STATE BAR OF WISCONSIN
PINNACLE
Your Practice. Our Purpose.

# WSSFC 2026

## Plenary 3

# 20 Things Every Lawyer Should Know


**Presented By:**

*Kelly Lynn Baker*
*Green Bay Packers, Green Bay*

*Allan M. Foeckler*
*Cannon & Dunphy, S.C., Brookfield*

*Monica Irelan Karas*
*Tabak Law LLC, Mt Pleasant*

*Erin R. Ogden*
*Ogden Glazer + Schaefer, Madison*

***Moderated By:***
*Stephen W. Sawyer*
*Sawyer Law LLC, Stevens Point*

# About the Presenters...

**Kelly L. Baker** serves as Associate Counsel to the 13-time world champion Green Bay Packers. She provides legal and strategic counsel to the club on commercial transactions, risk management, and compliance matters. Her duties include negotiating sponsorship, large events, and services agreements, as well as managing the club's real estate portfolio.
Kelly earned both her undergraduate and law degrees with honors from Marquette University. She began her career practicing mergers & acquisitions and general corporate law at one of Wisconsin's largest law firms. Immediately prior to joining the Packers, Kelly served as Corporate Counsel to one of the world's largest power tool manufacturers.

**Allan M. Foeckler** graduated from Marquette University Law School, where he was a member of Alpha Sigma Nu Honor Society and part of the Marquette Law Review. Over the years fighting for the rights of injured victims, he has earned numerous notable awards, including being named to the list of Super Lawyers every year since 2012. Mr. Foeckler also earned the 2017 Robert L. Habush Trial Lawyer of the Year award from the Wisconsin Association for Justice after **successfully representing victims** who were killed and injured after a 13.5-ton panel fell from the O'Donnell Park garage façade. In addition to his legal duties, Mr. Foeckler remains an invested member of his local community, including serving as Interim Mayor of Oak Creek from December of 2011 through April of 2012, a Trustee of the **Wisconsin Civil Justice Education Foundation**, board member of the Oak Creek Little League, and board member of the **Oak Creek Library Foundation**.

**Monica Irelan Karas**, attorney and partner at Tabak Law, LLC, is a Milwaukee native raised on the city's south side. She attended the University of Wisconsin – Milwaukee and obtained a Bachelor's of Business Administration with an emphasis in Marketing in 2002. She attended the John Marshall Law School – Chicago (now UIC-Law) and graduated in 2012 with a Juris Doctor. Attorney Karas began her legal career in 2000 working as an Office Administrator at a large Milwaukee litigation firm. In 2012 she began her career as an attorney. She joined Tabak Law in 2018 and was promoted to the position of Partner/Shareholder in 2021. Attorney Karas is an accredited Veteran's Benefits Advocate and concentrates her practice on litigating Veteran's claims against The Department of Veteran's Affairs, at the agency level, The Board of Veteran's Appeals (BVA), and the Court of Appeals for Veterans Claims (CAVC). Attorney Karas is a current member of the National Organization of Veteran's Advocates (NOVA). Attorney Karas is the daughter of a Untied States Marine Corps. Vietnam Veteran and the granddaughter of a Slovak-American immigrant who was a World War II Army Veteran and a Milwaukee-area Attorney who's practice spanned five decades. She is the proud wife of a Police Lieutenant and the mother of two phenomenal children and one black Labrador-Retriever. In her spare time, Attorney Karas enjoys hiking, rock climbing, and traveling.

**Erin R. Ogden** is a trademark and copyright nerd who loves helping businesses grow. Whether helping clients directly or working with other attorneys to help their clients, she helps identify, protect, and monetize intellectual property while looking at the business holistically. Her firm's points of culture are Make things as simple as possible, but no simpler; Play well with others; Speak English, not legalese; and Be the reason it works. She loves putting that into practice with her colleagues and business clients. Drop her a line or connect on social media. We'll nerd out together!

**Stephen Sawyer** is a former officer and helicopter pilot in the United States Navy. He grew up in Milwaukee, Wisconsin. After graduating with honors from the University of Notre Dame Law School he practiced corporate finance and financial institutions law in Milwaukee. He left corporate practice after September 11, 2001 to become a criminal law attorney working briefly in the Milwaukee County District Attorney's Office before going out on his own as a criminal defense attorney and sole practitioner. He now practices with his wife, Attorney Julie Sawyer, at Sawyer Law LLC in Stevens Point, and is the current President of the State Bar of Wisconsin.

