

19 O'NEIL CANNON LAWYERS SELECTED AS 2024 BEST LAWYERS; ANOTHER 4 NAMED BEST LAWYERS: ONES TO WATCH

We are pleased to announce 19 of our lawyers have been included in the 2024 Edition of *The Best Lawyers in America*, and an additional four have been selected as 2024 *Best Lawyers: Ones to Watch*.

The following are the O'Neil Cannon lawyers named to the 2024 lists:

Best Lawyers in America

- Douglas P. Dehler – Litigation – Insurance
- James G. DeJong – Corporate Law, Mergers and Acquisitions Law, and Securities / Capital Markets Law
- Seth E. Dizard – Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law and Litigation – Bankruptcy
- Peter J. Faust – Corporate Law and Mergers and Acquisitions Law
- John G. Gehringer – Commercial Litigation, Construction Law, Corporate Law, and Real Estate Law
- Joseph E. Gumina – Employment Law – Management and Litigation – Labor and Employment
- Dennis W. Hollman – Corporate Law and Trusts and Estates
- Grant C. Killoran – Commercial Litigation and Litigation – Health Care
- JB Koenings – Corporate Law
- Dean P. Laing – Commercial Litigation, Personal Injury Litigation – Plaintiffs, and Product Liability Litigation – Defendants
- Gregory W. Lyons – Commercial Litigation and Litigation – Insurance
- Patrick G. McBride – Commercial Litigation
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- Chad J. Richter – Business Organizations (including LLCs and Partnerships) and Corporate Law
- John R. Schreiber – Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law and Litigation – Bankruptcy

- Jason R. Scoby – Corporate Law
- Steven J. Slawinski – Construction Law

Best Lawyers: Ones to Watch

- Trevor C. Lippman – Litigation – Trusts and Estates
- Erica N. Reib – Labor and Employment Law – Management and Litigation – Labor and Employment
- Kelly M. Spott – Trusts and Estates
- Christa D. Wittenberg – Commercial Litigation

About Best Lawyers

Best Lawyers has published their list for over three decades, earning the respect of the profession, the media, and the public as the most reliable, unbiased source of legal referrals.

Best Lawyers: Ones to Watch recognizes associates and other lawyers who are earlier in their careers for their outstanding professional excellence in private practice in the United States.

Lawyers on *The Best Lawyers in America* and *Best Lawyers: Ones to Watch* lists are divided by geographic region and practice areas. They are reviewed by their peers on the basis of professional expertise, and they undergo an authentication process to make sure they are in current practice and in good standing.

***SUPER LAWYERS* RECOGNIZES 25 O'NEIL CANNON ATTORNEYS**

Each year, *Super Lawyers* surveys the State of Wisconsin's 15,000 attorneys and judges, seeking the State's top attorneys. Recently, *Super Lawyers* published its lists for 2022, which include the Top 10 Attorneys in Wisconsin, Top 50 Attorneys in Wisconsin, Top 25 Attorneys in Milwaukee, Super Lawyers (consisting of the top 5% of attorneys in Wisconsin), and Rising Stars (consisting of attorneys who are 40 years old or younger or who have been in practice for 10 years or less).

Twenty-five of our attorneys were recognized by *Super Lawyers*, which has referred to the firm as "the Milwaukee mid-sized powerhouse." Those attorneys are the following:

- Nicholas G. Chmurski:

- Rising Stars
- Douglas P. Dehler:
 - Super Lawyer
- James G. DeJong:
 - Super Lawyer
- Seth E. Dizard:
 - Top 50 Attorneys in Wisconsin
 - Top 25 Attorneys in Milwaukee
 - Super Lawyer
- Peter J. Faust:
 - Super Lawyer
- John G. Gehringer:
 - Super Lawyer
- Joseph E. Gumina:
 - Super Lawyer
- Jessica K. Haskell:
 - Rising Stars
- Grant C. Killoran:
 - Super Lawyer
- Dean P. Laing:
 - Top 10 Attorneys in Wisconsin
 - Top 50 Attorneys in Wisconsin
 - Top 25 Attorneys in Milwaukee
 - Super Lawyer
- Trevor C. Lippman:
 - Rising Stars
- Gregory W. Lyons:
 - Super Lawyer
- Patrick G. McBride:
 - Super Lawyer
- Britany E. Morrison:
 - Rising Stars
- Joseph D. Newbold:
 - Super Lawyer
- Erica N. Reib:
 - Rising Stars
- Chad J. Richter:

