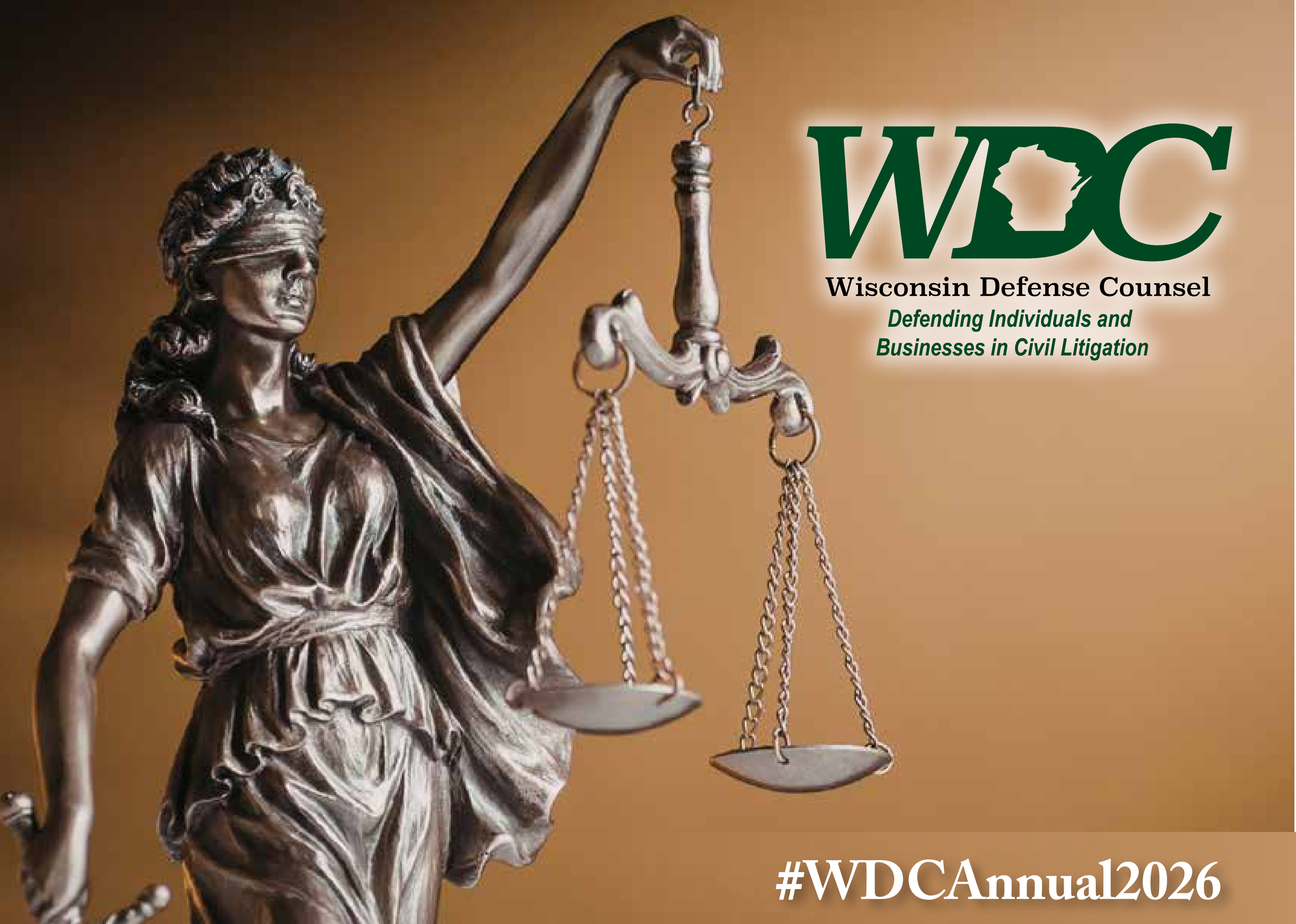

WDC
Wisconsin Defense Counsel
Defending Individuals and Businesses in Civil Litigation

#WDCAnnual2026

2026 Annual Conference

August 13-14, 2026

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

Program Chair:
Nicole Radler
Simpson and Deardorff, S.C.

Program Agenda & More Information inside!

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Wisconsin Defense Counsel
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Schedule of Events

Thursday, August 13, 2026

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

8:55 - 9:00 AM
Opening Remarks

9:00 - 9:50 AM
Interactive Torts Update
Aaron R. Berndt & Alan W. Ray, Borgelt, Powell, Peterson & Frauen

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

10:00 - 11:40 AM
Defending the Algorithm: Practical & Responsible AI for the Civil Defense Practice
Christopher M. Jacobs, Houston Harbaugh, P.C.

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

1:00 PM - 1:50 PM
Lessons Learned in Reverse: A Mediator-Turned-Judge's View From the Bench
Hon. Michael D. Rust, Winnebago County Circuit Court

1:50 – 2:00 PM
Break

2:00 PM - 2:50 PM
Influencing the Courtroom: Legislative Lobbying in the Legal Profession Panel
Moderator: Rebecca Hogan, Hamilton Consulting Group
Panelists: Caleb Gerbitz, Meissner, Tierney, Fisher & Nichols, S.C., Dan Mullin Crivello Nichols & Hall, S.C., Ariella Schreiber, Rural Mutual Insurance Co.

2:50 – 3:00 PM
Break
Sponsored by Baker Sterchi Cowden & Rice LLC

3:00 - 4:00 PM
Committee Meetings and Young Lawyers Committee Social

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

Friday, August 14, 2026

6:45 - 8:00 AM
WDC Wellness Committee Walk!

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

9:00 - 9:50 AM
Humanizing the Defense: Practical Jury Connection Strategies
Nicole Marklein, West and Dunn, LLC

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

10:00 - 11:40 AM
Aligning Defense Strategy & Claims Reality: Bridging Law Firm and In-House Perspectives
Roger Flores, Crivello, Nichols & Hall, S.C. &
Crystal Uebelher, Great American Insurance Group

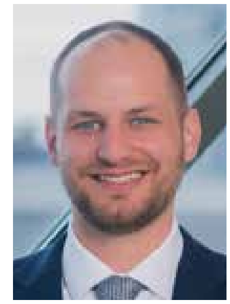
11:50 AM
Adjourn

Speaker Biographies

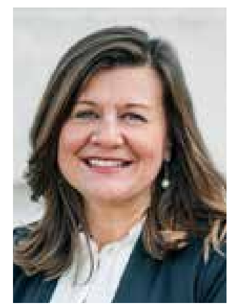
Aaron Berndt is a Shareholder at Borgelt, Powell, Peterson & Frauen, S.C., specializing in insurance defense litigation with a focus on defense against trucking liability, municipal liability, and general liability claims. He earned his Bachelor of Science from the University of Wisconsin-Madison and his Juris Doctor from the University of Wisconsin Law School. An active industry professional, Aaron is a member of the State Bar of Wisconsin and Wisconsin Defense Counsel, and he previously served as a member and President for the Southeast Wisconsin Chapter of the Claims and Litigation Management Alliance. Additionally, he frequently shares his expertise as a seminar presenter for organizations such as the Wisconsin Defense Counsel, Wisconsin Claims Counsel, State Bar of Wisconsin, Lorman, and the Southeastern WI Chapter of the Claims and Litigation Management Alliance.

Roger Flores is a Shareholder with Crivello Nichols & Hall S.C., in their Madison law office and for 29 years has represented and defended insurance companies, corporations – as well as their insureds and employees – in the evaluation of, and defense against, a broad variety of civil lawsuits and claims for damages. Roger has also lobbied at the state level on insurance issues in the Midwest and several southwestern states. Roger earned his Bachelor of Business Administration degree from the University of Wisconsin-Whitewater, and he is a 1997 graduate of the University of Minnesota Law School. Roger practices in both state and federal courts throughout Wisconsin and has represented clients through trial in dozens of cases before judges and juries.

Roger is a Certified Civil Trial Advocate and served as an adjunct professor at the University of Wisconsin Law School in Trial Advocacy. He lives in southwestern Dane County, with his wife, Grace, and three children, Siri, Caroline and Alexander.



Caleb R. Gerbitz is an appellate and litigation attorney at Meissner Tierney Fisher & Nichols S.C. Caleb serves as the Wisconsin State Chair of the American Bar Association's Council of Appellate Lawyers, co-chairs the Milwaukee Bar Association's Civil Litigation Section, and is a board member of the Wisconsin Defense Counsel. Caleb graduated *summa cum laude* from Mitchell Hamline School of Law, after which he clerked for Justice Brian Hagedorn of the Wisconsin Supreme Court. In addition to his legal practice, Caleb authors a Substack column, Appellate Approach, which features regular updates on cases from Wisconsin's appellate courts.



Rebecca Hogan has been developing and advancing policies and related political strategies for Wisconsin lawmakers, administrators and businesses for over 20 years. She joined Hamilton Consulting in 2013, where she advocates for clients in policy areas such as health care, general business climate, employment law, and government reform.

Before joining Hamilton, Rebecca served as the Director of Health and Human Resources Policy at Wisconsin Manufacturers and Commerce (WMC), the state's largest trade association representing business. While at WMC, Rebecca lobbied the legislature on health care policy and human resources issues such as unemployment insurance, worker's compensation, education and the Family Medical Leave Act.

Rebecca spent eight years in the Wisconsin State Senate working in a variety of positions for a number of senators. In her various roles as a Chief of Staff, Senate Education Committee Clerk and Legislative Director, she was responsible for preparing analysis and policy recommendations for committee fiscal deliberations, media relations and guidance to constituents.

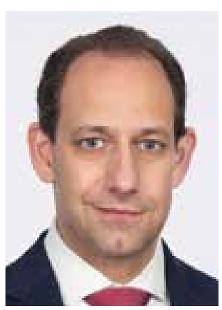
Speaker Biographies continued

In addition to her legislative experience, Rebecca was the Deputy Director for the Committee to Elect a Republican Senate where she conducted all administrative, financial management and fundraising activities. Rebecca also was a Regional Coordinator for former Governor Thompson's campaign committee.

