



# California

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## FROM ROLES TO RULES<sup>©†</sup> A NEW MODEL FOR MANAGING FAMILY DYNAMICS IN THE ESTATE PLANNING PROCESS

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### I. INTRODUCTION

#### A. Family Dynamics and Estate Planning

Estate planning for families who own businesses and other significant assets often presents difficulties rooted in the family's internal dynamics and psychological issues, which few attorneys are prepared to address. Even when such difficulties cannot be avoided, most attorneys focus exclusively on the financial and legal aspects of the estate plan. Unfortunately, this limited focus can permit family dynamics to distort or abort the planning process, or to generate an estate plan that is later contested in court.

The very act of estate planning may upset the delicate balance that a family has developed over decades to keep their business functioning. Strong emotions—pride, resentment, anger, fear, and envy—often suppressed for a lifetime, may emerge for testators contemplating their legacies and for beneficiaries contemplating their futures. When the will takes effect, death and grief can release pent-up emotions that fuel legal actions by survivors, which can erode the value of the business more quickly and surely than any tax code or competitor ever could. Indeed, fewer than one-third of family businesses survive the transition from first to second generation ownership, and about half of those survive to the third generation.<sup>1</sup>

Addressing psychological issues usually lies outside an attorney's area of responsibility and expertise. However, in situations where such issues threaten to undermine the estate planning process, attorneys who can at least recognize the root problem will hold an advantage. They may be prepared to address the root problem, to bring in an expert qualified to address it, or to limit or terminate involvement with the client. Responding in these ways can add value for the practice in the form of saved resources.

This article provides case examples that illustrate psychological dynamics at work in the estate planning process both for good and for ill. It also discusses ways in which estate attorneys can deal with a family's psychological issues in the planning process. We shall also briefly introduce the idea that carefully examining the organizational chart and reporting structure is the quickest way to identify internal conflicts, and to evaluate their capacity for remediation with and without outside help.

#### B. Definition of a Family Business

In this article, a family business is defined "as a pool of capital (usually, but not always, in the form of an operating, economic entity) that happens to be influenced/controlled, owned, and/or managed by: one or more members of a single family; one or more branches of an extended family; one or more unrelated families; and/or some combination thereof."<sup>2</sup> For our purposes, family businesses include not only operating businesses but also jointly owned assets, such as real estate or other capital assets where active management may or may not be required, as well as assets in which different family members are required to share use and ownership.

### II. FAMILY DYNAMICS AND ESTATE PLANNING

#### A. The Effects of Negative Family Dynamics

The difficulties arising from negative family dynamics and psychological issues may take explicit forms, such as family members' spendthrift behavior or drug dependency, which can be addressed in provisions of a trust. In other instances, the difficulties may take more subtle forms, such as family members' absenting themselves from meetings or failing to sign documents. Other difficulties include intractable arguments among family members, repeated changes of intention or direction, threats of outright disinheritance, or legal action among family members.

Legal action among family members involved in a business can be particularly destructive. As one attorney pointed out,

*Litigation involving disputes between family members is often bitter, hard fought, expensive, personally devastating to the litigants and financially devastating to the family business. The personal stake may be high. Emotion may often overrule rational and economic decision making. Family business members might be more inclined to expend on litigation amounts that far exceed the potential economic benefit that one or more of the litigants or the business hope to achieve.<sup>3</sup>*

Avoiding the damage done when the emotional dynamics of the family trump the logic of business economics may be the most compelling reason for an estate attorney to address those dynamics.

A detailed search of hundreds of cases reveals that litigation regarding family business estate issues most often involves certain presenting problems that form the legal basis of the case, but also likely point to negative underlying (and unaddressed) family dynamics and psychological issues. These presenting problems most often include the following:

1. Undue influence in preparation of estate documents<sup>4</sup>
2. Oral agreements as to distribution of estate assets<sup>5</sup>
3. Interpretation of estate documents<sup>6</sup>



4. Fiduciary issues, including trusts, shareholders<sup>7</sup>, directors<sup>8</sup>, and valuation issues in, for example, sales, buy-outs, or purchases of corporate assets<sup>9</sup>
5. Mental incapacity<sup>10</sup>
6. Combinations of the above issues.

Clearly, even the most diligent efforts to address negative family dynamics cannot completely prevent estate-related litigation. However, those efforts can lessen the likelihood of litigation by encouraging the attorney to exercise greater awareness, understanding, and control of the estate planning process when family conflicts threaten to undermine the process or to generate a plan that perpetuates those conflicts.

## **B. Other Psychologically Oriented Approaches to Family Dynamics in Business**

Over the past twenty years, experts from various disciplines, and business owners themselves, have recognized the importance of family dynamics in family business.<sup>11</sup> Business consultants, family therapists, and organizational behavior academics have applied several approaches to addressing family dynamics in family businesses.<sup>12</sup> Non-psychologically oriented approaches have included advising the family to keep family matters separate from business matters, focusing on improving communication, and applying formal business procedures, such as strategic planning, to the family business.

Psychologically based approaches to addressing family dynamics in family business have most prominently included the Myers Briggs Type Indicator (MBTI<sup>TM</sup>) of personality type and the Firo-B model of communication. Business consultants have used these tools to explain differences in the personalities and viewpoints of family members, and to smooth relations between those in the business.

For instance, we used MBTI to good advantage in the case of an elderly mother who owned a ranch with four daughters. One of the daughters lived in Oregon and the other three lived on the ranch with the mother. The goal of the estate plan was to divide the ranch so that everyone would get a share and be happy. So we arranged a meeting with the mother, the four daughters, and their CPA. We had everyone take the MBTI beforehand so that we knew everyone's type preferences.

Before the meeting started, the daughter from Oregon was quite nervous and approached us in private and said she did not want to be singled out in any way; she did not fit in the family and that was why she moved away. She was very tense.