- Super Lawyer
- John R. Schreiber:
 - Super Lawyer
- Jason R. Scoby:
 - Super Lawyer
- Steven J. Slawinski:
 - Super Lawyer
- Kelly M. Spott:
 - Rising Stars
- Christa D. Wittenberg:
 - Rising Stars

Super Lawyers is a national rating service that rates attorneys in all 50 states. The selection process utilized by *Super Lawyers* is multi-phased and includes independent research, peer nominations, and peer evaluations. One court recently had this to say about *Super Lawyers*:

“[T]he selection procedures employed by [*Super Lawyers*] are very sophisticated, comprehensive and complex. It is abundantly clear . . . that [*Super Lawyers* does] not permit a lawyer to buy one’s way onto the list, nor is there any requirement for the purchase of any product for inclusion in the lists or any quid pro quo of any kind or nature associated with the evaluation and listing of an attorney or in the subsequent advertising of one’s inclusion in the lists.”

We are proud to be one of the few firms in Wisconsin that had more than 50% of its attorneys receive recognition by *Super Lawyers*.

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ATTORNEYS CHRISTA WITTENBERG AND DEAN LAING PUBLISHED IN THE WISCONSIN LAWYER

Attorneys [Christa Wittenberg](#) and [Dean Laing](#) authored an article in the *Wisconsin Lawyer* magazine, entitled “A Litigation’s Reprise: Strategies for Requesting Attorney Fees.” Their article discusses strategy considerations for litigants requesting attorneys’ fees (or objecting to requests for attorneys’ fees) after the merits of the case have been resolved. As noted in the article, sometimes disputes over attorneys’ fees can be just as contentious as the underlying dispute, and strong lawyering can have a significant impact.

Read the full article [here](#).

20 OCHDL LAWYERS SELECTED AS 2021 BEST LAWYERS®; ANOTHER 5 NAMED BEST LAWYERS: ONES TO WATCH

We are pleased to announce 20 of our lawyers have been included in the 2021 Edition of *The Best Lawyers in America*, and an additional five have been selected as 2021 *Best Lawyers: Ones to Watch*.

The following are the O’Neil, Cannon, Hollman, DeJong and Laing lawyers named to the 2021 lists:

Best Lawyers in America

- Douglas P. Dehler – Litigation – Insurance
- James G. DeJong – Corporate Law, Mergers and Acquisitions Law, and Securities / Capital Markets Law
- Seth E. Dizard – Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law and Litigation – Bankruptcy
- Peter J. Faust – Corporate Law and Mergers and Acquisitions Law

- John G. Gehringer – Commercial Litigation, Construction Law, Corporate Law, and Real Estate Law
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- Gregory W. Lyons – Commercial Litigation and Litigation – Insurance
- Patrick G. McBride – Commercial Litigation
- Thomas A. Merkle – Family Law
- Joseph D. Newbold – Commercial Litigation
- Chad J. Richter – Business Organizations (including LLCs and Partnerships) and Corporate Law
- John R. Schreiber – Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law and Litigation – Bankruptcy
- Jason R. Scoby – Corporate Law
- Steven J. Slawinski – Construction Law

Best Lawyers: Ones to Watch

- Kelly M. Spott – Trusts and Estates
- Trevor C. Lippman – Litigation – Trusts and Estates
- Erica N. Reib – Labor and Employment Law – Management and Litigation – Labor and Employment
- Christa D. Wittenberg – Commercial Litigation

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EIGHTEEN OCHDL ATTORNEYS NAMED 2020 BEST LAWYERS IN AMERICA®

O'Neil Cannon is pleased to announce that eighteen lawyers have been named to the 2020 Edition of *Best Lawyers*, the oldest and most respected peer-review publication in the legal profession.

Best Lawyers has published their list for over three decades, earning the respect of the profession, the media, and the public as the most reliable, unbiased source of legal referrals. Its first international list was published in 2006 and since then has grown to provide lists in over 75 countries.

"For more than a third of the century," says CEO Steven Naifeh, "Best Lawyers has been the gold standard of excellence in the legal profession." President Phil Greer adds, "We are extremely proud of that record and equally proud to acknowledge the accomplishments of these exceptional legal professionals."

Lawyers on *The Best Lawyers in America* list are divided by geographic region and practice areas. They are reviewed by their peers on the basis of professional expertise, and undergo an authentication process to make sure they are in current practice and in good standing.

