Making Difficult & Distressed Corporate Divorce & Complex Ownership Disputes Resolvable through Mediation and Arbitration, Inside and Outside of Court Litigation - A Case Study / Mock-Dispute Resolution

Saturday, September 14, 2019
10:30am – 12:00pm ET

Sponsored by: the Dispute Resolution Committee

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Resolving Difficult & Distressed Corporate Divorce & Complex Ownership Disputes through Mediation – A Case Study/Mock Dispute Resolution
Saturday, September 14, 2019, 10:30 am – 12 pm

- Hon. Lita Popke, Judge, Wayne County, MI, Civil Division
- Frances Floriano Goins, Ulmer & Berne LLP
- David Katz, PJN Strategies
- Alisa Moen, General Counsel, Dillon Gage Metals
- John Sciaccotta, Aronberg Goldgehn
- Byeongsook Seo, Snell & Wilmer L.L.P.

Materials Summary Abstract
By: Frances Floriano Goins

Introduction & Background

Ownership disputes in private and family owned businesses can be as emotional and contentious as marital divorce actions. These “business divorces” often involve complex legal and personal issues that were not anticipated by the business’ founders and thus are not the subject of an operating or shareholder agreement, buy-sell agreement, or other contract. In most cases, the parties will be better served by attempting mediation as an alternative to lengthy and expensive litigation.

Most business ownership disputes involve complicated issues including corporate governance, fiduciary duties, and breach of contract. Employment, trade secret, non-compete law, and state dissolution statutes...
may also be implicated. While each side wants to maximize the value of its interest in the business, many adversaries fail to consider the impact of the cost of litigation (particularly when claims that give rise to indemnification obligations are involved), or the impact on a potential acquisition. However, the parties’ shared interest in maintaining the value of the business can provide a critical “meeting of the minds” to support a negotiation.

**Emotional Barriers to Resolution**

Many closely held companies were founded by a single individual with sole ownership, or by close friends or family members who shared ownership equally. Later, when heirs with differing levels of interest in the enterprise acquire control or one of the friends becomes ill or would rather sell the business than work at it, no mechanism is in place to accommodate these changes. One party may feel she deserves a larger share of the pie or more control to compensate for her day-to-day involvement in managing the business, while another may believe his longer-term ownership and contributions of capital entitle him to a majority position or veto rights. One owner may want to sell, while the other may not. Such divergent views can create emotional barriers to compromise. Counsel, and potentially a court, may have to convince the parties that a skilled neutral can ultimately bring them together.

**Choosing a Qualified Neutral**

Many courts have mandatory pre-trial mediation procedures or will order the parties to mediation. The court may have a panel of neutrals already assembled and the parties may have little or no choice of mediators. In other circumstances, the parties will have more control.

Unlike litigation or arbitration, it is entirely proper to interview a potential mediator (even *ex parte*). Many articles have been published supporting differing views of the preferred qualities of successful mediators. *See, e.g.*,
Report of the Task Force on Research on Mediator Techniques
(https://www.mediate.com/articles/landejaba.cfm). Generally, a mediator who has more experience with the process, whether as a neutral or as a representative of a litigant, will be more effective. Stamina and perseverance are key, since it can take more than one session to overcome the parties’ reluctance to compromise. Subject matter expertise is less important; the parties can educate the neutral on the law or the business issues, as necessary.

Most mediators are trained to operate most effectively in a cooperative scenario where both sides have the goal of reaching a reasonable and amicable resolution of differences, as opposed to a litigation-style “win.” If you know your client is unlikely to engage in the process of compromise without some pressure from the mediator, you are better off choosing a mediator who will take a more aggressive approach. The mediator should also be willing to tell the parties what she thinks about their prospective positions.

Preparation

It is impossible to over-emphasize the necessity for adequate preparation prior to the mediation to avoid wasting time and resources. If the client is going to incur the expense of mediation, he should see resolution of the dispute as the goal.

Preparation requires not only that the parties fully investigate their claims and defenses, but also fairly evaluate their financial and legal positions to establish settlement parameters. An accurate evaluation includes: analyzing legal claims and defenses and probability of success (rarely more than 50%); estimating potential damages; and estimating cost of litigation, plus a “litigation fudge factor” allowing for the inevitable unexpected. Lawyers are frequently overconfident in their positions, and clients even more so. A
thorough pre-mediation evaluation is a reality check to begin establishing the settlement mindset necessary for a productive negotiation.