Rounding out her background, Rebecca served in Governor Thompson's administration as a research and policy advisor at the Wisconsin Department of Financial Institutions. In this position she drafted bill summaries on legislation that impacted the agency, conducted research projects and wrote informational papers on the financial industry.

Rebecca holds a Bachelor of Arts in Political Science and International Relations from University of Wisconsin-Madison. She has received appointments from the Secretary of the Department of Workforce Development to the Wisconsin Apprenticeship Advisory Council and from Gov. Scott McCallum as the liaison to the United States Mint for the Wisconsin Commemorative Quarter Project.

Rebecca also currently serves on the Board of Visitors for UW-Madison's Department of Political Science.



A litigation attorney, **Christopher M. Jacobs** represents clients in Pennsylvania, West Virginia and Ohio state and federal courts and focuses his practice on the areas of insurance bad faith, insurance coverage and complex commercial disputes.

In addition to his traditional commercial and insurance litigation practice, Christopher has developed a focus on emerging issues at the intersection of artificial intelligence and the law. He advises clients on matters involving AI governance and AI-based liability, including the legal implications arising from algorithmic decision-making. His work in this area includes speaking and writing on AI-related legal developments, including a newsletter, blog and podcast called Defending the Algorithm™.

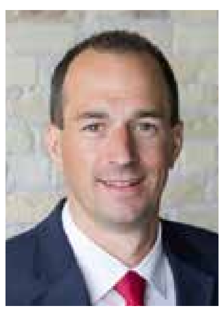
In his insurance bad faith litigation practice, Christopher has served as counsel for major national insurers in actions involving construction defect claims, latent and progressive injury claims, long-tail environment exposure claims, disputed uninsured and underinsured motorist claims, first-party property losses, appraisal demands and excess verdicts. Christopher's insurance coverage practice involves the preparation of coverage opinions and analyses in matters involving reservation of rights, disclaimer of coverage, examinations under oath, declaratory judgments, rescission, and extracontractual exposure.

Nicole Marklein is a partner with West & Dunn. She specializes in the areas of employment law and civil defense litigation. She represents businesses and individuals in various types of complex litigation, from contract and business disputes to personal injuries and insurance coverage. She also enjoys providing her clients with cost-effective employment advice and representation to help avoid employment claims and limit potential exposure if a claim arises.

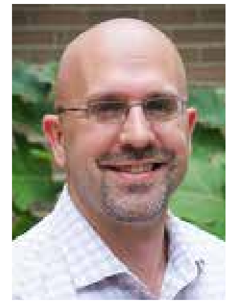
Attorney Marklein is a lifelong Wisconsin resident and a proud Badger; she obtained her law degree from the University of Wisconsin Law School and her undergraduate degree from the University of Wisconsin-Madison. She serves on the Wisconsin Civil Justice Counsel, and on the Board of Directors of the Wisconsin Defense Counsel, of which she is a Past President. Nationally, Nicole serves as Wisconsin's State Representative for DRI and is the Chair of DRI's State Legislation and Rules Task Force. She is also an active member of the Association of Defense Trial Attorneys (ADTA) and the Federation of Defense & Corporate Counsel (FDCC), and is a Fellow of the Litigation Counsel of America (LCA). She frequently writes and presents on topics related to civil litigation employment law.

Speaker Biographies continued

Danny Mullin is an equity shareholder and a member of the Crivello Nichols & Hall, S.C.'s Board of Directors. Danny represents public and private manufacturers of products on a national basis in both commercial and product liability litigation and regulatory compliance. In addition, Danny represents construction companies and contractors in liability litigation. In this capacity, he defends wrongful death, catastrophic injury, and significant property damage cases, whether arising from fires and explosions, roll-overs, drownings, construction-site injuries, or construction defect cases. He is licensed in Wisconsin, Illinois, and Minnesota and admitted to practice before the United Stated District Courts for the Eastern and Western Districts of Wisconsin, the Eastern and Western District Bankruptcy Courts in Wisconsin, and the Seventh Circuit Court of Appeals. He is also admitted to the Trial Bar for the Federal District Court for the Northern District of Illinois.



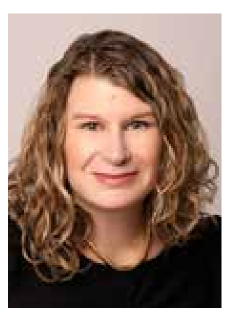
Alan W. Ray is a Wisconsin native who attended the University of Wisconsin-Madison, where he obtained his Bachelor of Arts degree with majors in Political Science and Legal Studies and a certificate in Criminal Justice. Attorney Ray then attended Marquette University Law School, graduating *cum laude*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



You might say that **Michael Rust** is addicted to conflict. With three teen/tween kids, dating an attorney, having a cat and a dog before being divorced from another attorney, previously serving as circuit court commissioner and CEO of a court connected and community mediation center and now serving as Winnebago County Circuit Court judge – conflict is his life.

Judge Rust is the recipient of the 2022 Lifetime Legal Innovation Award from the State Bar of Wisconsin. As CEO of the Resolution Center, Inc. (running the Winnebago and Fond du Lac Conflict Resolution Centers), he oversaw over 50 volunteer mediators on local cases and personally performed over 2,500 complex mediations throughout the country and trained thousands of mediators. Michael has served as International President of the Association for Conflict Resolution, President of the Wisconsin Association of Mediators, Chair of the Dispute Resolution Section of the State Bar of Wisconsin, and the Mediation Partner for the Wisconsin Special Education Mediation System.

Judge Rust is a Fellow of the American Bar Foundation, recipient of the Beacon Award (Distinguished Alumni) from the Carthage College Alumni Association, and has lectured and spoken at universities and conferences around the world. As a former member of the National Speakers Association, he has also given three different TEDx talks around the country.



Ariella Schreiber is the Vice President of Claims and General Counsel at Rural Mutual Insurance Company. She therefore spends a lot of time spending money and herding cats. In her spare time, she fosters cats. Her life is mostly cats.

Speaker Biographies continued

Crystal M. Uebelher, J.D., CPCU has honed her skills in the property and casualty insurance industry for over 20 years. Her experiences as a claims representative, insurance defense lawyer, claims attorney and claims leader have given her a deep knowledge of how the law and insurance are inextricably intertwined. Crystal's current role as a Divisional Assistant Vice President in Claim Practices for Great American Insurance allows her to support claims divisions across the many specialty lines of insurance offered by Great American. Crystal's role includes assisting in the management of complex claims and driving technical excellence in claims. Crystal is also a frequent speaker both at Great American and industry events to share her knowledge on bridging the gap between insurance and the law to respond to the ever-changing issues in our industry.

Crystal earned her juris doctorate in 2007 from the University of Wisconsin Law School (magna cum laude, Order of the Coif). She earned her Certified Property Casualty Underwriter designation in 2017. She is a recipient of the Property & Liability Resource Bureau's Outstanding Presentation Award (2022) and the Wisconsin Defense Counsel Publication Award (2019).

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INTERACTIVE TORTS UPDATE

AARON R. BERNDT
ALAN W. RAY
BORGELT, POWELL, PETERSON & FRAUEN, S.C.[1]

Wisconsin Court of Appeals – Published

Aker v. Good Sportsman Mktg., LLC
2026 WI App 3

(1) The Circuit Court erred in granting summary judgment as to the strict liability claim because a reasonable jury could conclude that misuse of the subject harness system was reasonably foreseeable.
(2) The Circuit Court erred in concluding that the plaintiff's contributory negligence exceeded that of the defendants because when evidence of the injured party's negligence was not "so clear" and of a quantum "so great" that the injured party's negligence was greater than the defendants as a matter of law.

Charles Aker was an active outdoorsman who had several hunting stands on his property. He always used a harness when hunting from a tree stand. At the time of his injury, he was using a harness system that he owned from the brand "Muddy Outdoors." That harness system contained, in relevant part, two components: a full body harness and a tree strap. The harness system is designed to prevent a user from falling to the ground even if they fall from the tree stand.

On the day of his injury, Aker was using the harness, climbed to a platform on a tree stand on his property and then buckled the tree strap around the tree and connected the tether on the harness to the tree strap. He used a carabiner to connect a loop at the end of the tether to a loop that he located on the tree strap. The loop on the tree strap was intended to function as a tab that can be pulled to release the buckle on the tree strap; it was not designed to be weightbearing. This loop was referred to as the "buckle release loop".

The instructions that were included in the package directed a user to connect the tether to the subject tree strap by threading the unbuckled tree strap through the loop on the tether and then buckling the tree strap around the tree. The subject harness system was not designed for use with a carabiner, and no carabiner was contained in the package.

Aker eventually fell asleep on the platform of his tree stand, the buckle release loop eventually broke under his weight, and he fell to the ground and sustained injuries.

Aker filed a lawsuit naming Good Sportsman Marketing, LLC, Dick's Sporting Goods, Inc. and Premier Outdoors Equipment, LLC as defendants. The complaint alleged that the defendants were liable for Aker's injuries based on their role in manufacturing, selling, or

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


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distributing the subject harness system. The complaint alleged two causes of action, strict products liability (specifically failure to warn) and negligence.

In his deposition, Aker admitted that he often used the subject harness with a tree strap made by a different manufacturer. That strap employed a Prusik knot, (a friction hitch that forms a loop and holds tightly when weighted), which was designed to be connected to the tether with a carabiner. He used the subject tree strap on the day of the incident because someone else was using the Prusik knot harness. Aker also testified that he had not read the instructions prior to use.

