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Session 3

**Rights and Duties of LLC
Members and Corporate
Officers in
Insolvency Situations**

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About the Presenters...

Devon Eggert is a Shareholder in the Firm's Receivership and Creditors' Rights Practice Group. Devon represents court-appointed receivers, trustees, statutory committees and secured and unsecured creditors in all types of insolvency proceedings and out of court restructurings. His practice covers all aspects of complex insolvency and restructuring matters, including corporate receiverships, financing and cash collateral issues, distressed sale transactions, plan disputes and post-confirmation trust issues. Devon also represents both plaintiffs and defendants in complex commercial and insolvency litigation, including breach of fiduciary duty, fraudulent conveyance, preference and recharacterization disputes in state and federal jurisdictions throughout the U.S. Prior to joining the Firm, Devon was a Partner and Co-Chair of the Bankruptcy and Corporate Restructuring Group at a mid-size firm in Chicago, Illinois.

Deanne M. Koll is an attorney and shareholder at Bakke Norman, S.C. with offices in New Richmond, Eau Claire, Baldwin and Menomonie, Wisconsin. Deanne's practice includes assisting clients with analyzing creditor's rights in bankruptcy, complex commercial collections, state insolvency proceedings and out-of-court business reorganizations. She received her undergraduate degree from the University of Wisconsin-Oshkosh, *magna cum laude*, and her law degree from William Mitchell College of Law in 2006, *cum laude*. Deanne was elected in 2013 and again in 2016 to the Board of Governors. In 2017, Deanne was elevated to chair of the Board of Governors. Deanne is a current board member for WisTAF, the Wisconsin Law Foundation and her local hospital, Western Wisconsin Health. In 2020, the Wisconsin Supreme Court appointed Deanne to the board of administrative oversight. Deanne has authored articles published in the *Wisconsin Lawyer*, *Law Practice Today* (ABA), and *Real Estate Litigation Newsletter* (ABA). Deanne regularly speaks at state-wide and regional conferences about collection issues, secured transactions and bankruptcy. Wisconsin SuperLawyers has recognized Deanne as a "Rising Star" every year since 2010 and as a "Super Lawyer" beginning in 2022. Deanne has previously been recognized by the Wisconsin Law Journal as an Up and Coming Lawyer. She is licensed to practice in both Wisconsin and Minnesota.

Matthew D. Lee is an experienced bankruptcy, restructuring, and real estate and business litigation attorney. He is a partner and a member of the firm's Bankruptcy & Business Reorganizations and Business Litigation & Dispute Resolution Practices. Matt is based in the firm's Madison, Wisconsin office and has practice experience nationwide. Matt represents Chapter 11 debtors, secured and unsecured creditors, official committees of unsecured creditors, chapter 7 trustees and other estate fiduciaries, and defendants in avoidance actions. In addition to his bankruptcy experience, Matt counsels clients in out-of-court restructurings, workouts, assignments for the benefits of creditors including those filed under Chapter 128 of the Wisconsin Statutes, and other insolvency matters. His real estate litigation practice encompasses eminent domain proceedings, land use and zoning disputes, foreclosure litigation, lease disputes and eviction actions, and other disputes involving real property interests. His business litigation practice encompasses, among other areas, construction disputes and commercial contract disputes. He also counsels his clients before a dispute or insolvency arises on the issues of litigation avoidance, loss mitigation, and risk management.

Claire Ann Richman is a partner in the Madison, Wis., office of Steinhilber Swanson LLP, where she concentrates her practice in bankruptcy, real estate, and commercial and claim litigation. Ms. Richman served on ABI's National Board of Directors, was appointed to the panel of chapter 7 trustees for the Western District of Wisconsin from 2004-2011, and was formerly a member of the National Association of Bankruptcy Trustees' New Trustee Advisory Committee. She is also past chair of the State Bar of Wisconsin's Bankruptcy, Insolvency and Creditors' Rights Section and serves as co-chair of its Legislative Committee. Ms. Richman formerly served as chair of both ABI's Central States Advisory Board and the State Bar of Wisconsin's Convention Committee, and she was a member of the Ethics Committee for the National Association of Bankruptcy Trustees. She is a Fellow of the Wisconsin Law Foundation. In 2005, she was recognized as one of the "Top 25 Female SuperLawyers," and has been named a "SuperLawyer" in *Law & Politics* and *Milwaukee Magazine*. Ms. Richman received her B.A. from Marquette University in 1987 and her J.D. from the University of Wisconsin in 1993.

