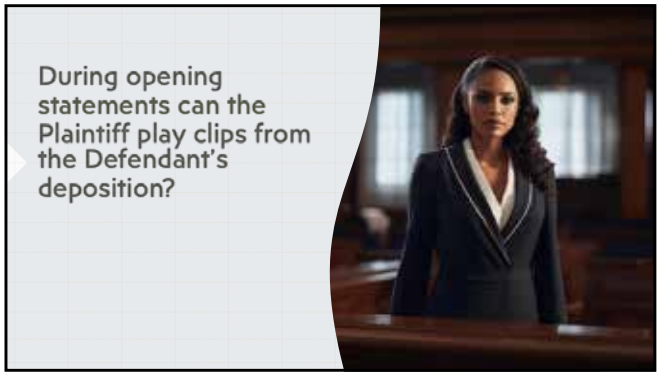
During opening statements can the Plaintiff play clips from the Defendant's deposition?

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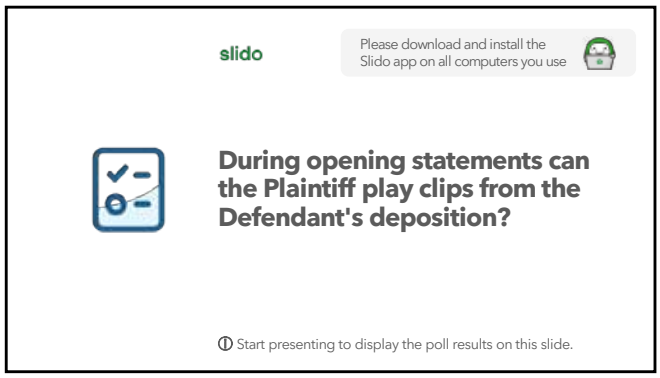
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During opening statements can the Plaintiff play clips from the Defendant's deposition?
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During opening statements can the Plaintiff play clips from the Defendant's IME doctor's trial deposition?

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During opening statements can the Plaintiff play clips from the Defendant's IME doctor's trial deposition?

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During opening statements can the Plaintiff show the jury an exhibit used during the trial deposition of their expert?

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During opening statements can the Plaintiff show the jury an exhibit used during the trial deposition of their expert?

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If there is an objection pending to the exhibit, can Plaintiff show it to the jury during opening?

10

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If there is an objection pending to the exhibit, can Plaintiff show it to the jury during opening?

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Can the Plaintiff call the Defendant's corporate representative to testify at trial?

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Can the Plaintiff call the Defendant's corporate representative to testify at trial?

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Plaintiff calls an important Defense witness adversely. Should the defense ask all their questions so the witness only testifies once?

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Should the defense ask all their questions so the witness only testifies once?

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The parties stipulate that the Plaintiff's medical expenses are reasonable and necessary.

Is the Jury told the amount of medical expenses?

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The parties stipulate that the Plaintiff's medical expenses are reasonable and necessary. Is the Jury told the amount of medical expenses?

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17

Plaintiff uses this graphic during closing arguments.

A. Do you object?
   a. Yes
   b. No

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Plaintiff uses the graphic from the prior slide during closing arguments. Do you object?

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B. If yes, why?
- a. It is very persuasive.
- b. It misstates the law.
- c. Only admitted evidence can be shown to the jury.

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If yes, why?

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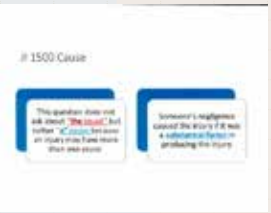
Plaintiff uses this graphic during closing arguments.

A. Do you object?
- a. Yes
- b. No



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Plaintiff uses the graphic from the previous slide during closing arguments. Do you object?

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B. If yes, why?
- a. It is not the actual jury instruction.
- b. It misstates the law.
- c. Only the judge can instruct the jury on the law.

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If yes, why?

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During closing arguments, Plaintiff's attorney tells the jury they must protect the community and find against the Defendants.

Do you object?

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During closing arguments, Plaintiff's attorney tells the jury they must protect the community and find against the Defendants. Do you object?

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If you decide to object, when do you make the objection?

28

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When do you make the objection

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If you object, what relief do you ask for?

