

## **Gonzales Family Business Dispute**

**By Phyllis E. Bernard, Oklahoma City University School of Law**

Roberto Gonzales built a successful produce distribution business, G&B, Inc., with his now-deceased partner, Ernesto Botano. G&B is one of the largest minority businesses in their region of the nation. It employs fewer than 300 workers, but has a large presence in the local community.

G&B is at a crossroads faced by so many family businesses: how to transfer the business intact from one generation to another. Roberto has grown weary of carrying the burden of the business alone, without his partner. He would like to leave the business to his adult sons, Leo and Ricardo (who prefers to be called “Rick”). However, there is no consensus among the family members (both immediate and extended family) about whether and to whom the business should convey. Roberto’s wife Elia is troubled that her husband has not even considered conveying the business to their adult daughter, Lena, who has probably invested more time learning the day-to-day operations than either of their sons.

One option is to sell the business to a much larger publicly-held corporation. This could be lucrative and expedient. But this large corporation is unlikely to share the same business and cultural values as Roberto. Whatever decision is made, according to the articles of incorporation, must be by supermajority vote.

Roberto holds 27% of the shares of G&B. His wife Elia holds 25%. The Botano family no longer has an ownership interest in G&B, although Roberto remains loyal to and inspired by the memory of his long friendship with Ernesto. Roberto continues to hope that his children will learn how to work together as he and Ernesto had, not only for their personal satisfaction but also for the long-term well-being of the family and of the larger community. Historically, however, relationships between the three siblings have been competitive, even acrimonious. Each adult child holds 16% of the remaining shares.

Pat Collins is the long-time attorney for G&B. Pat also has handled personal legal matters for Roberto and Elia (such as drawing up their wills), and a couple of real estate transactions for Leo and Lena.

Roberto and Elia have asked Pat to represent G&B in this situation. Pat met with all five of the Gonzales family jointly to explain critical issues concerning the feasibility and ethics of a joint representation. Pat discussed with them the principles embodied in the ABA Model Rules of Professional Conduct:

- MRPC 1.13 The Entity as the Client

- Who's the client MRPC 1.18 Duties to the Prospective Client
- What are their interests? MRPC 1.7 Conflict of Interest: Current Clients and MRPC 1.6 Confidentiality of Information
- Is a joint representation possible? MRPC 1.0(e) Informed consent and MRPC 1.2
- Scope of Representation and Allocation of Authority between Attorney and Client

Pat reviewed with the Gonzales family a range of options, explaining the various tools that a lawyer can bring to resolve this growing dispute:

- Negotiation? Mediation? Litigation? What are the risks and benefits of each? MRPC 1.4 Communication, esp. Comment [5] Explaining Matters with re ADR options;
- MRPC 2.1 Advisor, esp. Comment [5] Offering Advice including presenting ADR options

After the joint meeting with the Gonzales family, Pat recommended that they use the services of a third-party neutral, a trained mediator, to help them clarify what their goals in the representation. In this way, each individual was able to identify and sort through their underlying interests; sharing confidential information with the mediator, not with Pat. This prevented Pat from becoming tainted by hearing information that created an irreconcilable conflict of interest barring a joint representation through G&B, Inc.

The mediation was not intended to resolve the substantive issues of the shareholder dispute; but rather to clarify the attorney's scope of representation (if such representation was possible) and to assist in developing the most appropriate strategies to achieve the client's objectives. At the conclusion of the mediation, the mediator reported back to Pat, along with most of the Gonzales family that Pat should represent G&B in its corporate capacity, not in any personal role vis à vis individual family members. Further, they would prefer not to be locked into any one particular method to resolve their dispute; they want to leave all options open.

The pre-representation mediation also revealed that the interests of Rick are sufficiently divergent that he must seek separate counsel. Rick believes that G&B's corporate interests are not adequately represented by the other family members. He seeks to wrest control from his brother and father. He has asked his attorney, Kelly Miller, to file suit to recover – on behalf of the corporation – a \$300,000 loan made by G&B to his brother Leo. He is also suing to remove his father as CEO and Chairman of the Board due to alleged breach of fiduciary duty in using G&B funds for an unrelated business matter: purchasing an option on an airport parking lot. The

payments for this purchase option have jeopardized the cash flow of the company, and have placed its lines of credit at risk, Rick alleges.

Rick is not interested in anything but litigation. He does not trust negotiation nor mediation to yield a final, unbiased result. Further, his attorney's initial discovery requests have revealed documentation that Rick believes strongly supports his claims. He does not want this advantage to be "bargained away" in an ADR process.

Nevertheless, court rules will not permit a trial date to be set unless and until counsel have demonstrated a good faith effort at negotiation and/or mediation. Pursuant to this court mandate, Pat and Kelly meet for settlement negotiations.

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### **Outline of Workshop Presentation Attorney-Attorney Settlement Negotiations**

Vignette #1: Focus issues – Ethics and the conventions of negotiation/truthfulness and candor

1. Simulation (10 minutes): attorneys Pat and Kelly meet without their clients being present. (The degree to which they have previously interviewed and counseled with their clients in preparation for the negotiation can be left as an open question – perhaps relevant to the second vignette.) Both attorneys have researched the law and the facts concerning their cases, and both can make serviceable arguments on their client's behalf, although neither side is a "slam dunk."

Both attorneys engage in the adversarial, hard-ball style that is commonplace among attorneys and businesspeople.

- Kelly makes a serious misstatement of law, and gets away with it. Pat does not catch the error. Kelly continues to use the mistake to his/her own client's advantage.
- Pat makes a serious misstatement of fact, and gets away with it. Kelly does not catch the error. Pat continues to use the misrepresentation to his/her own client's advantage.

