

Lawyers, First Do No Harm—Then Bring in the Specialists

WHY LAWYERS SHOULD HIRE FAMILY DYNAMICS CONSULTANTS AND LAWYER MEDIATORS AT THE EARLIEST STAGE OF FAMILY BUSINESS CONFLICT

George F. Burns, Esq. | 10 April 2009

Twenty years ago, the week before Christmas, the phone rang -- it was my client asking me to dismiss immediately a lawsuit that he had brought against his brothers and his father regarding various family disputes in their construction company. “It just isn’t worth it.” And I knew exactly what he meant. Christmas was coming, and the lawsuit, though it had some merit, simply was not worth its ravaging effect on the family, an otherwise happy family that had prospered in the post-World War II period and had built on that prosperity in the decades thereafter. I was relieved to get the call and dismissed the case that day. Nothing good came of the lawsuit, except perhaps the collection of my legal fees. Like most lawyers, I would have preferred to have actually achieved something beyond collecting money.

This is not the only such case I have encountered in my career—there have been many since. But only recently, in the last decade or so, have I devoted a significant amount of my practice to avoiding and resolving family business disputes. Over that period, I have come to believe that we lawyers should re-embrace the existing ethical and professional framework for delivering litigation-related advice to family businesses, and rethink how we evaluate our effectiveness.

MEASURING REAL LAWYER EFFECTIVENESS

Lawyers are traditionally not ranked on the basis of their avoidance of legal fees and contests that never had to be incurred or fought. It puts one in mind of the critique of baseball’s traditional baseball statistics described by Michael Lewis in Moneyball: it took Billy Beane of the Oakland A’s to transcend hidebound tradition and start tracking statistics like on-base percentage and other data that had more to do with actually winning games. The same is true in the legal profession. This or that victory in a case may be ranked or listed in a resume, but there is no quantification of what it took to get even a

victory (not to mention a loss). As Voltaire said “I’ve been ruined twice in my life; once when I lost in litigation, and once when I won.”

We need our own on-base percentage statistic to score lawyer performance in family business dispute resolution. As noted below, one day of exposure to a family dynamics consultant and lawyer- mediator more than pays for itself in depositions never conducted, complaints never drafted, and tense shareholder meetings never endured. For too long the duty of “zealous advocacy” has made a stepchild out of all of the other lawyer’s duties and skills. It is time to give fair weight to all the skills and gifts that lawyers have to offer in this area. This article is devoted to that end.

WHY FAMILY LITIGATION IS DIFFERENT

Even though it is often said that there are no winners in litigation, some litigation is worth pursuing. But in the world of family business litigation, to lose a case, even to win a case, is to lose family affections and loyalties for a long time, often permanently. There is no monetary victory to offset such permanent damage to the family. Because family business litigation is the worst kind of litigation, it also yields the highest benefit from mediation, for at least these reasons:

1. Factor 1. Key Facts are Often Known or Knowable.

Family business disputes almost never involve matters of fact (unlike the personal injury case that stands or falls on whether the light was red or green, or whether the missed diagnosis caused a patient’s early death). Rarely do you see a witness on the stand suddenly recanting his narrative about what happened and when. It is usually obvious what the facts are. Shareholders have rights of accountability and transparency, and indeed most family businesses honor those rights, and those that do not can be made to do so without a great deal of legal effort. The stakeholders almost always know each other--often all too well. The informality of fact-gathering in a mediation context makes a lot more common sense than Shareholder Brother No. 1 hiring a lawyer to take the deposition of Shareholder Brother No. 2. The issue is often not what happened or what will happen, but rather what does it mean? Good lawyers know what facts

are important, and conscientious and ethical lawyers do not spend their clients' money proving the obvious.

