

FAMILY BUSINESS MEDIATION
Anatomy of the Process

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The term “family business mediation” has a number of connotations from parents mediating issues between/among their children, to circuit court mediators mediating issues among trustees (and other professionals) and family members (including siblings, parents, aunts, uncles, cousins, nephews, nieces). This article is intended to address the latter issue leaving the former to medical and family law practitioners.

Family business mediation is unique in the field of circuit court mediation in that the relationship between mediating participants is a crucial ingredient to the process from beginning to resolution and beyond. In a personal injury or wrongful death case (as tragic as it may be) the relationships are initiated at the moment of the accident. In contractual disputes relationships begin at or around the commencement of the contract. Stockholder or partnership disputes commence with the creation of those business relationships. In family disputes, however, the relationships date back to births, which may descend and ascend through generations.

Those relationships span not only time, but they also span enumerable chapters of life cycle events. Accordingly, family issues must be understood both in the context of the substantive issues as well as those family relationships that may be the motivation behind said issues.

For a mediator to assemble parties in a room for the traditional opening session without knowing, understanding, or appreciating the role of these relationships among the family participants, can be a formula for disastrous results. On the other hand, thoroughly understanding the procedural and substantive issues together with the family relationships (and histories behind

them) can assist the mediator and the process in bringing the right people together at the right time over the right issues. The family business mediation process is, therefore, divided into three segments:

I. **Pre-Mediation-Consultation with counsel and other relevant professionals and family members involved in issues**

For purposes of this article it is assumed that family members are represented by counsel or other professionals. Whoever those professionals are, it is best to begin with them.

Those discussions include the following:

- (a) Identification of the family members and their relationships (including those in leadership roles); and
- (b) Identification of the problem and issues;
- (c) Identifications of reasonable options for achieving resolution (concepts as to the means of achieving said options).

In initiating pre-mediation calls to professionals, there should always be an effort to achieve mutuality. That is to say, whenever a discussion occurs with one counsel, there should be an effort to contact the other counsel. These conversations can be held jointly and/or separately (there is nothing wrong with ex parte communications in mediation). Separate conversations with counsel can lead to separate conversations with other professionals with the guidance of counsel.

Ultimately, the mediator will acquire sufficient information to bring the professionals together, collectively. Collective conversations can occur either by phone or in person. Bringing the professionals together collectively can assist in establishing some professional rapport between them prior to bringing all the family members together. Exchanging questions, concerns or ideas may be helpful to the professionals in properly leading their clients in the right direction.

The pre-mediation work with professionals will lead to pre-mediation work with the family members and other relevant participants. At times it is helpful for the family members to meet with the mediator privately before the mediation (with counsel or other professionals). In this way, they can “break the ice” in engaging the process and get comfortable with the professionalism of the mediator while obtaining some context into the mediation process.

Such pre-mediation communication with the family members and the mediator can also give the family participants an opportunity to “vent”. Understanding where the family member is coming from (and why) is helpful to the mediator in ultimately designing the right process for all the parties. It also gives the parties confidence in who the mediator is and what the mediator is attempting to accomplish. The mediator can also use the pre-mediation opportunity with family members to help establish ground rules for the mediation.

These pre-mediation communications are all intended to “design the mediation”¹. While the mediator cannot control the ultimate result, he/she can control the process. Designing the mediation prior to the formal mediation session(s) can better control and manage the ultimate mediation process. For instance: where should the mediation take place (in a neutral place or in the venue/forum of one of the participants)? How should the parties be grouped or organized? Should there be an opening statement? When there are multiple issues, what issues should be addressed first and which should be saved for the end? Should there be one session that can go into the evening or should there be multiple consecutive day sessions? Who are the leaders of each group, and should they be brought together outside of the larger group to meet initially or later on in the mediation process? Answering these questions prior to “getting to the table” can aid the ultimate mediation process. Not only will it help the mediator, but it will also help the other professionals who are attempting to lead the family participants.