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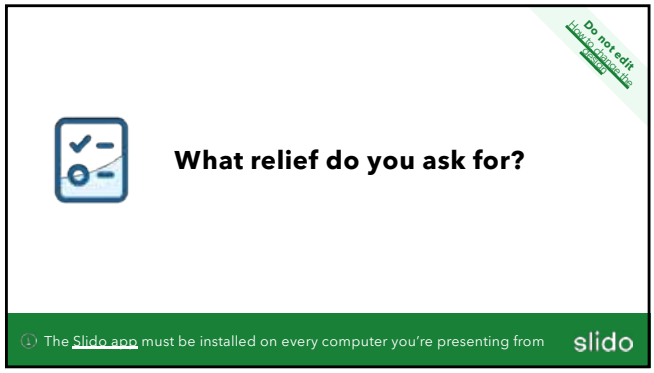
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What relief do you ask for?
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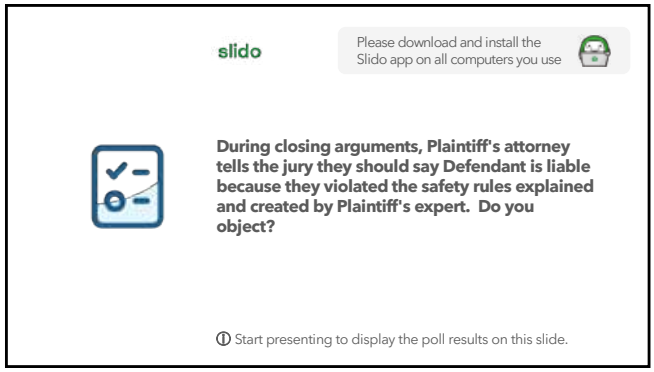
During closing arguments, Plaintiff's attorney tells the jury they should say Defendant is liable because they violated the safety rules explained and created by Plaintiff's expert.
Do you object?

32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During closing arguments, Plaintiff's attorney tells the jury they should say Defendant is liable because they violated the safety rules explained and created by Plaintiff's expert. Do you object?
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ANY QUESTIONS?

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

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NUCLEAR VERDICTS, A PLAINTIFFS LAWYER'S PERSPECTIVE-WHY THEY HAPPEN AND HOW TO AVOID THEM (You may not like my answers)
Presented by Steve Caya

WHAT IS A NUCLEAR VERDICT?

1. A nuclear verdict is defined as a jury verdict that significantly exceeds what is expected to be awarded for such a case, at least by the defense.
   A. Nuclear verdicts are often defined as verdicts exceeding $10,000,000 dollars. Thermonuclear verdicts are those exceeding $100,000,000 dollars.
   B. Cases where nuclear verdicts are most prevalent include trucking cases, product liability cases and med mal cases in certain areas of the country, but they can occur in many other types of cases as well.
   C. Nuclear verdicts seem to be on the rise and my sense is in Wisconsin verdicts generally are on the rise in all categories of cases, including cases viewed traditionally as low value cases, i.e., soft tissue cases.
   D. The basis of my presentation will be a discussion of three seven figure verdicts I have obtained since November of 2021.

   E. Case One, November of 2021, Dane County: My client is a single woman in her mid-forties. She is a high school dropout with a GED. She is employed as a CNA and activities coordinator at an assisted living facility. She has no health insurance.
      On the date of the crash, she is driving to get lunch. She is on a rural road with a 55-mph speed limit. A semi-truck driver delivers building material to a storage facility. Because of the configuration of the driveway, he must back out on to the road to exit. He does so with no assistance. He cannot see behind the truck as he attempts to back out. His employer has no policies or procedures regarding backing and provides no training for its employees regarding backing onto a road. Industry standards state a truck driver must never back a truck onto a road without assistance. My client fails to perceive the truck backing onto the road and strikes the rear end of the trailer at 60-mph. My client suffers a leg fracture requiring two surgeries. She incurs $289,450.00 in bills and $16,678 in wage loss. The trucking company's insurer makes no offer to settle the case and refuses to mediate, believing my client to be the majority at fault actor for failing to see the truck and for excess speed. The jury finds my client %30 at fault, the truck driver %30 at fault and the trucking company 40% at fault. The jury awards all of the above specials plus $16,768.00 for future care. The jury awards $750,000 in past pain and suffering and $1,250,000 for future pain and suffering. The jury awarded

exactly the sum I asked them to award. Defense counsel suggested $360,000 for past and future pain and suffering. I am later told the Defense conducted two mock trials and won on liability in each mock trial.

F. Case Two, January of 2022, Dane County: My client is a married man in his forties. He has a HS diploma and works as a chef at a family-owned restaurant. He is an avid hunter and is injured at a boat launch after a duck hunt. He is standing next to his truck, speaking with his hunting group, when he is struck by a boat trailer that is backing out of a nearby stall. He suffers a neck injury. He has a history of neck issues for which he regularly seeks chiropractic care prior to this incident. He treats conservatively for about nine months but eventually ends up having a cervical fusion with mixed results. He has $179,000 in bills and $6,000 in wage loss. The pre-suit offer is $26,000. The final offer before trial is $90,000. My last demand was $900,000. The limits were $1,250,000. The defense is based entirely upon the IME Doctor's opinion that after 4-6 months, my client's neck issues are due to his pre-existing condition. The jury awards my client $136,000 for medical bills, $6000 for wage loss, $400,000 for past pain and suffering and $800,000 for future pain and suffering. I had asked the jury to award a total of $1,500,000 for pain and suffering. The jury awarded my client's wife $250,000 for her companionship claim. I had asked for $125,000 for her claim. Defense Counsel asked for an award totaling $90,000. The insurer waived the limits post-trial and paid the excess.