2. Factor 2. Objective Benchmarks and Established Legal Principles Often Tell the Family What the Facts Mean.

Most family business disputes turn on matters of opinion or expert testimony (e.g., is my older CEO sister receiving too much compensation from the company compared to the market; is a sale of 40% of the stock in the company for \$40 million fair; is the company lagging behind its competitors and other industry benchmarks?). The most effective dispute resolution approach stresses objective measurement of the merits and drawbacks of this or that course of action, whether through a board of independent directors, an independent CPA, an independent appraiser, or other sources of industry measurement such as trade associations. A jealous sibling is less likely to take another sibling's word that the latter's compensation is fair—industry compensation surveys are more likely to do the trick. Similarly, the law books, as well as accounting and financial and tax books, are full of established principles of business and corporate law (e.g., business judgment rule, fiduciary duty, duty of loyalty, standard of care, how financial statements are prepared, how profits are taxed). If properly explained to the family, these precepts provide further objective guidance. Lawyers are well-qualified to find objective benchmarks and present them to the family, and often opposing counsel can find common ground on these principles. Because of Factor 1 (facts are known or knowable) and Factor 2 (objective principles offer ample common ground), family business conflict is a prime candidate for mediated solutions---but only if the family and its advisors first deal with Factor 3. There's the rub.

3. Factor 3. Family Emotion and History is the Primal Force that Trumps Factors 1 and 2.

Family litigation is rife with irrationality and emotion, all fueled by family history and the unique family dynamics that grow out of that

history. Patterns of blame and recrimination establish themselves (e.g., Uncle Joe is the problem; Brother Bob may be the oldest sibling and he started out as a good CEO, but his trophy wife has ruined him). Lawyers are not qualified or trained to manage these overriding factors, and yet traditionally lawyers plow ahead gathering facts and figuring out what the facts mean (that is, dealing with Factors 1 and 2 above) without acknowledging that Factor 3 (the irrational and emotional) make family members blind to reason and analysis so dear to the legal temperament. How many times have you seen opposing lawyers, during a break in a trial or deposition, shake their heads and, shedding crocodile tears while the meter is running, express amazement that the case has gone so far, what a waste of time, effort, and good will, etc. It would have better for everyone if these lawyers had long before come to grips with the most important single truth in family conflict: until the family is emotionally ready to absorb facts, legal principles and objective analysis, all the lawyers' efforts are likely to be at best inefficient and at worst destructive. Only a family dynamics consultant¹ can create the right environment in which lawyers can deliver effective services.

LITIGATION IS NOT THE ONLY WAY TO START A WAR.

Lawsuits are not the only way to start a family war. There are other bombs that can create a mushroom cloud (e.g., the aggressive demand letter, the notice of termination, the non-renewal of an employment contract, any aggressive or offensive measure permeated with legalism, even an aggressive omission like purposely excluding a family member from an important business meeting). So think before you hit the send button. Best to follow the old Abe Lincoln practice of writing the tough letter and then putting it in the desk drawer for ten days to see if tempers cool. A simple snub can have ripple effects for generations.²

¹ By "family dynamics consultant" I mean a person trained in psychology with specific experience in how family members interact.

² A famous example appears in William Faulkner's 1937 novel, Absalom, Absalom!. The chief character, Thomas Sutpen, when young and poor, suffered the indignity of being turned away from the front door of a mansion and forced to enter through the back door. That humiliation, only minutes in duration, compelled Sutpen to make an oath to himself to spend the rest of his life amassing wealth and

OBJECTIVITY VERSUS ADVOCACY

The fundamental role of the lawyer is stated perfectly in Rule 2 of the Code preamble as follows:

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides the client with an informed understanding of the client's legal rights, obligations, and explains their practical implications. As advocate, the lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, the lawyer seeks a result advantageous to the client, but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

As the preamble states, a lawyer is constantly moving between two poles: objectivity on the one hand and advocacy on the other. One cannot be an effective advocate without being objective just as a chess player has to anticipate what the other side's next move is. The obverse is not true, however. To be objective does not necessarily mean that one must be an advocate. The first thing a family business lawyer must do is be objective about whether there is any role for advocacy, and if so, by which lawyer and on behalf of which client.

WHO IS YOUR CLIENT?

The typical family business lawyer will represent the family business itself, some members of the family individually, and often, a variety of trusts. Indeed, the lawyer may also be acting as trustee. Throughout the whole inquiry into what the lawyer's role is, whether an objective assessor of a situation or an advocate, the first question is: who is your client? Very often the question has only one answer: you are either representing all of the clients where they have common interests or none of them.