**Session Title:** 20 Things Every Lawyer Should Know
**Session Presenters:** Kelly Baker (Green Bay Packers), Al Foeckler (Cannon & Dunphy), Monica Irelan Karas (Tabak Law), Erin Ogden (Ogden Glazer + Schaefer)

## 5 THINGS EVERY LAWYER SHOULD KNOW ABOUT CONTESTS & SWEEPSTAKES

Contests and sweepstakes often look deceptively simple: offer a prize, collect entries, pick a winner. But they can create significant risks for your clients when run poorly.

Here are five things every lawyer should know about contests and sweepstakes:

1. Rules Rule: Build a legal framework for the promotion.
2. Words Matter: Correctly classify your promotion, critically draft its rules, and carefully advertise it.
3. Prize with Precision: Clearly describe, and accurately value, prizes.
4. 50 States, 50 Problems: Navigating state-by-state requirements can be complex and may warrant excluding certain residents from eligibility.
5. Don't Accidentally Create a Lottery: prize + chance + consideration = an illegal lottery / gambling.

### 1. Rules Rule: Build a legal framework for the promotion.

**Every promotion should have rules that are accessible to entrants.**

Official rules serve many purposes:

- They tell consumers what they are agreeing to.
- They establish the mechanics of the promotion.
- They help prevent disputes.
- They provide a roadmap for employees administering the promotion.
- They establish the promotion sponsor's rights and protections.
- They create evidence of what the sponsor promised.
- They force the business to identify problems before launch.

Think of the rules as the instruction manual and contract for the promotion. Consider addressing the following in the rules:

- Eligibility
  - Age requirements
  - Geographic restrictions
  - Exclusion of insiders (ex. employees)
- Promotion Period
  - Start and end date and time
  - Time zone
- How to Enter
  - Methods of entry
  - How many entries are permitted
  - What happens to incomplete entries
- Prize
  - Precise description

    - Number of prizes
    - Approximate retail value
    - Odds of winning
    - Restrictions
    - Substitution rights
    - Taxes and expenses
- Winner Selection and Requirements
    - Method of selection
    - Selection/drawing date
    - Who conducts the drawing or judges the entries
    - How winners are contacted
    - Response deadline
    - Alternate winner selection
    - Eligibility verification
    - Tax documentation
- Disqualification
    - Fraud
    - Tampering
    - False information
    - Multiple identities/accounts
    - Automated entries
    - Rule violation consequences
- Sponsor Protections
    - Release
    - Limitation of liability
    - Force majeure
    - Technical failures
    - Rights to modify, suspend, or terminate when appropriate
- Legal Provisions
    - Governing law
    - Dispute resolution
    - Venue
    - Severability
    - Privacy/data provisions
    - Winner-list information
    - Void where prohibited
    - Any legally required disclosures

**Don't stop at the long-form rules.**

Create short-form rules / a disclaimer. This is the version that marketing can use on social media, digital ads, email, signage, landing pages, radio/TV, and promotional materials.

The disclaimer should contain the material terms consumers need to understand the promotion and provide a clear path to the complete rules.

Template:

*NO PURCHASE NECESSARY TO ENTER OR WIN; PURCHASE WILL NOT INCREASE ODDS OF WINNING. Valid [date] to [date]. Limit [#] entry(ies) per person. Eligible to legal residents of [geographic scope], age [#]+, and [other eligibility requirements]. Odds of winning depend on number of eligible entries. Void where prohibited. Sponsor: [Name]. For full rules visit: [link].*

**For larger prizes, consider a winner's affidavit.**

For a significant prize, don't simply call the winner and hand over the prize.

Consider requiring the winner to sign an Affidavit of Eligibility and Liability confirming his/her compliance with the rules (including eligibility requirements), acceptance of the prize, release of the promotion sponsor, and acceptance of tax obligations. This document can also be used to obtain rights to use the winner's name and likeness for promotional purposes.

2. Words Matter: Correctly classify your promotion, critically draft its rules, and carefully advertise it.

**The way you describe a promotion matters.**

"Contest," "sweepstakes," and "raffle" are often used interchangeably in everyday conversation, but they are not interchangeable terms from a legal standpoint, and their improper use can lead to unintended risk.