2. Stop action for discussion.

3. Panel analysis (15 minutes): Two panel members discuss the issues of ethics and strategy involved in the accepted conventions of negotiation.

- MRPC 4.1 Truthfulness in Statements to Others, especially Comment [1] Misrepresentation and Comment [2] Statements of Fact. (Any need to contrast with 3.3 Candor Towards the Tribunal? – considering that the settlement agreement will later be presented to the judge to become the order of the court?)
- Consider the conventions of negotiation and styles of negotiation: benefits and drawbacks.

4. Questions and Answers (10 minutes): discussion between audience and role players plus panel

Vignette #2: Focus issues – Authorization by the client; need for thorough consultation in advance to understand not only monetary but emotional/psychological issues and dynamics from your client's perspective

1. Simulation (10 minutes): Both attorneys shift to a more collaborative, problem-solving model of negotiation. But attorneys also need to be cautious in using this style, particularly since the litigation option is still very much open.

Pat makes an offer that exceeds what G&B has expressly authorized – not in monetary terms, but by offering an apology of sorts. Was authority for the apology implied?

Kelly tries to offer something in return for the not-quite-apology; perhaps a reduction of the monetary claim, or more generous terms for repayment. Kelly considers what use to make of Pat's statement, whether and how it could be used in evidence at trial, despite the ostensibly privileged nature of settlement offers.

2. Stop action for discussion.

3. Question and Answer (10 minutes): Audience engages role players and panel in commentary on the issues of ethics, strategy and evidentiary law involved in the vignette.

4. Panel (10 minutes): Panel summarizes key teaching points in conveying these lessons to students.

## **MID-PROGRAM BREAK**

### **Client-Client Mediation Assisted by Attorney Advocates**

Vignette #3: Focus issues – Mediation can be useful to resolve the underlying people problems that lay beyond the skills of the legal system. Attorneys can serve an important function as an advocate for their client in mediation, even though the client takes the primary role in speaking.

1. Simulation (10 minutes): The attorney-attorney negotiations managed to resolve the issue of the loan. Leo has issued a promissory note to G&B with provisions for payments to be withheld from Leo's G&B salary. Rick remained dissatisfied, however, about the leadership of G&B. He has identified a publicly held corporation interested in acquiring G&B. The new company has promised to install Rick as Chief Operating Officer of the new division (G&B), with a seat on the board of the new corporation.

Rick has come to mediation with Kelly assisting him. Roberto is present representing G&B. Roberto has authorization to speak on behalf of the corporation and the other family members who are not present. Roberto is accompanied by Pat. The action begins part-way into the mediation.

- Rick expresses his personal hurt and disappointment. He states that Roberto has never respected his abilities and has always favored his siblings.
- Roberto expresses apprehension that Rick has no sense of loyalty to family nor to community. He sees his son's Anglicization of his name and the institution of the law suit as indisputable signs that trust is not merited.

2. Stop action for discussion.

3. Panel analysis (10 minutes): A broad view of the client's situation (MRPC 2.1 Advisor) recognizes that there may be a need for more than advice on "the mere technicalities of the law." The savvy, modern lawyer seeks ways to meet the client's underlying interests, not merely to surface position stated. Mediation is not therapy; but it can identify emotional dynamics that can block a final resolution of the matter if they are not confronted and dealt with.

4. Questions and Answers (10 minutes): Audience engages role players and panel members in a discussion focused on using mediation to grapple with the people problems that are not amenable to solutions based solely on the law.

Vignette #4: Focus issues – Developing a mediated resolution that allows both sides to “save face” in ways that litigation does not. Mediation is not presented here as a “win-win” – which is too simplistic for the circumstances. Rather, mediation is presented as a way to craft a creative “out” for both sides; a truce that allows them to leave the table with dignity relatively intact (relative to litigation in open court, that is).

1. Simulation (10-15 minutes): Information that was revealed in caucus: These background facts could be summarized, rather than acted out, to save time.

Rick has been negotiating with his siblings and mother without Roberto’s knowledge. Leo is ready to let by-gones be by-gones, so long as he can have a position within the new company that gives him the same income. Lena is ready to vote in favor of the acquisition so long as she gets a position in the new company that recognizes her management abilities. Elia is willing to vote in favor of the acquisition if it will give Lena more opportunities for growth than her daughter has previously had with the family business. Rick knows this “disloyalty” would be very painful to his father, and would prefer to avoid humiliating him in this way, if possible. But he’s willing to press the issue if he must.

Roberto is vitally concerned that if G&B is sold to the publicly-held corporation the Latino community will lose a major source of employment; and he will lose the prestige and economic security that his position as Chairman and CEO have provided.

Role play should show the attorneys separately in caucus with their client and the mediator, developing a resolution.

This resolution could include Roberto’s identifying the absolutely essential qualities of a family business, as he understands and experiences it. Pat helps Roberto recognize that ownership of the business’ capital assets is not as important to him as having his family name associated with the business and having one of his children as chief executive officer. A family business also meant to him financial security for his immediate and extended family. Finally, the father highly valued having the family business be a respected presence in the local community. Part of that community stature included being a place where minorities could find not only entry-level work, but also find opportunities for advancement. The mediator presents these concerns to Rick and Kelly.

Kelly helps Rick identify to satisfy Roberto’s interests while still acquiring the business as a subsidiary. Kelly suggests terms that will prove satisfactory. With the

assistance of the mediator, the parties develop a statement describing their resolution in terms that “save face” for all involved.

2. Stop action for discussion.

3. Questions and Answers (15 minutes): Audience engages role players and panel in commentary on what mediation offers that litigation and negotiation do not? How skillful lawyers includes finding ways for the people problems to be resolved, making it easier for clients to support the lawyers’ resolution of the legal problems.

4. Panel (10 minutes): Panel summarizes key teaching points in conveying these lessons to students.

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