



AMERICAN
BANKRUPTCY
INSTITUTE

Central States Bankruptcy Workshop

Skills Track

Mediation and Risk Analysis

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Risk Analysis & Mediation: Practical Skills

2023 ABI Central States Bankruptcy Workshop

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Overview

1. ADR is Now the Norm
2. Pitfalls of Mediation - Bias
3. The Lake Wobegon Effect
4. Risk Analysis: How Biases May Hinder Settlements
5. BA[D]GER: Stages of the Mediation Process Involving Individuals
6. Confidentiality
7. BATNA
8. WATNA
9. Integrative Negotiation
10. Harvard Principles of Negotiation
11. Common Errors in Mediation Advocacy
12. Final Thoughts

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<https://youtu.be/oXY0fn68PKo>

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ADR Is Now the Norm

- Fewer and fewer cases result in a verdict.
- Supreme Court decisions have made case disposition by motion more likely.
- Parties in both civil and criminal cases are increasingly drawn to what they perceive to be readily available, less expensive and more attractive alternatives.



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Pitfalls of Mediation - Bias

- Although lawyers typically believe that rational decision making characterizes their negotiations, an abundance of evidence suggests that this belief is misplaced.
- Research in the past few decades has documented pervasive psychological biases in the judgment and decision making of a wide array of professionals and laypersons.
- For example, people tend to seek information that confirms their prior beliefs and tend to ignore or derogate information that refutes those beliefs.
- Such biases can act as barriers to mutually beneficial settlements and can make mediation less effective for all parties.



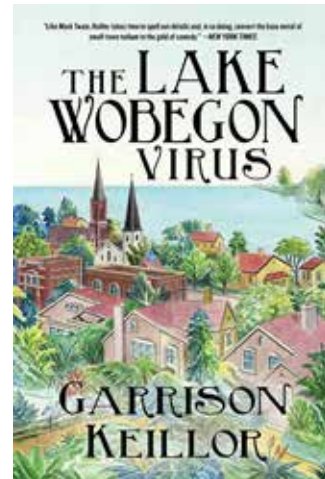
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Bias Cont. - The Lake Wobegon Effect

- "About 80 percent of us believe that our driving skills are better than average [A] large majority of people believe themselves to be smarter, more attractive, and more talented than average ... " (Kahneman & Renshon, 2007).
- "In one study, 94% of men ranked themselves in the top half of male athletic ability" (Burnham & Phelan, 2000, p. 91).
- We don't tend to think we are better than average in areas where actual measurement is possible, free-throw shooting for example.
- But if the criteria are sufficiently fuzzy, most of us give ourselves the benefit of the doubt.



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Risk Analysis: How Biases May Hinder Settlements

Question	Bias	Effect on Settlement	Remedy
How much is the case worth?	Believe what is memorable or easier to recall is what is typical.	Overestimate the value of your client's claim.	Research outcomes of similar cases rather than relying on intuitive judgments which may be skewed by high profile cases (e.g., McDonald's hot coffee case). Evaluate possible weaknesses.
How likely am I to win?	Assess strength of case in a self-interested or egocentric manner. Overconfidence—tend to overestimate probability of success.	Parties that are farther apart tend to strike for longer periods of time. May cause extreme reservation points.	Research outcomes of similar cases, including value. Recognize that your view of the case will be biased in your favor.
How do I evaluate the strength of the information I gather?	Evaluate and assimilate information in favor of your own position.	More information often widens the gap between parties, causing each side to become more biased in favor of their own position.	Enlist a disinterested party as a sounding board. Play devil's advocate.
What is a good outcome?	Fixed pie bias—perceive other party's interest to be diametrically opposed to your own. Tendency to place all client's interests into monetary terms.	Inhibits identification of mutually beneficial tradeoffs resulting in "lose-lose" agreements.	Focus on underlying interests of the parties.
What is fair?	Define what is fair in a self-interested manner (e.g., equity vs. equality norms). More sensitive to counterparty's relative payoffs than your own absolute payoffs. People willing to harm themselves in order to punish those they perceive as acting unfairly.	Parties often have competing norms of fairness.	Avoid the perception that one is acting unfairly. Important the other party does not feel that they are losing relative to what you are receiving, what others are receiving, or what they have received in the past.

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Risk Analysis Cont.