We started the meeting by agreeing to communication rules (See Section V B. 4 below and Exhibit A), and then discussed the MBTI. As the meeting progressed and people understood their differences, it became apparent to everyone in the family that they needed the Oregon daughter's gifts to help them make better

decisions. At that moment, the three daughters looked at her and said, "We need you," and the whole tenor of the meeting changed. Everyone started cooperating because they saw that differences were not necessarily difficulties, and could even help the group. Work on the estate plan progressed smoothly, and we found a fair solution that was blessed by the mother.

Although they have been used by business to improve teamwork and communication for more than forty years, the use of psychologically oriented approaches can be considered new in estate planning. Over the past decade, we have applied both Myers Briggs and Firo-B with some success in difficult estate planning situations. For us, the main benefit of these approaches has been to help family members realize that each member's thinking and behavior is individual, and may be legitimate even if idiosyncratic or annoying. However, the use of the MBTI and Firo-B did not provide us with a process for addressing family dynamics and psychological issues in the context of estate planning.

The approach that we call, for reasons that we explain below, From Roles to Rules does provide such a process. In this process we help family members move from decisions and behavior based on family dynamics and psychological motivations (that is, based on family roles) to decisions and behavior based on business needs and practices (that is, based on rules). We do not use Roles and Rules to analyze family members as psychological types or to assess their communication styles. That is not the purpose of the Roles and Rules model. Instead, the model sorts behavioral relations among people—their actions and interactions—into two kinds: role-driven relations, and rule-driven relations.

## **III. A MODEL OF HUMAN DEVELOPMENT AND BEHAVIOR**

### **A. Roles and Rules**

An old witticism identifies two kinds of people: those who believe that there are two kinds of people, and those who do not. Many people justly recoil at any hint of "categorizing." After all, the word root of "to categorize" is "to accuse." In our view, however, neither kind of relation—neither roles nor rules—is in any way "better" than the other. Furthermore, unifying the two categories is necessary for a conception of the whole picture, just as female and male cells are necessary for a biological conception.

In the sense in which we use the term, playing roles is not shallow or phony; in fact, we may be at our best in our "parent," "spouse," or "patriot" roles. And rules are not necessarily oppressive. Where would we be without traffic rules, or the rules of baseball? As children, we first perceive life in terms of roles, for example in the roles our parents play for us. As we grow, we learn about the rules that ensure fairness as we play games with others.

The distinction of Roles and Rules has philosophical ramifications, but we can also see the distinction in every day life. For example, soap operas are dramas about roles: faithless lovers,



distraught parents, heartless villains, concerned doctors, prodigal sons, and returning heroes. Spectator sports are dramas about rules: safe, out, fair, foul, forward passes, and ground-rule doubles.

The distinction between Roles and Rules may also someday help to detoxify the cultural stereotypes of feminine and masculine, or women and men. Women, for example, still often seem culturally identified with the “roles” they play for children and men. Men often seem identified with the rules of the games they play, and of the agreements they make.

Some works of popular culture delightfully reverse the stereotypes. For example, in the Rogers and Hammerstein musical drama, *The King and I*, a woman travels from Great Britain in the mid-nineteenth century to educate the children of the King of Siam in modern, “scientific” ways. She represents “rules,” while the traditional King represents “roles.” Perhaps the distinction between Roles and Rules is what women and men do not understand about each other.

Here, we shall present Roles and Rules as a model of human behavior which is both complete and simple enough to apply to virtually any psychological or social situation. Estate planning is our case in point. Perhaps an easy way to represent Roles and Rules is as a Cartesian graph, in which the horizontal axis is “rules,” and the vertical axis is “roles.” We use the terms “roles” and “rules” to have specific, even technical meanings, which are nevertheless consistent with their general use.

## B. The Roles Axis

A role is action or a set of actions performed for another, or for others, more than for oneself. One plays the role of parent, spouse, teacher, physician, or friend more for the other person than for oneself.

A role is larger than the person playing it. Thus, there is a selfless aspect to performing a role properly. All good actors understand this. When performing a role, actors must give up a bit of themselves in order to identify with their characters. To play their roles, they must respond to scripted situations the way their characters would, not the way they themselves would.

Something similar occurs when people assume their roles in life. When a couple become parents, they realize that they cannot impulsively leave the house for a night on the town. They must stay home and care for the infant. Soon, they may give up the sports car and buy a minivan. They may move from the city to a suburb with better schools. They give up a bit of themselves to play the role of parents for their child.

All of us take on new roles and shed old ones as life progresses. If we are suited to our roles, and can play them wholeheartedly, then we may develop “character,” defined as the capacity to play a useful role in the lives of others.

Within a role relation, higher rank enables a person to influence strongly, and in some cases impose his or her will on, people of lower rank. Within their role relations, presidents outrank vice presidents, masters outrank servants, teachers outrank students, and parents outrank children. The way in which people in their roles handle the influence and power that go with rank can be a force for good or for ill. This is particularly true in family businesses.

Happiness comes of playing a role well. Misery comes from unfulfilled role expectations of others. Many children, including many in family businesses, spend their lives trying to get their parent to play the role of the parent that they need, to their everlasting disappointment. Some parents become angry with children, even to the point of disowning them, for not playing the role that the parent expects them to play.

So, roles are actions—or sets of actions—taken for the sake of someone else more than for one’s own sake. Roles are also hierarchical, and so may be represented as the vertical axis on a graph. With that in mind, we turn to rules.

## C. The Rules Axis

A rule is a condition—not simply a requirement or prohibition, but a regulation of interaction, such as the rule of a sport or game. A rule applies to everyone regardless of rank. In fact, what makes a condition a rule (and not a role expectation) is that all parties agree to it. A rule cannot be imposed; as E.B. White wrote long ago, “It ain’t democracy unless a man helped to write the law that hangs him.”