And this becomes crucial when the lawyer decides, as this article suggests he or she should, to bring in a family dynamics consultant who in almost every case should work for the family as a whole and not some subset of the family. Of course, in due time the individual members of the group may need separate counsel and even separate

power. His material success was profound and lasting throughout his life and beyond; his family life was, well, Gothic.

psychological counseling as they solve whatever family problem they are confronted with: an employment contract, a succession plan, a family-wide estate plan.

**RESPECT FOR THE ATTORNEY-CLIENT, WORK PRODUCT, AND SETTLEMENT
COMMUNICATION PRIVILEGES AND THE CLIENT'S RIGHT TO CONFIDENTIALITY**

Another often overlooked area is the need to pay attention to the maintenance and protection of important privileges such as the attorney-client, work product, and settlement communication privileges and the client's right to confidentiality.³ Again, sensitivity to these privileges at the very beginning is the wisest course. Early documentation ought to be set forth indicating that this or that statement is an attorney-client communication, if appropriate, or at a minimum is advanced in furtherance of settling a dispute or preventing a dispute. All of these privileges require or presuppose some kind of attorney-client relationship, so it is important, once again, to be clear which lawyer is representing which client. Zealous advocates are attentive to these important privileges (who's representing whom and within what scope, to whom should communications be made and how); on this front it is the non-litigation lawyers, often the family business lawyers, who blur the various roles they and the family members are playing, often resulting in waiver and destruction of the privileges and complicating matters even more if actual litigation later occurs. Most business lawyers struggle even to remember that the privilege rules exist—it is not a world they live in; it does not occur to them, as they work in good faith to smooth things over, that they may be compromising important rights and choices of existing and future clients. They may even risk disqualifying themselves from acting as counsel later on for any family members, or even the business. Disqualification is highly likely if the later engagement is reasonably perceivable as adverse to stakeholders who reasonably thought the lawyer was everyone's personal lawyer as well as the business's lawyer.

³ These privileges are separate and distinct from each other. Under the attorney-client privilege, communications between lawyer and client are not subject to disclosure in most cases, nor are they admissible in evidence. The "work product" rule generally bars disclosure of information developed in anticipation of litigation. The "settlement communication" rule bars from admission in evidence communications made in an effort to resolve a claim or dispute. Lastly, the client's right to confidentiality bars a lawyer from sharing any material information with anyone outside the lawyer's firm without the client's consent.

LAWYERS' ETHICAL RULES TRANSCEND LEGAL CONSIDERATIONS AND PURE ADVOCACY

The Model Code of Professional Conduct provides as follows:

Rule 2.1 Advisor:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law, but other conditions, such as moral, economic, social, and political factors, that may be relevant to the client's situation.

This Rule requires a lawyer to cover the legal and technical bases, and permits him or her to refer to non-legal conditions. Family considerations are plainly one of those things.

Although I am stretching a bit here, any client suffering from family dysfunction is a client with diminished capacity. How many settlements fail when family emotions take over? Under Rule 1.14(b):

When a lawyer reasonably believes a client has diminished capacity, is at risk of substantial physical financial or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonable and necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client, and in appropriate cases, seeking the appointment of the guardian ad litem, conservator, or guardian.

What I suggest here is that when the lawyer reasonably believes that resentment is fueling the legal conflict or that the conflict is more a method of dealing with the symptoms of some deeper underlying family fault line (e.g., lack of recognition for family roles – the youngest brother who never felt his voice was heard, the oldest brother who thinks it is his job to act as patriarch and does not communicate, the stepchildren who resent their stepmother having a stake), then the client deserves to hear the lawyer recommend non-legal help through family counseling.

Lawyers counseling family businesses cannot forget that zealous advocacy, alone, is often the least effective service. The ethical rules remind us of our right, indeed our

duty, to inform the client of our non-advocacy skills. In short, avoiding traditional advocacy can be the best advocacy of all for the family and the business.