For example, in Wisconsin, "raffles" are games of chance for which tickets or calendars are sold and one or more drawings for prizes are held. Raffles require a license to run and only religious, charitable, service, fraternal, veterans, or 501(c)(3) organizations may hold them. Using "raffle" where "sweepstakes" is actually appropriate can, therefore, draw unnecessary regulatory scrutiny.

Definitions vary among jurisdictions, and a promotion's legal characterization can depend on how winners are selected, whether skill or chance controls, whether consideration is required, and who is eligible to participate, but here are the basics:

| Term | General Concept |
|---|---|
| Sweepstakes | A promotion in which winners are selected by chance. |
| Contest | A promotion in which winners are determined based on skill, judgement, or other stated criteria. |
| Raffle | A promotion where tickets are sold and a drawing is held among purchasers to select winners. |
| Lottery | A promotion involving a prize, chance, and consideration. |

**Draft with a critical eye.**

Vague language does not just create confusion; it can create leverage for bad actors.

Most promotions will be administered as intended, but lawyers should draft rules with the understanding that a bad actor may look for ambiguity or inconsistency and attempt to use it to

their advantage. A poorly defined prize, unclear eligibility requirements, conflicting entry periods, or an ambiguous winner-selection process can become the basis for a demand from an entrant that the sponsor provide something it never intended to offer.

**Say exactly what is happening. Don't make the consumer figure it out.**

If the promotion is a random drawing, say so. If skill determines the winner, explain the judging criteria. If there is a free method of entry, offer it. If there are eligibility criteria, don't bury them somewhere the entrant is unlikely to see them.

Finally, make sure the advertising associated with the promotion aligns with the rules. Treat promotional copy as a legal document – not merely marketing materials.

**Small words can create big problems.**

Compare: "ENTER TO WIN!" with "ENTER FOR A CHANCE TO WIN!" The first can sound like the entrant is being promised a prize merely for entering. The second accurately communicates that entry creates an *opportunity* to win.

Avoid language that suggests:

- Everyone who enters will win.
- A purchase is necessary to enter or will improve an entrant's odds of winning.
- An entrant has already won.
- A prize is guaranteed when it isn't.

The Federal Trade Commission has pursued companies where their promotion marketing made consumers believe one or more of the above. See, e.g., *FTC v. Publishers Clearing House, LLC* and *In the Matter of Traffic Jam Events, LLC.*

3. Prize with Precision: Clearly describe, and accurately value, prizes.

**Be specific about what the winner is actually receiving.**

The rules should clearly identify:

- The number of prizes.
- What the prize includes.
- The approximate retail value of each prize.
- Any material restrictions or limitations.
- Whether taxes, fees, travel, shipping, or other expenses are included.
- Whether the prize may be substituted.
- Any expiration or blackout dates.
- Any conditions the winner must satisfy to receive or use the prize.

The more valuable or complicated the prize, the more important specificity becomes. Compare "Win a trip to New York" with "Win a four-night trip to New York City, including round-trip coach airfare for two from the major U.S. airport nearest the winner's residence, hotel accommodations for four nights, and a $500 spending allowance." The second description leaves significantly less room for interpretation.

**State the approximate retail value (ARV).**

The ARV is an important disclosure and can determine whether a promotion triggers additional state requirements. The stated value should be based on the reasonable retail valuation of the prize at the time the promotion is launched.

For example, if the prize is a trip, consider what is actually included in the package rather than assigning an inflated value based on a hypothetical luxury version of the experience. If the prize is a product that is frequently discounted, consider whether the stated value accurately reflects its ARV. If the final value may vary, say so.

**Be careful with third-party brands and trademarks.**

When advertising a promotion that includes a third-party's products or services as prizes be careful not to imply an affiliation, sponsorship, endorsement, or authorization that does not exist. Some third parties may even expressly prohibit their products or services from being used in promotions, so check the fine print (especially if the prize is tickets to an event).

Further, a promotion sponsor should not use a third party's trademarks, logos, trade dress, or other protected branding in promotional materials without proper authorizations.

4. 50 States, 50 Problems: Navigating state-by-state requirements can be complex and may warrant excluding certain residents from eligibility.

**There is no federal contests and sweepstakes law, though some federal laws certainly impact promotions.**

One common trap in promotions is assuming that a set of rules that work in one state will work everywhere. Two states may use the same terminology but define it differently. A promotion that can run without registration in one state may be required to be filed and bonded in another. A prize value that seems insignificant from a marketing perspective may be significant from a regulatory perspective.

