Mediating family business disputes: a primer for clients, family business advisers and other professionals

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1. Introduction

Although the practice of mediation has an ancient lineage – dating back to Bible times and even longer ago in China – our modern era did not see a resurgence in the use of mediation until about thirty years ago. In law schools in the United States, for example, the first textbook[1] on mediation appeared in 1985, and many similar texts – aimed primarily at the legal market – have been published more recently. However, the public's knowledge of what mediation is, and isn't, is surprisingly limited. Because of that lack of awareness, the need for mediation far exceeds the demand.[2]

Accordingly, this chapter will begin with a basic introduction to the subject of mediation and then move on to more sophisticated aspects of the subject in later sections.

2. Overview of mediation

There are five different aspects that need to be considered when trying to understand the basics of mediation, as set out below.

2.1 What is mediation?

The simplest, two-word, definition of mediation is 'facilitated negotiation'. Mediators manage negotiations in such a way as to create a safe place for a sometimes difficult conversation. Unlike arbitrators, who are legally empowered to act as judges and make binding decisions regarding a conflict, mediators have no power to impose a solution. All of the power remains with the parties, while the mediator, using a variety of techniques discussed below, tries to help the participants find fair and reasonable solutions.

2.2 Who can serve as a mediator?

The short answer is, literally, anyone. Most professional mediators come to the field

1 Stephen Goldberg, Eric Green and Frank Sander, *Dispute Resolution: Negotiation, Mediation and Other Processes* (1985).

2 Bill Ury, co-author of *Getting to Yes* (see note 5 below) and author of many other books on dispute resolution, is the source of this observation.

from some other profession, such as law or psychology, but many distinguished mediators pursue mediation careers directly out of college or graduate school. Mediation is not yet a licensed profession in any state in the US, but a few states have certification programmes for mediators who receive referrals from the courts. In addition, there are professional organisations, such as the International Academy of Mediators, whose membership is selective and based on success in the field.

2.3 What do mediators do?

The mediator's toolbox is broad and deep – we use a variety of techniques, adapted to the specific needs of the situation. For example, if a family business is in crisis because of personality conflicts, the mediator's techniques might focus on fostering greater understanding among family members and improving communication. Or if the family conflict has arisen because of financial issues – such as some members wanting to withdraw, others wanting to continue, and the business lacking sufficient liquidity to pay those who wish to withdraw – the mediator's techniques might focus more on financial analysis and problem solving.

Mediators use active listening and reframing so that participants feel heard. They serve as referees and managers in a negotiation, sometimes coaching the parties on how to be more effective in communicating their positions and perspectives.

The mediation process begins with 'contracting' – discussions between the parties and the mediator (or someone on the mediator's staff) to determine the scope of the mediation, the logistics (such as location and cost) and the signing of an agreement to mediate (containing provisions about confidentiality).

Then the next stages are story, interests, options and alternatives:

- *Story:* Mediators often begin by creating an opportunity for each participant to tell their story in their own way. This might be in a one-on-one meeting with the mediator, or in a room with all participants present. People in conflict need to feel heard, and the best mediators are good listeners.[3] It is not uncommon – in family business disputes or any other type of dispute – for the collection of narratives that mediators hear to have a *Rashomon*-like quality. The stories are often one-sided, self-serving and drenched in blame and accusation. The participants often use their narratives to try to recruit the mediator to their version of the facts. From the mediator's standpoint, the stories are worth hearing regardless of how partisan or distorted they might be, because the manner of telling is highly diagnostic for the mediator and at least as important as the content of the story.[4] Each narrative reveals the emotional impact of the conflict, and the extent to which the teller can see the conflict from a balanced perspective, or not.
- *Interests:* As the mediator listens to each party's narrative, s/he is trying to discern what each side wants (ie, their positions or demands) and their underlying interests. 'Positions' are what we want; 'interests' are why we

3 For an excellent resource on attentive listening, see Rebecca Sharif, *The Zen of Listening: Mindful Communication in the Age of Distraction* (2003).

4 See David Hoffman and Richard Wolman, "The Psychology of Mediation," 14 *Cardozo L Rev* 759, 764 (2013).

want them. The value of shifting our focus from positions to interests was one of the central insights in *Getting to Yes: Negotiating Agreement Without Giving In*,[5] which revolutionised negotiation theory and practice. Before *Getting to Yes* was published, much of the literature about negotiation focused on how to manipulate a negotiating partner through a combination of threats, ultimatums, cajolery and even deception. The authors of *Getting to Yes* advised depersonalising the conflict (separating the people from the problem), looking for objective benchmarks of fairness, and communicating about underlying interests. They illustrated the latter point with a story of two children fighting over an orange, which has become a classic of negotiation literature. In this story, the children's parent settles the conflict by slicing the orange in half, without asking either child why they wanted the orange. The story's moral – based on the fact that one child wanted the orange to make juice while the other wanted only the rind for baking – was that disclosing interests could lead to win–win 'expand-the-pie' solutions.