A business divorce will likely involve emotional factors in addition to pure dollar issues. Non-monetary factors may bridge a gap in the parties’ views of valuation. Educating clients prior to the mediation about the process and potential outcomes manages expectations and encourages the parties to continue negotiating. Flexibility is key to resolving disputes, and an acceptable resolution not previously considered may appear during the mediation.

**Timing**

Mediation is most effective after some exchange of information among the parties, or after preliminary discovery in litigation. Most courts that routinely require mediation do so after discovery is completed and after motions for summary judgment have been briefed but before they are decided.

That said, if the business in question is in a precarious financial condition or if a potential sale is on the horizon, it may be more expedient to mediate earlier, with an informal information exchange.

**Conclusion**

Mediation can be an excellent device to resolve an emotionally charged business divorce. The process allows the parties to craft outcomes that are acceptable and certain, and can result in significant savings of time and expense. Mediation can also serve as a vehicle to repair relationships and mend bruised egos, allowing the parties to go forward with a minimum of residual resentment.
Judge Lita Masini Popke has been a judge on the Wayne County Circuit Court in Detroit, Michigan, since 2000. She has a combined docket of general civil and business court cases. Her prior service on the court includes terms as Chief Judge Pro Tem, Executive Committee member, Presiding Judge of the Family Division, and Mediation Tribunal Association board member.

Judge Popke has also held positions outside the Court, including membership in the American College of Business Court Judges, President of the Michigan Judges Association, member of the Judicial Section of the State Bar of Michigan, member of the Child Support Leadership Council by appointment of the Michigan Supreme Court, member of the Michigan Judicial Institute’s Academic Advisory Committee, member of the Michigan State Court Administrative Office’s Post-Judgment Docket Committee, faculty member at the Michigan New Judges Seminar, and member of the State Bar of Michigan Subcommittee on Civil Discovery Scope. Judge Popke has also been an active participant in an Inn of Court and the Dads From Day One Advisory Board.

Before joining the bench, Judge Popke was an appointed member of the State Board of Ethics, a Wayne and Oakland County mediator, and active in a wide variety of community organizations. She currently serves on the Schoolcraft College Development Board Authority. As an attorney, she practiced commercial litigation and fidelity and surety law. Judge Popke is a graduate of St. Mary’s College, Notre Dame, Indiana, and the University of Detroit School of Law.
Frances Floriano Goins is a partner at Ulmer & Berne LLP, chairing the firm’s Cybersecurity & Privacy and Financial Services & Securities Litigation groups. She represents clients in complex business disputes, including matters involving securities, cybersecurity, corporate governance, consumer, and contract law. Her practice also includes counseling businesses on compliance and training for data privacy, cybersecurity, corporate governance, ethics, and anti-bribery best practices.

She is a long-time proponent of alternative dispute resolution, and a member of the American Arbitration Association’s Commercial Arbitration Panel and the ABA Business Law Section Dispute Resolution Committee.

Fran has been consistently honored in prestigious client and peer rankings, including Chambers USA, Benchmark Litigation, Ohio Super Lawyers, and The Best Lawyers in America®. You can access Fran’s full bio here.

Fran graduated Order of the Coif from Case Western Reserve University School of Law, where she was Editor-in-Chief of the Law Review, and obtained undergraduate and master’s degrees from the Cleveland Institute of Music.
John C. Sciaccotta focuses his practice on litigation, arbitration and business counseling matters with a special emphasis on complex civil trial and appellate cases brought in federal and state courts throughout the United States. John has also been appointed by the American Arbitration Association as an Arbitrator and Lawyer Neutral to adjudicate various claims and disputes in arbitration.

For many years John has provided results-oriented and value-driven legal counsel and advice to public and privately held businesses, lenders, employers and individuals. In these and other concerns, he has experience dealing with numerous industries and business activities.

His litigation/trial services and business counseling work has included:

- Counseling and representing corporations, limited liability companies, partnerships and their owners in issues involving corporate control, valuation, corporate squeeze-outs, minority oppression, and breach of fiduciary duty claims.
- Representing property owners in various types of litigation against municipalities.
- Interpreting and litigating complex contracts in construction negligence, commercial real estate, title insurance and mechanic's lien matters.
- Prosecuting and defending doctors, accountants, engineers, architects, and real estate and insurance brokers in professional negligence and business fraud cases.
- Advocating for various companies and individuals in trade secret misappropriation, and other unfair competition disputes.
- Coordinating the investigation of business frauds, with the ultimate recovery of substantial sums of money.
- Representing property owners in zoning and land use controversies.
- Defending Fortune 100 company employees in employment discrimination claims.
- Defending business entities and their owners in criminal investigations.
- Representing banks and financial institutions in loan documentation transactions.
- Arbitrating as a Neutral Panel Arbitrator in numerous arbitration disputes and controversies.
In addition, John has been involved in many appellate court decisions in which his clients have prevailed.

