



7 Steps to Mediate Family Business Disputes

Philip L. Chapman, Esq.
(973)228-6786 | pchapman@lumlaw.com

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&**
Lum, Drasco & Positan LLC

Welcome Letter

Lum, Drasco & Positan LLC



Most of my clients operate small and mid-sized businesses, many of them family-owned; and I have learned from them what it takes to run a successful business. I also know how challenging it can be to settle disputes that arise within a business run by family members and sometimes part-owned by family members who do not work in the business; and I offer mediation services for business disputes among family members.

My goal, whether as a transaction attorney, a litigator or mediator, is to use my experience with business clients and knowledge of the New Jersey law to settle business disputes in an efficient and effective manner. I examine complex business issues that arise within a company and use a broader focus to guide everyone involved toward the right solution. Many times the solutions are simple, but people directly involved in the business are unable to see them. I act as a neutral third party; and I assist the parties involved to discover creative practical solutions that will be best for their business, often preventing the need for litigation or helping them to settle litigation which has already been commenced.

I know how important it is to keep the balance between running a successful business and dealing with family dynamics. I understand that so much of effective mediation requires a deep appreciation of context and mature judgment. I am known for asking the right questions that get to the heart of the dispute and the underlying emotions that might be preventing a solution and for attentive listening to their answers. For testimonials from some of my clients, see my website, www.superlawyer-nj and the website of an internet lawyer rating service, www.Avvo.com.

Mediation helps New Jersey businesses resolve their disputes, whether they be internal or external, without the expenditure of a great deal of time of the parties, distraction from the operation of their business and the incurring of high legal expenses.



Sincerely,

Philip L. Chapman, Esq.

Lum, Drasco & Positan LLC
(973)228-6786 | pchapman@lumlaw.com
<http://www.superlawyer-nj.com>
<http://www.lumlaw.com>

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When disputes involving business matters are submitted to mediation, whether before or after litigation has commenced, a high percentage of the disputes are settled. Mediation of internal disputes in a family business is one of the most effective tools business owners have for solving problems among relatives, including those who do not work in the business.

There are times when the family would benefit from seeking the assistance of a mediator knowledgeable in the law, well versed in the workings of businesses and attuned to the emotional issues that are so often present in family businesses. For instance:

- When a family member is not performing his or her responsibilities, and a non-family member in such position would be fired
- When business matters can't be discussed without an argument, sometimes resulting in serious open conflict among family members
- When other employees, especially valuable one, including family members, are jealous or resentful or highly critical of some family members
- When the organizational structure, or a rule or practice, causes resentments and non-cooperation
- When the family members insist on the payment of dividends from the corporation or distributions from the

limited liability company when good business practice would be instead to the use of funds for working capital or capital expenditures

- When the leaders of the business have conflicting ideas for the future leadership of the business
- When a son-in-law or daughter-in-law plays an important role in the business but his or her marriage to a family member is the subject of pending or existing divorce proceedings, and the family member wants her or his spouse fired

Mediation can be used...

- To insure that family members are held to the same workplace standards as non-related employees would be
- To promote professional workplace communication, even where co-workers have a casual family relationship, and to discourage use of inter-office e-mails and texts where face-to-face meetings would be much more appropriate
- To help control inappropriate and sometimes ill-timed displays of resentments and negative attitudes
- To prevent family squabbles from overflowing into the workplace
- To promote open and constructive discussion about the Company's business problems and challenges to its successful operation

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How are Family Business Disputes Mediated?

Mediation of family business disputes is similar to any other mediation situation. There are seven steps.

1 Choose the Right Mediator

The first and arguably the most important part of successful family business mediation is to choose the right mediator. It is preferable that the mediator has wide and deep experience in counseling business owners. While it is advantageous that the mediator be familiar with the type of business, it is not necessary. In advance of the mediation you can take the time to familiarize the mediator with the context in which your business operates and how the business is conducted. This will save time during the mediation and put the focus on the internal family problems and on finding solutions instead of explaining details. Mediation is about communicating and solving disputes, so you do not want the process to get hung up on minor details.

Should the mediator be a lawyer? The answer is that, depending on the nature of the disputes and whether there are concerns that one or more family members may start a lawsuit or have already started a lawsuit, a lawyer's knowledge of the applicable laws, the expenses and delays involved in the litigation and its probable outcome and may be a significantly helpful in managing the expectations of the family members. If a lawyer mediator would be best, I recommend that that the lawyer be a business transaction lawyer with litigation savvy.