Wisconsin is a relatively manageable state from a compliance standpoint, while Florida and New York are far more difficult. For example, New York and Florida both require certain disclosures and bonding for prizes exceeding $5,000 in value.

Therefore, when determining the geographic scope of the promotion, it is helpful to ask:

- Who is the client seeking engagement from to accomplish their marketing goals?
- Can you provide the prize to entrants everywhere?
- Is there a business reason to include every state?
- Are there jurisdictions that create disproportionate compliance obligations?
- Would excluding a particular jurisdiction materially affect the business objectives?

If, for example, your client's promotion is intended to drive foot traffic to a brick-and-mortar location, it may make sense to limit eligibility to just the state where that location is.

5. Don't Accidentally Create a Lottery: prize + chance + consideration = an illegal lottery / gambling.

An illegal lottery is a promotion with all of the following elements: prize, chance, and consideration.

**Element 1: Prize.** Something of value that is being offered. This one is usually obvious and hard to avoid. Examples include $10,000 cash, a car, tickets, merchandise, a membership, and hospitality experiences.

**Element 2: Chance.** The winner is selected, at least in material part, by chance. A promotion can contain both skill and chance and the legal question can then become whether chance is the more significant of the two. Examples include a random drawing, spinning a wheel, a random number generator, and a rubber duck race.

**Element 3: Consideration.** This is the element that frequently gets lawyers' attention. Consideration generally means that the entrant provides something of value in exchange for the opportunity to win. "No purchase necessary" is not a magic phrase. You must examine what the entrant actually has to do to participate. Examples include paying an entry fee, purchasing something, an exhaustive task, providing extensive information, and burdensome travel.

**Solutions**

The most common solution is to design out consideration and the easiest way to do this is by offering a free alternative means of entry. For example, if entrants can enter a promotion by purchasing your client's new product, also allow entrants to mail in a handwritten letter with their name, email, and street address to receive an entry.

Chance can be eliminated by converting a sweepstakes into a skill-based contest or awarding all entrants an equally valuable prize.

Conclusion

When your client comes to you and says, "We want to run a promotion", here's what you should do:

- **Seek to understand the promotion:** What is the prize? How does someone enter? How are winners selected?
- **Identify the risks:** Is this an illegal lottery and, if so, how can we eliminate the prize, chance, or consideration? Who should be eligible? Does the prize or promotion's advertising implicate third-party rights? Where will it be offered, and do those jurisdictions impose additional requirements?
- **Build the framework:** Draft the official rules and make sure advertising accurately communicates the material terms.
- **Pressure-test it:** Look at the promotion critically – not just as the client intends it to work, but as an entrant, regulator, or plaintiff might interpret it.

Monica Irelan Karas

Who is a Veteran?

38 USC 101(2) The term "veteran" means a person who served in the active military, naval, air, or space service, and who was discharged or released therefrom under conditions other than dishonorable.

And while this seems pretty plain on its face, the differentiation actually matters. A person who was dishonorable discharged will not qualify for any benefits - no housing, education, service-connection, health care, burial, etc.

Discharge upgrades are possible, but they are done through the Department of Defense, not the Department of Veterans Affairs. This process is to change a Veteran's form DD-214 that lists the person's discharge code. Unless the individual can find a free clinic (think law schools) or Veteran's pro bono service, the Veteran will need to put down a retainer amount and be willing to be charged an hourly fee.

_____

There is a difference between the Federal Department of Veterans Affairs versus state and other departments of Veterans affairs. (they have different benefits and different scopes).

38 USC 301(a) The Department of Veterans Affairs is an executive department of the United States. The United States Department of Veterans Affairs officially became a cabinet level Executive department on March 15, 1989, after President Regan signed it into law.

The Wisconsin Department of Veterans Affairs was created in 1945 to take over state-run Veterans facilities.

_____

Veteran's benefits can overlap into numerous other areas of practice, specifically at the state level: criminal (specifically DUI, drug, and domestic violence charges), civil, estate planning, probate, family and divorce, disability and personal injury.

_____

The (federal) Department of Veteran's Affairs falls into three arms: The Veterans Health Administration, The Veterans Benefits Administration and the Cemeteries.

Monica Irelan Karas

_____

There are some survivorship benefits, but to receive them, a person must speak to an accredited agent or attorney.