- *Options/alternatives:* Once the parties in a negotiation know more about each other's interests, they can begin to explore more productively a range of possible options. Brainstorming solutions plays a major role in mediation, and the mediator may choose to meet privately with each party to discuss options, or generate options in a plenary session with all participants present, or do some of each. In any case, the ground rules are the same: everyone is permitted to float ideas and propose solutions without being committed to them, or even necessarily supporting them. I often tell people in mediations that generating a very broad, creative range of options – including even some bad or outlandish options – is useful because in our reactions to unattractive options, we might learn more about our underlying interests, concerns and goals.

In mediation, we use the term 'options' to mean settlement terms that the participants can agree on at the bargaining table – as distinct from 'alternatives', which are the solutions available away from the bargaining table. For example, if family members are joint owners of real estate and one family member wants to convert his/her stake in the property to cash, one option would be a buy-out of that family member by the other members of the family. Another option might be looking for a third-party investor to purchase the withdrawing person's share. If the family members are unable to agree on any of the available options, the withdrawing family member might consider the alternative of filing a lawsuit, seeking a judicially ordered sale of the property.

Fisher, Ury and Patton, in *Getting to Yes*, introduced the idea that effective bargainers need to compare the available options to their "best alternative to a negotiated agreement" (their 'BATNA'), and mediators can help the participants, individually and collectively, to make this comparison.

Although my mantra as a mediator – story, interests, options/alternatives – seems

5 Roger Fisher, Bill Ury and Bruce Patton, *Getting to Yes: Negotiating Agreement Without Giving In* (1981).

to be sequential, there is no required order. As mediator Brad Honoroff once noted, "Mediations have a beginning, a middle, and an end, but not necessarily in that order."

One of the important features of the mediation process is that, in most cases, the ground rules – established by an agreement to mediate signed by all participants – permit the mediator to speak with everyone together, or one-on-one, or in subgroups. The mediator, in consultation with the parties, decides which of these formats (joint sessions, private caucus sessions, or various hybrids) will be most useful at each point along the way in the mediation. In my own work, I usually meet with everyone together initially to describe the mediation process and the scope of the mediation (ie, the issues to be addressed), meet with the participants individually at least once and then, from there, use a combination of joint and separate sessions depending on the topic to be discussed and each participant's level of comfort discussing that topic with others present. In striking the balance between separate and joint sessions, the mediator is trying to promote both candour (which is sometimes easier in separate sessions) and communication (which usually requires joint sessions).

2.4 What are the ground rules?

Each mediator has his/her own form of an agreement to mediate, but the most common features are the following:

- Participation is voluntary. Any participant can choose to withdraw from the mediation at any time.
- The process is confidential. The participants and the mediator agree not to disclose the substance of their discussions with anyone other than a specified list of need-to-know people (such as lawyers, accountants, spouses, etc).
- The process is essentially forward-looking. Discussions about the past are welcome, and often necessary, but the main focus of discussion is what lies ahead. (This, I point out, is why car windscreens are bigger than rear-view mirrors.)
- There is a division of responsibility in which the parties are ultimately responsible for the substantive decisions about settlement, and the mediator is responsible for managing the decisions about the mediation process, such as making sure that everyone gets 'airtime' in the discussions.
- Occasionally, mediators will help the parties develop a set of communications guidelines that foster mutual respect.

2.5 How does mediation differ from other processes?

When members of a family business sense that third-party involvement and expertise are needed, they have a range of options to choose from: facilitators, mediators and family business consultants.

Facilitators help run meetings. They do not need in-depth substantive knowledge of the business, and they may be hired for one or more meetings. Their role is to help participants have a productive discussion and enforce guidelines about participation. Facilitators are hired for their process skill. And, while some facilitators become long-

term participants in periodic family business meetings, sometimes they are hired just once to help with a particularly challenging meeting.

At the other end of the spectrum, family business consultants and advisers are often hired for in-depth, long-term involvement with the family business. They typically have expertise in both the psychological and business-management aspects of the family business enterprises that hire them. One of the distinguishing characteristics of the best consultants is their expertise in family systems analysis.