Finally, the pre-mediation sessions should be used to help establish options for resolution that should be endeavored during the course of the mediation. The pre-mediation sessions can establish what is available for discussion and what is not. Viable options will help keep the process on track, whereas non-viable options should be avoided (or at least their non-viability should be understood).

II. Mediation

Having properly “designed the mediation”, the mediator can lead the family participant into the process with some understanding of the day’s agenda. Where the family participants are relatively amicable, a joint session may be initially endeavored. However, where there are issues or concerns that are identified in pre-mediation, it is best to initiate the process by having the family participants in separate rooms. In this way, the mediator can give each family participant an opportunity to understand who the mediator is; how he/she will work through the day; what the general agenda will be (as identified through the pre-mediation discussions); and how their concerns or issues will be addressed. This will also give the family participants a comfort level that they can meet and talk to the mediator outside the presence of others.

Once the separate caucuses are concluded, the mediator may bring the family members together collectively. The mediator should be the first one to speak—primarily as to the process. The mediator should promote “trust of the process” explaining, collectively, how he/she is going to work for all involved (this may be repetitive of the separate initial caucuses, but it is appropriate to re-enforce that which has been said separately and confirm its validity in front of all family participants. The mediator will be in a position to acknowledge not only the process, generally, but also the agenda more specifically. Where there are differences, the mediator should generally acknowledge that “it is ok to disagree”. The very purpose of the mediation is to identify the

¹ See “Designing the Mediation” by Rodney Max (uww-adr.com)
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differences and explore options to find common ground. The mediator should also use the opening session to acknowledge the professional leadership on each side so as to validate the role of the professionals who are duly leading them.

At the conclusion of the mediator's opening, he/she may look to each side's leadership to make whatever opening statements they deem appropriate (the pre-mediation discussions will have generally identified the extent and nature of the professionals' opening statements). The mediator should stress open and objective listening by those family participants on the other side of an opening statement.

Before adjourning the opening session, and subject to the advice of counsel (or other professionals), the family participants may be given an opportunity to speak. (Through the pre-mediation design as set forth in Section I above, it may be determined that such family participant statements will not be made.)

The opening session can be as long or as short as it is deemed appropriate with deference given to both the issues and the relationships. Often family participants can remain together in lengthy sessions. Sometimes joint opening sessions should be limited to a shorter time frame.²

It must be emphasized at this point that the use of the professionals, whether legal, financial, or otherwise, both in joint and private sessions can be invaluable to this process. Realizing that the relationships play a significant role, professional viewpoints on issues can lend significant objectivity to decision-making. There are certainly times when those professional decisions differ, but they can also be a "tool" to help the parties find common ground.

Can the professionals do this in front of their clients or is it better for them to do it separately with the aid of the mediator? Ideally, a separate professional caucus should take place

² In certain cases, it may be more effective to begin the family business mediation in separate caucuses without the family members being brought together before some progress has been made.

prior to the mediation day. The professionals should be encouraged to do all that is necessary and possible to explore means and methods of identifying common ground so as to aid the process while preserving their positions of professional leadership. If, and only if, those discussions breakdown should there be consideration of selecting an independent professional to assist them in resolving the particular issue in that area of expertise. For instance, should two certified public accountants be in irreconcilable conflict over methodology, it may be possible for them (with the consultation of their respective family participants) to select a neutral CPA to assist the mediator in a neutral facilitation. (Again, where the difference exist, it is best that they be identified prior to the mediation so that said independent professional can be in place at the time of the mediation).

The central part of the mediation is the development of procedural and substantive solutions both long-range and short-range. As to procedure, the family participants will attempt to establish the following:

- (1) Protocols for communications;
- (2) Means of dealing with one another;
- (3) Means of making decisions;
- (4) Allocation (of whatever the subject matter or issue is);
- (5) Alternative dispute resolution mechanism to resolve future disputes.