Which begs the question, what is an accredited agent or attorney? (see 38 CFR 5901). *And*, what are survivorship benefits? (see 38 USC 1318).

20 Things Every Lawyer Should Know
Erin R. Ogden, Ogden Glazer + Schaefer

# Copyright

This presentation is meant to give a basic understanding of what material is protected by copyright and who can claim copyright.

**What can be protected by copyright?**

- Copyright protection extends to
    - original works of authorship
    - fixed in any tangible medium of expression, now known or later developed,
    - from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device

- Works of authorship include the following categories:
    (1) literary works;
    (2) musical works, including any accompanying words;
    (3) dramatic works, including any accompanying music;
    (4) pantomimes and choreographic works;
    (5) pictorial, graphic, and sculptural works;
    (6) motion pictures and other audiovisual works;
    (7) sound recordings; and
    (8) architectural works.

- 17 U.S.C. §102. Subject matter of copyright: In general

- Must meet a threshold of creative expression
    - The panel held that under 17 U.S.C. § 102(b), the "Sequence," developed by Bikram Choudhury and described in his 1979 book, Bikram's Beginning Yoga Class, was not a proper subject of copyright protection because it was an idea, process, or system designed to improve health, rather than an expression of an idea. Because the Sequence was an unprotectible idea, it was also ineligible for copyright protection as a compilation or choreographic work. *Bikram's Yoga College v. Evolation Yoga,* No. 13-55763 (9th Cir. 2015)

**Who owns the copyright in a work?**

- The author or authors of the work is the default owner in a work

- A "work made for hire" is either:
    - a work prepared by an employee within the scope of his or her employment **or**

- if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire **and** is a work specially ordered or commissioned for use as
    - a contribution to a collective work,
    - a part of a motion picture or other audiovisual work,
    - a translation,
    - a supplementary work,
    - a compilation,
    - an instructional text,
    - a test,
    - answer material for a test, or
    - an atlas

- The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law

- A transfer of copyright ownership is not valid unless in writing and signed by the owner of the rights conveyed. 17 U.S.C. §201

    - The US Supreme Court held that under Reid was an independent contractor. Because CCNV failed to satisfy the terms of § 101(2) regarding the work for hire provisions, they are not the sole owner. However, CCNV nevertheless may be a joint author of the sculpture if CCNV and Reid prepared the work "with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole" under 17 U. S. C. § 101. In that case, CCNV and Reid would be co-owners of the copyright in the work. *Cmty. for Creative Non-Violence v. Reid,* 490 U.S. 730 (1989) **.**

        - No copyright owned on works prepared by an officer or employee of the United States Government as part of that person's official duties.7 U.S.C. §105

**Who can create copyrightable work?**

- The Copyright Office refuses to register a claim that a human being did not create the work citing *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) and *Trade-Mark Cases*, 100 U.S. 82, 94 (1879)

    - Copyright law is limited to “original intellectual conceptions of the author” *Burrow-Giles* at 58.
    - SCOTUS repeatedly referred to such “authors” as human, describing authors as a class of “persons” 15 and a copyright as “the exclusive right of a man to the production of his own genius or intellect.

    - The copyright law only protects “the fruits of intellectual labor” that “are original and are founded in the creative powers of the mind.”

- Courts have found unique fact scenarios to confirm
    - Naruto (the monkey) couldn't protect his "selfie". *Naruto v. Slater*, 888 F.3d 418, 420 (9th Cir. 2018)
        - The *Naruto* court concluded that only humans had standing, explaining that the terms used to describe who has rights (e.g., "'children,' 'grandchildren,' 'legitimate,' 'widow,' and 'widower') "all imply humanity and necessarily exclude animals." *Id.* at 426.
    - The Ninth Circuit found that because "the Urantia Book, was authored by celestial beings and transcribed, compiled and collected by mere mortals" the copyright registration was invalid. *Urantia Foundation v. Maaherra*, 114 F.3d 955, 955 (9th Cir. 1997)
- The Copyright Office adds some more examples of certain "No, Thank You" claims in Chapter 313.2 of the Compendium
    - A mural painted by an elephant
    - Driftwood that has been shaped and smoothed by the ocean
    - Cut marks, defects, and other qualities found in natural stone