The Circuit Court granted the Defendants' motion for summary judgment as to both the negligence and strict liability claims. It stated that a warning would not have prevented the plaintiff's injury nor could the defendants foresee that a consumer would disregard the explicit instructions or use a component not supplied by the manufacturer. The Circuit Court also concluded that, as a matter of law, Aker's causal responsibility exceeded that which could be attributed to the Defendants. Finally, the Circuit Court determined that Aker's strict liability claim also failed based on the elements set forth in Wis. Stat. section 895.047(1). Specifically, the Circuit Court determined that by using a carabiner, Aker "substantially changed" the subject harness system from the condition in which it was sold, which represents a bar to liability under Wis. Stat. section 895.047(1)(d). Aker appealed.

The Court of Appeals explained that in Wisconsin, products liability claims can be based on any of three categories of defects: manufacturing defects, design defects, and defects based on a failure to adequately warn. A warning defect claim is based on the premise that, although the product was "designed and manufactured to be as safe as possible," the product contains a "hidden danger" of which the consumer should have been warned. The Court of Appeals further explained that regardless of whether the claim is based on strict liability or negligence, a warning defect claim turns in part on whether the product posed a risk of harm that was reasonably foreseeable. If a plaintiff "used the product in a manner other than its intended use" and is injured as a result of "that abnormal use," "liability should not follow unless the abnormal use was itself foreseeable." The Court of Appeals further explained that Wisconsin case law provides that sometimes certain misuses of a product are foreseeable such that a manufacturer must warn against them.

Aker argued, and the Court of Appeals agreed, that there was a genuine dispute of material fact. The Court of Appeals observed that at least two different harness systems exist on the market, ones which use a carabiner and ones which do not. Aker's expert witness opined that, based on the phenomenon of "negative transfer," it was foreseeable that some users would mistakenly conclude that they could use a carabiner to connect their tether with the buckle release loop on the subject harness system. The Defendants' expert witness disagreed. Based on these facts, the Court of Appeals concluded that a genuine dispute of fact existed regarding whether Aker's misuse of the subject harness system was reasonably foreseeable.

The Court of Appeals also concluded that it was not unforeseeable as a matter of law that users would forego reading the instructions accompanying the harness. The fact that the Defendants employed a human factors analyst to consider foreseeable misuses of the product during its design did not change the Court's analysis. The Court of Appeals also pointed out that

a lack of documented reports of misuse of the subject harness did not mean that no other users had made the same mistake as Aker.

The Court of Appeals also addressed whether Aker's affidavit constituted a "sham affidavit." A "sham affidavit" is an affidavit that a party submits in opposition to a motion for summary judgment, and that purports to create an issue of material fact by averring facts that "directly contradict" an affiant's prior deposition testimony with no reasonable explanation for the contradiction. The Court of Appeals disagreed with the Circuit Court's finding that the subject affidavit was a sham affidavit. In his affidavit, Aker averred that his prior harness system "used a carabiner," and that on the day of his injury, he thought that the subject harness system "worked the same" as the Muddy system that he previously owned. The Court of Appeals concluded that this statement was generally consistent with Aker's deposition testimony and certainly was not a direct contradiction. Any difference was attributable to Aker learning, through his deposition, that the subject harness system was different than the ones he had used in the past.

Additionally, the Court of Appeals concluded that whether Aker's contributory negligence exceeded the Defendants' presented a question for the jury. The Court of Appeals explained that only when evidence of the injured party's negligence is "so clear" and of a quantum "so great" that a court should determine that the injured party's negligence was greater than that of the defendants as a matter of law. Aker's actions were not so unreasonable or dangerous that his negligence exceeded that of the defendants as a matter of law because a jury could conclude that Aker was exercising reasonable care for his safety.

Because the Court of Appeals concluded that genuine issues of material fact precluded summary judgment, it reversed and remanded to the Circuit Court.

Wisconsin Court of Appeals – Unpublished

Becker v. Nova Cas. Co.

2025 WI App 23, 415 Wis. 2d 785, 19 N.W.3d 849

Unpublished per curiam opinion that cannot be cited except for certain limited purposes. Wis. Stat. § 809.23(3).

(1) The Circuit Court properly found the exculpatory release signed by Becker and Hintze was enforceable under Wisconsin law and barred their claims against Granite Peak for negligence related to the design, construction, and maintenance of the ski jump.

(2) The Circuit Court properly granted summary judgment on Becker and Hintze's claim that Granite Peak acted recklessly because the evidence was insufficient to create a genuine issue of material fact.

On January 4, 2016, Brett Becker and Zachary Hintze were seriously injured on a ski jump owned by Granite Peak. Both Becker and Hintze were nineteen years old at the time of the accident and were experienced skiers. Becker's injury happened first, after which the jump closed for a time, but then reopened. Hintze's accident happened at about 5:00 pm. After the second accident, the park shut down and redesigned the jump. The redesign involved doubling the length of the "deck", that is the beginning of the landing area, from fifteen feet to thirty feet.

On the day of their accidents, before entering the ski area, both men signed a document entitled "Granite Peak Lift Ticket Release of Liability & Parent Agreement 2015–2016" ("the Release"). Although both men had the choice to pay an additional fifteen dollars to avoid signing the release, neither exercised that option.

In January 2019, Becker and Hintze filed suit against Granite Peak. The complaint alleged common law negligence, negligent hiring, training, supervision and/or retention, and a violation of the Safe Place Statute, Wis. Stat. section 101.11.

Becker and Hintze filed a motion for declaratory judgment asking the Circuit Court to declare the release was unenforceable as against public policy. The Circuit Court denied the motion and concluded that the Release was enforceable under the two-step test set forth in *Roberts v. T.H.E. Insurance Co.*, 2016 WI 20, 367 Wis. 2d 386, 879 N.W.2d 492.

Granite Peak then moved for summary judgment based on the Release. In opposition, Becker and Hintze again argued the Release was unenforceable and argued that a jury could find that Granite Peak acted recklessly, and the motion should be denied because an exculpatory contract cannot release reckless or intentional acts. The Circuit Court granted Granite Peak's motion for summary judgment and entered an order dismissing all claims. Becker and Hintze appealed.

On appeal, the Court of Appeals explained the relevant test from *Roberts.* First, the court examines the facts and circumstances surrounding the release to determine if the release covers the activity at issue. If not, then the release should be unenforceable with respect to such activity. If the release covers the activity in question, the court proceeds to the second step of the analysis, whether the release is enforceable under public policy. "Public policy refers to the principle of law under which freedom of contract or private dealings is restricted by law for the good of the community."

Wisconsin law instructs courts to consider several principles relevant to determining whether a release is enforceable under public policy. The release "must clearly, unambiguously, and unmistakably inform the signer of what is being waived" and "must alert the signer to the nature and significance of what is being signed." *Yauger v. Skiing Enters., Inc*., 206 Wis. 2d 76, 84, 557 N.W.2d 60 (1996). Other factors which the Wisconsin Supreme Court has considered are whether the release "is overly broad and all-inclusive"; whether the release serves multiple functions; whether the release requires a separate signature for the exculpatory clause; and whether the signer had an "opportunity to bargain or negotiate in regard to the exculpatory language in question."

Becker and Hintze did not dispute that the Release covered the activity, namely skiing. Accordingly, the Court of Appeals turned to the question of whether the Release was enforceable under public policy.

The Court of Appeals concluded that the Release clearly and unambiguously informed the signer of what was being waived and alerted them to the significance of what was being signed. The Release informed the reader of the risks of skiing and explained how to reduce those risks. The Release stated, in bullet points that the signer released Granite Peak from liability for injury caused by "any negligent act or omission" of Granite Peak with respect to specific activities including the design, location, construction, inspection, and maintenance of jumps. The Court of Appeals also pointed out the capital letters and bold type indicating that the signer was aware they were waiving legal rights and the bold lettering immediately before the signature lines.

The Court of Appeals also noted that the Release served a single function. Further, Becker and Hintze had an opportunity to bargain or negotiate the exculpatory language in question because the Release itself informed the reader that they could purchase a lift ticket that would not require them to sign a Release.

Becker and Hintze argued that the Release was unenforceable for several reasons, most of which centered around the idea that the Release did not inform the skiers that Granite Peak's jumps are "especially dangerous." Becker and Hintze cited *Eder v. Lake Geneva Raceway, Inc.*, 187 Wis. 2d 596, 523 N.W.2d 429 (Ct. App. 1994), where a vehicle at a motorbike race left the racetrack and struck the plaintiffs. In *Eder,* the Court of Appeals concluded that the release was unenforceable because neither plaintiff had a meaningful opportunity to read the release before signing it and the plaintiffs' questions about the release were not answered. The *Eder* court also concluded that the plaintiffs could not have contemplated the risk of a motorbike leaving the track and injuring them and noted that the plaintiffs had never been to a racetrack before. The Court of

Appeals distinguished the case before it from *Eder* because there was no evidence that Becker and Hintze were not given the opportunity to read the Release. Furthermore, Becker and Hintze, both experienced skiers, knew the risks involved with skiing and the Release informed them of the same.

Becker and Hintze also challenged the Circuit Court's grant of summary judgment arguing there was a genuine issue of material fact as to whether Granite Park engaged in reckless conduct. An exculpatory contract may not release a party from tort liability for reckless conduct. Reckless conduct involves "a conscious disregard of an unreasonable and substantial risk of serious bodily harm to another." Becker and Hintze supported their recklessness argument with a "Summary of Prior Ski Patrol Reports at Granite Peak" which spanned from December 7, 2011 through April 9, 2016. The Plaintiffs also retained an expert who opined that the subject jump was originally negligently designed and was inherently dangerous and unsafe. The Circuit Court concluded that no reasonable jury could conclude that Granite Peak acted recklessly based upon this evidence.

The Court of Appeals agreed with the Circuit Court's analysis. The Court of Appeals noted that Becker and Hintze's expert did not consider which jump was involved in an incident on the ski patrol reports nor did he analyze the causes of any of the incidents. The Court of Appeals agreed with Granite Peak that the fact that a skier is injured on a jump does not prove anything about the design, construction, or maintenance of the jump or the cause of the accident. The Court of Appeals, therefore, agreed with the Circuit Court's conclusion that no reasonable jury could conclude that Granite Peak acted recklessly.