Keep in mind that a mediator is a neutral party. He or she will attempt to understand all sides of the dispute and help those participating in the mediation reach a workable solution—one which will enable the business to function with a substantial decrease or elimination of the disputes. A mediator should be selected whose communication style makes the family members comfortable—considering the personality style of the mediator in advance will help everyone to be on the same page during the process and will increase the odds a solution will arise from the mediation.

Determine whether you want a mediator who guides everyone towards taking immediate action by influencing those involved to come to specific agreements on important details, or who waits patiently for proposed solutions to come from the parties, or some combination of each. The personalities of those involved will play a role in which type of mediating style works best. For instances, if everyone in the group is focused on just the fine details of the dispute, it could take forever to reach an agreement. In such case a leadership-oriented mediator who is eager to reach a resolution would be the best option to keep the process moving along.

7 Steps to Mediate Family Business Disputes

2 Prepare for the Mediation

Mediation preparation is similar to preparing for a trial, and the respective parties may want to seek assistance from their own lawyers. In this connection, where the nature of the disputes could well result in litigation, the lawyer for the business has a conflict of interest and should not be counselling any of the family members. Depending on the circumstances, even if a lawsuit has not already been commenced, it may be necessary or if not, wise, to have lawyers attend the mediation.

It is important for all parties to come prepared to the mediation. They should be clear about how they feel and willing openly to share their feelings and concerns. Mediation is a time to “get it all out”; and if the disputants are reserved or unwilling, this could result in a less than desirable outcome. A good mediator is one who is skilled at understanding how a person feels and conveying that point of view to the others in a gentle and unthreatening manner.

Mediation proceedings are confidential, so that the information you share with the mediator cannot be used against you in court. Moreover, when the mediator meets with each party separately, each party can direct the mediator as to which of the party’s thoughts and feelings matters disclosed to the mediator, if any, the party does not want disclosed to the other parties.

3 Schedule a Time and Location for the Mediation that Works for Everyone Involved

Obviously, for mediation to be successful in solving family business disputes, everyone must be in attendance. In addition to being present, it is also important everyone be free from distractions and that the operations of the business not be impaired because on the day or days of the mediation a family member is not able to attend to important business matters.

In addition to finding a date in general that works for everyone involved, it is also important to choose a time of day that works for everyone and for the business. Most mediators recommend not scheduling mediations for first thing in the morning or at the end of the day. It is also a good idea to leave enough time before or after other important events during the day, so they do not affect the mediation. If there is a certain busy period for the business, this would be the worst time to schedule mediation because there are other priorities pulling everyone’s attention away from the proceedings.

Finally, it is important to choose a neutral location for mediation. It is best for everyone to agree on the location, so the process is able to begin on the right foot. If anyone is resentful about the location or time of the proceedings, there could be a problem before the mediation even begins.

7 Steps to Mediate Family Business Disputes

4 Organize Relevant Information Pertaining to the Dispute

One of the quickest ways to put a damper on successful family business mediation is for the process to be disorganized. One of the goals of mediation is to communicate concerns and come to a resolution concerning a dispute. In order for this to occur, people must be prepared to discuss the issues at hand. In addition to stating how each person feels about a situation, there might also be documents to back up opinions. Paperwork, including time logs, business arrangements, employment contracts, shareholder agreements, financial statements and stock information often play a vital role in business mediation.

Unfortunately, some family businesses tend to be a lax when it comes to paperwork and record keeping. This is not always the case; but when everyone involved in a business is family, the business tends to run like family – familiar, casual, and sometimes messy. If this is the case, it is important to get things organized before mediation. This can also be beneficial down the road, since some disputes arise from the lack of organization within a business.

5 Prepare the Mediator

In addition to organizing paperwork prior to mediation, it is also important to prepare the mediator for the proceedings. Depending on the nature of the dispute or disputes, the mediator may suggest to each party that they prepare a detailed mediation statement to be furnished, in confidence, only to the mediator.

A mediation statement should give a detailed overview of the disputes. Each person should be candid about his or her concerns, so the mediator knows what to expect. At the very least, the mediation statement should include pertinent information, such as the names, roles, and relations of all involved (perhaps with a schematic table of organization with appropriate footnotes or other forms of explanation), the facts of the dispute(s), and how the dispute(s) have affected the business.

