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Using Collaborative Law to Resolve Disputes in Family Businesses

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As everyone knows, litigation to resolve family business disputes often has a destructive effect on the family. Family members hold grudges, feel hurt and angry or triumphant, and it may take years for the family to recover, if it ever does. Litigation can also have a detrimental effect on the business by diverting the focus of running the business; creating an atmosphere of contention: creating fear in the employees of what will happen to the company, causing employees to feel that they have taken sides; and creating a climate of fear and uncertainty.

Certainly, many family business advisors are adept at avoiding this litigation, as are mediators. Another alternative has been developed called "collaborative law" It is especially appropriate where parties have a common economic interest in resolving their disputes and want to preserve their relationships.

Collaborative law provides a structure that enhances the ability of the parties to the dispute to cooperate in finding a solution themselves and avoiding damage to the family and the business rather than having a court impose a solution

What is Collaborative Law?

Collaborative law is a voluntary dispute resolution process in which each party is represented by an attorney who is motivated to be non-adversarial. The process is structured to engender cooperation and problem solving, resulting in satisfying the interests of the parties as much as possible.

The process uses what is known as interest based negotiation as opposed to position based bargaining. In position based bargaining, parties are concerned with winning and getting the most that they can. Each party starts from a polarized position so that it will have something to give away. Concessions are seen as coming from weakness; it is necessary to be on the

offensive at all times; and the other party is seen as the opponent. It is very much an “us versus them,” “win –lose” mentality and strategy. Interest based negotiating, on the other hand, emphasizes working toward a result which is mutually satisfying. Negotiation is over what each party needs or wants. It is the problem, rather than the opposing party, that is the adversary, so that the focus is a solution that meets the needs of all of the parties wherever possible.

The structure of the collaborative process is agreed to in an enforceable agreement called a “Participation Agreement in which the parties agree to:

- identify their goals and interests;
- disclose all relevant information;
- make decisions on a level playing field;
- keep all communications confidential; and
- negotiate in good faith.

They are free to advocate for their own interests while at the same time giving consideration to the other party’s interests, and using their best efforts to create options that meet the interests of all parties. The Participation Agreement aims to remove as much as possible all obstacles to cooperation in reaching a settlement which satisfies the goals of all the parties.

In order to promote collaboration among the attorneys, they must agree that neither they nor any of their associates will represent their clients in any litigation regarding the subject matter of the dispute. This encourages each attorney to focus solely on using his or her skills of analysis, clarification, and negotiation, to help the client identify and obtain his or her interests and goals.

Very often the collaborative process is multidisciplinary. It may be appropriate to add experts to the process such as financial advisors, tax experts, and appraisers. At times it may be useful to bring in coaches and facilitators when clients get stuck or want help with, for example, emotional, communication, or decision-making issues and difficulties.

When the dispute involves a family business, it would be desirable to include family business consultants who understand the dynamics of and interrelations between the family members and the business can improve communication, conflict management, and working with multiple systems. In cases where a family business consultant has worked with the

family before and earned its trust and respect, the consultant may have an important role to play as a neutral party because of the knowledge he or she has gained about the workings of the family and the business.

When not appropriate

Settling a dispute using collaboration is not for everyone or for every case. Where a party is not concerned with future relationships; when the interests of the parties are not interdependent or are mutually exclusive; where a party believes it can win and the goal is to get as much as he or can; or if it is important for a party to feel vindicated, collaborative law is not desirable and will not be appropriate. (2)

Comparison between litigation and collaborative law

Using litigation has definite disadvantages when compared with the collaborative process:

- If the collaborative process works, the costs will most likely be lower. Even in cases that ultimately settle, a great deal of time and money is spent on discovery and motion practice.
- Information regarding the family and its business will become public knowledge. Suppliers and customers may shy away from doing business with a company that they know is having legal problems and internal disputes, and competitors can take advantage of the conflict.
- Parties lose control of the schedule and delay can become a weapon. The opposing party can delay the trial with motions and seemingly endless discovery, and parties must wait for a court date and appeals may be filed.
- Communications are filtered through the attorneys.
- Often each party leaves feeling taken advantage of.
- If the collaborative process works, less time will be spent on the dispute, leaving more time to be spent on running the business, and employees feel the tension and fear the unknown consequences of the dispute.
- Relationships between family members and sometimes with non-family management are more likely to be harmed if not destroyed.

When collaborative law is used:

- The parties maintain control over the outcome.
- Those with the most knowledge - the parties - are creating the solution which preserves their business and other interests.
- The parties control the schedule and cases are resolved in a matter of weeks or months, not years.
- In most cases the costs are lower, often significantly lower.
- Relationships, both personal and business, can continue after the process is concluded.

How it works

At the first meeting of the parties, they will sign the Participation Agreement described above, which is meant to give a road map of the process but also to be as flexible as possible. Included in the Participation Agreement are ground rules. These would include agreements for each client to:

- speak from his or her own perspective, rather than asserting a view as an absolute fact (“I statements” rather than “you statements”);
- express what one want in terms of needs and interests rather than demands;
- avoid language using blame or finding fault; and
- use active listening and other communication skills.

Procedures are established and strictly adhered to in order to assure the process remains collaborative. For example, in each session:

- there is a fixed agenda which must be adhered to in order to avoid any surprises which the other parties did not plan for;
- minutes of each meeting are prepared by one of the attorneys and submitted to all the participants for their review and comments to avoid any misunderstandings; and
- meetings are face to face to help in communication and rapport.

The Protocols include suggestions as to seating, rotating meeting sites, and providing a hospitable venue to create safety and facilitate a collaborative process.