Question	Bias	Effect on Settlement	Remedy
Should I make the first offer?	<p>Anchoring bias—tendency to anchor on a salient number.</p> <p>Reciprocity—one should reciprocate concessions made by others.</p>	<p>First offers can be used to exploit an anchoring basis to draw counterparty into an order of magnitude that is more favorable to you.</p> <p>Second offers can be used to exploit reciprocity and provide an opportunity to define where the midpoint lies.</p>	<p>Gather as much information as possible to assess the value of the claim in question to protect against anchoring bias.</p> <p>Decide reservation price in advance based on a well-researched estimate of what is likely to happen if the case goes to trial.</p> <p>Insist that your own concessions be followed by concessions from the other party.</p>
How should I evaluate their offer?	<p>Tendency to evaluate proposals offered by one's adversary less favorably (i.e., reactive devaluation).</p>	<p>Party's may undervalue offers or concessions made by counterparty.</p>	<p>Maintain cordial relationship with counterparty.</p> <p>Have mutually trusted intermediary convey a proposal (e.g., mediator).</p> <p>Examine whether impulse is rational response or emotional reaction.</p>

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BA[D]GER: Stages of the Mediation Process Involving Individuals

- **B**eginning the mediation
- **A**sking for and acknowledging parties' opening statements
- **[D]**eveloping the agenda]
- **G**athering information and generating movement
- **E**xit the caucus
- **R**esolving the dispute



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Confidentiality

- Bankr. E.D. Mi. Local Rule 7016-2(a)(5): “. . . All proceedings and writings incident to the mediation will be privileged and confidential, and must not be reported or placed in evidence. . . .”
- Bankr. W.D. Mi. Local Rule 9019-12, “Confidentiality and Privilege”:
 - Definitions
 - Confidential Mediation Communications
 - Evidence Rules and Laws
 - Exceptions to Confidentiality
 - Required disclosures
 - Attorneys, agents, etc.
 - Preservation of Privileges
 - Mediation Participants shall not . . .
 - Communications with Court Personnel

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Confidentiality Cont.

- Federal Rule of Evidence 408, “Compromise Offers and Negotiations”
 - Prohibited Uses
 - Exceptions
- Case Study
 - *In re Lake Lotawana Cmty. Improvement Dist.*, 563 B.R. 909, 913 (Bankr. W.D. Mo. 2016) (creditors sought production of a prepetition mediation statement to ascertain whether the debtor mediated in good faith and was thus eligible to file Chapter 9 under 11 U.S.C. § 109(c)(5)(B); the court concluded that the mediation statement was privileged and need not be produced.)

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BATNA

- Roger Fisher and William Ury, *Getting to Yes*.
- BATNA is an acronym for Best Alternative to a Negotiated Agreement.
- You should **accept** any offer **better** than BATNA.



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BATNA Cont.

- | | |
|---|---|
| <ul style="list-style-type: none"> ▪ Scenario <ul style="list-style-type: none"> – The background facts relevant to the negotiation. ▪ Issues <ul style="list-style-type: none"> – Your issues in relation to the scenario. ▪ Interests <ul style="list-style-type: none"> – Your interests – why the negotiation is important to you. | <ul style="list-style-type: none"> ▪ Options <ul style="list-style-type: none"> – Ideas that are worth testing to see if they meet your interests. ▪ Objectives <ul style="list-style-type: none"> – The selection of options that you seek as potential outcomes. ▪ Positions <ul style="list-style-type: none"> – Your BATNA (best alternative to negotiated agreement). |
|---|---|

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- You should reject any offer worse than WATNA.



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Integrative Negotiation

- Aspect of negotiation that grows the negotiation pie.
- Most negotiations allow parties to do better if they cooperate rather than compete.
- Do you see what I see, put yourself in the other party's position.
- Brains work 31% better in a positive state of mind.
- What is the why behind what you want?
- What is important to them? You are in it together. Mediocre negotiators use leverage to force a yes.
- Think out of the box. Keep an open mind for creative settlement opportunities.
- Litigation breeds contempt, mistrust and often misunderstanding.



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Harvard Principles of Negotiation

- Separate the person from the issue. The other side is your counter-party, not your enemy.
- Interest, not position.
- What conditions must exist for you to say yes?
- People like to choose – different options – don't develop one option only.



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Common Errors in Mediation Advocacy

- Be prepared – know your facts and the case law
- Know the psychological obstacles, e.g., pride, fear, shame, etc.
- Let the client speak... it's mediation, not trial. Let them have their “day in court.”
- Manage the math
- Endurance



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Common Errors in Mediation Advocacy Cont.

- Invite the mediator to do their job
- Don't draw a line in the sand
- Be cooperative and respectful
- Credibility with the mediator
- THINK



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Final Thoughts

- Mediator's Proposal?
- The Importance of Picking the Mediator
- If you remember nothing else from this presentation...