**REPRESENTATIVE MATTERS**

- Successfully represented an heir of an Estate to block the sale of the Estate’s interest in a closely held business that was to be sold for a devalued purchase price. John obtained an emergency Temporary Restraining Order (“TRO”), stopping the sale. The TRO was affirmed by the Appellate Court. John’s legal theories that stopped the sale resulted in the heir becoming the majority and controlling owner of the business.
- Successfully prosecuted and negotiated a favorable buyout of a founder of a technology company in a bitter and acrimonious business divorce.
- Successfully defended a professional services firm in a substantial post-judgment collection proceeding.
- Successfully represented and obtained a favorable settlement in arbitration on behalf of a publically traded business entity in a dispute involving the contractual obligations for the sale and purchase of heavy duty construction equipment.
- Represented and counseled business owners in the asset sale of a closely held business entity to a publically traded business entity. As part of the business sale, John was able to thwart and defend a significant threat of litigation involving the alleged misappropriation of trade secrets by the sellers that would have prevented the sale of the business.
- Represented the largest Japanese Hotel owner/operator, with 242 hotels under its marquee, in negotiating and securing City of Chicago approvals and property re-zoning necessary for the construction of a 23-story, 615 room hotel in Chicago. The client intends to develop numerous hotels in the United States.
- Secured a favorable outcome on behalf of a lender under a title insurance policy in U.S. Bankruptcy Court pursuant to fraud and equitable subordination and subrogation theories.
- Represented and obtained a significant settlement on behalf of a professional sports league in a lawsuit involving insurance broker fraud and negligence in the procurement of worker’s compensation insurance.
- Represented and secured a favorable settlement for three entrepreneur-inventors in a lawsuit involving alleged trade secret misappropriation and breach of fiduciary duty related to a patented device.
- Obtained a multimillion-dollar judgment in a fraud investigation involving the embezzlement of a closely held business and reported the investigation results to federal authorities, resulting in the ultimate filing of a federal indictment.
- Successfully defended a business entity and its owner in a breach of contract and shareholder control/dispute litigation.
- Successfully defended various business entities and their owners against fraud, breach of fiduciary duty, and conspiracy allegations involving the alleged fraudulent inducement of an investment transaction and the recovery of the investment funds.
- Represented and secured a favorable defense and settlement of a trustee and co-guardian of a trust and a disabled person in an action to remove said trustee and co-guardian based upon allegations of fraud and breaches of fiduciary duties.
• Successfully represented high level senior technology employees and their new employer against covenant not to compete, unfair competition, non-solicitation and trade secret misappropriation claims.
• Defended corporate business clients against the City of Chicago for municipal code violation and demolition claims.
• Represented a client, favorably, in a fee petition (fee-shifting) dispute and controversy.
• Negotiated favorable operating agreement terms and conditions in a new start up technology company.
• Arbitrated several matters, including a high stakes law firm partnership dispute

PROFESSIONAL BACKGROUND

John joined Aronberg Goldghen in April 2015 from Taft Stettinius & Hollister LLP. He practiced at its Chicago office predecessor firm, Shefsky & Froelich, for 15 years.

He has been awarded an AV® Peer Review Rating from Martindale-Hubbell, its highest rating for ethical standards and legal ability. Also among his accolades, since 2007 John has been recognized annually as a Leading Lawyer in Commercial Litigation by Illinois Leading Lawyers. He has also been named a Super Lawyer in Business Litigation by Illinois Super Lawyers, a designation awarded by peers to only 5 percent of Illinois attorneys.

SPEECHES AND PUBLICATIONS

• Facilitator, Illinois Supreme Court Commission on Professionalism Law School Orientation Program at DePaul University College of Law, 2012-2013.
• "Successful Strategies When Pursuing Equitable Remedies and Extraordinary Writs," Business Torts Committee Regional CLE Program.