We would like to congratulate the following attorneys named to the 2020 *Best Lawyers in America* list:

- Douglas P. Dehler – Litigation – Insurance
- James G. DeJong – Corporate Law, Mergers and Acquisitions Law, Securities / Capital Markets Law
- Seth E. Dizard – Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law, Litigation Bankruptcy
- Peter J. Faust – Corporate Law, Mergers and Acquisitions Law
- John G. Gehringer – Commercial Litigation, Construction Law, Corporate Law, Real Estate Law
- Joseph E. Gumina – Litigation – Labor and Employment
- Dennis W. Hollman – Corporate Law, Trusts and Estates
- Grant C. Killoran – Litigation – Health Care
- Dean P. Laing – Commercial Litigation, Personal Injury Litigation – Plaintiffs, Product

Liability Litigation – Defendants

- Gregory W. Lyons – Commercial Litigation, Litigation – Insurance
- Patrick G. McBride – Commercial Litigation
- Thomas A. Merkle – Family Law
- Chad J. Richter – Business Organizations (including LLCs and Partnerships)
- John Schreiber – Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law, Litigation – Bankruptcy
- Steven J. Slawinski – Construction Law

Since it was first published in 1983, *Best Lawyers* has become universally regarded as the definitive guide to legal excellence. *Best Lawyers* is based on an exhaustive peer-review survey. Over 54,000 leading attorneys cast more than 7.3 million votes on the legal abilities of other lawyers in their practice areas. Lawyers are not required or allowed to pay a fee to be listed; therefore inclusion in *Best Lawyers* is considered a singular honor. *Corporate Counsel* magazine has called *Best Lawyers* “the most respected referral list of attorneys in practice.”

DEAN P. LAING NAMED “LAWYER OF THE YEAR”

On July 16, 2019 [Dean P. Laing](#) was named “Lawyer of the Year” by the Milwaukee Bar Association at a reception attended by more than 300 attorneys. Dean was recognized for winning two cases at the Wisconsin Supreme Court for defendants and settling several million dollar plus cases on behalf of plaintiffs during the past year. In presenting Dean with the award, the President of the Milwaukee Bar Association stated that Dean is recognized as “one of Wisconsin’s top trial attorneys.”

Dean can be reached at 414-276-5000 or dean.laing@wilaw.com.

OBJECTING TO AN OPPOSING PARTY’S REQUEST FOR ATTORNEY FEES CAN HAVE RAMIFICATIONS

You just lost a case in which the opposing party has a claim for attorney fees pursuant to a contract, statute or other fee-shifting mechanism. The opposing party has now filed a motion for attorney fees. Your initial reaction is to oppose the motion by arguing that the amount of

time spent by the opposing party's attorneys was excessive and their hourly rates are unreasonable. Before pulling the trigger, however, you will want to consider a potential negative ramification of taking that position.

When a party requests an award of attorney fees, the party must establish that its request is reasonable, meaning that the time spent on the case by its attorneys was reasonable in the context of the factual and legal issues in dispute, and that its attorneys' hourly rates are reasonable in the community in which the case is venued. The party on the other end of the motion, of course, has the right to challenge the fee request. When such a challenge is made, the moving party may counter by seeking discovery of the objecting party's attorney fees in the case. This is usually done for two reasons: (1) to try to back off the objecting party by creating the risk that its own attorney fees will be discoverable, and (2) to argue to the court that the best evidence of what is reasonable is what the objecting party paid in litigating the same legal and factual issues in the case.

Wisconsin has not yet decided whether such discovery is permissible, but courts in other jurisdictions have frequently considered the issue and are split on their holdings. The majority of courts hold that discovery of an objecting party's attorney fees is permissible under these circumstances. As one court held, "the defendant's fees may provide the best available comparable standard to measure the reasonableness of plaintiffs' expenditures in litigating the issues of the case." *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 1996 WL 66111, at *3 (N.D. Ill. Feb. 13, 1996). As another court held, "the time spent by the defense counsel . . . may well be the best measure of what amount of time is reasonable," calling it a "logical yardstick." *Pollard v. E.I. DuPont De Nemours and Co.*, 2004 WL 784489, at *3 (W.D. Tenn. Feb. 24, 2004).