Establishment of these procedural solutions will help the family members work toward solutions on the substantive issue. Coming to an agreement on “how to get to yes” can be medicinal in achieving the ultimate agreement. While it has been suggested above that pre-mediation communications can achieve the establishment of the procedural solutions, there is value to achieving these at the mediation as a part of the “bridge building” process by and among the family members themselves.

There will be an anxiety among the family participants to move on to substantive solutions. While ideally the substance should follow the procedures (for “bridge-building” purposes) moving into substantive negotiations is at the “heart” of the family business mediation process. Moving the parties through demands, offers, and counter-offers incorporates the traditional mode of mediation. However, in family business mediation it is not merely moving numbers or positions back and forth. Rather, it is having a reason for whatever the proposition is, so that the other side knows what is being offered and why. The concept of “legitimacy” in negotiations is crucial to a family business mediation. Whether the issue is money; property; or allocation of assets or liabilities or authority, having a legitimate reason for a proposal is important between and among family members.

While the general mediation practice puts no limit on the number of offers and counter-offers between parties, family business mediation should encourage as few moves as is practicable. Fewer moves allow each to be more meaningful. When combined with a legitimate rationale, the negotiations tend to be more constructive.

During the course of negotiations, calling on family leadership in each room is also helpful. While professional leaders can help initiate the process, family leadership is helpful to the negotiation process. Parents, siblings, and other relatives who have mutual respect can bridge gaps. Bringing the right people together at the right time requires both knowing who the right people are, and when it is appropriate to bring them together. Such family leadership is certainly helpful in breaking impasse.

As the family participants move their negotiations from the initial stages to their respective goals, the question will be are those goals similar. To the extent that they are not, impasse-breaking techniques will need to be employed. In the family business mediation context, the question is,

“who do they trust”? Do you call upon the professionals, the family leadership, or has the mediator obtained the level of trust to “broker” an agreement. Certainly, the professional and family leadership should be called on before the mediator offers his/her services to break the impasse. Leadership caucuses designed to explore common ground are best saved for this stage of the negotiation. Can that leadership develop compromise among them, by which they can return to their respective rooms to make a mutual recommendation for resolution? If not, can the mediator make such recommendation with the support of that leadership?

Thus, the rapport initiated in the preliminary pre-mediation design meetings and communications become crucial to the “deal making” stage of the negotiations. The more unanimous the professionals and family leaders are the better. To the extent that solutions, both procedural and substantive can be achieved, they should be codified in a mediation agreement or memorandum of understanding. The terms should be set forth with the expectation that a more detailed settlement agreement can be drafted and executed later. The mediation agreement or memorandum of understanding should be signed by all family participants.

III. Post Mediation

Should resolution not be achieved, the mediator should do everything in his/her power to avoid impasse among the family participants. Adjournment is acceptable, impasse is not. Sometimes “getting away from the table” is helpful. An adjournment for re-evaluation purposes with a follow-up within a short period of time is a viable option. “Homework” or directions to look into certain aspects of unresolved issues may also be helpful. Subdividing some of the issues between professionals or family leaders may also allow for post-mediation dialogue and ultimate resolution or re-convening of the mediation to achieve such ultimate resolution. The mediator’s goal is to keep families in dialogue and prevent families from getting involved in a “litigation war”.

This can be done by phone, by selective post mediation caucuses, or by subsequently re-convening all family participants.

IV. Conclusion

The courtroom is not a place for family issues. Long drawn out adversarial forums (outside of formal litigation) are also no places for families. Resolution of family business disputes in mediation helps families efficiently handle their internal family business matters discretely, privately and confidentially so they can keep their businesses in the family, and preserve their family wealth for generations to come. Mediation facilitation and dialogue can help families (no matter the degree of conflict) save stress, money, relationships, and opportunities of growth for all family participants. The earlier a family in conflict convenes a mediation process, the better the long term results. Families are “priceless” and so is the utilization of the mediation process for their use and benefit.

Respectfully submitted,
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