G. Case Three, June of 2025, Racine County: My client is a 62 year old self employed truck driver. He is delivering pipe on a flat bed trailer to a construction site. When he arrives, he is directed to park his trailer on a public road. There is no traffic control in place. He is concerned about his truck being unloaded on a road with no traffic control. An employee of the contractor arrives to unload the trailer by himself using a wheel loader. The employee struggles to get the forks on the wheel loader under the pipe. My client observes the load shifting on his trailer, a known hazard in the pipe installation industry. He decides to assist the wheel loader operator in unloading. In the process of doing so, he is struck by pipe falling off the trailer. He suffers a broken shoulder, a broken foot, a broken leg and a concussion. He requires two surgeries and is unable to work for an extended period of time. He incurs $306,000 in bills and $161,000 in wage loss which is stipulated to by the Defense. The Defense maintains throughout my client is the majority at fault party. This despite well-established procedures in the pipe installation industry regarding how to safely unload pipe from a trailer.

The company has no policies or procedures pertaining to unloading pipe and provides no training concerning unloading pipe from trailers. The Defense initially offers $5000. After losing a summary judgment motion, the defense offers $375,000 at mediation. My final demand is $1,250,000. The jury awards my client all of the above-mentioned bills and wage loss. I asked the jury to award $1,500,000 in past pain and suffering and $1,000,000 in future pain and suffering. The jury awarded $1,500,000 in past pain and suffering and $925,000 in future pain and suffering. The jury found my client %8 at fault, the wheel loader operator %22 at fault and the contractor who employed the wheel loader operator %70 at fault. I asked the jury to award my client's wife $500,000 for her companionship claim and they awarded $500,000 for the companionship claim. Total verdict, $3,116,000.

2. STEP ONE TO A NUCLEAR VERDICT-I NEED A CASE THAT CAN RESULT IN A NUCLEAR VERDICT (Gathering the uranium)
   A. Type of case I am looking for on the road to insurance company Armageddon:
   B. Quality, likeable and credible client;
   C. Quality, likeable and credible spouse;
   D. Significant injuries, but need not be catastrophic;
   E. No issue with pre-existing conditions or pre-existing condition concerns are minimal;
   F. Surgical treatment, six figure or more medical bills and permanency;
   G. Wage loss, or at least injuries that are impacting my client's ability to support him/herself and family;
   H. Clear or likely majority liability on the tortfeasor; and
   I. Source of recovery, i.e., substantial coverage.

3. STEP TWO TO A NUCLEAR VERDICT-A COMPELLING STORY (Enriching the uranium)
   A. Trials are stories;
   B. Does the client I have discussed above have a compelling story and can I tell it in a meaningful way;
   C. What are our favorite books and movies;
   D. Our favorite books and movies involve a protagonist who overcomes great obstacles and adversity and who in the end triumphs;
   E. Seriously injured people and their families face adversity, often daily;
   F. My role is to develop and present that story;
   G. Examples of compelling stories;

H. Compelling stories are critical and can overcome many of the defense's theories on liability and damages;
I. If presented correctly, the jury will conclude the defense is the final obstacle my client needs to overcome to obtain justice;
J. Your pretrial discovery tactics may not reveal to you the compelling story;
K. The jury will come to realize it is they who have the power to write the final ending to my client's compelling story.

4. STEP THREE TO A NUCLEAR VERDICT-MOTIVATING MY CLIENT TO DO BATTLE
   A. Most injured claimants do not wish to go to trial, but, often times the defense will take actions that will embolden an injured party;
   B. A ridiculously low pre-suit offer;
   C. Perceiving they, or worse yet, their spouse, are being ill-treated in a deposition;
   D. Suggestions of malingering, embellishment or secondary gain;
   E. Most IME reports; and
   F. Unreasonably blaming my client for the occurrence.

5. STEP FOUR TO A NUCLEAR VERDICT-FAILING TO CREATE RISK FOR THE PLAINTIFF/PLAINTIFF'S LAWYER (Diplomacy fails)
   A. This is the critical stage leading to a nuclear verdict;
   B. Over reliance on a liability defense;
   C. Over reliance on an IME;
   D. Vastly underestimating the value of the claim;
   E. Using "comparables" from other cases to assess damages; and
   F. Failing to make an offer to the plaintiff/plaintiff's lawyer that makes it too risky for the plaintiff/plaintiff's lawyer to reject.