Share information about the business in general with the mediator. He or she should know the nature of the business, how the business came into existence, for how long it has been operating and the clientele to which the business caters. What is the business's brand? Who is the competition? Which of these factors mostly account for successful sales: relationship selling, price or product or service differentiation? It might also be helpful to share some basic financial information, though this is not always necessary.

Each participant should explain the preferred outcome of mediation, which might differ among them. For instance, if mediation is being used to determine how the ownership of the business should pass in case of the death, or long-term disability or retirement of some of the family members, or to determine whether

7 Steps to Mediate Family Business Disputes

any working family member should cease performing for the company, different family members will have different opinions.

6

Use a Mediator as a Communication Tool

Before and during the mediation proceedings the mediator can be used as an effective communication tool. As stated previously, one of the most important goals of mediation is to communicate about a dispute in an effective way. This can be difficult without a mediator, so when the time arrives to mediate, take advantage of the mediator's ability to share information without the conversation dissolving into an argument.

Remember, a mediator is completely neutral, so anything shared with the mediator cannot be used against a participant. If there is something you consider non-negotiable, let the mediator know before the proceedings begin. You might have already shared this non-negotiable factor with others involved in your family business, but this is not always the case. Often, non-negotiable issues create problems because the other side sees it as unwillingness to compromise. Typically participants have non-negotiable issues for which they are unwilling to bend. When the mediator understands what is non-negotiable for all involved, the proceedings run much more smoothly because boundaries are set and the mediator is able to enforce them.

Another important aspect to consider in family business mediation is that one or more of the participants may feel that his or her efforts for the business are very much undervalued, and other participants may feel that the efforts of one or more of the others are significantly or even greatly overvalued, as measured by their compensation and perks and by the authority given to them. Mediators should do whatever is possible to not let anyone sell themselves short or oversell his or her value to the business.

Family issues are complicated; and, in addition to business concerns, often underlying the disputes are long standing jealousies and resentments having nothing to do with the business. People might bring to the table age-old family issues that are now affecting the business.

7

Put the Agreed upon Matters in Writing

Unless the participants otherwise agree, the outcome of mediation is not enforceable by a court. However, it is possible to create a document that governs future proceedings based on the resolution reached during mediation proceedings. The best way to ensure the solution is organized, memorable and adhered to is to put it into writing. Ideally, the written version of the resolution is created by one person with the input and approval of everyone else. Often by agreement of the participants, the mediator prepares the document for review and comment by the participants.

7 Steps to Mediate Family Business Disputes

If simple enough, it can be created and signed before the end of the mediation session. Longer agreements will be written up in the days following mediation. At the least, a general outline of the agreement reached during the mediation can be made that will later be used to create the more detailed written document.

The document should describe the intent of the resolution and what must be done to carry it out. It should also be signed by everyone involved. If necessary, time frames and payments should be detailed in the document.

Concluding Thoughts

Mediation can be used to solve a variety of disputes in a family business. Even if the business is undergoing change, mediation is still a valuable tool. One of the best things about mediation is it avoids lengthy, distracting and expensive litigation. Those participating in mediation have the option of hiring their own attorneys, but in some situation the engaging of attorneys will be counter-productive. Even if they choose to do so, it will be much cheaper than paying an attorney to build a full case and represent you in court.

Mediation also prevents business matters from tearing families apart. It is enough of a challenge for families to work through their differences and maintain strong ties; but if business disagreements become personal, relationships both within and outside of the business will surely suffer. Using mediation to solve business disputes can preserve family unity, even if those involved in the business struggle to get along amicably.

Not only can mediation prevent business challenges from spilling over into personal relationships, there is a chance the positive effects of mediation can become a part of family patterns. If family members involved in the family business learn to work together and communicate effectively in their business, it might benefit their personal relationships, as well as the relationships within the entire family.

If you are involved in a family business and things are not going as well as planned, consider hiring a mediator to help you and everyone else with a stake in the business come to terms on which you all agree.



Contact Me:

Philip L. Chapman, Esq.

Lum, Drasco & Positan LLC

103 Eisenhower Parkway

Roseland, NJ 07068

Tel. direct (973) 228-6786

pchapman@lumlaw.com

<http://www.superlawyer-nj.com>