COMMUNITY INVOLVEMENT

• Barrington School District 220 Educational Foundation Board, Trustee
• WINGS, Board of Directors Member
• Chicago Bar Foundation, Past Trustee
• Fenwick High School Bar Association, Past President and Founder
• Fenwick High School, Oak Park, IL, Life Trustee
• Illinois Fatherhood Initiative, Past President, Director
• Creighton University
• Pi Kappa Alpha Fraternity
• DePaul University College of Law, Past Public Interest Law Board Member
• Jesse White (Illinois Secretary of State) Tumblers, Inc., Past Director
• Barrington (IL) High School Horseshoe Club and Baseball Booster Club
LEADERSHIP ROLES

- Chicago Bar Association’s Business Divorce and Complex Ownership Disputes Committee, Co-Founder and Vice Chair, 2018
- The Chicago Bar Association, Board of Managers, 2017-2019; Bench and Bar Committee Chairman; Golf Outing Chairman
- The Chicago Bar Foundation’s Investing in Justice Campaign Leadership Representative, March 1997-Present; Board of Trustees, 2007-2013; Fall Benefit Gala, Co-Chairman
- WINGS, Board of Directors Member
- The DePaul University College of Law Dean’s Council, Member, 2018-2021
- Fenwick High School, Life Trustee, 2013-Present; Board of Trustees, 2007-2014
- 100 Club of Chicago, Director, 2010-2014
- The Civic Federation of Chicago, Director, 2005-2014
- Illinois Equal Justice Foundation, Past Director
- Chicago Legal Clinic, Past Director
- Chicago Volunteer Legal Services, Past Director
- Fenwick High School Bar Association, Founder, 1989; President, 2010-2016
- The Justinian Society of Lawyers, President, 2004-2005; Officer, 1999-2005
- Chicago Legal Clinic, Director, 2007-2010
- Museum of Broadcast Communications, Chicago, Vice President, Director, 2007-2012
- Cook County Retention of Judges Lawyers Committee, Co-Chairman
- Barrington High School Baseball Booster Club, President, 2013-Present
- Barrington High School Horseshoe Club, President, 2016-Present
- Illinois Fatherhood Initiative, President, 2009-2010

John has also served on numerous committees to elect judicial candidates and publicly elected officials.
Byeongsook Seo is a member of the firm’s commercial litigation practice. He took an interesting path to becoming an attorney. Before attending law school, Byeongsook served as an Officer in the United States Air Force after earning an engineering degree from the United States Air Force Academy. This unique experience has served Byeongsook well in addressing an ever changing array of subjects.

Byeongsook has applied his experiences to a broad range of subjects which include the representation of individual clients as well as Fortune 500 companies in complex intellectual property and commercial matters. He has represented high-tech clients in disputes that ranged from patent and trade secret enforcement actions to disputes over the sale of high-tech products. Byeongsook's clients have sought his guidance in disputes related to failed business ventures and disputes among business partners, shareholders and directors. He has defended many officers and directors from lawsuits arising out of their business dealings.

Byeongsook has represented clients in real estate litigation that involved construction defects, architectural issues, commercial landlord/tenant disputes and disputes regarding real estate development projects. He has represented commercial landlords and tenants in litigation over possession of property and damages.

Byeongsook represents investors in disputes arising out of their private investments. Many of his cases have involved hearings regarding extraordinary remedies such as injunctions and receiverships. Byeongsook is experienced in all aspects of litigation, including trials and appeals, injunction hearings, receivership hearings and arbitrations.

Representative Experience

- Represented the managing member of a real estate development company in a two-week jury trial in an action initiated by a minority member of the company. The dispute involved claims, counterclaims and third-party claims of breach of contract, breach of fiduciary duty, self-dealing, fraudulent nondisclosure, conversion, civil theft, unjust enrichment and allegations of sham contracts.

- Represented a company in pursuing claims of fraud, misappropriation of trade secrets and interference against a shareholder and former officer and director arising out of client’s acquisition of company.

- Represented a client in contempt hearings in a divorce matter initiated by her ex-husband. The client and ex-husband were directors, officers and shareholders of an information technology company. The
hearings involved issues arising out of the failed conversion of the company from a corporation to a limited liability company and accusations related to the loss of majority ownership of the converted company. There were claims for fraud, breach of contract, breach of fiduciary duty, conversion and civil theft and requests for injunctive relief and dissolution of the company.