6. STEP FIVE TO A NUCLEAR VERDICT-THE TRIAL (The nuclear warhead is loaded onto the missile)
   A. My Tour Guide Philosophy;
   B. Believe it or not, Jurors want to do the right thing and come to what they believe to be a just result, they just don't know how to get there;
   C. Jurors have no training or life experience in assessing the value of pain and suffering;
   D. Being on a jury is like vacationing in a foreign country where you do not speak the language;

E. When on vacation in a country where you don't speak the language, you need a tour guide, so does the jury;
F. I want to be chosen by the jury as their tour guide;
G. How will I do that; and
H. If the jury chooses me as their tour guide and rejects defense counsel as their tour guide, you are in trouble.

7. STEP SIX TO A NUCLEAR VERDICT-ESTABLISHING THE VALUE OF MY CLIENT'S PAIN AND SUFFERING (The nuclear missile is being transported to the launch pad)
   A. Pain and suffering awards are what make a verdict a nuclear verdict;
   B. Jurors don't determine the value of pain and suffering, the lawyers do;
   C. The plaintiff's bar is the greatest cap on damages known to mankind;
   D. Typical plaintiff's lawyers routinely underestimate the true value of their cases;
   E. You are underestimating the value of cases;
   F. If I have been chosen by the jury as the tour guide, and I have presented my client's story in a compelling fashion, the jury is likely to trust that my ask for pain and suffering is reasonable.

8. STEP SEVEN TO A NUCLEAR VERDICT-THE JURY REJECTS DEFENSE COUNSEL AS THEIR TOUR GUIDE (The countdown to launch begins)
   A. Critical to a nuclear verdict is the rejection by the jury of defense counsel as their tour guide;
   B. Discussion of how and why the jury will reject defense counsel as the tour guide;
   C. Impact of the jury rejecting defense counsel as the tour guide.

9. STEP EIGHT TO A NUCLEAR VERDICT-THE CLAIMS REP'S ROLE AT TRIAL (The last chance at diplomacy)
   A. If the claims rep is attending the trial, and you should be, what should the rep do if things are going south for the defense?;
   B. If your liability defense is falling apart, do not rely upon the jury to limit pain and suffering numbers to what your defense counsel suggests, they are no longer the tour guide;
   C. What you believe to be an unreasonable ask by the plaintiff's lawyer for pain and suffering may not be viewed as unreasonable by the jury if the jury selects plaintiff's counsel as the tour guide;

D. The hope that the pain and suffering award will not be all that bad when your liability defense is crumbling is not a safe bomb shelter;
E. This is your last chance to create risk for the plaintiff/plaintiff's lawyer by making an offer before the jury deliberates.

10. THE FINAL STEP TO A NUCLEAR VERDICT-THE DEFENSE MAKES NO FINAL EFFORT AT SETTLEMENT AND ALLOWS THE CASE TO GO TO VERDICT (BOOM!!!!!)
    A. The final step to a nuclear verdict, underestimation of risk;
    B. Improper analysis of the trial evidence;
    C. Unreasonable belief that even if we lose on liability, the jury will never award what the plaintiff's lawyer asked for pain and suffering;
    D. Don't blame the jury;
    E. Don't blame the plaintiff's lawyer for the "unreasonable" ask, or reptile or anything else.

11. AVOIDING NUCLEAR VERDICTS
    A. Relying on a liability defense where large damages are in play is extremely risky;
    B. Discussion of liability defenses that are not likely to be effective;
    C. If liability is bad for you , or even stipulated, your IME Doc is not likely to save you;
    D. If you are unwilling to create risk for the plaintiff/plaintiff's lawyer with an offer sizable enough to do so, be prepared for the consequences.

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Event Data Recorders in Passenger Vehicles

Emmanuel J. Manuel, Senior Consultant

This 60-minute seminar will present the latest in technology of vehicle Event Data Recorders (EDRs) that record data of various operational aspects of an automobile before, during, and after a collision. Additional topics will include what vehicles are equipped with EDRs, the data available, how it can be used in determining the root cause of an accident, the accessibility of that data in obtaining the material evidence critical in determining claim and legal responsibilities for damages incurred, and how it can be used by claims professionals or attorneys in making preliminary evaluations of insurance or legal claims.