A rule operates among all parties to the rule in the same way. The rules of baseball apply to all players on the field. A household rule about knocking on the bathroom door applies to Mom, Dad, and the children equally. All drivers must stop at red lights, whether they’re in a Mercedes Benz or a Hyundai. The Constitutional doctrine of equal protection under the law explicitly states that the law applies to everyone equally. Some “rules,” such as a parent’s rule that a child be in bed by eight p.m., are more role expectations than rules.

Rules are therefore the great equalizers in the natural order of things. The rules of multiplication and division apply equally to all numbers, regardless of how large or small they are. There is no rank among numbers. In physics, a proton doesn’t outrank a neutron. In astronomy, Jupiter doesn’t outrank Saturn. They are all subject to the same Newtonian and Einsteinian laws.

In sum: Rules apply to everyone equally. Roles establish rank. These two principles—Roles and Rules—are constantly at work in our lives and in our relationships.

## D. Roles and Rules Together

Human behavior and interpersonal dynamics arise from both roles *and* rules.



For example, a very family-oriented father, a retired professor of biology with three over-40 children, was doing his own estate planning. He gave a percentage of a house to his daughter with the understanding that she would share it with her siblings when he died. He came to see us about gifting the remainder of the house to his daughter to “save estate taxes.”

We explained the tax consequences of the gift to the daughter and suggested that he might want to consider asking the other children how they felt about it and gently predicted that problems could arise. He said, “My children all trust each other, and I know everything will be okay.”

One month later, he came to our office a bit agitated. He said that his children were working out among themselves how the house would be divided and shared. He was concerned that they were not consulting him or involving him in the process. We told him that this was wonderful. We briefly explained the Roles and Rules model and suggested that he encourage his children to develop rules for joint ownership of the house, and to tell them that he would bless the rules if they were fair, just, and equitable. As a result, the father understood his role and his children’s roles. That understanding saved him from confusion and meddling, and saved the family from conflict.

We have often found that our understanding of Roles and Rules helps us cut to the heart of an estate planning situation in this way.

## IV. THE ROLE OF THE ATTORNEY AND THE FACILITATOR

### A. Neither Therapy nor Psychological Counseling

Addressing family dynamics in the estate planning process *does not* involve family or individual therapy or psychological counseling. Indeed, therapy and psychological counseling lie beyond the scope of the attorney’s engagement, skills, and expertise.

Moreover, the conditions required for therapy are typically absent in difficult estate planning situations. Candidates for therapy approach the therapeutic process with a desire, or at least a willingness, to change and with at least a modicum of good will and openness to new modes of interacting. In contrast, family conflicts over estate plans signal the presence of hidden agendas, changing alliances, or outright animosity.

Dealing effectively with negative family dynamics does, however, call for a shift in mindset for most attorneys and other estate planning professionals. This shift is required because attorneys are generally attuned to the inherently adversarial nature of legal proceedings, business negotiations, trust beneficiary conflicts (and to issues of client identification, confidentiality, and conflict of interest).<sup>13</sup> These situations are inherently adversarial because not everyone can have everything all the time. These situations are zero-sum; nobody gains except as someone else loses.

Regardless, an excessively adversarial approach to estate planning will preclude a good outcome, even requiring every interested party to hire his or her own attorney. An adversarial approach or even standing as an advocate for a member or faction of the family can actually stand in the way of a sound estate plan, and even make it necessary for every interested party to have his or her own attorney.

Therefore, the attorney facing difficulties arising from family dynamics should ideally shift toward the mindset of *facilitator* of the estate plan as discussed in the next section, or bring such a facilitator into the case, always without compromising his or her position as legal advisor to the client.

### B. The Maieutic Facilitator

In cases marked by mildly to moderately negative family dynamics, an attorney, accountant, trust officer, business consultant, or other advisor may act as the facilitator. In cases marked by high and persistent levels of tension, animosity, or unreasonableness, it may be necessary to call in a psychologically oriented consultant with a background in family business, family systems, or organizational behavior to facilitate the estate planning process.

In either case, we call this facilitator “Maieutic”—a word taken from the Greek for midwifery or obstetrics, which Socrates used to describe the delivery of other people’s concepts—because the facilitator “delivers” the estate plan for the family.<sup>14</sup> In a sense, the estate plan is the fertilized seed, the conception of the family business identity of the next generation. In the estate planning process, the Maieutic<sup>TM</sup> facilitator helps one generation deliver its self-concept, along with its financial and operating assets, to the next generation. In this way, the next generation can act in the best spirit of the preceding generation.

One question immediately arises for many attorneys: Who does this facilitator work for? Our policy in our practice is to work for the senior generation, who are the people with the power. We have them hire the facilitator, who then takes on the family or the family business as the client while we retain the role of the attorney for the senior generation. The facilitator then consults with the attorney and together they develop the family estate plan.

It is amazing to us how often a designated facilitator can gain information and produce results in situations where the traditional lawyer cannot. For example, a woman owned a large house in California, with a guest house in the back. Among her three children, one son was a successful real estate agent, another son had a drug problem, and her daughter had a serious illness and an out-of-work husband. The woman came to us wanting to leave the house to her daughter and to her son with the drug problem, and wanting to evict the child living in the house, the real estate agent. We asked her to hold off and referred them to a psychologist who worked with them to facilitate communication. He also worked with the mother to help her see her role as the leader.



After several discussions with various family members, we arranged a meeting with the family to work out what to do with the house and then recommend the solution to their mother. After a long session, the family decided to sell the house and split the proceeds when the mother died. It was a major decision in which all participated and went away happy. In fact, the tension had dissipated to the point where the whole family went to Hawaii on a vacation together.

