

THE ROLE OF THE FAMILY BUSINESS LAWYER IN MEDIATION OF FAMILY BUSINESS DISPUTES

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Introduction

Whenever the business attorney is dealing with two or more owners of a business, whether the business be in partnership, limited liability company or corporate form, conflicts will inevitably arise among the owners at some time during the business' history. These conflicts may result from differences of opinion over expansion of the business, hiring personnel, strategic alliances, bringing in new partners/shareholders, compensation, or the like. These conflicts are usually more acute in a family business where the owners are related. In such cases, emotions play a larger role and extended family members or in-laws who are not in the business become more involved in voicing opinions on fairness and related matters. Over a period of years and perhaps beginning with dealings with the next generation, the family business lawyer becomes intimately involved in trying to assist in dealing with these conflicts, many of which never get satisfactorily resolved. If we look at the hypothetical example in Appendix A, the following undertakings, among others, if done at earlier stages might have alleviated the conflicts that existed and helped to avoid the current disputes:

- (a) Development of a Family Business Constitution or Family Charter to outline the roles, rights, and responsibilities of family members within and without the business, including guidelines for hiring and firing of family members and compensation.
- (b) Creation of an advisory board or independent Board of Directors to establish independence in governance, hiring, firing, and compensation.
- (c) Adoption of a compensation policy related to established job positions geared to performance and

market factors and comparables, and unrelated to family dynamics.

(d) Preparation of a Shareholders' Agreement dealing with values and buy-outs on death, disability, or retirement.

(e) Retention of a family business consultant/psychologist/mediator in the early stages to deal with family conflicts.

(f) Consideration and dealing with conflicting role of family attorney and other professionals.

The balance of this paper assumes the partners/shareholders are in a full fledged dispute that has given rise to litigation. Under normal circumstances, the family business lawyer will have turned the matter over to a litigator in his office with one of the parties hiring other counsel or, in the worst case scenario, has had to bow out completely because of the conflicts which exist. For our purposes, we will assume that the family business lawyer is still involved with one or more of the parties to the dispute and, because of his or her history with the family and the respect and trust they still have in him, that is a good thing. Alternatively, the lawyer may not be involved with one of the parties but may be called upon by the mediator for expert advice with the approval of both parties. In such case, there are a multitude of things the family business lawyer can do – and indeed may be better equipped to do than the litigator – in attempting to help resolve the dispute. The following is a discussion of what those things might be, focusing on mediation as a desirable alternative to litigation.

Proponent of Mediation. First, the lawyer should be a proponent of mediation as opposed to litigation in resolving the dispute. Mediation allows the parties to craft their own solutions to resolve the dispute, and gives them the best chance of preserving their future family relationships in some fashion. Where the lawyer is not representing one of the parties in the mediation, the lawyer may be consulted by the mediator to provide useful legal information so that each party can benefit from his knowledge.

Maintain a Role in the Process. If it is possible to participate in the process, the business lawyer should not abdicate his role to the litigator in mediation. In choosing a dispute resolution process, we must be cognizant of normal differences in attitudes and personality traits between a lawyer who is a litigator and a lawyer who advises a family business. For example, we might find the following differences –

<u>Business Lawyer</u>	<u>Litigator</u>
Adaptable	Aggressive
Pragmatic	Combative
Sympathetic	Defensive
Conciliatory	Skeptical
Knowledge of substantive law	Limited knowledge of substantive law
Knowledge of parties	Lack of knowledge of parties

These general attitudes and characteristics of the family business lawyer as contrasted with the business litigator leads one to conclude that the former should be more helpful in assisting in the resolution of the dispute through mediation, thus promoting a faster resolution and a preservation of relationships.

Selection of the Mediator. One of the more important aspects of the mediation process is the selection of the mediator. The mediator should be a person experienced in dealing with family business matters, one who is able to deal with the emotions of the parties and is familiar with the substantive law. Moreover, the mediator's role may be evaluative or facilitative and the parties must decide who would be the best choice. These varying roles have been described as follows:

The evaluative mediator assumes that the participants want and need the mediator to provide some

directions as to the approximate grounds for settlement – based on law, industry practice, or technology. She also assumes that the mediator is qualified to give such direction by virtue of her experience, training, and objectivity.