      U.S. Copyright Office, Compendium of U.S. Copyright Office Practices sec. 313.2 (3rd ed. 2021).
- AI is definitely out.
    - In *Thaler v. Perlmutter*, the D.C. district court sided with the copyright office, finding that an artificial intelligence (AI) machine alone could not be considered an "author" under U.S. copyright law. 687 F. Supp. 3d 140 (D.D.C. 2023).
        - The Court of Appeals agreed. "The human-authorship requirement, in short, eliminates the need to pound a square peg into a textual round hole by attributing unprecedented and mismatched meanings to common words in the Copyright Act." *Thaler v. Perlmutter, 130 F.4th 1039, 1049 (D.C. Cir. 2025), cert. denied.*
    - There are unresolved issues regarding the precise level of human involvement needed for copyright protection.
        - *Allen v. Perlmutter*, No. 1:24-cv-2665 (D. Colo. Sept. 26, 2024) has an artist challenging the Copyright Office's denial of registration for an image generated using Midjourney with more than 600 iterative prompts.

# Copyright

1

## Copyright

- Copyright protection extends to
  - **original** works of authorship
  - **fixed** in any **tangible** medium of expression, now known or **later developed**,
  - from which they can be perceived, **reproduced**, or otherwise communicated, either directly or with the aid of a device

2

## Owner

- The author is the default owner
- A “work made for hire” is either:
  - a work prepared by an employee **within the scope** of his or her employment or
  - if the parties **expressly agree in a written instrument** signed by them

3

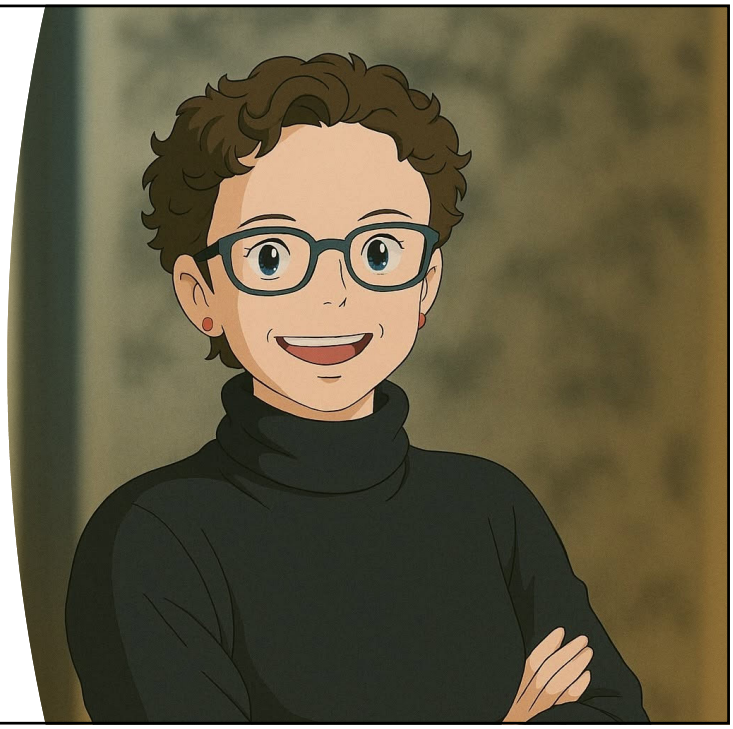
## Human Made

- Created by a human
  - Not a monkey
  - Not celestial beings
  - Not AI

4

## Other IP exists

- Trademark
  - Source of Origin of Product
- Right to Publicity
  - Name, Image, Likeness
- Right to Privacy
  - That is <u>not</u> how I want to be famous



5

# 5 THINGS EVERY LAWYER SHOULD KNOW

# ABOUT OWI IN CIVIL CASES

Punitive Damages in Impaired-Driving Cases

Al Foeckler · Cannon & Dunphy, S.C.
afoeckler@c-dlaw.com
o: 262-796-3704 · m: 414-405-7079

Impaired-driving (OWI) cases can look like ordinary motor-vehicle collisions — but Wisconsin law treats them very differently when it comes to punitive damages. For the civil practitioner, an OWI is not merely a liability fact; it can be the key that unlocks uncapped punitive exposure and dramatically changes the value of a case. Handled carelessly, though, a punitive-damages claim can be screened out by the court before it ever reaches a jury.

Here are five things every lawyer should know about OWI and punitive damages:

1. Impaired driving can remove the cap on punitive damages.
2. The standard is "intentional disregard of the plaintiff's rights" — more than negligence.
3. Not every drunk-driving case qualifies: degree of intoxication and causation drive the result.
4. Punitive damages turn on the defendant's conduct alone — which reshapes allocation, parties, and proof.
5. Mediating punitive damages takes special care — on coverage, framing, and locking down the deal.