The Maieutic facilitator serves as a leader, as well as a model of good leadership. Often the founder of a family business lacks the skill or temperament to lead the family toward a sound estate plan. He or she may be too bound up in family dynamics or too headstrong to put the long-term good of the business and the family first. But with patience, a facilitator can lead the founder and the family to craft an estate plan that meets the goals of the client *and* the needs of the business and the family.

This calls for the estate planner or the Maieutic facilitator, if that is another individual, to be “loyal to the process” rather than loyal to a member or faction within the family. This in turn requires the express consent of the elder generation. Indeed, the art of the Maieutic facilitator is in large part the art of working for and protecting all involved parties and being perceived as doing so. The Maieutic facilitator must be as professionally disinterested as a judge.

## V. A NEW APPROACH TO ESTATE PLANNING: FROM ROLES TO RULES

### A. Roles and Rules in Estate Planning

All human systems, including a family business and an estate plan, have a “roles component” and a “rules component.” Traditionally, estate planning efforts focus on the “rules component,” that is, on the financial, tax, and legal aspects, and largely ignore the “roles component,” the emotional and psychological aspects of the situation. Certain role-realities may be acknowledged (Dad made huge sacrifices to build the business; Junior had every right to become a performance artist) but rarely are their emotional implications addressed. Failure to focus sufficiently on the roles component can result in faulty or even destructive rules or hamper successors and survivors in their future management of the business.

For instance, we dealt with a case in which the senior generation did not accept the transition from role-based power to rules. The father, who developed and owned the business, was the president of the company. He had three daughters in the business and a wife. The daughters tried to help run the business, but their father would not relinquish any control.

The father tried to fire the daughters, who kept fighting with him and challenging his role. However, the mother intervened and nullified the father’s power because by California law she owned half of the business. Fighting between the mother and father

nullified their power, and their relationship suffered. The daughters started doing whatever they wanted, but with a constant struggle with their father.

Eventually, the family agreed to bring in an outside president. The father and the new president worked with us to develop an employment contract with job descriptions, rights and responsibilities, and the father’s duties all well defined. Unfortunately, the father just ignored these rules and continued in his former role. Under these circumstances, the business could not cope with adverse economic conditions and is now barely surviving. The outside president has left, and the situation is grave.

It sometimes happens, as it did in this case, that a principal in the business simply cannot or will not make the transition from Roles to Rules, even when they have participated in framing the rules and have agreed to act in accordance with them.

All families and most family businesses are primarily roles-driven, and this can affect both the formulation and the implementation of the estate plan. Even with a sound estate plan, the rules of law do not supply all of the rules necessary for a proper succession plan. Estate planning efforts generally aim to preserve capital, minimize taxes, provide for financial needs, all in the context of the client’s estate planning goals. Estate planning tools, such as insurance, trusts, and so on offer practitioners and families the means for accomplishing these tasks. Yet if estate planning were purely rules-driven, these tools would ensure a sound plan. Instead, they are necessary, but not sufficient.

### B. Roles and Rules in Practice

This subsection summarizes the key steps (but not all steps) in the From Roles to Rules process as it applies to estate planning. This section employs examples drawn from cases we have handled and which we have disguised here, to maintain client confidentiality. These steps are adjuncts to the traditional planning process of learning the testator’s financial situation and estate planning goals; choosing tax-minimizing techniques of transferring assets; solving liquidity issues through insurance, gifting, and other means; and so on. The six key steps are to:

1. Analyze the reporting structure
2. Learn who has the legal power to do what
3. Develop a history of the family business to ascertain the key roles
4. Establish rules for communication
5. Introduce rules that shape necessary behavior and protect legitimate interests
6. Use an independent general manager or board member to “enforce” the rules (if necessary).



## *1. Analyze the Reporting Structure*

The quickest way to ascertain the workings of Roles and Rules in a family business is to analyze the reporting structure of the business. The reporting structure, as depicted in the organization chart, functions as an X-ray of the structure of the business. For the business to evolve, the new concept of the business must grow from, and correct what needs correcting in, the existing structure.

A family business typically emanates from the vision of the founder and becomes increasingly complex as the organization grows. Yet the reporting structure of the business may or may not become more sophisticated. In addition, the actual reporting structure may or may not resemble the official reporting structure—the responsibility chart may not resemble the authority chart.

For example, in a regional chain of food stores, the founder issued directives to everyone from the store managers to the stock clerks, rather than go through his senior managers. He would give orders to anyone at any time regardless of previous orders from their immediate supervisors. By ignoring the chain of command, the founder undermined the authority and morale of his senior managers and store managers. On paper, there was a clear, hierarchical chain of command. Yet in reality the organization chart resembled a mandala (a Hindu and Buddhist circular graphic with patterns of interweaving lines).

The reporting structure can be ascertained in a series of carefully conducted, in-depth interviews with family members and other participants in the business. A delicate but probing interview will elicit the disappointment and confusion in the organization. Useful questions include: Who do you report to? Who reports to you? What are your responsibilities? How do you spend your time on the job? Who do you interact with on the job? How do you know when a task is properly completed? Who evaluates your performance? This assiduous interviewing will illuminate any irrationality in the system. It will also reveal how every location in the organization chart relates to the business as a whole.

Very often several versions of the reporting structure will emerge, regardless of whether there is an official organizational chart. The presence of different versions points to disparities in people's understanding of the location and distribution of authority, responsibility, accountability, and influence in the business. In turn, these disparities may reflect or point to negative family dynamics in the organization.

In a family business, family roles often override business rules, and upon succession and the transfer of assets to the next generation, this foments a "rules crisis." Old roles must dissolve and new rules must provide the guidance for what comes next. If those rules are not in place, people either perpetuate their current role-driven behavior or try to fill the vacated role, which is generally impossible. In either case, a properly organized and implemented reporting structure creates a self-sustaining process of governance that becomes part of the family and the business culture.