For these reasons, the Court of Appeals affirmed the Circuit Court's grant of summary judgment dismissing all of Becker and Hintze's claims.

Jagdfeld v. Jagdfeld
2025 WI App 78

Unpublished per curiam opinion that cannot be cited except for certain limited purposes. Wis. Stat. § 809.23(3).

(1) The Circuit Court properly granted summary judgment because the defendant was immune from liability under Wis. Stat. section 895.481(2).
(2) The exception to immunity did not apply because the defendant had no obligation to engage in a "present-day" inquiry as to the plaintiff's equine abilities.

On June 23, 2019, Brittany and some friends visited the home of her former sister-in-law, Lynn.[2] Brittany considered herself an experienced horse rider and had ridden and owned horses since childhood. She had also competed at approximately twenty horse shows in her teenage years and had worked at a horse camp. Lynn was well aware of Brittany's abilities and experience with horses. Lynn offered to let Brittany ride her horse and Brittany accepted. As Brittany was mounting the horse, the horse was spooked and Brittany was tossed off. Brittany fell and fractured her right leg.

Brittany sued Lynn for negligence. Brittany alleged that Lynn had acted negligently by failing to properly saddle the horse, failing to have a bridle in the horse's mouth, and failing to maintain control of the horse. Lynn moved for summary judgment, arguing that she was immune under Wis. Stat. section 895.481(2), the "equine immunity" statute because Brittany was injured while engaged in an equine activity. The Circuit Court granted Lynn's motion after concluding that the statutory immunity covered Brittany's accident and that no exception within the statute applied to Brittany's claim. Brittany appealed.

Wis. Stat. section 895.481(2) provides that a person "is immune from civil liability for acts or omissions related to his or her participation in equine activities if a person participating in the equine activity is injured or killed as the result of an inherent risk of equine activities." Wis. Stat. § 895.481 (2).

Rather than arguing against immunity, Brittany argued that an exception listed in subsection (3) of the equine immunity statute applied, specifically, 895.481(3)(b). 895.481(3)(b). That subsection withdraws immunity if the person seeking it "[p]rovides an equine to a person and fails to make a reasonable effort to determine the ability of the person to engage safely in an equine activity or to safely manage the particular equine provided based on the person's representations of his or her ability." Brittany unsuccessfully argued that this subsection required a "present-day" inquiry as to the person's abilities. The Court of Appeals concluded that no present-day conversation or inquiry was required under the plain language of the statute. The Court of Appeals affirmed the Circuit Court's grant of summary judgment because no reasonable juror could

[2] Like the Court of Appeals, we refer to the parties by their first names because they share a last name.

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conclude that Lynn "fail[ed] to make a reasonable effort to determine" Brittany's ability to ride Lynn's horse or to safely manage the horse by relying on her pre-existing knowledge of Brittany as an experienced and capable rider.

Polfuss v. Wis. Mut. Ins. Co.,

No. 2025AP1186, 2026 LX 12340 (Ct. App. Jan. 8, 2026)

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

(1) The public policy factors do not per se preclude liability when a dog is kept unrestrained inside its owner's house and the dog bites someone who enters the owner's house without the owner's knowledge or consent.

(2) The Circuit Court erred in granting Buschke's motion for summary judgment because a genuine dispute of material fact existed as to whether Buschke acknowledged Polfuss in some way before he entered the mudroom.

Jeffrey Polfuss and Cassee Buschke had been neighbors for a number of years. Buschke's children and Polfuss' grandchildren often played together at Buschke's and Polfuss' houses. When Polfuss' grandchildren visited Buschke's house, Polfuss often picked them up. When he did so, he would go through the door at the back of Buschke's house, which opens into a mudroom. A person outside that door, "the mudroom door", could see into the mudroom through an adjacent door also at the back of the house that opened into the kitchen.

Buschke owned a dog, which had injured Polfuss in 2022. Even though Polfuss was "leery" of the dog, he continued to allow his grandchildren to play at Buschke's house.

In April 2023, Buschke's children and Polfuss's grandchildren were playing together at Buschke's house. Polfuss went to Buschke's house, approached the mudroom door and saw at least one of his granddaughters through the door.

The parties disputed what happened next. Polfuss testified that Buschke acknowledged him in some way, but Buschke testified that she did not. It was undisputed that Polfuss did not knock when he reached the mudroom door, but instead opened the door saying, "Where's the dog?". Almost immediately, the dog charged Polfuss and bit his arm, resulting in a wound that required thirty stitches.

Polfuss filed a lawsuit against Buschke and her home insurer, alleging strict liability under Wis. Stat. section 174.02(1), the dog bite statute. Buschke eventually moved for summary judgment, arguing she was not liable for Polfuss' injury as a matter of public policy pursuant to *Fandrey v. Am. Family Mut. Ins. Co.*, 2004 WI 62, 272 Wis. 2d 46, 680 N.W.2d 345. Buschke argued that *Fandrey* stood for the proposition that judicial public policy factors preclude liability when a dog is kept unrestrained inside its owner's home and the dog bites someone who enters the owner's house without the owner's knowledge or consent. Polfuss opposed the motion, arguing, in relevant part, that *Fandrey* was distinguishable because Polfuss' entry was a reasonable act consistent with the parties' neighborly relationship. Polfuss also argued that public policy factors should only preclude liability if the circumstances are "so extreme that it would shock the conscience of society to impose liability."

The Circuit Court granted Buschke's motion for summary judgment, analogizing the present circumstances to those in *Fandrey*. The Circuit Court also concluded that it would shock

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the conscience to impose liability in these circumstances because dog owners would be required to lock up their pets at all times. Polfuss appealed.

The Court of Appeals explained that section 174.02(1) provides that, subject to the statute addressing contributory negligence, “the owner of a dog is liable for” either the full amount or double the full amount of “damages caused by the dog injuring or causing injury to a person ....” Wis. Stat. § 174.01(1)(a) and (b). The dog bite statute imposes strict liability on a dog owner for injuries caused by the dog such that a plaintiff need prove only causation and damages. However, a plaintiff’s contributory negligence may reduce the amount owed or bar liability.

The Court of Appeals explained that a court may conclude that public policy factors preclude liability. This public policy analysis involves consideration of whether:

> [1] the injury is too remote from the negligence or [2] too “wholly out of proportion to the culpability of the negligent tort-feasor,” or [3] in retrospect it appears too highly extraordinary that the negligence should have brought about the harm, or [4] because allowance of recovery would place too unreasonable a burden upon [a class of tortfeasors], or [5] be too likely to open the way to fraudulent claims, or [6] would “enter a field that has no sensible or just stopping point.”

Pawlowski v. Am. Family Mut. Ins. Co., 2009 WI 105, 322 Wis. 2d 21, ¶ 59, 777 N.W.2d 67.

The Court of Appeals analyzed *Fandrey* and, ultimately, distinguished it from the present case. In *Fandrey*, the dog owners were not home when one of their friends entered the home with a young child to drop off a plate of cookies. Although the front door was unlocked, it was undisputed that the dog owners were not expecting visitors and had not given their friend permission to enter the home. When they were in the home, the child was bitten by the dog. The *Fandrey* court concluded that liability was precluded as a matter of public policy because, in relevant part, allowing recovery would be too out of proportion to the dog owners’ liability because the only thing they did wrong was leaving the door unlocked.

The Court of Appeals disagreed with Buschke’s argument that *Fandrey* set forth an ironclad rule that the public policy factors preclude liability any time an injured party enters a dog owner’s home without the owner’s knowledge or consent. The Court of Appeals distinguished *Fandrey* because the *Fandrey* court considered factors other than the dog owner’s lack of knowledge or consent, including that the owners did all they reasonably could have been expected to do to control the dog, emphasizing the only other thing they could have done to control the dog would have been to keep the dog restrained by a kennel, muzzle or lock and key.

Even assuming, without deciding that Buschke’s reading of *Fandrey* was correct, the Court of Appeals held that summary judgment was inappropriate because genuine issues of disputed fact existed. Specifically, there was a question of fact as to whether Buschke acknowledged Polfuss and knew he was at the door before he came into the house. In the light most favorable to Polfuss, the fact that it was common for Polfuss to come over unannounced to check in on or pick up the children precluded summary judgment.

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Finally, the Court of Appeals concluded that, as a matter of law, this was not an “extreme” case that would warrant application of the public policy factors to bar liability.

For these reasons, the Court of Appeals reversed the grant of summary judgment.


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A Lawyer's Bayesian Analysis of AI Litigation & Law
Defending the Algorithm™ — Practical & Responsible AI for the Civil Defense Practice

Christopher M. Jacobs | Houston Harbaugh, P.C. | Pittsburgh, PA |

Wisconsin Defense Counsel, Inc. | August 14, 2026

Roadmap: Two hours, four parts — from theory to daily practice.

I. **The Bayesian Lawyer** *Trial lawyers already think in probabilities, which makes them natural, disciplined users of AI.*

A. AI is a probability engine. Large language models predict the most probable next word from learned patterns — conditional probability at scale, not a database lookup or human reasoning. Lawyers do the same: weighing evidence, updating odds, forecasting a verdict.

B. The lawyer's mental model. Prior (starting read) → Evidence (each new fact) → Posterior (updated read), which becomes the next prior. If you already reason this way, you can supervise a machine that does too.

C. Core AI vocabulary.

1. Large Language Model
2. Prompt
3. Token
4. Hallucination
5. RAG (retrieval-augmented generation)
6. Black Box

D. What AI is / is not.

1. It is: a first-draft engine, pattern-finder, brainstorming partner, and judgment multiplier.

2. It is not: a lawyer, a verified fact database, a source of truth, or confidential on public platforms.

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E. The rising probability of AI litigation. Each new ruling pushes the "posterior" higher — illustrated across Bartz, Reddit, OpenEvidence, Lokken, and Nippon.