## 1. Impaired driving can remove the cap on punitive damages.

**Wisconsin generally caps punitive damages — but not for intoxicated operation.** Wis. Stat. § 895.043(6) provides that punitive damages "may not exceed twice the amount of any compensatory damages recovered by the plaintiff or $200,000, whichever is greater." That ceiling is familiar to most litigators. What many overlook is the exception built into the same subsection. The cap "does not apply to a plaintiff seeking punitive damages from a defendant whose actions under sub. (3) included the operation of a vehicle ... while under the influence of an intoxicant to a degree that rendered the defendant incapable of safe operation of the vehicle."

**"Vehicle" is defined broadly.** The exception is not limited to cars and trucks. By its terms it reaches:

- a motor vehicle (§ 340.01(35));
- an off-highway motorcycle (§ 23.335(1)(q));
- a snowmobile (§ 340.01(58a));

- an all-terrain vehicle (§ 340.01(2g));
- a utility terrain vehicle (§ 23.33(1)(ng)); and
- a boat (§ 30.50(2)).

**Practice point.** In a qualifying OWI case, punitive damages are limited only by constitutional due-process constraints — not the statutory 2x / $200,000 cap. That single fact can transform case value and should shape your pleadings, discovery, and demand strategy from day one.

2. The standard is "intentional disregard of the plaintiff's rights" — more than negligence.

**The statutory trigger.** Under Wis. Stat. § 895.043(3), a plaintiff may recover punitive damages "if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff." In impaired-driving cases, the "intentional disregard" prong is almost always the battleground.

**The three-part test.** To prove intentional disregard of the plaintiff's rights (Wis. JI-Civil 1707.1; Centrifugal Acquisition Corp., Inc. v. Moon, 849 F. Supp. 2d 814 (E.D. Wis. 2012)):

- the act must be deliberate;
- the act must actually disregard the injured party's rights; and
- the act must be sufficiently aggravated to warrant an award of punitive damages.

How aggravated is "aggravated"?

- "Intentional" means a state of mind higher than ordinary negligence; it can be wanton, willful, or reckless. Wosinski v. Advance Cast Stone Co., 2017 WI App 51, 377 Wis. 2d 596, 901 N.W.2d 797.
- The defendant must have either acted with a purpose to disregard the plaintiff's rights, or been aware that his acts were substantially certain to result in such disregard. Strenke v. Hogner, 2005 WI 25, 279 Wis. 2d 52, 694 N.W.2d 296.

3. Not every drunk-driving case qualifies: degree of intoxication and causation drive the result.

**The court is a gatekeeper.** Not every drunk-driving case will give rise to punitive damages. Circuit courts act as gatekeepers, deciding whether the evidence is sufficient before a punitive-damages question can be sent to a jury. Strenke v. Hogner, 2005 WI 25. The evidentiary standard is clear and convincing evidence, and the conduct must be "outrageous," reflecting "aggravating circumstances beyond ordinary negligence." Lievrouw v. Roth, 157 Wis. 2d 332, 459 N.W.2d 850 (Ct. App. 1990).

**The case law is a spectrum.**

| Case | Key Facts | Result |
|---|---|---|
| Strenke v. Hogner (2005 WI 25) | 16–18 beers in roughly five hours; BAC .269; four prior OWI convictions | Punitive damages allowed — the excessive drinking was a clear example of intentional disregard. |
| Henrikson v. Strapon (2008 WI App 145, 758 N.W.2d 205) | BAC .11 (just over the legal limit); no prior OWIs; no evidence of how many drinks were consumed | No punitive damages — only marginal intoxication; no intentional disregard shown. |
| Lievrouw v. Roth (157 Wis. 2d 332, 459 N.W.2d 850) | Two beers; ran a stop sign; no field sobriety test and no proof of intoxication level | No punitive damages — no causal link established between the level of intoxication and the crash. |

**Practice point.** Build the record on the degree of impairment — high BAC, the number of drinks consumed, the time span, and any prior OWI history — and tie that impairment causally to the collision. The absence of proof on intoxication level (Lievrouw) or only marginal intoxication (Henrikson) is what defeats these claims; aggravated, well-documented intoxication (Strenke) is what wins them.