FIRST, DO NO HARM—THE FIRST STAGE OF FAMILY BUSINESS CONFLICT

The medical profession has an ethical rule, the Latin expression: “*primum, non nocere*,” “first, do no harm.” In the context of a potential family business conflict, what does this mean? I suggest the following:

1. Express more than the usual skepticism of the net benefit of litigation (or other aggressive legal action).
2. Do not fan the flames of family resentment.
3. Strongly encourage the client to get non-legal assistance, including family counselors.
4. Set the tone with opposing counsel that invites reciprocal feelings of dispute avoidance and conciliation.
5. Consider win-win solutions that benefit your client and keep family harmony as a fundamental part of the strategy.

In the initial interview, when litigation possibilities are being assessed, a lawyer does not know whether he or she is going to be a zealous advocate or a sensitive negotiator. My point here is that the lawyer ought to encourage patient negotiation with the client as far as he or she can in the family setting, before firing the cannon.

None of this is to suggest that the client is not entitled to a full exploration and description of legal rights and obligations. In fact, the contrary is true. It is precisely when one is promoting negotiation and conciliation that one has to be most aggressive in laying out in extreme form the possible benefits that a full-blown assertion of rights might bring. Then you are in a position to say that even in the best case scenario, the law might not yield a gratifying outcome.

USE OF TOLLING AGREEMENTS AND CONTRACT EXTENSIONS TO AVOID HARM WHILE SEEKING PEACE

It is occasionally the case that a right or a claim may expire or be prejudiced by virtue of the statute of limitations or other similar deadlines. In most jurisdictions, however, the parties can readily agree to a so-called tolling agreement (meaning an

agreement that, while the parties are trying to resolve the matter, the time spent on that effort will not be counted against the statute of limitations). Likewise, contractually imposed deadlines can be amended just as a contract itself can be amended. This is worthy of mention, because many lawyers who are not enlightened and selfless enough to defer expensive litigation can invoke the deadline of a statute of limitations or other contractual deadline as an excuse for inciting an early war in the family.

It is a relatively rare case that giving the process a bit more time for negotiation will irrevocably impair or reduce a client's rights. When delay would prejudice rights, there are provisional measures you often can take, including urging opponents to provide interim relief while the family is discussing possible voluntary resolution. Of course, you must take care of emergencies, the same way an emergency room doctor would—but before you move into the zealous advocacy mode, consider bringing in professionals who devote their careers to family dynamics counseling and mediation.

BRINGING IN THE SPECIALISTS—FAMILY DYNAMICS CONSULTANTS AND LAWYER MEDIATORS

Ideally, when the first clouds of conflict begin to gather a family will engage a consultant on family dynamics and a lawyer-mediator. This course is totally counter-intuitive; everyone's natural reaction is to run off and hire a lawyer and head for the ramparts. This may be a wise thing to do, but it is unwise to leave it just there. Without excluding the benefits of individual counsel for each member of the family with a stake in the game, a wise family retains a family dynamics consultant and lawyer-mediator as early as possible for the following reasons:

1. With a proper engagement letter delineating who the lawyer-mediator's "client" is, many, if not all, sensitive communications are protected by the settlement communication privilege and by the right of confidentiality that arises from the hiring of a lawyer. This in and of itself has a unifying effect, as opposed to the fragmentation that inevitably results when each stakeholder hires his or her own counsel. The ethical rules expressly provide that a mediator is not the attorney for any one of the contestants, and indeed the mediator must inform the parties of this fact.