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SUCCEEDING IN MEDIATION: AVOIDING THE COMMON FAILURES

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I. Introduction

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

II. Cases That Work Well for Mediation

1. Personal injury claims
2. Business disputes/divorces
3. Real estate disputes

4. Family law matters
5. Insurance coverage matters

III. Mediation Rules

1. Formal- See Exhibits attached
2. Non-formal
3. Written
4. Contracts
5. The statutes

IV. Common Causes of Mediation Failure

Setting the stage

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

Preparation: Calls and Contacts

5. No clear pre-ADR communications, i.e., no idea if opponent will negotiate in good faith
6. No contact with subrogation carrier before mediation- contact during mediation
 - a. Medicare
 - b. Medicaid
 - c. Made whole
 - d. Future set-asides
 - e. Paternity & other liens
7. Failure to prepare/education client for mediation

8. Wrong decision maker in control - e.g., non-party
9. No one present with authority to settle

Knowledge of case

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

Insight and Perceptions

13. Failure to perceive risk
14. Lawyer working against mediator
15. Lawyer supporting mediator too much (*See Model Rules for Mediation (ABA), Sections II and III, Mediatorial Impartiality, Conflicts*)
16. No knowledge of judge or jurisdiction, i.e. rural county= low verdict
17. Gaining the parties' trust

Law and Legal Practice

18. No knowledge of policy limits/coverage issues;
19. Impact/usefulness of "expert opinions" incorrectly valued
 - a. Permanency
 - b. Economic Loss
 - c. IME's

- 20. Posturing mediator as expert who opinion/evaluation stays in the case (*see* admissibility restrictions, Wis. Stat. § 904.85)
- 21. "Real issue" (i.e., what client wants and needs is not addressed)
- 22. No understanding of litigation cost
- 23. Mediation roulette: overreliance on strategies and judgment calls vs. facts and law, e.g.
 - a. Strategic bluffs: "settlement talk stops today"
 - b. Assumptions - opposition cannot/will not try
- opposition unprepared
 - c. Let's take a chance and ring the bell
 - d. I have better witnesses; reliance on past verdicts
 - e. This jury will be conservative

Getting Off Course

- 24. Outcomes: plaintiff correlates to financial needs, not case value
- 25. Inappropriate motivations
 - a. Punishment
 - b. Financial ruin

When to Quit

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

Concluding Mediation Correctly

- 27. Wis. Stat. § 807.05

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

28. "An oral contract reached by stipulation in the course of court proceedings is unenforceable unless formalized in the way required by sec. 807.05." *Kocinski v. Home Ins. Co.*, 154 Wis. 2d 56, 67-68, 452 N.W.2d 360 (1990).

29. The purpose of this rule is "to prevent disputes and uncertainties as to what was agreed upon." *Adelmeyer v. Wis. Elec. Power Co.*, 135 Wis. 2d 367,372,400 N.W.2d 473 (Ct. App. 1986).

No Duty to Mediate In Good Faith

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

31. It is an error for a court to conclude, based on a settlement offer of zero, that a mediation process was a sham or perfunctory, for purposes of imposing sanctions for failure to comply with a scheduling order. *Gray v. Eggert*, 2001 WI App 246,248 Wis. 2d 99,635 N.W.2d 667.

32. But see, *Lee v. Geico*, 321 Wis. 2d 698 (Ct. App. 2009), court imposed sanction for not attending mediation with claim representative.