More broadly, and later in the process, rules must be created to govern job content, compensation policies, financial and other decision-making authority, ownership and voting rights, dividends and other distributions, conditions for the purchase and sale of assets, and other rights and responsibilities. All of these "rules" involve the reporting structure and the authority, accountability, and rewards associated with each position in the structure. Family businesses in general tend not to have elaborate rules of this type in place, preferring instead to operate by role-driven tradition. Planning for succession presents an excellent opportunity to introduce the necessary rules and best practices.

Analyzing the reporting structure is the primary device for eliciting and addressing defects in the system. In addition, a revised reporting structure is an excellent vehicle for installing new rules that define and reinforce new roles.

## *2. Establish Who Has the Legal Power to Do What*

In some cases, the family or even the testator may not understand who has the legal power to take various actions. For example, negative family dynamics ran deep in a building supplies company we worked with, and ascertaining who had the power to do what represented an early breakthrough. In this company, the younger, up-and-coming generation (all adults) wanted the business to remain in the family. They wanted to assume responsibility for running and growing it as members of the parent generation retired, which they were gradually doing. Members of the younger generation did hold conflicting visions of the business and of their roles in it and harbored psychological issues, yet they wanted to keep the business in the family and work out their differences.

However, seeing these differences and the potential for conflict among the younger generation, key members of the parent generation did not want to pass the business on to them. In fact, to avoid creating conflict, they wanted to sell the company and distribute the proceeds equitably among themselves and the next generation. This set the two generations against one another.

In examining the actual ownership structure of the business, we learned that the parent generation had, through a gifting program over the past several years, already given majority control to the younger generation. (Interestingly, both generations had been unaware of this rather obvious development.) This meant that, regardless of how the parent generation felt, they lacked the actual, legal power to sell the business over the younger generation's objections. The rules did not allow it.

This would not, of course, preclude the parent generation—moms, dads, uncles, and aunts—from trying to exert their roles-based power to persuade the younger generation to support selling the business. ("My brother—your Uncle Jimmy—and I built this business, and we want to sell it.") But the younger generation had the rules on its side. Legally, they did not have to sell the company if they didn't want to, and the role of facilitator regarding this situation was simply to make everyone aware of it.



The gifting program had transferred the power gradually over the years, giving a few percentage points of the voting shares to each son, daughter, nephew, and niece per year. It was so gradual, and the role-driven beliefs were so persistent, that no one noticed that the majority of the votes had shifted. With those votes, the younger generation, some of whom had contributed significantly to the business during their careers at the company, had tremendous leverage in the situation. They also had added incentive to grow into their new ownership roles.

### 3. *Develop a History of the Family Business*

Every organization has its own oral history, and this is particularly so for a family business. Personalities, emotions, myths, and crises are the stuff of every family and inform every family business history. The most useful history of a family business will be one developed from the viewpoint of several family members, and perhaps non-family members, preferably from different generations and branches of the family. Such a history reveals much about the workings of family dynamics in the business and about the current state of the business.<sup>15</sup>

For instance, in the case discussed in the preceding subsection, we took a detailed history from more than thirty family members. We established that 1) the business had its roots in a lumber company founded by the retiring CEO's father, who like the retiring CEO had been the eldest child in the family; 2) the grandfather came to California from Milwaukee to become an engineer but when that didn't work out, he and his brother, who also migrated west, started the lumber business; 3) the two brothers found that they could not get along, so they sold the lumber operation and each invested his share of the proceeds in his own business; 4) the grandfather's new business became quite successful and grew into the building supplies company, 5) in this company, the CEO's younger brother, as chief operating officer (COO) had not achieved the stature or respect accorded to the CEO, despite his expertise and his very significant contributions to the business, which included expanding into new locations and managing day-to-day operations, and 6) the "cousins' generation" had divided loyalties, with the CEO's children supporting the CEO and the COO's children supporting the COO. This was the cause of much of the conflict in the cousins' generation that motivated the older generation's desire to sell the business.

Aside from revealing volumes about the current state of the business and the family's relationship to it, this business history enabled us to discern an interesting pattern: The grandfather and his brother couldn't get along, so they sold the business to avoid further conflict. His two sons, that is, the CEO and the COO of the building supplies company, had a strained relationship which set up competitive dynamics in the cousins' generation. Family dynamics replicate themselves over generations. In this case, almost seventy years later, the retiring generation wanted to sell the company, ostensibly to spare the cousins' generation from conflict, just as the preceding generation had sold the lumber company to end their conflict.

With this history in hand, our facilitator was able to show the family the patterns of decisions and behavior that they were re-enacting. He also led them to understand their roles in this re-enactment. That realization led both generations to consider their roles in the family business. (Recall that the rules prevented the older generation from selling the company from under the younger generation.) This process led the older generation to consider the wishes of the cousins' generation more seriously and, before long, to accept those wishes and to adopt appropriate mentoring roles. The younger generation discovered some of the roots of their conflict, which they had already decided to resolve, and that discovery hastened that resolution.

A family business history need not be as detailed or exhaustive as the one we developed in this case. Even a short history from three observers can shed light on where the family business has been and why it is in its present state.

### 4. *Establish Rules for Communication*

Honest, structured family communication is essential in difficult estate planning situations. Communication laden with mistrust, hostility, hidden agendas, and score-settling cannot do the job. In such instances, an attorney or facilitator can, with initial input from the family, establish ground rules for communication that can establish order and treat all parties fairly. These rules for communication also enable the family to see (perhaps for the first time) how rules should be established and followed.

Rules for communication are among the easiest to start with because most rational participants can agree to hear someone else out if they can be assured that they too will be heard. Also, relatively little is at stake compared with, say, provisions in a trust, which can affect an individual's financial future.

It is important that the client, family, and all other parties to the estate planning process see how the attorney or facilitator goes about establishing communication rules. As noted earlier, one of the benefits of the Roles and Rules approach is that the family, particularly family members with the power to make decisions, see the attorney or facilitator in the role of a good leader. Early successes, even on something as simple as communication rules, enable the facilitator to model good leadership for the testator and his or her family.