II. **The Litigation Landscape** *In eighteen months, AI went from novelty to named defendant.*

A. *Bartz v. Anthropic* — the fair-use line. Training can be transformative, but building a library from pirated books created massive exposure. Provenance of training data is now a legal question. ($1.5B settlement.)

B. New theories, new exposure.

1. Contract — *Reddit v. Anthropic*
2. CFAA — *Ryanair v. Booking.com*
3. Trade secret — *OpenEvidence v. Pathway*

C. *Nippon Life v. OpenAI* — the adversary. A chatbot-drafted campaign of 60+ filings; novel theories of tortious interference, abuse of process, and unlicensed practice of law; products-liability framing. Seeks $10M punitive damages plus defense costs and an injunction. Included a hallucinated citation (Carr v. Gateway) to a case that does not exist.

D. *Lokken v. UnitedHealth* — the black box. Algorithmic claim denials; discovery now reaches training data, model weights, architecture, reward signals, and vendor design. The explainability trap: proving reasonableness when even builders can't fully explain the model.

E. The insurer's dilemma — regulation. The NAIC Model Bulletin and Pennsylvania's Notice 2024-04 require a documented AI Systems (AIS) program: written governance, bias testing, record-keeping, and vendor accountability.

F. Compound risk: P(Bad Faith | AI). New AI-specific theories stack on traditional unfair-practices theories, raising both the odds and the stakes.

III. **Privilege & Responsible Use** *The attorney-client privilege is a circle of trust — does inviting a machine inside break it?*

A. A tale of two courts. United States v. Heppner (no protection) vs. Warner v. Gilbarco (protected). The lawyer — not the tool — creates the work product; direction and confidentiality decide the outcome.

B. The three tiers of AI privacy.

1. Tier 1: public, open-loop tools (public knowledge only)
2. Tier 2: enterprise, closed-loop tools (most day-to-day work)
3. Tier 3: dedicated/on-prem deployments (crown-jewel matters)

C. The Golden Rule — guard the circle. Never input privileged or confidential detail into a public, open-loop platform. Ring-fence data, anonymize before asking, and train the whole firm.

D. Trust, but verify. AI drafts → attorney checks every citation → second lawyer confirms. Verify against Westlaw or Lexis and human judgment, every time.

E. Sanctions watch — hallucinations. The familiar pattern of confident, well-formatted citations to cases that don't exist. The fix is not avoiding AI — it's verification.

IV. Practical Adoption *Strategy becomes advantage only when it becomes routine.*

A. The AI daily routine. Start with the prompt, build reusable knowledge, mirror your voice, and verify before use.

B. An integrated tech stack. Legal research AI (Westlaw Advantage, Lexis+ AI), document review (Relativity), general AI assistants (Claude, Gemini), and practice infrastructure — tools that actually talk to each other.

C. High-ROI use cases. Litigation analytics, transcript synthesis, and practice development.

D. Garbage in, garbage out. Sequence: Data → Infrastructure → Training → AI that works. Organization must precede deployment.

E. Two ways to use the same tool. The AI-enhanced lawyer (verifies, holds conclusions provisionally, extends reach) vs. the AI-deluded amateur (accepts output as fact, files hallucinated citations, ends up sanctioned).

F. Your firm AI policy. Scope and permitted tools, confidentiality and privilege, verification standards, and training and enforcement.

G. Client expectations in the AI era. Clients expect efficiency, fluency, governance, and the conversation — build AI symmetry between lawyer and client.

H. AI and billing. Disclose the use, reconcile with client policies, and price the value. Transparency deepens the relationship.

V. Closing Themes

A. The modern polymath. You won't lose your job to AI, but to someone who understands and uses it.

B. Two lawyers, same case. Identical experience, reputation, and rate — the AI-fluent lawyer is faster, broader, and more responsive.

C. Kasparov's Law. A weak human + machine + a better process beats a strong human + machine + an inferior process. Process wins.

D. The ethical bright lines. Model Rule 1.1 (competence now includes technology) and Model Rule 1.6 (confidentiality governs every prompt).

E. Key takeaways. Treat AI as a probability engine; the lawyer bears the risk; never feed confidential detail to public tools; verify every citation; organize data before deploying; adopt an enforceable policy; build client symmetry; become the disciplined polymath.

VI. Questions & Discussion

Outline:

1. Facilitating judge's understanding of the civil process and technical knowledge.
    a. Educating on process without overstating or placating
    b. Educating on technical knowledge without overwhelming or getting lost in the details
2. Describing the effective mindset for mediation and how to utilize the mediation mindset in the courtroom.
    a. The elements of a mediation mindset
    b. How to apply the mediation mindset to the courtroom
3. Effectively communicating with judges.

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Influencing the Courtroom

Legislative Lobbying in the Legal Profession Panel

I. Speaker Bios

Rebecca Hogan has been developing and advancing policies and related political strategies for Wisconsin lawmakers, administrators and businesses for over 20 years. She joined Hamilton Consulting in 2013, where she advocates for clients in policy areas such as health care, general business climate, employment law, and government reform.

Before joining Hamilton, Rebecca served as the Director of Health and Human Resources Policy at Wisconsin Manufacturers and Commerce (WMC), the state's largest trade association representing business. While at WMC, Rebecca lobbied the legislature on health care policy and human resources issues such as unemployment insurance, worker's compensation, education and the Family Medical Leave Act.

Rebecca spent eight years in the Wisconsin State Senate working in a variety of positions for a number of senators. In her various roles as a Chief of Staff, Senate Education Committee Clerk and Legislative Director, she was responsible for preparing analysis and policy recommendations for committee fiscal deliberations, media relations and guidance to constituents.

In addition to her legislative experience, Rebecca was the Deputy Director for the Committee to Elect a Republican Senate where she conducted all administrative, financial management and fundraising activities. Rebecca also was a Regional Coordinator for former Governor Thompson's campaign committee.

Rounding out her background, Rebecca served in Governor Thompson's administration as a research and policy advisor at the Wisconsin Department of Financial Institutions. In this position she drafted bill summaries on legislation that impacted the agency, conducted research projects and wrote informational papers on the financial industry.

Rebecca holds a Bachelor of Arts in Political Science and International Relations from University of Wisconsin-Madison. She has received appointments from the Secretary of the Department of Workforce Development to the Wisconsin Apprenticeship

Advisory Council and from Gov. Scott McCallum as the liaison to the United States Mint for the Wisconsin Commemorative Quarter Project.

Rebecca also currently serves on the Board of Visitors for UW-Madison's Department of Political Science.

Ariella Schreiber is the Vice President of Claims and General Counsel at Rural Mutual Insurance Company. She therefore spends a lot of time spending money and herding cats. In her spare time, she fosters cats. Her life is mostly cats.

Danny Mullin is an equity shareholder and a member of the Crivello Nichols & Hall, S.C.'s Board of Directors. Danny represents public and private manufacturers of products on a national basis in both commercial and product liability litigation and regulatory compliance. In addition, Danny represents construction companies and contractors in liability litigation. In this capacity, he defends wrongful death, catastrophic injury, and significant property damage cases, whether arising from fires and explosions, roll-overs, drownings, construction-site injuries, or construction defect cases.

He is licensed in Wisconsin, Illinois, and Minnesota and admitted to practice before the United Stated District Courts for the Eastern and Western Districts of Wisconsin, the Eastern and Western District Bankruptcy Courts in Wisconsin, and the Seventh Circuit Court of Appeals. He is also admitted to the Trial Bar for the Federal District Court for the Northern District of Illinois.

Caleb R. Gerbitz is an appellate and litigation attorney at Meissner Tierney Fisher & Nichols S.C. Caleb serves as the Wisconsin State Chair of the American Bar Association's Council of Appellate Lawyers, co-chairs the Milwaukee Bar Association's Civil Litigation Section, and is a board member of the Wisconsin Defense Counsel. Caleb graduated *summa cum laude* from Mitchell Hamline School of Law, after which he clerked for Justice Brian Hagedorn of the Wisconsin Supreme Court. In addition to his legal practice, Caleb authors a Substack column, *Appellate Approach*, which features regular updates on Wisconsin's appellate courts.


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II. WDC and the Legislative Process

A. Value of WDC's Legislative Affairs Committee (Caleb Gerbitz — >5 minutes)

- Caleb to highlight the existence of WDC's Legislative Affairs Committee and discuss the value WDC's partnership with Hamilton Consulting provides to WDC members.

- Caleb to note that WDC is endeavoring to increase member engagement in the Legislative Affairs Committee. WDC's objective is to empower members of the defense bar to have their voices heard in Madison, particularly on matters that affect their day-to-day practice.

B. The Lobbyist's Role (Rebecca Hogan — 10 minutes)

- Question for Rebecca: As a mechanical matter, we all know how a bill becomes a law. What many of us do not know is how we as defense attorneys—and you as WDC's lobbyist—can have our voices heard in that process. In broad strokes, can you describe the partnership you have with WDC and what you do in Madison on WDC's behalf?

- Question for Rebecca: Can you describe some of the initiatives you and your colleagues at Hamilton have spearheaded on behalf of WDC in recent years?

C. Legislative Updates (Rebecca Hogan — 10 minutes)

- Question for Rebecca: Those of us who join the Legislative Affairs Committee meetings every other Monday have the benefit of hearing you provide insight on what's happening behind the scenes in Madison. For the benefit of all the members here today, could you give us a rundown of the current state of play in Madison?

- Question for Rebecca: Depending on the electoral results this fall, and what are the likely implications for WDC's legislative priorities?


