

What Families in Conflict Can Learn from Baseball and Teachers

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Either a private family business conflict ends up in the courts, or gets settled by alternative methods involving third-party neutrals – usually mediation and arbitration. These neutral parties can guide the warring factions towards a settlement and help them avoid the courts. While they typically are faster, less expensive, and more confidential than going to court, both methods have drawbacks. We propose a hybrid solution that offers the best of both worlds and offers a real chance to relationships during a difficult period of family business conflict.

How Typical Third-Party Solutions Work

In mediation, the third-party facilitator helps the parties develop a mutually agreeable solution. In arbitration, by comparison, the third party usually renders a final and binding solution that both parties must accept.

Family business disputes can be devastating to those involved and often destroy future family relations. Families often turn to third parties to help them resolve governance issues, the overlap of business and family, salaries and benefits of family members, the use of business resources for personal use, trustee appointments, succession planning, divorce and exit of family members, and stock ownership (Means February 17, 2015: 1).

A relatively new variation, final-offer arbitration (FOA) has grown in popularity. First utilized in Eugene, Oregon in 1971 as a means to settle negotiations, FOA is also known as “baseball arbitration” and “last, best offer” (Fleischli 1980: 561). Major League Baseball (MLB) in 1974 adopted final-offer arbitration in its Basic Agreement with the players’ union as a means of settling salary disputes. (Major League Baseball

Players’ Association 2012-2016: 17-22). Today over half the states that provide collective bargaining rights to public sector employees also provide a form of FOA to settle disputes with state or local employees such as police officers, fire fighters, and teachers (Carrell and Bales 2013: 28).

The Drawbacks for Families

In traditional mediation, the parties are not required to accept any proposal and thus avoid the possibility of an imposed third-party decision they find unreasonable. Because both parties typically agree to the settlement, mediation is extremely appealing to family members seeking a method of family conflict resolution. However, its major disadvantage is the possibility of no settlement when both parties cannot reach agreement. Thus, parties in mediation might find themselves back at square one after having expended time, money, energy, and emotional capital on the mediation process.

Traditional arbitration almost never suffers from the mediation problem of failing to produce a settlement, because the parties have agreed in advance to accept the decision of the arbitrator as final and binding. Unlike mediation, arbitration guarantees a settlement...but it also negates the primary advantage of mediation: the parties themselves developing the terms of any settlement. The fear of an unacceptable, imposed settlement by an arbitrator, no matter how that arbitrator was chosen, therefore often causes the parties to seek an alternative process to settle a dispute (Carrell and Manchise Dec. 2013 – Jan. 2014: 1). Thus, in arbitration, where cases are often lacking in formal evidence, the expertise of the arbitrator to judge the facts becomes crucial, and the possibility of an unfair decision is cause for concern (Jan 2021: 1).

A Third Way

We propose a third alternative: Med-FOA, the combination of mediation with final-offer arbitration (FOA), as a means of resolving family business disputes. Med-FOA can combine the positive attributes of both traditional mediation and interest arbitration. The advantages of Med-FOA as a method to settle some of the 46,523 divorces, which occur each week in the U.S., has recently received similar support (Schwartzman 2019: 53). We believe Med-FOA also offers distinct advantages for the settlement of other types of private sector disputes, such as bankruptcy; employment; insurance claims; contracts; property; and commercial complaints against federal, state, and local jurisdictions; etc. It is an effective alternative to mediation or arbitration for family business disputes as well.

How Med-FOA Works

The hybrid Med-FOA model is based on a 2011 Indiana statute requiring a similar process for teachers and school boards in labor contract negotiations that are at an impasse (West 2012: 20-29-6-13). Med-FOA is a two-step process – a hybrid of mediation and final-offer arbitration, which can utilize the same third-party neutral, or two separate ones in the process. The first step is traditional mediation, and then if mediation is not successful, it is followed by the second step of final-offer arbitration. The mediation step utilizes the traditional dispute resolution process in which a neutral third party works to facilitate a settlement of unresolved issues between parties. The mediator has no authority to render a decision, but instead relies on skills and persuasion to enable the parties to reach an agreement (Heisel and Hallihan 1967: 103-112). The Federal Mediation and Conciliation Service (FMCS), the American Arbitration Association (AAA), local court systems, many state labor departments, and centers for dispute resolution provide experienced mediators who professionally mediate disputes. Local private mediators can also be equally qualified to mediate a dispute.

The second step of Med-FOA involves final-offer arbitration (FOA). In FOA, the arbitrator or tripartite panel is given the authority to render a final and binding decision, as is true in traditional interest arbitration. However, in FOA the arbitrator can only choose between the parties' last offers, either on a total package basis or on an issue-by-issue basis (Feuille 1975: 302). Thus, FOA provides the primary advantage of interest arbitration: the parties are guaranteed a

settlement.