To the extent possible, the facilitator should lead the family to create their own communication rules. Questions such as, How would you like to proceed? What do you feel causes arguments? and Is it okay to disagree? help the facilitator to draw, in a Maieutic manner, the communication rules from the family, gain their commitment to follow the rules, and set the stage for developing more complex rules regarding the estate later.<sup>16</sup> The facilitator should also work with individuals and sub-groups, such as children and their spouses, to discover issues that have not been fruitfully discussed. Then, the facilitator must create a calm environment in which these issues can be discussed and addressed.



We have also found Robert's Rules of Order, modified for the purpose at hand, to be useful in larger family or business meetings. Robert's Rules allow everyone to be heard, allow anyone to make a motion, and allow the facilitator to control the proceedings. Most adults, whether or not they have heard of Robert's Rules of Order, can accept them as an authoritative source of meeting rules.

The tone of formality that communication rules and elements of parliamentary procedure bring even to small family meetings enables the facilitator to keep psychological issues from polluting the process. When family members are not permitted to "act out" their psychological issues, they typically find more useful ways to state their positions and express their desires.

Families are so immersed in their mode of communication that they do not understand how counterproductive their discussions can be. Substituting communication guided by rules for communication driven by family dynamics is an important step toward keeping psychological issues from overwhelming the estate planning process.

## 5. *Introduce Rules that Shape Behavior and Protect Interests*

Under the guidance of the attorney or facilitator and using communication rules as noted in the preceding subsection and Exhibit A, the family should develop rules that will be acceptable and considered fair, just, and equitable to everyone. This requires a person in a leadership role, a role that may initially be filled by the attorney or facilitator, but that should eventually be filled by a family member, usually from the senior generation.

For instance, a father had control of a large tract of land and worked with a developer who built a shopping center on it. In this arrangement, the father retained ownership of the land and leased it to the developer. He also did not inform his wife and children about the arrangement or bring them into the business in any way. When the father died suddenly in 1993, the business went to the children—two daughters and one son, who was dependent on legal drugs—outright and with no real structure in place.

The children could not agree on ways to make decisions. One daughter was angry at the son because she perceived him as mother's favorite because her mother kept "helping" him. The daughter would call our office with complaints about how bad the son was. Working with a business psychologist and the family, we developed a detailed partnership agreement that specifically defined the rules under which the business would be managed, the roles for each family member, including the mother, the composition of the management and board, and the distribution of income from the property.

Although she initially resisted the role, the mother agreed to act as the chairperson and final decision-maker. Meetings were formalized and an outside advisor provided the family with expertise in property management, so they could make informed decisions. Over several months, the rules of the partnership

agreement forced the children to work together in order to receive their shares of the income. Although she had been reluctant, the mother grew into her leadership role and recently informed us that one of the daughters is about to assume that position.

Partnerships, trusts, and shareholder agreements must be structured in detail sufficient to shape the behaviors that are necessary to the continuation of the business and in the best interests of the family, and not just with an eye toward the legal aspects of such agreements. Often a testator or the survivors feel that selling the business and distributing the proceeds equally is the best solution. Many times they are just trying to avoid having to work things out, even when it would be in their economic interests to do so.

The Roles and Rules model holds that people grow into maturity and develop character by assuming roles and learning to play them properly. In the foregoing instance, the mother learned to play the leadership role for her children and thereby prevented them from degenerating into chaos. In growing into this role and modeling leadership behavior, she prepared her daughter to assume that role. But the rules written into the partnership agreement also enabled this to happen.

## 6. *Use an Independent Manager or Board Member to "Enforce" the Rules (if necessary)*

As in most situations, not everyone will follow all the rules at all times. At those times someone must act as a leader or referee to ensure that the rules are followed. For instance, a mother died and left her house and an investment portfolio to her three children, who were named as the successor trustees. (We represented the three children as trustees and not in their beneficiary status.)

There were serious issues among the children and their spouses that prevented them from working together reasonably. One child, against the wishes of the other two, moved into the house "to take care of it," which prompted the other two to hire an attorney to protect their rights. In response, the child in the house hired an attorney and the post mortem work on the trust ceased as the situation worsened.

We persuaded the three children to resign as co-trustees and to hire an independent trustee. The children had approval over the individual hired as the independent trustee. This family needed a capable individual with the power to play the role of a fair and just parent to guide the children to develop fair and just rules for operating the trust. We located a retired certified public accountant who was experienced in working with families and whom the children approved.

The CPA was appointed by the court as trustee and had the power to make decisions regarding the trust, but continued to consult the children. Meanwhile, the attorneys for the two family factions had agreed on the date on which the one child would move out of the house. Unfortunately, the child (and her spouse) decided to ignore the agreement, a decision that generated serious tension.



The independent trustee met with the child and her spouse and expressed empathy for their attachment to the house, thus playing the role of the good and caring father. He also stressed the importance of following the agreement (the rules) that the three children had committed to through their attorneys. The trustee's experience with families enabled him to play the role of fair and just father, so to speak, and to insist that the agreement to move out be honored, thus enforcing the rules. He pointed out that they had all agreed to the date and that they would have to move out anyway when the house was sold, which it later would be. The child and her spouse agreed to move out, and actually did so willingly.

This case could easily have spun out of control, with increasing expenses and animosity for the family, had the two sides fought it out in court. Someone had to play the leadership role and enforce the rules with as much kindness as possible. We were fortunate enough to tap the right individual to play this role.

In many cases we have found that a family facing the "rules-crisis" of succession in their business either requires or would benefit from an independent general manager or one or more independent board members.<sup>17</sup>

Such individuals play a leadership role for the successors and help them develop and follow objective rules concerning matters such as financial controls, job descriptions, performance standards, compensation, and ownership rights and responsibilities. Without these rules and someone to see that they are followed, family members will revert to their familiar roles rather than complete the transition to new management and continued growth.