- Represented members of a startup oil and gas company in a case initiated by an expelled member of the startup. Plaintiff asserted claims for civil conspiracy, fraud, breach of fiduciary duty, unjust enrichment, promissory estoppel, breach of contract and interference with business relations.
- Represented a medical product manufacturer, related principals and related companies, in an action where the manufacturer’s former distributor sought to pierce its corporate veil and impose liabilities on all clients for product liability cases initiated by product plaintiffs throughout the U.S. Plaintiff alleged fraudulent transfer, breach of fiduciary duty, violation of LLC distribution laws, and tortious interference.
- Represented a national engineering firm in a trespass action where plaintiff alleged that the client negligently supervised the construction of overpass.
- Represented minority member in a limited liability company asserting individual and derivative claims in an action against other members of the company and related affiliates for breach of contract, unjust enrichment, breach of fiduciary duty, civil conspiracy and dissolution of the company.
- Represented engineering firm, who had purchased another engineering firm, in an arbitration where the selling firm alleged the client breached its purchase agreement earn-out representations and obligations and sought millions in damages. Client countersued for millions based on the seller’s breach of purchase agreement representation and warranties.
- Represented the estate of a deceased cattle investor along with the widow and a cousin of another deceased cattle investor against a cattle rancher for failing to provide the promised return on the clients’ investment.
- Represented international manufacturer of complex imaging and measuring systems, including aerial LiDAR systems designed to be used on airplanes and helicopters, in an action against a national surveying company who countersued for millions in damages based on alleged breach of warranty and negligent misrepresentation.
- Represented nine clients, including a commercial real estate company, a brokerage firm, an architectural design committee, a custom build homeowners’ association, an architect, a home designer and landscape architects, in an action where the plaintiff alleged breach of contract, civil conspiracy, interference, breach of fiduciary duty and deceptive trade practices and sought an injunction against the clients’ contract right to seize real property.
- Represented an engineering firm in an action where plaintiff alleged breach of contract, negligence and negligent misrepresentation based on the allegedly deficient design of a waste water treatment system.
- Represented holding company, two related companies and its principal members, who were involved in the acquisition of business and intellectual property assets, in an action where the sellers alleged breach of contract, negligent misrepresentation, fraud, fraudulent inducement, fraudulent non-disclosure, civil theft and intentional interference.
- Represented former officers of an acquired connect play company in a dispute with the robotic, digital technology and immersive entertainment company that acquired it to address allegations of pre-purchase misrepresentations. The dispute dealt of the acquiring company framing pre-purchase disclosures as misrepresentations.
Represented a co-owner of a 20-year old business to obtain his buyout from the company that suffered a deadlock in management and lacked essential buyout remedies within its corporate governance documents. There were allegations of outrageous conduct, breach of fiduciary duty, theft and conversion.

Education

- University of Denver, Sturm College of Law (J.D., 1999)
- United States Air Force Academy (B.S., Engineering Mechanics, 1992)

Professional Memberships & Activities

- American Bar Association
- Colorado Bar Association
- Denver Bar Association
- Asian Pacific American Bar Association of Colorado
- Collaborative Bar Leadership Academy (2019)

Representative Presentations & Publications

- "Why Proper Document Redaction May Be An Ethical Duty," Author, Law360 (February 6, 2019)
- "'Prenups' Are Not Just for Individuals: Protecting Your Client in a Business Divorce," Co-Author, Corporate Counsel Magazine (April 2018)

Professional Recognition & Awards

- The Best Lawyers in America®, Commercial Litigation (2017-2020)
- APABA Colorado's Minoru Yasui Award (2014)
- Top Rated Lawyer-AV® Preeminent™, Martindale-Hubbell

Community Involvement

- Downtown Denver Partnership, Mobility Committee Member (present)
- 2nd Judicial District Judicial Nominating Commission (present)
- APABA Foundation, President and Board Member (2005-2006, 2009-present)
- Colorado Bar Foundation, Fellow (2015-present)
- Colorado Lawyers Committee (2005-2015)
- Colorado Dragon Boat Festival, Board Member (2013-2015)
- Theatre Esprit Asia, Board Member (2012-2015)
- Asian Pacific Development Center, Board Member (2010-2013)
- Community Resource Center, Board Member (2007-2010)

Other Professional Experience
• Isaacson Rosenbaum, P.C., Shareholder (2005-2011), Litigation Department Chair (2008-2011)
• Gorsuch Kirgis, LLP, Attorney (1999-2004)

Military Service

Bar Admissions
• Colorado

Court Admissions
• Supreme Court of Colorado
• United States District Court, District of Colorado
• United States Court of Appeals, Tenth Circuit