I.	Introduction and Definitions a. Highlight topics to be presented b. Summary of what an Event Data Recorder (EDR) is and what it does	5 Min
II.	History a. Outline highlighting the advent and evolution of the EDR	5 Min
III.	Technology a. Airbag Control Modules b. Data Sources c. Supported Vehicles d. Retrieving Data i. Deployment Events ii. Non-Deployment Events e. Data Uses	15 Min
IV.	Legislation a. Federal i. Title 49 Part 563 ii. Driver's Privacy Act of 2015 b. State	10 Min
V.	Data Examples	20 Min
VI.	Questions	5 Min

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Crossing the Line: Dealing with Difficult Opposing Counsel and the Ethical Perils and Pitfalls that can Occur

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"Ethics is knowing the difference between what you have the right to do and what is the right thing to do"

- *U.S. Supreme Court Associate Justice Potter Stewart.*

I. Civility and Collegiality in the Practice of Law

- Common experience of lawyers encountering difficult opposing counsel.
- Bad behavior can provoke similar responses, but ethical rules demand restraint.
- Purpose: Explore
- When opposing counsel's conduct crosses the line.
- Obligations under the Wisconsin Rules of Professional Conduct when it does.

A. Legal Foundation

- Attorney's oath: respect courts, abstain from offensive personality, avoid unjust lawsuits, refrain from false statements.
- Oath excerpt: "abstain from all offensive personality … respect judicial officers, refrain from advancing unjust lawsuits, and avoid misleading a judge or jury by a false statement of fact or law."
- Violation = misconduct subject to discipline.
- Civility is a fundamental aspect of professionalism, encompassing "respect, courtesy, and integrity in interactions with clients, colleagues, opposing counsel, and the judiciary."

B. Relevant Rules (SCR 20:3.4 – Fairness to Opposing Party and Counsel) Prohibits conduct including:

- "Unlawfully obstructing access to evidence."
- "Knowingly disobeying a court rule."
- "Making frivolous discovery requests."
- "Intentionally failing to comply with proper discovery requests."
- Rules apply even in contentious matters—retaliatory unethical conduct is also sanctionable.

II. Don't Take the Bait

A. Temptations in Adversarial Situations

- Examples: sarcastic emails, evasive discovery, inflammatory motions.
- Ethical requirement: maintain professionalism regardless of provocation.

B. Key Rules

- SCR 20:4.4(a): "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person."
- SCR 20:8.4(c): Prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation."

C. Strategies for Maintaining Professionalism

- Keep communications brief, courteous, and documented.
- Mind tone and word choice, especially in digital formats.
- Use procedural tools (protective orders, motions to compel, court intervention).
- Avoid inflammatory language.
- Professionalism builds a strong reputation with judges and clients.

III. Mandatory Reporting: When Ethical Obligations Escalate

A. SCR 20:8.3(a) Duty

- "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate professional authority."
- Duty applies if:
- Actual knowledge of a violation.
- Violation of Rules of Professional Conduct.
- Raises substantial question as to honesty, trustworthiness, or fitness.

B. Defining "Substantial"

- Comment [3] to SCR 20:8.3: "The term 'substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware."
- Example: knowingly filing a false affidavit or using criminal threats for leverage.

C. Reporting Process

- Report to the Office of Lawyer Regulation (OLR).
- Acknowledgment that reporting may be uncomfortable but is vital for integrity.

IV. Discretion vs. Duty: Informal Resolution or Formal Report

- Not every lapse requires formal action.
- Avoid frivolous or tactical grievances.
- Informal options:
- Direct discussion with counsel.
- Guidance from a mentor.
- Mandatory reporting applies when core values (honesty, fairness, justice) are at stake.

V. Use Available Resources

- State Bar of Wisconsin Ethics Hotline for confidential guidance.
- Consult colleagues or supervisors.
- Contact OLR if serious misconduct is suspected.
- Preamble to the rules: "[The principles underlying the rules] include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system."

VI. Examples of Difficult Situations with Opposing Counsel

Example 1 – An associate from your firm takes a job with another firm that has several cases in litigation against you. When employed by you, the associate worked on some of these cases in varying degrees. You learn that, despite making clear with your departing associate and opposing counsel, that the associate is now working on one or more of these cases.

SCR 20:1.10 – Imputed disqualification, general rule

- While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by SCR 20:1.7 or SCR 20:1.9
- Notes:
    - **Principles of Imputed Disqualification**
    - [2] The Rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c). firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

SCR 20:8.4 – Misconduct

- It is professional misconduct for a lawyer to:
    - (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another

SCR 20:5.2 Responsibilities of a Subordinate Lawyer

- (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
- (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

- ABA Comment [2] to this rule highlights that when ethical issues are clear, both lawyers bear responsibility, but when there is a justifiable basis to act one way the subordinate lawyer may be absolved of negative findings.

Example 2 – Opposing counsel makes arguments to the court in writing and oral arguments that border on misrepresentations of fact.

