



Resolving Family Business Disputes

By: Margo Keller
Mediator, Arbitrator

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I do love to buy from a family business. I especially enjoy the immediacy of knowing the person who picked my carrots at the organic farm, stomped my grapes at the winery, or smoked the salmon that I'll place on the table. I value the local banker who handles my business and the neighborhood restaurateur who knows just what I like to order. I believe in "the family business ethic," like watching a father and daughter operate their law firm together, learning from each other along the way. All of this just confirms many core social and economic values. But, in my experience, a family-run business must develop strong conflict resolution skills to remain viable through the generations and continue on the path of success.

Some family businesses are great role models for healthy communication and positive conflict resolution. Others suffer from unique barriers to reaching agreement, often issues which actually originate in the familial relationship.

CLASSIC CONFLICTS

Consider the following cases:

-A father brings only one of his four adult children into his fish processing business. He is considering gifting smaller percentages of the company to the

other children over time but he has not discussed this with any of the other three. The working sibling resents the others getting shares of a company "for free," while the others wonder why they have been excluded.

-Siblings start up a restaurant with one putting up the capital and the other contributing non-quantified "sweat equity." The sister who put in the money resents her brother's blanket assertion that his work equals what she put in. (Of course, the IRS has an even stronger view.)

-Two brothers have been buying houses, fixing them up, and selling them without any agreement for division of profits. Now that the older brother has married, he wants a monthly salary, while the other wants to keep living with their parents for "free" in order to hold all earnings for the next house purchase.

-Five cousins inherit the family winery in equal shares; however, two of the five have been working in the business for years. Everyone has a different view of how the business should be run now that the founders have passed. (For starters, they all want to be the boss!)

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Mediator Focus: Donald Kelley

By: Penny Gans, WAMS Staff

Don Kelley and WAMS go back a long way. Their paths first crossed in the late 1980's when Don, a prominent plaintiff's attorney in Tacoma, represented a client in a mediation conducted by Seattle ADR pioneer Alan Alhadeff, director of the WAMS mediation panel at that time. Throughout his career, Don had developed an appreciation and respect for both sides of the cases he tried. He always looked for ways to help his clients achieve satisfactory outcomes of their claims while avoiding the oppositional nature of litigation. He has always been regarded as a worthy yet reasonable plaintiffs' advocate who earned the respect of his peers. The mediation process fascinated him from the start and suited his personality. When he was ready for a new professional challenge in 1989, WAMS invited Don to participate in its intensive mediator training program and join the WAMS panel.

Since joining WAMS, Don has mediated more than 3,500 injury, commercial and tort claims in the Pacific Northwest and throughout the United States. For many years, Don also maintained his private law practice, feeling that continuing as a working attorney helped him as a mediator, and vice versa. In response to an increasing mediation caseload, Don finally closed his office in 2005 and became a full-time mediator.

Don has strong feelings about the mediation process and the proper role of the mediator. He believes the participants in mediation must have faith in the confidentiality of the process and the absolute neutrality of the mediator. He feels that clients are justified in expecting that their case will be resolved during the period of time allocated to the mediation. He works very hard to achieve settlement during the scheduled mediation session, believing momentum can be lost if the mediator "adjourns" the mediation in favor of telephone follow-up. Don's years of experience with

clients and juries enables him to quickly clarify issues and raise "talking points" with all parties. He asks questions which help each party visualize what the other parties might be thinking. Don looks for opportunities to humanize and personalize each room to the other side, feeling that the effort will encourage the parties to listen to each other and negotiate instead of argue. As one of his many satisfied clients wrote, "One presumes that you enjoy mediating. It sure looks that way."

A creative mediator, Don is also creative in his personal life. He is an accomplished photographer, having honed his skill as a TV news and sports cameraman while still a student at the University of Washington. Don also walks (rather, drives) on the wild side, as a sports car buff and avid fan of Formula One auto racing, which he has observed up close in England, Canada, France, Germany, Austria and the Netherlands. Don and his airline pilot son periodically tune up their driving skills at the Laguna Seca competitive race course in Monterey, California. According to Don, the racing instructors driving Dodge Neons on the corkscrew track are more than a match for the students who drive racing-type formula cars. Don definitely knows how to make a highway-patrol-style U-turn! Don also enjoys sailing, dabbling in creative writing and playing the occasional round of golf "with a relaxed attitude". Don's professionalism and that relaxed attitude are much appreciated by his mediation clients at WAMS.

DID YOU KNOW?