The facilitative mediator assumes the parties are intelligent, able to work with their counterparts, and capable of understanding their situation better than either their lawyers or the mediator. So the parties may develop better solutions than any that the mediator might create. For these reasons, the facilitative mediator assumes that his principal mission is to enhance and clarify communications between the parties in order to help them decide what to do. The facilitative mediator believes it is inappropriate for the mediator to give his opinion, for at least two reasons. First, such opinions might impair the appearance of impartiality and thereby interfere with the mediator's ability to function. Second, the mediator might not know enough – about the details of the case or the relevant law, practices, or technology – to give an informed opinion.*

The family business lawyer can be of invaluable assistance, based on his knowledge of the parties and family dynamics, in choosing the best type of mediator for this dispute.

Determination of Goals. In most cases that have reached the litigation stage, the client's stated goal is usually to get the best possible terms from the other side – that is usually translated into a monetary settlement. However, family business mediation may have other possible goals besides a monetary result due to the family relationship. These include an interest based solution, such as hiring of a family member or resolving an issue of compensation, repair of relationship, such as a result which reinforces the parties desires to continue to work together on an amicable basis, or a transformation of perspectives, such as a result

* Golann & Folberg, "Mediation – The Roles of Advocate and Neutral," p. 118, Aspen Publishers (2006).

which cause family members outside the business to change their viewpoints or demands.*

In fact, the mediator may be able to create solutions that would not otherwise exist in a normal business dispute where a continuing relationship may not be desired. One author has suggested the following probabilities:

When parties mediate a legal dispute arising from a significant prior relationship with a mediator open to imaginative solutions, there appears to be approximately a 15 to 20 percent chance that the process will culminate in a repair of the parties' relationship, a 30 percent chance of a settlement that has at least one significant integrative term in addition to money,¹ a 25 to 30 percent probability of a settlement consisting solely of a monetary payment, and a 25 to 30 percent likelihood of impasse.

Here, again, the family business attorney is liable to better understand the goals of each family member and the likelihood of achieving a satisfactory settlement.

Parties to Mediation. For the business lawyer, once the goals are outlined, the issue becomes what parties should attend the mediation. The immediate disputants, in our example, George and Jack, may not be the only parties who will be affected by the mediation. Particularly if the children will be affected, they may benefit from attendance and being part of the decision making process. In-laws may also be necessary parties. A good mediator who has a full understanding of the legal and emotional issues

* Id. at pp. 114-15.

¹ Examples of integrative terms in business disputes included an agreement among parties breaking up a partnership that one partner would have the exclusive use of certain billing software, or that the ex-partners would continue to share office space. In employment cases, companies agreed to terms such as temporarily maintaining the health coverage of a departing employee or changing records to reflect a voluntary quit rather than a termination, and employees sometimes agreed never to apply for employment with the company again. Releases of liability and confidentiality agreements were not counted as integrative terms in the survey because they were typically assented to as a matter of course. Id. at p. 115.

involved may be helpful in suggesting the extended parties to attend the mediation. The family business lawyer can be helpful in making sure that the mediator has a full understanding of these issues.

The Mediation. Once the mediation starts, the family business lawyer can assist in providing information and crafting solutions. A split up of the business or the issuance of a different class of stock may involve tax considerations for which the business lawyer is uniquely qualified. If a Shareholders' Agreement is to be drafted, the business lawyer will have a head start being familiar with the business and the necessary parties to the Agreement. If the dispute is resolved through mediation, one can assume that much will be saved in professional fees, and the parties will be able to get on with their daily lives much faster than if litigation were pursued.

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APPENDIX A

Family Business Dispute: A Case Study

The Family Business: Foxwell Company, a fourth-generation, family-owned business founded in 1892 in Detroit, manufactures valve products sold nationally. The business is divided principally between two lines, standard line of automatic valves for controlling pressure and pumping water and custom valves with various applications.