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III. A Case Study in Venue: From the Courthouse to the Statehouse and Back Again

A. The Venue Bill's Path from Inception to Legislation (Daniel Mullin — 10 minutes)

- Question for Danny: One of WDC's top legislative priorities during the past session was an amendment to state law governing venue of civil actions. Could you tell us how this project came to be, what the bill would have done, and what happened during the session?
- **Slides: Venue Shopping [See slides attached to materials.]**
- Open discussion regarding the venue bill, its rationale, and potential next steps. All panelists encourage to contribute to discussion.

B. Venue Strategies Under Current Law (Ariella Schreiber — 10 minutes)

- Question for Ariella: With current law being what it is on venue, what should defense counsel do when faced with a poorly venued action? What arguments can an attorney advance in a motion to change venue?
- Open discussion with the panelists and attendees regarding strategies for changing venue.

IV. Looking Ahead

A. WDC's Legislative Affairs Committee

- Encourage those interested in participating in WDC's legislative efforts to contact a member of the Executive or Legislative Affairs Committees.
- Open discussion to panelists and attendees to discuss any other legislative priorities for defense attorneys.

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B. WDC Legislative Agenda 2026-27

Improve accuracy and function of courts and civil proceedings

- Prevent efforts by the plaintiff's bar to unfairly bias juries towards unreasonable damage awards whether through legislation, Supreme Court rule, or curative instruction

- Ensure courts use high standards for evidence and expert testimony

- Protect and enforce Wisconsin's current transparency requirements when lawsuits are underwritten by third-party financiers.

Ensure civil court proceedings are resolved in a timely, equitable manner

- Advise against the creation of new civil causes/private rights of action, especially as a policy tool. Some bills use lawsuits or the threat of lawsuits to achieve policy goals, rather than using regulations or spending programs. Among other things, this would cause a proliferation of claims

- Support reasonable limits on liability for individuals and businesses that act responsibly. Examples would be basic COVID liability protection for employers, property owners; deicer liability protection from standard slip-and-fall claims.

- Support caps on unfair, unreasonable noneconomic damage awards, which have lead to skyrocketing insurance costs and threaten vital industries like healthcare and logistics, while still allowing plaintiffs to recoup what they are fairly owed

Control litigation costs and protect consumers from unreasonable fees and surcharges

- Enact reasonable limits on fees for obtaining copies of medical records to ensure consumers, insurers, and attorneys can easily obtain electronic copies

- Place reasonable limits on vehicle towing and storage fees charged to consumers and insurers

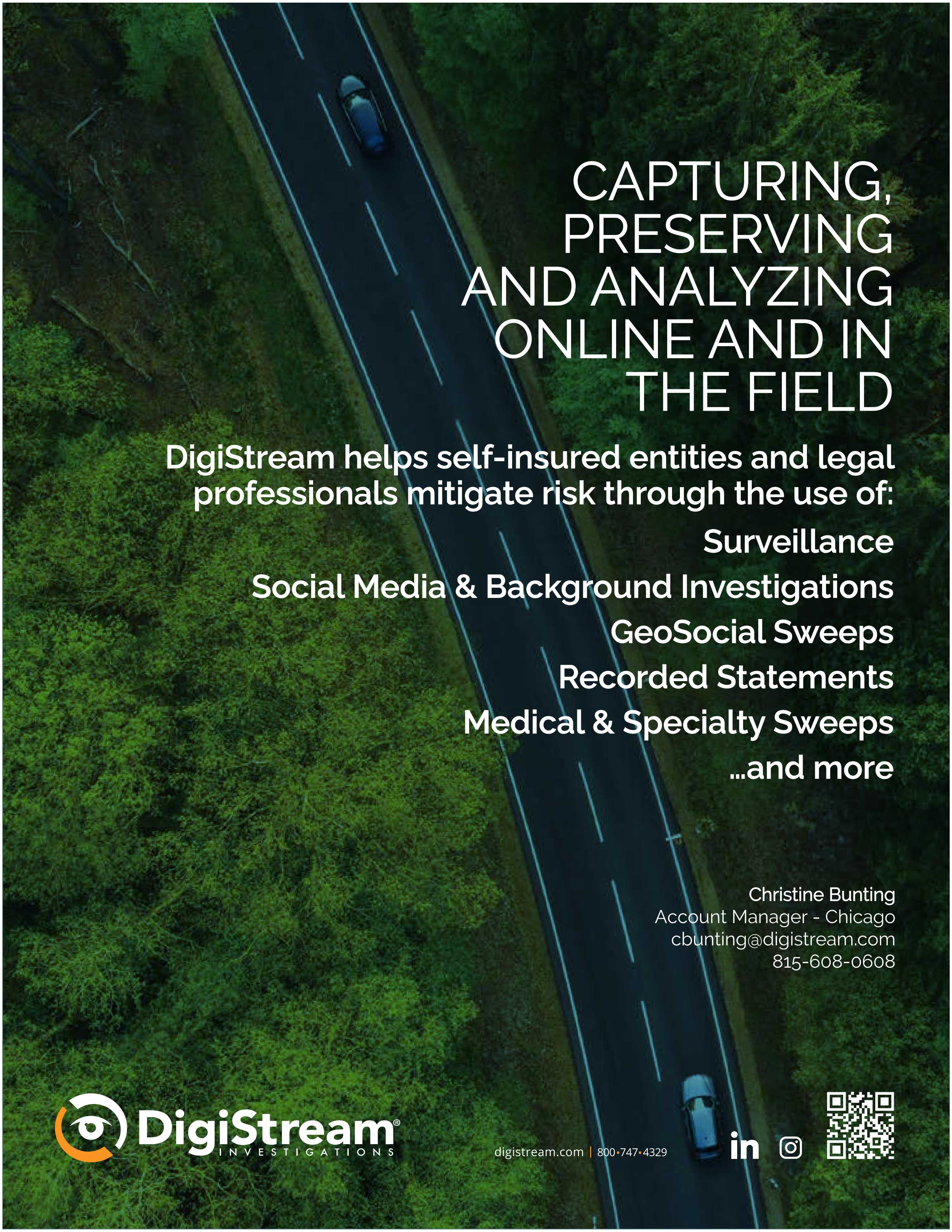
- Protect consumers from predatory litigation advance firms by requiring reasonable limits on fees and standard contract provisions (regulate "lawsuit lending")

- Ensure fairness through reasonable limits on the costs of interviewing expert witnesses

Promote fair regulation of insurance policies

- Urge policymakers to consider the effects - like the cost to consumers - of increasing auto insurance policy coverage minimums and adding other requirements like disclosure of coverage amounts.

- Oppose attempts to modify insurance contracts after the fact. An example of this would be attempts to redefine the terms of business interruption insurance policies with respect to COVID-related business closures.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Purpose of the Venue Statute

- The purpose of venue statutes is to set a fair and convenient location for trial. *Voit v. Madison Newspapers, Inc.*, 116 Wis. 2d 217, 224, 341 N.W.2d 693, 698 (1984).
- Wisconsin courts have acknowledged that the county where the underlying conduct occurred is likely the most convenient forum. *See State ex re. West v. Bartow*, 2002 WI App 42, ¶9, 250 Wis. 2d 740, 642 N.W.2d 233.

Proper Venue – Wis. Stat. § 801.50

(2) Except as otherwise provided by statute, venue in civil actions or special proceedings shall be as follows:

(a) In the county where the claim arose;

(b) In the county where the real or tangible personal property, or some part thereof, which is the subject of the claim, is situated;

(c) In the county where a defendant resides or does substantial business; or

(d) If the provisions under par. (a) to (c) do not apply, then venue shall be in any county designated by the plaintiff.

Proper Venue – Wis. Stat. § 801.50

(2) Except as otherwise provided by statute, venue in civil actions or special proceedings shall be as follows:

(a) In **<u>the</u>** county where the claim arose;

(b) In **<u>the</u>** county where the real or tangible personal property, or some part thereof, which is the subject of the claim, is situated;

(c) In **<u>the</u>** county where a defendant resides or does substantial business; or

(d) If the provisions under par. **<u>(a) to (c) do not apply</u>**, then venue shall be in **<u>any</u>** county designated by the plaintiff.

Wis. Stat. §801.52 Discretionary Change of Venue

- "The court may at any time, upon its own motion, the motion of a party or the stipulation of the parties, change the venue to any county in the interest of justice or for the convenience of the parties or witnesses…" Wis. Stat. § 801.52.

Stelling v. Mt. Morris Mut. Ins. Co., 2023 WI App 10, 406 Wis. 2d 197, 986 N.W.2d 354

- Sauk County motor vehicle accident
- Plaintiffs were Sauk County residents
- Both drivers were Sauk County residents
- Mt. Morris' principal office is in Waushara County
- Middlesex's principal office is in Portage County


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Proper Venue – Wis. Stat. § 801.50

(2) Except as otherwise provided by statute, venue in civil actions or special proceedings **shall** be as follows:

(a) In **the** county where the claim arose;

(b) In **the** county where the real or tangible personal property, or some part thereof, which is the subject of the claim, is situated;

(c) In **the** county where a defendant resides or does substantial business; or

(d) If the provisions under par. **(a) to (c) do not apply**, then venue shall be in **any** county designated by the plaintiff.