The advantages of a WAMS "short notice" mediation:

- ☑ Easy access to the WAMS online calendar (www.usamwa.com) for mediator availability within the next 2 weeks.
- ☑ No cancellation fee if you schedule within 2 weeks (not including the date of mediation) and need to cancel for any reason.
- ☑ WAMS Case Administrators email confirmation notices for easy forwarding to clients.



...WAMS Buzzz

WAMS is delighted that Teresa Sidlowski has joined the organization to provide staffing support in the Tacoma office and bookkeeping help with the Lemon Law and other programs based in the Seattle office. Teresa has an extensive background in accounting, finance and office management, so WAMS is fortunate to have someone with her experience on a part-time basis.

In other news, WAMS mediator Bill Joyce recently contributed to a regional survey of mediators, attorneys and judges regarding confidentiality in the mediation process. The study was conducted by the Albers School of Business & Economics at Seattle University. The findings from that study were just published as "The Promise of Confidentiality in Mediation: Practitioners' Perspectives" in *The Journal of Dispute Resolution* (Vol. 2009, No.1), a publication of the University of Missouri School of Law.

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COMMUNICATE: WHAT'S OUR DEAL?

How many of us are assertive in a general business setting but cannot confront our father or older sibling? Sometimes it is very difficult for members to overcome the family dynamic to communicate messages of change, approval or dissatisfaction. Family members can transport notions of fairness or patriarchy from the kitchen table to the board room without considering factors such as merit, aptitude, work ethic or profitability.

The time for tough talk is never as good as when the deal and the parties are just coming together. Discuss and hash out: who is contributing what, who makes what decisions, what happens if more capital is needed, when and how profits will be distributed, and what buy-sell provisions will be implemented if one party wants out. Communicate and then put those agreements in writing. **No written agreement should be postponed under the theory of: "we are family and we trust each other"**. Trust deepens after good communication and the execution of a good written agreement.

NEGOTIATE: WHAT ARE OUR INTERESTS?

When differences arise, focus on interests rather than positions. Your position is what you have decided on: "I want a controlling percentage in this LLC". Your

interest is what motivates you—what lies behind your position: "I need to make sure no one can fire me until I retire". Once the interest is understood, the other member may be able to address the interest and agree to a long-term employment agreement which can only be terminated in the event of gross misconduct, or perhaps, the parties can require unanimous or supermajority votes in certain areas to protect the non-controlling members.

In almost all cases of family business conflict there is an overriding interest in preserving the family relationship. If parties learn to negotiate based on interests rather than positions and agree to place this shared interest as paramount to any negotiation, they will have a greater chance of success. Advisers to family businesses should recognize and respect this shared interest and acknowledge that sometimes, protection of the ongoing relationship is far more important than the particular conflict. Without this recognition, Thanksgiving dinner can become a pretty tense affair.

MEDIATE: WORK BEYOND A WIN-LOSE PARADIGM AND DEVELOP CREATIVE OPTIONS FOR SETTLEMENT

When family members take their dispute to trial, someone is generally regarded as the "winner" and the "loser(s)" may be forever alienated. Not only is there a resulting alienation from the business but

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more importantly, disputing family members can become permanently estranged from the larger family.

Mediation can provide an opportunity to be creative and develop solutions well beyond what a court could do if the parties went to trial. Maybe the parties can craft tax-advantaged results, agree on payment plans for a buy-out, or at least stipulate to appraisers and a process for resolution. Consider mediating a dispute before a lawsuit has been filed, before the tension from a deposition has hardened hearts (and spouses), and before the pie has been reduced by legal fees. Alternatively, consider mediation once the discovery has been completed but well before the trial date where settlement offers can still reasonably be compared against the risks associated with trial.

Mediation can also assist the parties in negotiating new ways of doing business, such as:

- including outside members on the Board of Directors to provide that "objective standard" and feedback;
- developing agreements for regular meetings and communications;
- creating or amending existing member agreements that address old and new issues;
- negotiating succession planning before the triggering event occurs; and
- stipulating to an expedited arbitration process for disputes.

The family business is often touted as our country's key to economic recovery. Therefore, the key to resolving conflict in the family business involves three components. First, engage in early communication that addresses specific family issues and the "deal" of being in business together. Second, practice negotiation that recognizes the primary need to preserve relationships. Finally, use mediation which depends more on creative problem solving than a model of winning versus losing.



Tom Harris

"I am grateful you were willing and available to take on this matter.

It was a difficult and indeed even surprising road. Nevertheless, you were able to resolve this matter. For a variety of reasons I am extremely appreciative of your efforts and your tenacious persistence."

-WAMS client

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