SCR 20:3.3 Candor toward the tribunal

- (a)(1) – lawyer shall not knowingly make a false statement of law or fact
- (a)(2) – lawyer shall not knowingly fail to disclose controlling legal authority adverse to their position
- (a)(3) - lawyer shall not knowingly offer evidence they know to be false

SCR 20:3.1 Meritorious claims and contentions

- In representing a client, a lawyer shall not:
    - (a)(1) knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law
    - (a)(2) knowingly advance a factual position unless there is a basis for doing so that is not frivolous
    - (a)(c) file a suit, assert a position, conduct a defense, delay a trial or take other action on behalf of the client when the lawyer knows or when it is obvious that such an action would serve merely to harass or maliciously injure another

ABA Comment (showing that this is a high bar to prove): [2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

Example 3 – Opposing counsel frequently engages in making representations on the phone or in person, and contradicting those later in writing. For example . . .

SCR 20:4.1 – Truthfulness in statements to others

- (a)(1) – lawyer shall not knowingly make a false statement of law or fact to a 3rd person
- ABA comment: [1] A lawyer is required to be truthful when dealing with others on a client's behalf, **but generally has no affirmative duty to inform an opposing party of relevant facts**. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.
- [2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation

SCR 20:8.4 – Misconduct

- It is professional misconduct for a lawyer to:
    - (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation

Example 4 – Opposing counsel makes personal attacks at a deposition in the presence of your client.

- Unethical? Probably not. This can lead to a slippery slope…
- Consider the requirements of SCR 20:3.4 Fairness to opposing party and counsel
    - A deteriorated relationship with counsel can lead to intended or unintended bad acts in response to personal attacks

- Note – preamble No. 9 and the note of how professional and personal conduct should occur:
    - [9] . . . Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, ***while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.***

Example 5 – You are defending an insurer and insured in a personal injury lawsuit. Early in the case you make several settlement offers to Plaintiff's counsel, all of which are summarily rejected. After initial discovery, you depose the Plaintiff and ask about the rejected offers. The Plaintiff is surprised, and you learn that the offers were never relayed to the Plaintiff, and there were no general instructions regarding dealing with settlement offers.

SCR 20:1.2(a) - . . . lawyer shall abide by a client's decision whether to settle a matter.

Informed consent is needed to accept/reject a settlement offer and a lawyer is bound to inform their client of any offers.

Wisconsin Comment to this rule notes:

- [1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

SCR 20:1.4 – Communication. A lawyer shall "Promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in SCR 20:1.0(f), is required by these rules"

Example 6 – You represent a defendant in a personal injury and wrongful death matter arising from an automobile accident. The plaintiffs are the estate of a wife and injured husband, sole survivor and executor of the estate of the wife. As the case progresses, you come to learn that husband suffered a TBI in the accident, and may also have early onset dementia. There is a legitimate question whether the Plaintiff has the capacity to understand case decisions. The plaintiffs' attorney, known for a questionable reputation, calls to relay settlement discussions and says that he has 'unilateral authority' to resolve the case. You are concerned that the surviving party does not have capacity to understand the settlement.

SCR 20:1-14 – client with diminished capacity

- (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

Example 7 – A newer lawyer appears in a case with a senior colleague, and appears for an in-person scheduling/status conference in a case. When arriving, the lawyer is directed to chambers, where they hear jovial banter going on. Entering, they find opposing counsel and the judge talking and laughing. Off the record, the judge asks about the status of the case, and then moves to pointed questioning to the newer lawyer about settlement and asking for commitments the lawyer is not permitted or prepared to give. The newer lawyer is left convinced that *ex parte* communication occurred prior to their arrival, and an ambush was set up when they arrived.

SCR 20:3.5 – Impartiality and decorum of the tribunal

- (b) A lawyer shall not communicate *ex parte* with such a person during the proceeding unless authorized to do so by law or court order or for scheduling purposes if permitted by the court. If communication between a lawyer and judge has occurred in order to schedule the matter, the lawyer involved shall promptly notify the lawyer for the other party or the other party, if unrepresented, of such communication;

VII. The flipside? Too close of a relationship and when disclosure is needed

Attorney Dean Dietrich looked at this issue in an article for the Wisconsin Lawyer.[1]

"There are very real and practical considerations that must be taken into account when deciding whether to represent this new client. SCR 20:1.7 of the Wisconsin Rules of Professional Conduct, regarding conflicts of interest, provides that a conflict of interest might exist if the lawyer cannot effectively represent a client because of responsibilities (often called loyalties) that are due to another client, a former client, another person, or the personal interests of the lawyer.

In this case, the lawyer must analyze whether he or she can provide competent representation to the new client even though he or she might have a very close personal relationship with the lawyer on the other side. That requires the lawyer to analyze the nature of the representation, the degree of conflict that might arise during the representation, and whether the lawyer will feel constrained in effectively advocating for his or her new client because of his or her relationship with the lawyer on the other side of the matter."