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Faculty

A. Todd Almassian is a partner with Keller & Almassian, PLC in Grand Rapids, Mich., and focuses his practice in the areas of bankruptcy, reorganization and creditors' rights. He represents debtors, creditors and trustees. Mr. Almassian has served as an expert witness for plaintiffs and defendants in various insolvency matters and bankruptcy cases, and he is a frequent lecturer regarding the Bankruptcy Code. He also serves as a qualified mediator for the U.S. Bankruptcy Court for the Western District of Michigan and was recently inducted into the American College of Bankruptcy as a Fellow. Mr. Almassian is Board Certified in Consumer Bankruptcy Law by the American Board of Certification. He is listed in the 2011-15 editions of *The Best Lawyers in America* for Bankruptcy and Creditor-Debtor Rights Law and as its 2016 Grand Rapids Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law "Lawyer of the Year." Mr. Almassian received his B.A. from Michigan State University in 1993 and his J.D. from the University of Detroit Mercy School of Law in 1996.

Brendan G. Best is a partner at Varnum LLP in Birmingham, Mich., and serves on the firm's Bankruptcy, Restructuring and Creditors' Rights team. His practice focuses on representing senior secured lenders, debtors, other creditors and other stakeholders in complex chapter 11 restructurings, out-of-court workouts and insolvency-related transactions and litigation. Mr. Best has more than 20 years of experience representing clients in insolvency-related matters across a wide array of industries including manufacturing, automotive, building supply and service, energy, oil and gas, health care, food service, gaming, hospitality, construction and real estate. He serves as outside commercial counsel for clients, advising them on commercial issues with customers, suppliers and other parties. He also counsels buyers, sellers, lenders and other stakeholders in complex troubled company transactions, both out of court and in § 363 bankruptcy sales. Mr. Best is a senior chapter 11 bankruptcy practitioner and litigator who has successfully represented clients in bench trials over issues including adequate protection, plan confirmation, valuation and other matters, as well as nondischargeability actions, avoidance actions and other debtor/creditor matters in state and federal courts, including automotive tooling and construction lien litigation. He is a frequent writer and speaker on restructuring, workouts and bankruptcy topics. Mr. Best is routinely honored as a top practitioner by publications including *DBusiness* magazine, *The Best Lawyers in America* and *Michigan Super Lawyers*. He is a board member and immediate past president of the Turnaround Management Association's Detroit chapter and an ABI member. Mr. Best received his B.A. *cum laude* in 1997 from The George Washington University and his J.D. *cum laude* in 2003 from Wayne State University Law School, where he was admitted to the Order of the Coif and was a member of the *Wayne Law Review*.

Hon. Scott W. Dales is Chief U.S. Bankruptcy Judge for the Western District of Michigan in Grand Rapids, initially appointed in 2007 and named Chief Judge in 2013. In 2016, the Chief Justice appointed him to serve on the Information Technology Committee of the Judicial Conference of the United States, and in 2018, the U.S. Court of Appeals appointed him to serve on the Sixth Circuit's Bankruptcy Appellate Panel. Following law school, Judge Dales clerked for Hon. Constantine G. Cholakis, U.S. District Judge for the Northern District of New York, and subsequently practiced law for several years with Barrett Gravante Carpinello & Stern in Albany, N.Y. After clerking for Hon. James D. Gregg, Chief Judge of the U.S. Bankruptcy Court for the Western District of Michigan, and prior to taking the bench, he practiced law with Dykema Gossett, PLLC in Grand Rapids and served

as in-house counsel to National City Corp. and its bank and nonbank subsidiaries. As a member of National City's insolvency practice group, he worked primarily with distressed commercial transactions, including National City's aircraft lease portfolio and troubled automotive-supplier loans. Prior to attending law school, he served as a legislative analyst for the Federal Home Loan Mortgage Corp. (Freddie Mac). Judge Dales received his bachelor's degree from the University of Michigan in 1987 and his J.D. from the George Washington University Law School.

Laura Krucks is a restructuring associate with Winston & Strawn LLP in Chicago. She represents clients in bankruptcy and restructuring transactions across a variety of industries, including oil and gas, retail and technology. She also advises clients on liability management and out-of-court restructuring transactions. Ms. Krucks has been listed in *The Best Lawyers in America* as one of the "Ones to Watch" for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law from 2021-23. She received her B.A. in English literature from DePauw University and her J.D. *magna cum laude* from Loyola University Chicago School of Law, where she served as an editor for the *Loyola University Chicago Law Journal*.