In addition, FOA offers at least four additional major advantages compared to interest arbitration:

1. It strongly encourages the parties to bargain in good faith and move toward a middle ground position, knowing that the arbitrator is likely to choose the more reasonable final position.
2. Because FOA is a process that includes a clear winner and a clear loser, the parties are more likely to engage in mediation discussions that are more serious and therefore avoid the "chilling effect" commonly found in interest arbitration. The "chilling effect" is where the parties cool down or cease serious discussions and movement in anticipation of the arbitrator splitting the difference in their last offers. This strong incentive has caused the majority of cases in baseball arbitration to settle before arbitration: 97% in 2009 (Tulis 2010; 90).
3. FOA avoids the prospect of having an arbitrator drafting the settlement (Elkouri and Elkouri 2003: 1366). Instead, in FOA, the arbitrator can only choose an offer drafted by one of the parties, and the arbitrator generally strives to choose whichever party's last offer is the most reasonable.
4. FOA can include a "grace period" between when the parties receive both final offers and when the arbitrator selects one of the final offers. This gives the parties time to reach a mutually agreeable settlement, and thus avoid "losing" when the arbitrator chooses one of the final offers. The desire to avoid losing can be a powerful motivation.

A Mediator's Perspective

(Louis Manchese, the author of this section, is a retired federal mediator of over 1,000 disputes involving labor-management contract negotiations; family business disputes, employment conflicts; public-policy issues (federal, state, and local); regulatory negotiations (agricultural and educational); commercial; court; environmental; and Equal Employment Opportunity claims for numerous federal agencies.)

Based on the lessons learned from a career mediating over 1,000 disputes, rarely does the outcome of good faith problem solving and negotiations get much better after the exercise of the threat of litigation, especially for

people such as family members who will have an ongoing relationship. One must consider the cost increases, the loss of confidentiality, the extended time to reach a settlement, and the likelihood of a negative impact on the family business. It is true that sometimes one party or the other promptly comes to their senses and realizes it is wiser to get back to the negotiating table because they misjudged impact of impasse and the consequences of not reaching an agreement. However, in most impasse situations, one or both parties must experience the negative consequences for an extended period before they request a return to negotiations. The working relationship is damaged, and the seeds of their future relationship are sown.

To gain further insight as to why Med-FOA is a valuable and possibly preferred option, one should note that before impasse is reached, it is highly likely the mediator and the parties have already resolved many problems and issues, and they have laser-focused the remaining issues down to a handful of the thorniest high-value issues. These difficult issues, when processed through a FOA process, can create new settlement proposals that can successfully stake out the middle ground to capture the arbitrator's choice of the most reasonable position. Again, the process is efficient, effective, and very confidential.

Family members with strong desires to control the outcome may justify their decision to escalate the dispute to a courtroom setting. However, the Med-FOA option can practically alleviate such control concerns because the arbitrator generally strives to choose whichever party's last offer is the most reasonable (Carrell and Manchise 2014: 16). One cannot ignore the risk to let the arbitration process determine which final offer best suits the interests and circumstances of the parties. However, as in all high-value situations, one cannot eliminate all risks, but one could attempt to calculate Med-FOA's benefits. Med-FOA avoids an unfavorable court determined solution. It prevents the negative intended and unintended consequences of not reaching an agreement. The disputing parties significantly fashion the settlement by narrowing the gap between two settlement offers, so the arbitrator's choice via Med-FOA will be closer to a settlement they can accept. A potential acceptable settlement is reached in a timely and cost-effective process. In addition, it is important to consider that the family members' future relationship is maintained.

Another significant benefit of Med-FOA is it encourages a settlement during mediation. At or near impasse, mediators will take the opportunity to attempt to persuade the clients to settle the case in mediation to save money, time, and anxiety over which proposal the arbitrator may pick -- and thus possibly lose the case. Tenacious mediators know that this is a proven tactic to reach a settlement.

Med-FOA thus enhances settlement possibilities in the first step of the process, mediation. It improves the effectiveness of dispute resolution (reasonable, meets respective interests, and confidential) and promotes the efficiency of settling (faster and less costly). Med-FOA also often maintains future working relationships: it produces a settlement that increases the likelihood that the resolution is one the parties can live with, since the parties themselves significantly influence the final terms of the settlement. Thus, we believe Med-FOA is an option worthy of serious consideration by family members engaged in a dispute.

Conclusion

Mediation and arbitration historically have been the primary third-party neutral methods of dispute resolution, but both have limitations that can ultimately drive some families to court. Med-FOA, however, offers a valuable third option, a hybrid of traditional mediation and final-offer arbitration that keeps the advantages of both.

Med-FOA may not be the best dispute resolution method for all family disputes. Internal contractual agreements and policies can prevent issues from needing third-party resolution. Some cases need a court's interpretation of the law or need to set precedence because a principle is involved.

In addition, in some disputes family members believe they cannot give up control over the outcome of the case regardless of Med-FOA's advantages. After all, almost every client and representative believe they will prevail in a court of law. Sometimes, at the heart of the case, are deeply held values that essentially demand capitulation, by the perceived offender. Alternatively, as is sometimes the case, one family member may simply be the difficult person who must win at all costs.

However, when the family members focus the remaining outstanding issues, choose an appropriate mediator and/ or arbitrator, and want to reduce their risk from a

court-ordered resolution, Med-FOA offers them a reasonable, fair, and workable process that maximizes the possibility of a successful mediation, or, if needed through FOA, guarantees a settlement that both parties can reasonably accept.

We believe that in many, if not a majority of family business disputes, Med-FOA is a superior alternative to traditional mediation and arbitration processes. It has a record of success in settling other types of disputes. The authors recommend family members seriously consider Med-FOA because it is effective, efficient, confidential, and when important, it can preserve the parties' future relationship.

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