"The other question in this situation is whether the lawyer has an obligation to disclose the existence of the close, personal friendship to the new client. The relationship with opposing counsel might or might not affect the nature of the representation by the lawyer and might not become a factor in an analysis of whether a conflict of interest exists."

[1] Ethics: Friends with Opposing Counsel: Disclosure Required?, Wisconsin Lawyer, Feb. 11, 2020, *available at https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=93&Issue=2&ArticleID=27467*.

VIII. Best Practices for working around incivility

1. Keep the purpose of your representation in mind – remember that opposing counsel is not your enemy.
2. Establish credibility with opposing counsel by having authority to support your positions in any dispute that may arise.
3. Do not rush to respond to offensive communications. Do not allow opposing counsel to make you angry, and do not respond based on emotion.
4. Remember that not every concession is a loss. Litigation, and especially discovery, is an ongoing negotiation and there is a give and take. Set up calls with opposing counsel (do not limit yourself to written communications) and work to establish a cadence for these negotiations and discussions.
5. Consider the 'let them' theory when personal attacks are involved – do your best to ignore and move on provided they do not materially impact your ability to represent your client
6. Document, document, document – the best defense to a deteriorated relationship with opposing counsel that impacts representation is to show you have taken the higher road. If necessary, follow-up tense verbal exchanges with a written summary of what occurred.
7. Be calm and stay calm – avoid the temptation to 'fight fire with fire' or 'win' an argument that has little to do with the merits of a case and more to do with an adversarial relationship with counsel.