The standard line traditionally accounts for 60% of sales; the custom line accounts for the other 40%. Although Foxwell has prospered from profound growth and productivity for more than a century, its two owners, brothers, are beset by bitter disputes over succession and control.

Ownership Structure: Foxwell Company is organized as an S-corporation. The capital of the company consists of 10,000 shares of voting common stock, 50% owned by each of George and Jack Foxwell.

George and Jack are the two directors. George is the president, and Jack is secretary and treasurer. George is 69 years old, Jack is 63. George and Jack earn the same compensation in the form of salary and bonus, typically \$500,000 per year; and the shareholders receive dividends each year, typically in excess of \$200,000. Each has adequately saved for his retirement.

Fourth-Generation Employment:

- George has three children.
 - George, Jr. is 42, has an MBA, and is a senior executive who joined the company in 1995. George, Jr.'s salary in 2010 was \$230,000. His bonus was \$250,000.
 - Barbara is 35, with a BA, and is a marketing executive who joined the company in 1998. 2010 salary was \$125,000; bonus was \$150,000.

- Ken is 33, with a BA in engineering, and is an operations manager who joined the company in 2004. His salary is \$125,000. His 2010 bonus was \$100,000. Ken has health problems and now works part-time.
- Jack has two children.
 - Amy is 32, with a BA, and is a senior marketing manager who joined the company in 2007. Amy's 2010 salary was \$95,000, and she has never received a material bonus. Amy seeks to move to another city but to continue to work remotely. George has stated that Amy cannot remain employed except in a regional sales role if she does not work full-time in the company's regular offices.
 - Jack, Jr. is 26. He has an MBA from a lesser known program and lives in the southeast. Jack has recently insisted that the company hire Jack, Jr. into a managerial position. George has refused. George has advised Jack, Jr. that he will not hire him because Jack has filed suit against George.

The company employs no spouse of any Foxwell family member.

Conflict: George and Jack are embittered and hostile to each other. After years of harsh communications, they seldom speak. Disputes have arisen and center on the following issues:

Management succession: In 2011, without board action or approval, George publicly announced that he intended to resign as president and appoint his older son George, Jr. president. The company has no experienced senior executive other than George, Jack and George, Jr. Jack objects to the decision to appoint George, Jr. on both procedural and substantive grounds. Deadlock prevents the board from resolving this dispute.

Fourth-Generation Employment and Compensation: Jack blames George for Jack's children's relative indifference to careers in the company and maintains that George is favoring his own

children. George blames Jack for mistreating George's son, George, Jr., since he joined the company. George credits George, Jr. for a great deal of the company's recent success and views him as the natural next generation of leadership based on commitment, drive and talent.

The Alleged Oral Agreement: Jack maintains that in the early 1980s, he and George entered into an oral agreement requiring the company to hire any child of Jack or George who wished to join provided he or she possessed an MBA or engineering degree, and two or more years relevant, full-time work experience outside the company. George acknowledges discussions in which Jack stated that none of their children should join the company unless they had undergraduate and graduate degrees, and outside work experience of two years or more.

Among other issues relating to treatment of the fourth-generation, Jack objects to the positions, salaries and bonuses that George, as president, has given to his three children. Jack also objects to George's treatment of Jack's children. Jack's daughter, Amy, and her young family seek to move from the headquarters, located in a rural area, to Chicago. Jack maintains that Amy should remain in her sales and marketing role, working remotely. George maintains that the success of the business requires that all business operations other than regional sales must take place at the company's rural headquarters, and Amy and others in her generation must work at the headquarters or move into a regional sales role, and be compensated accordingly. George stresses that his son, George, Jr., and other children moved or remained at the rural headquarters. Sam also objects that George's refusal to hire Jack, Jr. is retribution against Jack for bringing litigation. George maintains that Jack, Jr. lacks experience or other qualifications and is not genuinely interested in joining the business.

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