## VI. CONCLUSION

### A. Practice Issues and Concerns

Employing Roles and Rules in estate planning raises several important considerations for attorneys. These include:

- *Increased time for developing the estate plan and increased fees for the client.* It usually takes more professional involvement and a longer elapsed time to employ Roles and Rules. Analyzing family dynamics, facilitating meetings, and bringing in a facilitator or independent general manager all take time. Therefore, these activities should be limited to cases in which negative family dynamics threaten to undermine, or have undermined, the estate planning process and in which the client can afford the added expense. However, the attorney should keep in mind that the human dynamics of roles and rules are always at work, and therefore From Roles to Rules can guide the process even in relatively straightforward estate plans. In general, time and money spent to reduce or resolve family difficulties in the near-term can significantly reduce the long-term costs of litigation and asset erosion should those difficulties undermine the succession process or the settlement of the estate.

- *Resistance on the part of family members.* From Roles to Rules cannot be employed explicitly unless the senior generation endorses the process. This approach differs from the usual approach to estate planning, and this will be obvious to the client and his or her family. Therefore, the attorney or facilitator must explain the process, the need for it, and the expected benefits to the family, the business, and the estate. Resistance from other family members can often be addressed by rules that encourage or require their participation in the process at some level.
- *Strained family relationships as psychological issues come to the surface.* We have found that it is useful to set realistic client expectations and to warn that things may get worse before they get better, particularly if problems have been long suppressed.
- *A change in the attorney's position vis-à-vis the process and the estate planning team.* If an attorney does not want to or cannot fulfill the role of Maieutic facilitator, it is best to call in someone who can and will play that role. The attorney retains control over all legal, tax, and other technical aspects of the estate plan, but may have to relinquish the leadership role in the process to some degree, and must be comfortable doing so.
- *Issues of client identification, client confidentiality, and conflict of interest.* While "loyalty to the process" rather than loyalty to a particular person may be a useful posture, in practice this may mean stating the goal of developing the best possible estate plan in the letter of engagement as opposed to including whatever provisions the client wants included. Similarly, considerations of client confidentiality may proscribe the extent of a lawyer's communication among family members. These issues should be resolved and any necessary permission secured before extending communication.

For most estate attorneys Roles and Rules can modify and supplement standard approaches. Some, however, may wish to adopt a more formalized approach. For us, Roles and Rules provides the underlying theme that we use in working with every family estate planning situation. In the more difficult situations, an attorney in our practice either takes the facilitator role, or we hire an outside facilitator, and employ the steps described above.

### B. Summary

Estate planning for family businesses presents difficulties to trust and estate counsel due to the mingling of the family's psychological and business issues. The psychological issues arise from family dynamics; the business issues arise from financial and legal imperatives. Difficulties occur when psychological issues hamper or abort the estate planning process or result in a contested or flawed estate plan.



We have developed an approach to estate planning that diminishes the difficulties and improves outcomes by addressing family dynamics and psychological issues as a part of the estate planning process. The estate planner adopts a posture of facilitator rather than advocate, or actually brings in a facilitator. This facilitator guides family members to allow their decisions and behavior to be guided by business “rules” rather than dictated by family “roles.” In the process the family members in their roles—that-be learn these rules, and learn to use them to generate, to the extent possible, a spirit of fairness among the parties. For this reason, we call the approach From Roles to Rules.