The attorneys usually meet with their respective clients after every meeting for debriefing, and the attorneys (and other professionals involved where desirable) will confer to plan for

the next meeting and to address issues related to the dispute.

Flexibility

In order to further their goals, the parties may agree to use mediation to get through an impasse or to resolve a particular issue, submit an issue to arbitration, or use experts for their advice and opinions. If there are multiple parties involved in the dispute, all of the parties may agree to use the collaborative process. If fewer than all agree, if it's practical, those parties who want to use collaborative law may agree to do so while using another means of dispute resolution with respect to the other parties.

The goal is to be as flexible and creative as possible to get to a desired result.

Stages of the Collaborative Process.

1. **Determination of the Parties' Goals and Interests.** This is the most important stage. At the first meeting the parties are encouraged to express what outcome they are looking for and any reservations or concerns they have about the process or being able to collaborate with the other parties. The parties have an opportunity to discuss how the dispute has affected their lives and the business. Then the parties with the help of their attorneys will discuss their own wants, needs, interests, and goals, and look for areas of commonality with those of the other party or parties. Parties may find their goals and interests change as they hear the interests and goals of the other parties and as they work through the collaborative process.

2. **Information gathering.** The parties gather, organize, and analyze all relevant information. They disclose all information reasonably requested or, even if not requested by the other party, information that they think may be relevant.

3. **Development of Settlement Options.** The lawyers assist the clients in brainstorming and putting on the table any options anyone can think of which might be useful in finding solutions. All parties are encouraged to feel free to propose any alternative even if it may seem impractical or improbable, without fear of judgments, threats, and demands.

4. **Evaluation of the Options.** The clients with the help of their lawyers evaluate the options, analyze how they meet their interests and goals, and whether a given option is realistically

achievable.

5. Negotiation of the Settlement. The final stage focuses on determining which options best suit the parties' interests and goals, whereupon the settlement agreement is prepared and signed.

As one would expect, this is not always a smooth process. It is often two steps forward, one step back; sessions can become heated and emotional; and it takes hard work and commitment to find a solution. The process, as it unfolds, causes a shift from conflict to cooperation to finding a solution.

A vignette

Three brothers, Alan, Brad, and Chip, inherited a business from their father, each receiving an equal share with all the same rights. Alan, the oldest son, had been CEO when their father died. There was no succession plan in place, but the father told Alan that he trusted him to take care of the business after he died, Brad and Chip felt they should have an equal voice in the business but Alan, while continually promising he would give them one, never did. The younger brothers felt they could expand the business and increase sales and earnings if they were in control.

There came a blow up. Brad and Chip were frustrated because Alan refused to expand the business into an area which they believed would be synergistic and highly profitable. Alan brushed them off. The younger brothers had had enough. With two thirds of the voting power of the company, they threatened to remove the two outside directors and then Brad would replace Alan as CEO. Alan, however, believed he controlled the board of directors, and his attorney advised him that the corporate governance and law were sufficiently ambiguous so that at least until the next shareholders' meeting, he was in charge. The brothers were headed to court to have their disputes resolved.

However, when collaborative law was suggested, they agreed that their mutual interests were better served by using it. They realized that going to court would take years and the executive authority would be uncertain during that time, and they could not afford what damage might be done to the business until the dispute was resolved. The brothers agreed that in the interests of time, cost, avoiding public knowledge of the family's

business, and to stabilize the business, litigation was not a good alternative. Furthermore, they knew the business better than anyone else and as entrepreneurs they had a natural bent to want control over the process. Moreover, each wanted to be able to preserve their relationship as brothers.

During the course of negotiation, a spirit of cooperation began to build. When it was clear that underlying emotions were driving the process and creating impasses as the parties became fixed in their positions, a facilitator skilled in working with communication issues in families was brought in. A seminal moment was when Brad was able to articulate what he understood to be the anger, hurt, and resentment Alan might be feeling, and apologized for the way he had handled the situation. Alan said he felt acknowledged and respected for the first time since the conflict came to a head. This broke an emotional logjam between the two and a spirit of cooperation began anew.

After much brainstorming, exploration of options, and evaluation of those options, the parties were able to fashion a solution agreeable to all. Alan did not completely get what he wanted, but he got enough to satisfy him. He agreed to become the non-executive chairman of the company. This saved face for him. Furthermore, to the world the transition in leadership seemed seamless, to the world the company was stable and intact. Also, Alan as chairman could continue business relationships with those whom he had strong ties. All major decisions (other than those requiring board approval) would be made with his input, although Brad, who became CEO, had the final say. All of the brothers would be directors within a corporate governance allowing for contingencies in certain events. Alan wanted to have the option to be bought out at a price measured in part by the present value of the business because he felt that since he no longer had control of the business, he did not want to rely on the future of the company under Brad's leadership. The option was agreed to and the price he would receive for his share had a formula built in and a process for valuation by agreed upon experts.

Summary

A successful collaborative settlement allows a family business and the family to preserve important relationships and allows the business to continue with stability. It may also have the effect of increasing cooperation, improving communication, and helping the family find ways to deal with conflict which will

serve both the family and its business after resolution of the dispute.

Endnotes

(1) I am using the Protocols and Participation Agreement adopted by the Global Collaborative Law Council as my model, which I have varied and condensed from the actual documents which are much more comprehensive.

(2) In an initial consultation, a collaborative lawyer will discuss with a prospective client whether using a collaborative process is appropriate and inform the prospective client of benefits, costs, and risks of collaborative law and other legal alternatives such as mediation, arbitration, and litigation in order for the client to make an informed decision.

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