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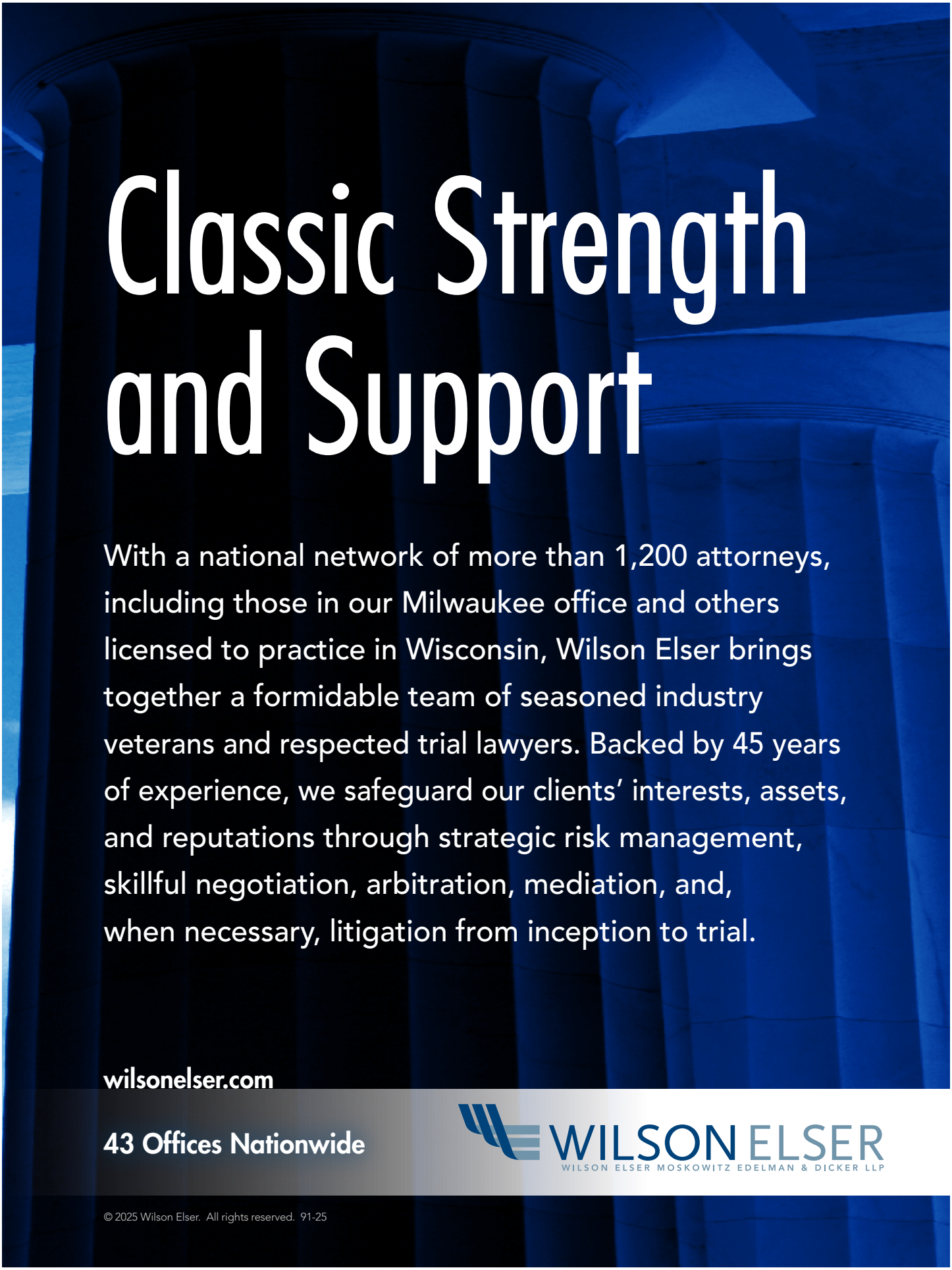
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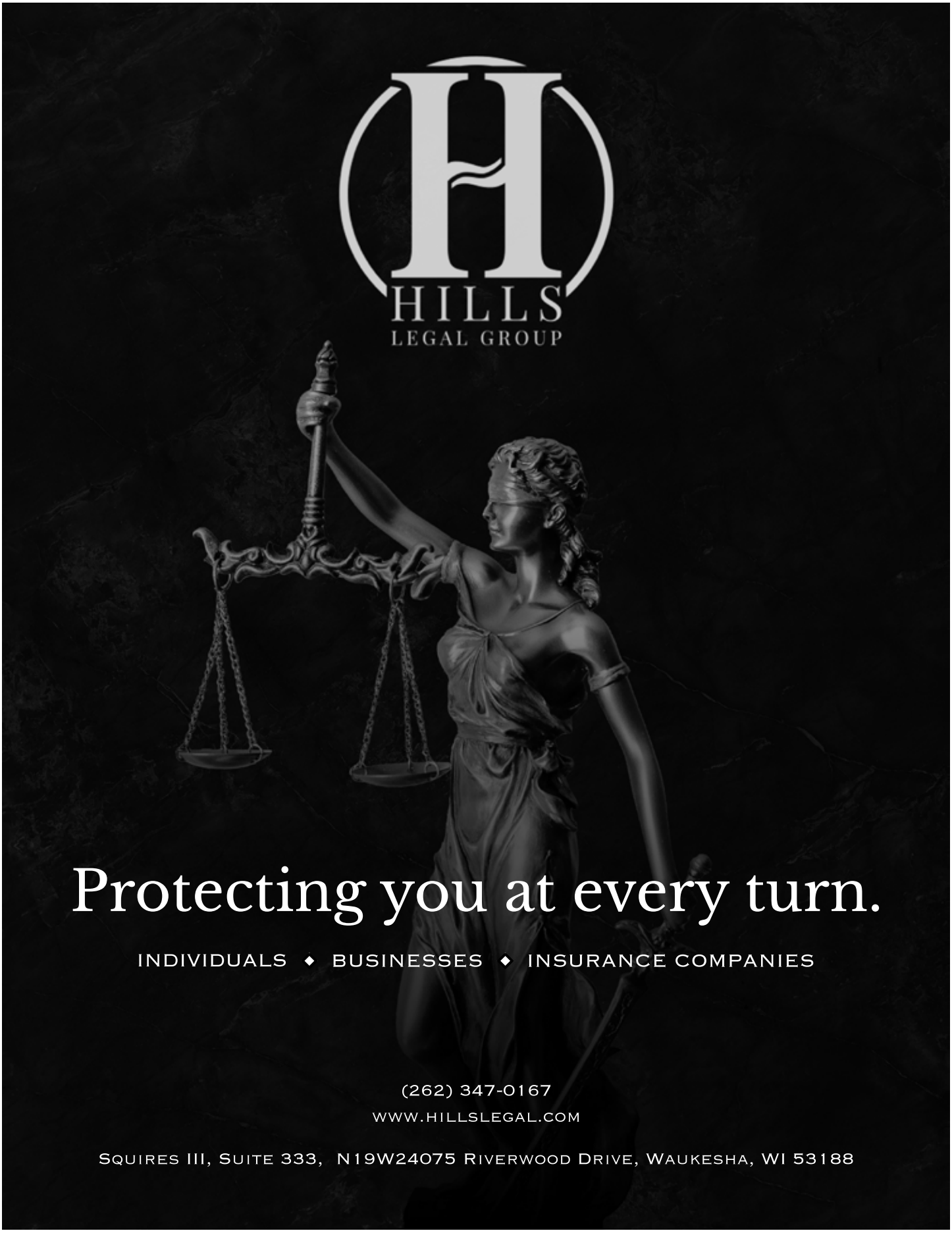
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