Numerous other cases hold the same way. See, e.g., *Henson v. Columbus Bank and Tr. Co.*, 770 F.2d 1566, 1574-75 (11th Cir. 1985); *In re Fine Paper Antitrust Litig.*, 751 F.2d 562, 587 (3d Cir. 1984); *Frommert v. Conkright*, 2016 WL 6093998, at **2-3 (W.D.N.Y. Oct. 19, 2016); *Mendez v. Radec Corp.*, 818 F. Supp. 2d 667, 668-69 (W.D.N.Y. 2011); *Cohen v. Brown Univ.*, 1999 WL 695235, at **2-4 (D.R.I. May 19, 1999); *Murray v. Stuckey's Inc.*, 153 F.R.D. 151, 153 (N.D. Iowa 1993); *Coal. to Save our Children v. State Bd. of Educ.*, 143 F.R.D. 61, 64-66 (D. Del. 1992); *Real v. Cont'l Grp., Inc.*, 116 F.R.D. 211, 213-14 (N.D. Cal. 1986); *Blowers v. Lawyers Coop. Publ'g Co.*, 526 F. Supp. 1324, 1325-28 (W.D.N.Y. 1981); *Naismith v. Prof'l Golfers Ass'n*, 85 F.R.D. 552, 562-64 (N.D. Ga. 1979); *Stastny v. S. Bell Tel. and Tel. Co.*, 77 F.R.D. 662, 663-64 (W.D.N.C. 1978); *Vulcan Materials Co. v. Chandler*, 992 So. 2d 1252, 1268 (Ala. 2008); *Paton v. Geico Gen. Ins. Co.*, 190 So. 3d 1047, 1050-53 (Fla. 2016); *Miller v. Kenny*, 325 P.3d 278, 303 (Wash. Ct. App. 2014).

A minority of courts go the other way, holding that what an objecting party paid in attorney fees to defend a case is not relevant on the issue of whether what the plaintiff paid to prosecute the case is reasonable. The most recent case to so hold is *In re Nat'l Lloyds Ins.*

Co., 532 S.W.3d 794 (Tex. 2017). In that case, the Texas Supreme Court held as follows:

To the extent factual information about hourly rates and aggregate attorney fees is not privileged, that information is generally irrelevant and nondiscoverable because it does not establish or tend to establish the reasonableness or necessity of the attorney fees an opposing party has incurred. A party's litigation expenditures reflect only the value that party has assigned to litigating the matter, which may be influenced by myriad party-specific interests. Absent a fee-shifting claim, a party's attorney-fee expenditures need not be reasonable or necessary for the particular case. Barring unusual circumstances, allowing discovery of such information would spawn unnecessary case-within-a-case litigation devoted to determining the reasonableness and necessity of attorney-fee expenditures that are not at issue in the litigation.

Id. at 799. Other cases similarly holding include *Hernandez v. George*, 793 F.2d 264, 268 (10th Cir. 1986); *Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc.*, 776 F.2d 646, 659-60 (7th Cir. 1985); *Costa v. Sears Home Improvement Prods., Inc.*, 178 F. Supp. 3d 108, 113 (W.D.N.Y. 2016).

Because Wisconsin has not decided this issue as of yet, and other jurisdictions are split on the issue, it may be risky to oppose an opponent's request for attorney fees on the grounds that the time spent by its attorneys was excessive or its attorneys' hourly rates are unreasonable, particularly if it is anticipated that the attorney fees you spent likely exceed the attorney fees spent by your opponent.

Dean Laing is the President of O'Neil Cannon, and a member of its Litigation Practice Group. He can be reached at 414-276-5000.

FIRM WINS TRIFECTA

O'Neil Cannon was victorious in three cases before the Wisconsin Supreme Court this year, all involving issues of first impression in Wisconsin.

In the first case, decided on January 29, 2019, the Supreme Court held that bad faith under the Uniform Fiduciaries Act ("UFA") requires proof by a bank customer of bank dishonesty whereby the bank willfully failed to investigate compelling and obvious known facts suggesting fiduciary misconduct because of a deliberate desire to evade knowledge of fiduciary misconduct.

In *Koss v. Park Bank*, 2019 WI 7, 385 Wis. 2d 261, 922 N.W.2d 20, an employee of Koss

Corporation embezzled \$34 million from the Company over a 10-year period. A significant portion of the embezzled funds came from cashier's checks obtained by the employee from the employer's bank accounts at Park Bank, which the employee used for her personal benefit. After the embezzlement was discovered, Koss Corporation sued Park Bank, alleging that Park Bank should have discovered the embezzlement earlier and reported it to Koss Corporation, and its failure to do so was bad faith under the UFA, which precludes claims of negligence against banks. After five years of litigation, the trial court dismissed the case on summary judgment, finding that Koss Corporation failed to meet the high standard for establishing bad faith under the UFA. The Court of Appeals affirmed the dismissal, and the Supreme Court did so as well.