4. Punitive damages turn on the defendant's conduct alone — which reshapes allocation, parties, and proof.

**Purpose: punish and deter, not compensate.** The purpose of punitive damages is to punish the tortfeasor and deter others — not to compensate the plaintiff; the focus is on the defendant's behavior. Kimble v. Land Concepts, Inc., 2014 WI 21, 353 Wis. 2d 377, 845 N.W.2d 395. The defendant may try to explain why the conduct is not so egregious from his perspective; the plaintiff may still argue the conduct warrants punishment because of its impact on the plaintiff's life.

Allocation rules are different.

- Joint and several liability does not apply to punitive damages. Wis. Stat. § 895.043(5).
- Comparative-negligence principles do not apply to punitive damages. Lorbiecki v. Pabst Brewing Co., 2024 WI App 24, 412 Wis. 2d 641, 8 N.W.3d 821.

Watch the defendant — and the causal link.

- Punitive damages are assessed against the tortfeasor based on his own behavior and are generally not recoverable from parties who are only vicariously liable; a parent's wealth is not a proper basis. Franz v. Brennan, 150 Wis. 2d 1, 440 N.W.2d 562.
- Conduct that did not cause the accident will not support punitive damages — e.g., fleeing the scene after the collision. Kehl v. Economy Fire & Cas. Co., 147 Wis. 2d 531, 433 N.W.2d 279.
- Mere negligence or recklessness short of intentional disregard is not enough — e.g., driving while fatigued. Boomsma v. Star Transport, Inc., 202 F. Supp. 2d 869 (E.D. Wis. 2002).

**Procedure once you clear the gate.** If the plaintiff establishes a prima facie case for punitive damages (Wis. Stat. § 895.043(4)): (a) the plaintiff may introduce evidence of the defendant's wealth; and (b) the court submits a special verdict on punitive damages — to the jury, or issued by the court if the case is tried to the court.

5. Mediating punitive damages takes special care — on coverage, framing, and locking down the deal.

Before the mediation.

- Client: hold pre-mediation meetings and set expectations.
- Discovery: confirm enough discovery is complete to evaluate the strengths and weaknesses of the punitive claim.
- Motions: consider timing — resolving (or holding) dispositive and gatekeeping motions may matter.
- Insurance coverage: determine whether the policy covers punitive damages, and the limits. This is often the decisive practical question.

At the mediation.

- Mediation is a confidential, compromise-negotiation process in which a neutral with no power to impose a decision helps the parties reach agreement. Wis. Stat. § 802.12(1)(e), (4).
- Decide whether to present punitive damages as a separate demand/offer.
- Understand what the mediator may and may not disclose; the mediator may need your consent to reveal key facts and may caucus separately with the individual defendant and the insurer.

- The mediator may offer an opinion on strengths and weaknesses — but the mediator is not the judge.

Lock down the settlement.

- A settlement is not binding unless it is made in court (or in a § 807.13 / § 967.08 proceeding) and entered in the minutes or recorded, or made in writing and subscribed by the party (or the party's attorney) to be bound. Wis. Stat. § 807.05; Adelmeyer v. Wisconsin Elec. Power Co., 135 Wis. 2d 367, 400 N.W.2d 473 (Ct. App. 1986); Kocinski v. Home Ins. Co., 154 Wis. 2d 56, 452 N.W.2d 360 (1990).
- If the plaintiff is a minor or an adjudicated incompetent, the settlement requires court approval, made by the guardian (if represented by counsel) or the guardian ad litem. Wis. Stat. § 807.10(1).

Conclusion

When an impaired-driving case lands on your desk, here is what to do:

- **Spot the exception:** If the defendant operated a vehicle (broadly defined) while intoxicated to a degree that rendered safe operation impossible, the statutory cap likely falls away — evaluate value accordingly.
- **Prove the state of mind:** Marshal clear and convincing evidence that the conduct was deliberate, actually disregarded the plaintiff's rights, and was sufficiently aggravated — BAC, number of drinks, time frame, and prior OWIs.
- **Build causation:** Tie the level of intoxication to the crash; don't let the claim die for lack of a causal link.
- **Mind the allocation rules:** No joint-and-several liability, no comparative negligence, and no reaching merely vicarious parties.
- **Prepare the resolution:** Confirm coverage for punitives, decide how to frame the punitive demand, and make sure any settlement is binding and — if a minor or incompetent is involved — court-approved.