



Mediation – Strategic Conflict Management

Over the course of a couple of days I read the lead article in the August 2011 issue of NZ Business and attended (courtesy of BDO Napier – thanks guys) a presentation by Dr Justin Craig from Bond University on Family Businesses.

In combination, that material reinforced for me what those of us engaged in providing professional advice have been aware of for years namely:

1. The economic backbone of our region is small to medium (often family) businesses;
2. The “baby boom” demographic means that a transfer of capital and business management is underway and will continue for coming decades;
3. There is huge scope for good advice and planning to add value for clients engaged in those transitions.

This article looks at the value add for clients and their advisors in using mediation within those planning processes. It involves only a slight shift in thinking to see the value of the mediation process as a conflict prevention as well as conflict resolution tool. Purists might call it “facilitation” rather than “mediation”. The label matters little. The process works and the fundamentals are the same.

I don't think it is contentious to suggest that the following are very often features of the circumstances in which advice is sought:

1. There is no plan. In 2010, 41% of business proprietors intended to retire but had no articulated plan to do so (*Passing it On* NZ Business, August 1011 issue p 29);
2. Few proprietors intend a “clean” exit , 7% in 2011 (*Passing it On* NZ Business, August 1011 issue p 29);
3. Successors to business/capital have different priorities, skills and priorities from their predecessors;
4. Business stakeholders and family members will each have a different relationship with and level of comfort and familiarity with you as advisor;
5. They (and affected third parties – spouses/partners) will each have different interests;
6. The quality of the advice given depends on the quality of the information provided and “...*The statistical data clients give to their [advisors] is usually comprehensive and accurate, but hidden interests and suppressed emotional needs of clients are seldom fully disclosed in the presence of one another.*” Gage, D. and Gromala, D., *Mediation in Estate Planning: A Strategy for Everyone's Benefit*; Elder's Advisor, The Journal of Elder Law and Post-Retirement Planning - November 2002;
7. You cannot ethically have confidential discussions with all stakeholders. With respect, the temptation to do so, while understandable, is mistaken.

What that creates is a risk that:

1. Plans will be based on assumptions or inaccurate information and will be flawed accordingly;
2. Necessary interests will not be met, leading to later conflict;
3. The process will be longer and more costly as existing conflict is worked through;
4. Conflicts of interest for advisors will not be identified and avoided;
5. Important relationships will be damaged;
6. The safe and orderly transitions that are intended, will be jeopardised.

While those risks are perhaps more obvious in a family succession or estate planning context (how many of us have not been exposed to miserable Family Protection or Testamentary Promise litigation that could have been avoided with forethought), the same issues and dynamics arise in business planning.

Lawyers, accountants and financial planners are engaged, day to day, in advising clients on these planning processes. My evangelism is not directed to supplanting that advice or undermining the valuable client relationships you have. I well know however that there are situations where, because of existing discord (whether or not crystallised into litigation) or because of fear of conflict, necessary planning is not undertaken or important consultation is avoided. I also know that later disputes (the least welcome kind of inheritance) are sometimes made almost inevitable because plans are made and implemented with important interests undisclosed and therefore ignored.

If those dynamics are at play or the stakes are high for whatever reason, mediation processes can be useful. Why?:

1. First and fundamentally, a mediator is able to confer confidentially with all parties and is in fact contracted to do so. The clarity with which that enables problems (existing or potential) and their root causes to be identified and addressed, is stunning;
2. The mediator's skills lie in working through parties' assumptions to help clarify and communicate their key interests and in helping negotiate around where those interests intersect;
3. The cost of using a mediator to assist stakeholders negotiate an agreed plan is minimal compared to the cost (measured in any way) if it goes wrong;
4. The process supports the involvement of lawyers and/or other professionals to ensure individual parties are making informed decisions and gets the various professionals "on the same page" from the outset (again with major cost savings);
5. The outcomes, implemented with professional advice, are likely to be of higher quality because they have a solid information base and take into account all affected interests;
6. There is less risk of conflict of interest claims against the professionals involved;
7. Finally and most importantly, clients get the best and most robust outcome achievable.

When I was starting out in legal practice a very wise senior practitioner (one Graham Cowley) gave me a piece of advice which has proved itself true on too many occasions to count, "...*never underestimate the power of habit*". My challenge is that next time you are giving planning advice in circumstances that are difficult in the ways I have talked about, don't approach it in the same way you always have because that is how you have always done it. Consider whether the quality of the outcome for your client might be improved following a well mediated planning discussion with all the stakeholders.

Not every business, succession or estate plan needs mediation BUT many would be far better for it. I'm sure you will know several such situations off the top of your head. Any mediator I know would be happy to discuss the process with the parties and/or their advisors, obligation free (and explain to the old man that we won't have to hold hands while we are doing it).

There is little to lose and much to gain.

Bryan King LLB AAMINZ