In a 2-3-2 decision, the Supreme Court held that the following "foundational principles" are applicable in analyzing a bank's conduct when bad faith is asserted under the UFA: (1) bad faith is an intentional tort requiring that a bank employee suspected fiduciary misconduct but purposefully failed to investigate out of a fear of discovering the misconduct; (2) bad faith is reviewed on a transaction by transaction basis, such that the facts known by each individual bank employee are not aggregated to form collective knowledge of the bank; (3) whether a bank acted in bad faith is determined at the time of the breach of fiduciary duty, not by looking back at transactions that occurred many months earlier; and (4) considerations of bad faith require analyses of a bank's actions to determine its subjective intent.

In applying these bank-friendly standards and principles, the Supreme Court held that "none of Koss Corporation's factual allegations asserted, or even implied, that Park Bank acted dishonestly such as being motivated by self-interest with regard to the transactions [the customer's employee] initiated," and "none of Koss Corporation's allegations assert that Park Bank suspected that [the customer's employee] was acting improperly." Concluding, the Supreme Court held that, while "[t]here is much here from which a claim of negligence could be made," negligence is not sufficient to establish bad faith under the UFA.

In the second case, decided on March 14, 2019, the Supreme Court held that a business purpose is not required in order for land to be classified as "agricultural land" for property tax purposes. In *State ex rel. Ogden Family Tr. v. Bd. of Review*, 2019 WI 23, 385 Wis. 2d 676, 923 N.W.2d 837, the Ogdens owned property in the Town of Delafield that was originally classified as "agricultural land," thereby resulting in a low assessed value for property tax purposes. In 2016 the Town reclassified the property as "residential" on the grounds that the property was not being used for a business purpose, which resulted in a 50-times increase in the assessed value of the property. The Ogdens challenged the reclassification, arguing that the property is used primarily to harvest apples and hay for food and fiber, and to grow Christmas trees, which are agricultural uses. The Town failed to budge, determining that a business purpose is required for land to be classified as "agricultural land" for property tax purposes. The Ogdens filed a petition for certiorari review, which the trial court rejected, siding with the Town.

The Ogdens appealed, and the Court of Appeals reversed, concluding that a business purpose is not necessary for land to be classified as “agricultural land” for property tax purposes. The Supreme Court affirmed, in a unanimous decision, holding that section 70.32(2)(c)1g., Wis. Stats., merely requires the “growing” of crops, not the marketing, selling, or profiting from them, for land to be classified as “agricultural.” As a result, the Supreme Court held that “[a] business purpose is not required in order for land to be classified as ‘agricultural’ for property tax purposes.”

In the third case, decided on May 23, 2019, the Supreme Court held that constructive trust is a remedy, not a cause of action. In *Tikalsky v. Friedman*, 2019 WI 56, 386 Wis. 2d 757, 928 N.W.2d 502, Tikalsky’s parents disinherited him from their estates, leaving their entire estates to their other three children, equally. Following his parents’ deaths, Tikalsky sued his siblings, alleging that two of them intentionally interfered with his expected inheritance. As to his third sibling, Tikalsky sued her for constructive trust arguing that, even though she was innocent of any wrongdoing, she is in possession of a portion of his expected inheritance and, if he prevails on his claims against his other two siblings, his innocent sibling should be required to disgorge the excess portion she received from her inheritance.

The trial court dismissed the innocent sibling from the lawsuit on the grounds that no cause of action for liability was asserted against her and, without a finding of liability against a party, no remedy can be ordered against that party. The Court of Appeals reversed, holding that constructive trust is available against an innocent beneficiary if wrongful conduct is found against any party and it would be inequitable for the innocent beneficiary to hold onto the property received as a result of the wrongdoing.

In a 4-3 decision, the Supreme Court reversed the Court of Appeals’ decision and held that “constructive trust is a remedy, not a cause of action.” The Supreme Court further held that, while “a constructive trust may be imposed on property in the possession of one who is wholly innocent of any” wrongdoing, that remedy is only available where the innocent beneficiary “came into possession of property that was already burdened with a constructive trust,” *i.e.*, the owner of the property must have conveyed the property to an innocent beneficiary in violation of a duty to transfer it to the plaintiff (such as by a court order in a divorce proceeding). Concluding, the Supreme Court held that Tikalsky’s parents “violated no duty to [Tikalsky] when they caused their estate planning documents to transfer part of their estate to [Tikalsky’s innocent sibling]” and, as a result, “where there is no violated duty . . . there can be no constructive trust.”

Dean Laing represented the bank in *Koss* and the innocent beneficiary in *Tikalsky*. He can be reached at 414-276-5000.