Proper Venue – Wis. Stat. § 801.50

(a) In the county where the claim arose: **SAUK COUNTY**

~~**(b)** In the county where the real or tangible personal property, or some part thereof, which is the subject of the claim, is situated;~~

(c) In the county where a defendant resides or does substantial business; or

~~**(d)** If the provisions under par. (a) to (c) do not apply, then venue shall be in any county designated by the plaintiff.~~

Wisconsin's Direct Action Statute

- "Wisconsin permits a direct action regardless of whether the insured is a party, but only if the insurance policy was issued or delivered in Wisconsin." *Wild v. Subscription Plus, Inc.*, 292 F.3d 526, 532 (7th Cir. 2002).
- "Direct action can be maintained only if and so long as the insureds remain parties." *Id.*

Stelling v. Mt. Morris Mut. Ins. Co., 2023 WI App 10, 406 Wis. 2d 197, 986 N.W.2d 354

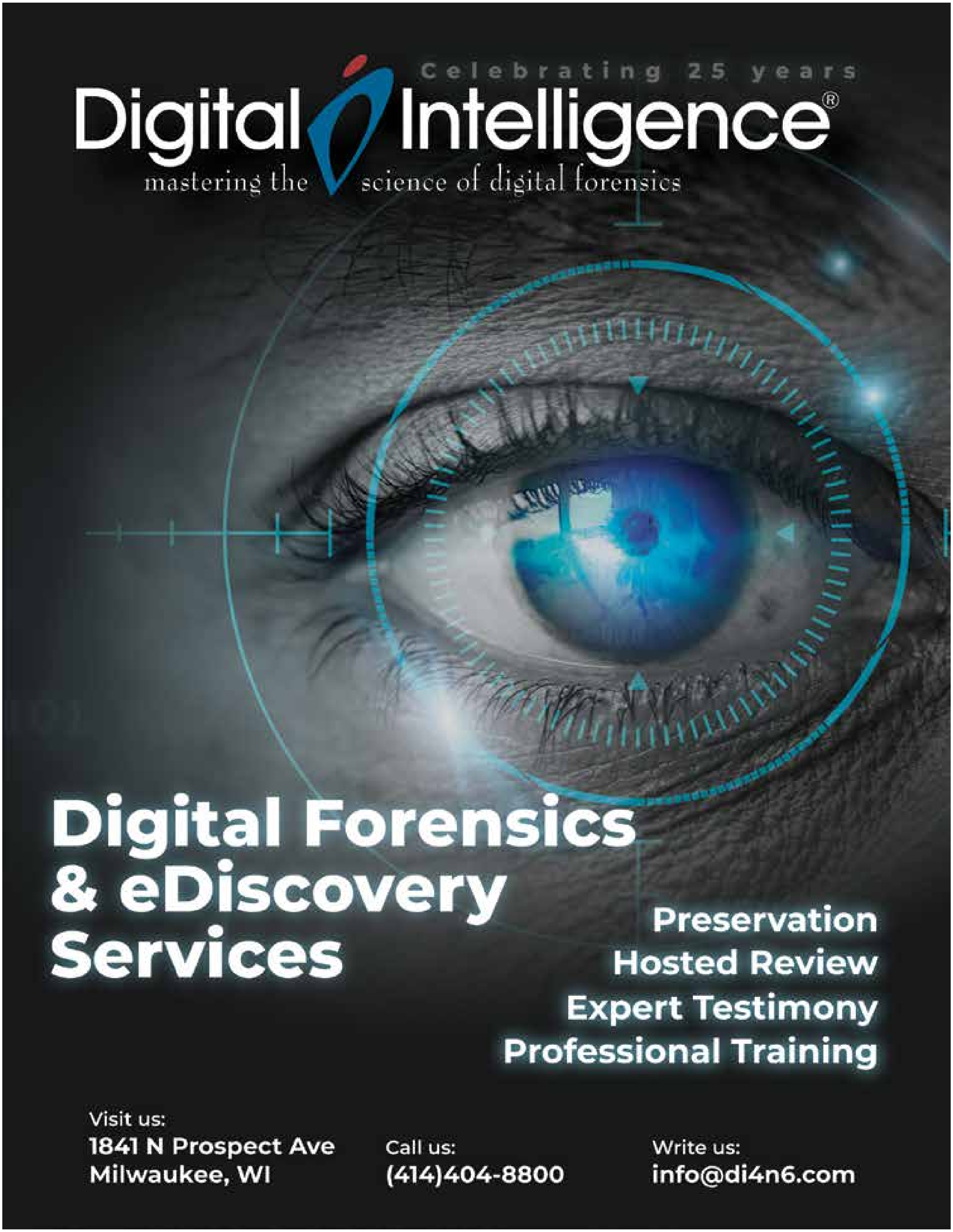
- 24,431 policies issued in Wisconsin
- Three counties where it issued more than 1,000 policies and Dane County was not one of them
- 2.23 percent of the policies it issues in Wisconsin are issued in Dane County (559)
- $859,145 in annual premiums come from Dane County, which is only 2.6 percent of its annual revenue

Stelling v. Mt. Morris Mut. Ins. Co., 2023 WI App 10, 406 Wis. 2d 197, 986 N.W.2d 354

- "Had the legislature intended to limit such a designation to only one county, it would have necessarily used such limiting phrases as 'does the most business' or 'does a majority of its statewide business.'"
- "We acknowledge that 'the' is a definite article that is generally 'used as a function word to indicate that a following noun or noun equivalent refers to someone or something that is unique.'"
- "A defendant can do substantial business in only one county, would require adding words to the statute to clarify that 'substantial' means 'the most substantial,' which we cannot do."

Stelling v. Mt. Morris Mut. Ins. Co., 2023 WI App 10, 406 Wis. 2d 197, 986 N.W.2d 354

- "¶35 With all of that as background, we determine the meaning of "does substantial business" in WIS. STAT. § 801.50(2)(c) by: (1) applying Enpro's focus on the extent of business done by the defendant in the county designated as the lawsuit venue by the plaintiff; and (2) using the dictionary definition of "business" noted in Enpro, 171 Wis. 2d at 546, along with the dictionary definition of "substantial" just quoted. Doing so, we interpret the phrase "does substantial business" in § 801.50(2)(c) to mean that the extent of the defendant's various commercial activities and business relationships, of any type, conducted or occurring at least in part in the county at issue, considered in isolation or relative to the defendant's total commercial activity and business relationships, is considerable."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Wis. Stat. §801.52 Discretionary Change of Venue

- "The court may at any time, upon its own motion, the motion of a party or the stipulation of the parties, change the venue to any county in the interest of justice or for the convenience of the parties or witnesses…" Wis. Stat. § 801.52.
- In *Stelling*, Mt. Morris asked the circuit court to separately consider transferring the venue from Dane County to Sauk County based on Wis. Stat. §801.52. Wis. Stat. §801.52 is a discretionary decision for the judge. The circuit court judge in *Stelling* denied the request to transfer the case to Sauk County even though the lawsuit arose from a motor vehicle accident that occurred in Sauk County between individuals all of whom reside in Sauk County.

Stelling appeals court treatment of discretionary change of venue

- "We pause to address Mt. Morris's apparent argument in its briefing that, in exercising its discretion under WIS. STAT. § 801.52, a circuit court "must" consider the following factors pursuant to *Littmann v. Littmann*, 57 Wis. 2d 238, 245-46, 203 N.W.2d 901 (1973) (quoting Ehrenzweig and Louisell, Jurisdiction in a Nutshell (2d ed. 1968)):
  - the ease of access of proof, the availability and cost of obtaining witnesses, the possibility of harassment of the defendant in litigating in an inconvenient forum, the enforceability of the judgment, the burden on the community in litigating matters not of local concern, and the desirability of litigating local matters in local courts.
- However, as we now explain, Mt. Morris points to nothing in *Littmann* that either imposes such a requirement generally or applies specifically to a discretionary change of venue decision under § 801.52." Id. at 76.

Stelling appeals court treatment of discretionary change of venue

- ¶81 Mt. Morris argues that it would be "easiest and least expensive" for all parties if the lawsuit were moved to Sauk County because the persons involved in the accident and witnesses to the accident reside in Sauk County and the employer of one of the drivers is located in Sauk County. Mt. Morris also argues that the interest of justice would be better served by having a Sauk County jury "evaluat[e] and reach[] a judgment upon an incident which occurred within its own county." These assertions focus on the evidence most favorable to Mt. Morris and essentially posit that the circuit court should have balanced the facts and the parties' interests differently. However, it is not the role of an appellate court to exercise the circuit court's discretion.

Proposed Revisions to Wis. Stat. §801.50

Proposed Revisions to Wis. Stat. §801.50

- Wis. Stat. §801.50(2)(c) "substantial business" is amended
  - Court cannot consider insurers joined under the Direct Action Statute
  - Court cannot consider insurers with subrogation interests
  - Clearly define what it means for non-insurer corporations and business associations to do "substantial business", based on how federal law determines where a business does business for diversity jurisdiction

Proposed Revisions to Wis. Stat. §801.50

Why don't we just define "substantial business" with respect to a quantity of business or business volume?

- The court in *Stelling v. Middlesex Insurance Company* indicated that a quantitative threshold for determining "substantial business" places "an unreasonable burden on plaintiffs and generating uncertainty for all parties, because a plaintiff would be required to determine before filing suit: all of the counties in which a defendant does business; in which of those counties the business is substantial; and, of those counties, the county in which the defendant does the most substantial business." Id. at ¶ 41. The facts and data Mt. Morris provided in *Stelling* relating to its business in Dane County is as follows: 559 policies in force in Dane County constitutes 2.28% of the total of 24,431 policies that Mt. Morris had in force in the 72 counties in Wisconsin. In terms of number of policies, Dane County ranks 14th highest out of the 72 counties where Mt. Morris Mutual issues policies in Wisconsin. The annual revenue from the Dane County policies [$859,145] constitutes 2.6% of Mt. Morris's total annual revenue in Wisconsin. See id. at ¶ 10 and 63.
- The proposed bill needs to be easy to apply and understand to avoid creating an unreasonable burden on plaintiffs and uncertainty for all parties.

Consequences of taking no action

- The “substantial business” criteria announced in *Stelling* erodes existing statutory law about venue being proper on the defendant’s “home turf”
- Policyholders (and their insurers) face the prospect of litigating cases in counties that have virtually no connection to the true parties in interest or the underlying incident
- Claimants and their lawyers can leverage the *Stelling* decision to sue businesses who conduct even modest business throughout the state in any county where they conduct business
- There is no distinction between the mandatory nature of Wis. Stat. §801.50 (i.e., the venue “shall be”) and the discretionary nature of Wis. Stat. §801.52.