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## ENDNOTES

1. See John L. Ward, “Keeping the Family Business Healthy,” Jossey-Bass Inc., Publishers (1987) at page 1.
2. See *Business Succession Planning and Beyond*, by Dirk R. Dreux IV and Joe M. Goodman, Section of Real Property, Probate and Trust Law, American Bar Association 1997 at page 1.
3. See Massachusetts Continuing Legal Education seminar entitled, “Litigating Family Business Blowups,” presentation outline by Christopher J. Trombetta, Esq., Boston, MA entitled, *Contractual Approaches To Preempting Family Disputes*, page 4. (1999)
4. See, for example, *Ernest E. Morrow v. John A. Morrow*, 201 Cal.App.2d 235 (1962), *Estate of Mabel Goetz v. Earl William Roberts*, 253 Cal.App.2d 107 (1967), *Estate of Anna Dorothea Fransen Clegg v. Dan Wiebe*, 87 Cal.App.3d 594 (1978), *Estate of Hazel Mann v. Roy Laird Smith*, 184 Cal.App.3d 593 (1986), *Estate of Walter R. Bliss v. William James Williams*, 188 Cal.App.2d 630 (1962), *Estate of Ulrich A. Fritchi v. Marie Sylvera Teed*, 60 Cal.2d 367 (1963).
5. See, for example, *Alex G. Sparks et. al. v. Dean C. Lauritzen*, 248 Cal. App.2d 269 (1967), *Arthur N. Watson et. al. v. Jo Ann Adams, et. al.* 177 Cal. App. 3d 569 (1986), *Mitzi Lee Redke v. Abraham Silvertrust*, 6 Cal.3d 94 (1971), *Kind Dodd et. al. v. Ruth Burnham Cantwell et. al.* 4 Cal. App.2d 727 (1960), *Margaret Fallon v. American Trust Company*, 176 Cal.App.2d 381 (1959), *Hermina Goncalves Teixeira et. al. v. Emily L. Domingos*, 171 Cal. App. 2d 196 (1959), *Estate of Paul Majtan v. T. M. Robison, Jr.*, 237 Cal.App.2d 7 (1965)
6. See, for example, *County National Bank and Trust Company of Santa Barbara, as Trustee v. Bryon L. Sheppard*, 288 P.2d 880 (1955), *Estate of Fred H. Bixby v. Security First National Bank*, 362 P.2d 43 (1961), *Maxine V. Jue et al.*, 329 P.2d 560 (1958), *Anna Dakin Jones v. Frank Bryson*, 99 Cal.App. 583 (1929), *Electa B. Hartson v. Thomas Turner*, 200 Cal.App.2d 757 (1962), *Estate of May Shumack v. Nell Maday*, 152 Cal.App.2d 208 (1957).
7. Corporate lawsuits may also include allegations of stock fraud, diversion of corporate opportunity, and conflict of interest. See, for example, *Arthur S. Demoulas v. Demoulas Super Markets, Inc.*, 732 N.E.2d 875 (2000). See also, “A Legal Perspective on Shareholder Relationship in Family Businesses: The Scope of Fiduciary Duties,” by Moni Murdock and Charles M. Murdock, *Family Business Review*, vol. IV, no. 3, Fall, 1991.
8. See, for example, *Robert M. Stark v. Dean G. Stark*, 177 Cal. App. 2d 561 (1960), *Hermina Gonclaves Teixeira et. al. v. Emily Domingos*, 171 Cal. App. 2d 196 (1959), *Estate of Rose Gennet Martin v. Alice M. Karlebach*, 72 Cal. App. 4th 1438 (1999), and *Arthur S. Demoulas v. Demoulas Super Markets, Inc.*, 732 N.E. 2d 875 (2000)
9. See, for example, *Arthur S. Demoulas v. Demoulas Super Markets, Inc.*, 732 N.E.2d 875 (2000).
10. See, for example, *Charles Goodman v. Joan Goodman Zimmerman, et.al.*, 25 Cal.App.4th 1667 (1994), *Estate of Sylvia A. Morgan v. Alice B. Petersen*, 225 Cal.App.2d 156 (1964), *Estate of Jane R. Wynne v. Bennet Siemon*, 239 Cal.App.2d 369 (1966), *Estate of Louise Amelia Goulart v. Louis S. Amaral*, 222 Cal. App.2d 808 (1963), *Estate of Andrea Foss v. William J. Raffetto, Jr.*, 210 Cal.App.2d 464 (1962), *Estate of John Nigro v. Esterina Fata*, 243 Cal. App.2d 152 (1966), *Estate of Annie L. Lockwood v. Alan Swanson*, 254 Cal.App.2d 309 (1967).
11. For example, the Family Firm Institute, Inc. (FFI) was established in 1986 by family business owners and various professionals who recognized a need for interdisciplinary collaboration in the field of family-owned business. Today, FFI is an international membership association of 1,200 members, including consultants, educators, researchers, attorneys, accountants, and organizations from 31 countries.
12. See, for example, Randel S. Carlock and John L. Ward, “Strategic Planning for the Family Business,” Palgrave, 2001; Quentin J. Fleming, “Keeping Family Baggage Out of the Family Business,” Simon & Schuster, 2000; Jane Hilburt-Davis and W. Gibb Dyer, Jr., “Consulting to Family Businesses,” Jossey-Bass/Pfeiffer, 2003; Scott C. Fithian, “Values Based Estate Planning,” John Wiley & Sons, Inc, 2000; and Dennis T. Jaffe, “Working with the Ones You Love, Strategies For A Successful Family Business,” Conari Press, 1991.
13. It is beyond the scope of this article to discuss the conflict of interest issues that attorneys face when dealing with a family in the estate planning process. See for example ACTEC Commentaries on the Model Rules of Professional Conduct, especially MRPC 1.7.
14. The Maieutic facilitator is very similar to the collaborative mediation approach, which most attorneys are familiar with.
15. We have occasionally found constructing a genogram, a particular way to diagram a family tree that may cover several generations, to be useful. For more information, see “Genograms in Family Assessment and Intervention” by M. McGoldrick, et al., Norton, 1999.
16. Please see Exhibit A: Ground Rules for Family Business Discussions at the end of this article for sample rules for communication. Note that we have participants sign this document in order to formalize the rule-making process and secure their commitment.
17. For guidance regarding best practices for board members and for assembling boards of directors, see John L. Ward, “Creating Effective Boards For Private Enterprises,” Jossey-Bass, Inc. (1991)



## EXHIBIT A

### Ground Rules for Family Business Discussions

The following is a proposed set of ground rules for communication at all family meetings concerning business. Bear in mind that these are business meetings and that the role of all participants is that of a business person.

#### I. Communication Ground Rules for Family Business Meetings

1. Listen respectfully and don't interrupt.
2. Focus on issues, not people or personalities.
3. At every meeting, create an opportunity for all attending family members to address each other as peers.
4. It is okay to disagree with other family members, and for them to disagree with you.
5. When you disagree, use language that does not invite a defensive reaction. For instance say, "I have another view," or "Tell me more about what concerns you."
6. Use "I" statements rather than "you" statements. For example say, "I often feel that I am not part of the big decisions," instead of "You leave me out of the big decisions."
7. Assign a "referee" or timekeeper for particularly emotionally charged discussions.
8. Remember that no one is always right or wrong in everything he or she suggests.
9. Instead of trying to "win," try to create the give-and-take that results in win-win solutions. Try to find a middle ground that meets everyone's minimum requirements (a "compromise approach") or, better yet, try to find a solution that satisfies everyone's needs (a "collaborative approach").
10. Keep anything told to you confidentially in confidence or, in private, get the person's permission to share the information or viewpoint.
11. Respect each person's talents, intelligence, and Type preferences (as illustrated by the Myers Briggs Type Indicator) and use them for the benefit of the business.
12. Other family suggestions to achieve good communication:

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#### II. Upon execution of this agreement, the undersigned hereby agrees to abide by the above ground rules for communication at all family business meetings.

\_\_\_\_\_  
Name

\_\_\_\_\_  
Date