2. Taking this step early also accentuates the family-wide duties of the family dynamics consultant and lawyer-mediator. When a family waits until they are in the midst of an actual conflict, then a proposal by any one of the combatants to bring in a consultant-mediator team is tainted and compromised. The fresher the start and the earlier the start, the better.
3. An early engagement heightens the chances that the short-term crisis that might lead to a deeper conflict can be averted. Just as is true as in troubled marriages, the point of contention in family business is often disproportionately small given the height of the emotions. I know from working with family business psychologists that it does not matter how small the issue-du-jour is – it can be an opportunity for understanding just how the family dynamics work and what the root causes of the conflict are. At the same time, a relatively small-risk issue gives the family an opportunity to see how the family dynamics consultant can salve the short-term wounds and set up a protocol for the handling of even bigger conflicts down the road.
4. With the protection of the settlement communication privilege, all stakeholders are free (and indeed have no excuse) for not speaking their minds regarding the family and the business. No veteran litigator would hesitate to acknowledge that even an unsuccessful mediation yields a great deal of benefit. Instead of a host of burning issues that every stakeholder is paying an individual lawyer to prove or disprove, suddenly even in a “failed” mediation the issues are narrowed dramatically. The same dynamic works with an early family business mediation. It also provides an opportunity for reaffirmation of common values and goals. Just as you are delineating what divides the stakeholders, you are also re-embracing what they have in common.
5. It is to denigrate no family or business to say that disputes are inevitable and unavoidable; the realities of birth and death guarantee this. The only question is: how does one manage them? Honest assessment and streamlining of the existing methods of dispute resolution will pay off, not only in the long run but

often in the short term. For example, a family shareholder agreement might have a dispute resolution clause calling for mediation and arbitration, while some other important corporate document does not. There may be no delineation whatsoever as to how mediation is to be handled. In the most fractious and procedurally burdensome kind of family business litigation, the families face multiple tribunals for resolution of disputes: court on some issues, arbitration on others, mediation on yet others. But even aside from legalities, a working protocol on how family members are to treat each other at meetings, how they are to speak about each other to third parties in the outside world, and how information is to be shared is of incalculable value, and the earlier the better.

RISKS IN ENGAGING FAMILY COUNSELORS AND LAWYER-MEDIATORS

Like any other investment, the decision to engage a family dynamics consultant and a lawyer-mediator is not risk-free. It costs money. In the short term it might deepen the divisions, just as any kind of serious diagnosis of a patient often reveals maladies worse than the patient felt or detected.

But, to extend the medical analogy, there is very little lost in having an annual checkup and getting a clean bill of health. No decent counselor or mediator will suggest surgery to a patient who is the picture of health. The only real risk, therefore, is that dangerous conditions and root causes might be identified and dealt with; just as is true with an unhealthy human being, there is always some short-term anguish associated with the recommendation that there be some form of surgery.

Granted, some patients are too weak for surgery, just as some family business are too weak for this kind of intervention. Such situations, however, are extremely rare, and some intervention is likely better than none, even in those extreme cases.

SHAKING UP THE STATUS QUO

Bringing in a consultant-lawyer mediator team can mean that the existing crew of family advisors and influencers will have to cede some control and power— in many cases this is a good thing, but it is hard for the holders of that power to see it that way. The retention almost inevitably will rile things up to some degree (Yugoslavia was stable

under Tito, chaotic after Tito). It might create a temporary loss of management focus. When a business is owned by a trustee or heavily influenced by a long-term advisor, say a patriarchal lawyer or that sort of person, however much in good faith that person wishes to operate, it is almost certain that he or she will tend to be more open to the arguments and pressures of one faction of the family over the other. For example, if long-time legal counsel is a trustee and answers to management of the company every day as well as fulfills his duty as trustee on a family-wide basis, the potential for conflict is obvious. For these very same reasons that advisor may be reluctant to bring on a family-wide advisor, whether it be the family dynamics consultant or the lawyer-mediator, and yet doing so is a very healthy thing. A fresh approach, free of family history and past family dynamics, presents the best chance of a lasting resolution.

CONCLUSION

As lawyers, we absorb a great deal of education, are trained to be diligent, and to make every reasonable effort to be skillful and effective in our work. We can draft the best complaint in the world, take the best deposition, conduct the best closing argument, but all is for naught if those tools are simply not what the situation calls for. There is a time for a legal approach, and the best time is after a non-legal professional has determined how best to manage family emotion and history. Then and only then can the lawyer proceed with confidence that he or she will not be doing harm by applying that lawyer's favorite legal tools, the tools he or she was trained to live and die for. It is no different from setting a firm foundation for a building that you hope will last for generations.