Humanizing the Defense: Practical Jury Connection Strategies

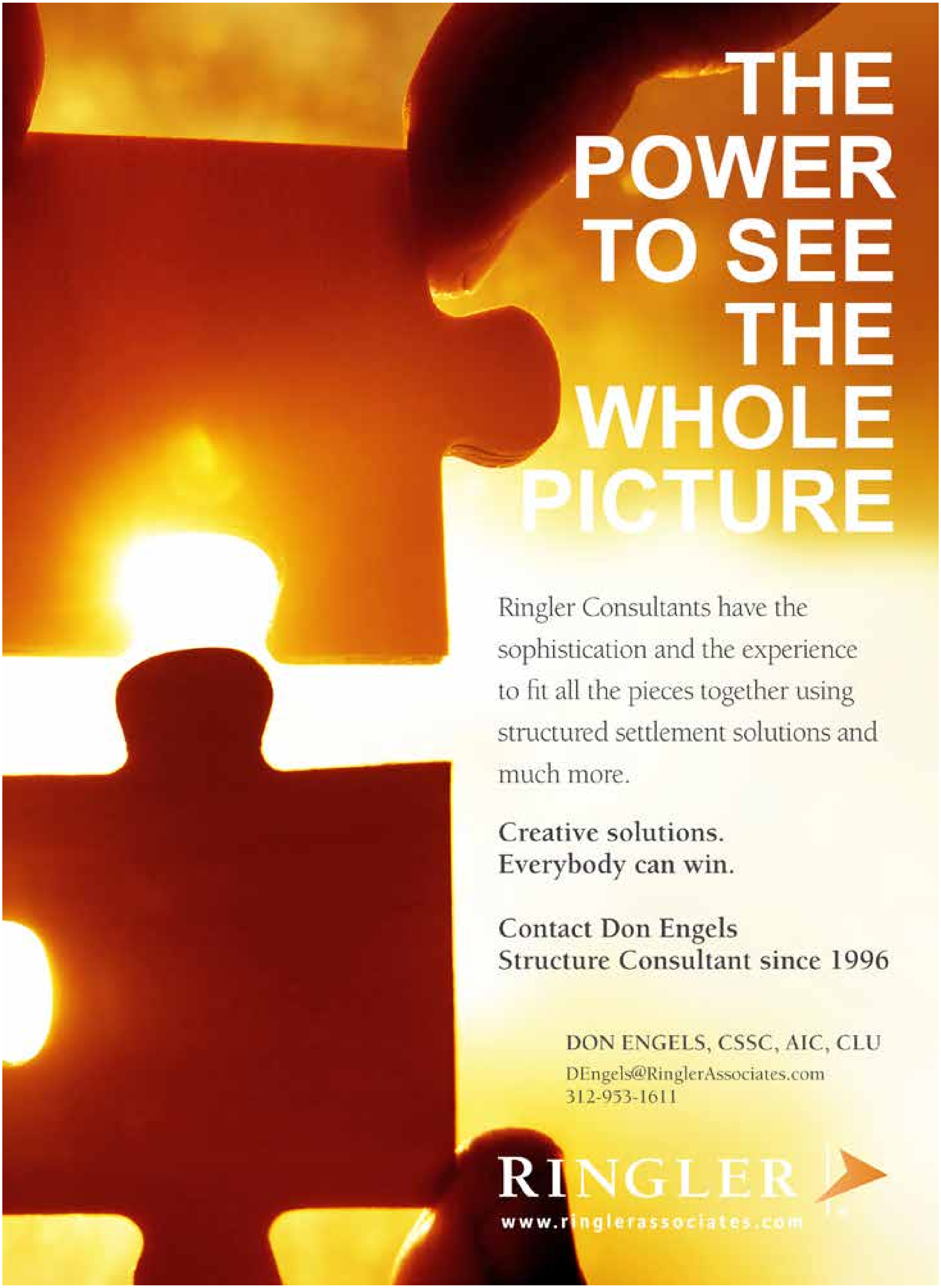
Attorney Nicole Marklein
West & Dunn
nmarklein@westdunn.com
(608) 301-5457

I. Overview of the Defense's PR Problem: Not perceived as sympathetic or on the side of justice.
   A. Effect on Verdicts/Settlements
   B. Effect on Plaintiffs
   C. We need to show the jury that money is not necessarily the best way to exact justice.

II. Flip the Script—Make your position the sympathetic one
   A. Hone your theme as the case develops
   B. The jury's verdict as the final message to the plaintiff about his/her injuries
      1. Conscious pain and suffering
      2. Scars
      3. Activity limitations
      4. Future pain and suffering

III. Pretrial
   A. Consider early, strategic stipulation to liability
      1. Limits discovery, particularly when the defendant/insured is unsympathetic
      2. Potentially avoids/limits higher damages awards based on liability factors.
      3. Possible to alert the trier of fact that defense has consistently taken responsibility
   B. Educate the judge early and often.
      1. Substantive and procedural civil law
      2. Your command of the law, facts and your reasonableness
      3. Assume the judge will eventually see all communications with counsel
      4. Carefully consider your position on discovery and other disputes without being a pushover.
   C. Motions in Limine
      1. Prohibiting "Jury Anchoring" (suggesting amounts to award for non-special damages prior to closing argument)
      2. Prohibiting Per Diem Arguments
      3. Prohibiting Golden Rule Arguments and their Variations
      4. Precluding evidence or mention of settlement offers, negotiations, etc.
      5. Precluding evidence or mention of certain irrelevant facts
      6. Prohibiting emphasis on insurance or "insurance company lawyer"
      7. Addressing the plaintiff's motion to prohibit reference to plaintiff firm advertising

IV. At Trial
   A. Harness your authenticity to connect with the jury.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B. Have the insured at counsel's table with you if at all possible.
   1. If insured may not be present at counsel's table, argue for presence in the courtroom throughout trial.
   2. At a minimum, introduce an individual representative of the insurer to the jury.

C. Voir Dire
   1. Directly address anything unflattering about you, your client or your case
   2. Use notoriety of plaintiff's counsel's firm to your advantage
   3. Thoughts on jurors who have personal experience with similar injuries?

D. Objections
   1. Object consistently to any topics covered by motions in limine
   2. Consider moving for a mistrial

E. Closing Argument
   1. Do not hesitate to object to improper argument
   2. Flip the Script—Show the jury that the defense position is most just for all, including the plaintiff
   3. If jury anchoring is improperly permitted, explain to the jury exactly what plaintiff's counsel is doing.
   4. Suggested damage awards based on plaintiff's counsel's closing
      a. When, if ever, is it advisable not to suggest specific amounts?
      b. When is it advisable to suggest a slightly higher amount than your best day?

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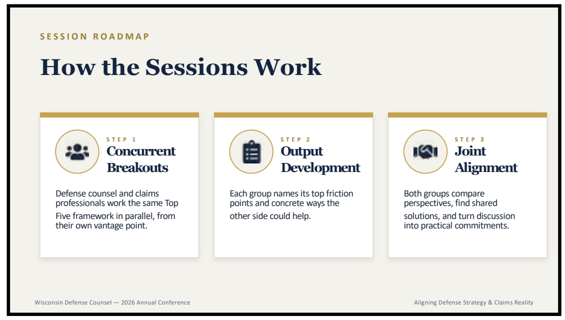
SESSION ROADMAP
How the Sessions Work
STEP 1
Concurrent Breakouts
Defense counsel and claims professionals work the same Top Five framework in parallel, from their own vantage point.
STEP 2
Output Development
Each group names its top friction points and concrete ways the other side could help.
STEP 3
Joint Alignment
Both groups compare perspectives, find shared solutions, and turn discussion into practical commitments.
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Aligning Defense Strategy & Claims Reality

2


BEFORE WE BEGIN
Ground Rules
A shared foundation for candid, productive discussion.
Not Billing Focused
Decision-marking is largely out of the hands of individual reps.
Systemic Focus
Address systemic issues, not specific carriers or people.
Alignment, Not Blame
Aim for shared solutions, not fault-finding.
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ONE SHARED FRAMEWORK
The Top Five Misalignments
Both breakout groups examine the same five subjects — then compare how each side experiences them.
1 Settlement Negotiations & Mediation
2 New Damages, Reserve Changes & Exposure Shifts
3 Timing & File Life Cycle
4 Reporting Expectations & Updates
5 Large Expenses, Budgets & Billing Guidelines
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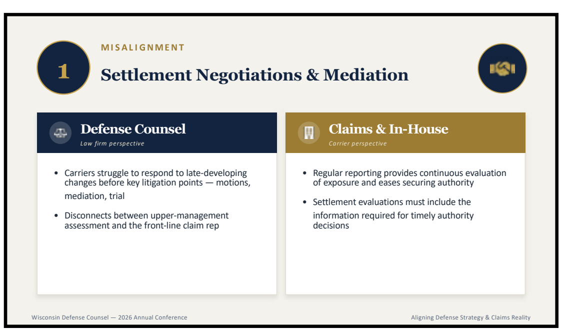
MISALIGNMENT
1 Settlement Negotiations & Mediation
Defense Counsel
Law firm perspective
Carriers struggle to respond to late-developing changes before key litigation points — motions, mediation, trial
Disconnects between upper-management assessment and the front-line claim rep
Claims & In-House
Carrier perspective
Regular reporting provides continuous evaluation of exposure and eases securing authority
Settlement evaluations must include the information required for timely authority decisions
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5


MISALIGNMENT
2 New Damages, Reserve Changes & Exposure Shifts
Defense Counsel
Law firm perspective
Verbal reports versus written report requirements
Managing tensions within the tripartite relationship
Claims & In-House
Carrier perspective
Reputation risk, precedent concerns, and reserving
When legal strategy conflicts with business realities
Delayed reporting strains reserving, supervision, authority requests, and documentation
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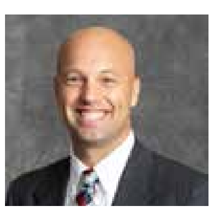

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