Mediators occupy a middle ground between these two poles. Mediators are usually brought into family business discussions to help the participants address a specific conflict, challenge or opportunity. Unlike facilitators, who generally meet with everyone together, mediators use a variety of meeting structures – sometimes meeting with participants separately on a confidential basis to learn about their individual interests and perspectives, and sometimes meeting with everyone together or with subgroups – with the goal of trying to identify some common ground. Mediators also get more involved than facilitators in substantive problem solving and in developing options.

Unlike family business consultants, mediators do not ordinarily give advice or make recommendations. Ethical rules governing mediation vary from one jurisdiction to another, but most prohibit mediators from providing professional services, such as law or therapy, in a mediation even if they are licensed in those professions. Also, unlike consultants, mediators usually do not take on long-term roles in a family enterprise.

One of the valuable services that mediators (along with consultants, facilitators and other family business professionals) can provide is triage – ie, serving as process experts who advise the family business on what services are most needed and most appropriate. For example, if one of the issues that the enterprise is struggling with is business valuation, a mediator can facilitate the negotiation of an appraisal process. Or there may be a legal issue, and the mediator can facilitate the process of getting unbiased legal advice for the enterprise.

Many mediators are generalists, working with many kinds of conflict. Even those who focus on family business conflicts may work with a wide variety of industries and work with both large and small enterprises.

3. How to select a mediator

The three most important characteristics are competence, chemistry and tenacity:

- *Competence*, of course, has multiple components. Does the candidate have experience with family business conflicts, and if so, how much experience? Are there lawyers or mediation participants who can vouch for the mediator's skill in the family business arena? Participants in a family business dispute often assume that the mediator must have industry-specific knowledge. For example, in one family business dispute involving the ownership of a hotel, the participants wanted to know how much experience I had in the hospitality industry; but the success of the mediation depended far more on my process skills than my industry expertise.
- *Chemistry* is hard to quantify, but (to paraphrase US Supreme Court Justice

Potter Stewart) "you know it when you see it" – or, to be more accurate, feel it. Hiring a mediator for a family business dispute is a bit like hiring a therapist or business adviser. Qualifications are usually not the deciding factor if the interpersonal connection does not feel right. With multiple family members trying to select a mediator, this can be complicated: Some family members might be looking for sensitivity to nuance, and others might be looking for a blunt, brass-tacks approach. (Of course, these two traits are not always mutually exclusive.) A mediator might not match everyone's preference perfectly, but the selection is not irrevocable. Some families try one mediator, and then move on to work with another. That said, choosing the wrong mediator can be costly, because the new mediator will have to be educated about the family, the business and the conflict.

- *Tenacity* is, like chemistry – ie, hard to measure. However, in interviewing potential mediators one can ask about their experience in their most difficult cases. Often, the best guidance for mediator selection comes from the people who have used the mediator's services. Although mediators are not usually at liberty to provide potential clients with the names of past clients, mediators can provide the names of lawyers who have been involved in their cases. From the lawyers' standpoint, tenacity is important because many lawyers tend to equate success in mediation with the mediator's settlement rate (as opposed to whether the parties reached a new level of mutual understanding but no settlement).

One option to consider in choosing a mediator for a family business conflict is whether the situation warrants the use of co-mediators. In commercial mediation, the parties to the conflict and their counsel usually opt for a single mediator. However, in family business conflicts, where communication and relationship issues introduce psychological elements to the conflict, it is not uncommon for two mediators to be used – often, the combination is one psychologist–mediator and one lawyer–mediator. The mediators work side by side, helping to manage the negotiation together but bringing somewhat different perspectives and skills to the table. If the participants prefer to hire just one mediator, and that mediator does not have psychological training, s/he should at least be someone with a high level of emotional intelligence.

4. The role of lawyers

In high-stakes family business disputes, it is not uncommon for lawyers to be involved. There may be one or more lawyers who work for the enterprise, and sometimes individual family members have their own lawyers. Access to legal advice is critical in some cases in order for the parties to be able to give informed consent to whatever deal is on the table for discussion. The risk, of course, is that the lawyers could go overboard and become needlessly adversarial. Thus, care in the selection of lawyers is important.[6]

In most family businesses, there is already a lawyer in place who has been

6 See John Talvachia, "Effective Legal Representation of Family Firm Clients" in Richard L Narva (ed), *Family Enterprise: How to Build Growth, Family Control and Family Harmony*, Globe Law and Publishing, 2015.

advising the enterprise for years. When conflicts arise, family dissidents may view this lawyer as partisan – ie, supporting the non-dissident family members. Accordingly, there are some situations where that lawyer can best serve the enterprise by recusing herself or himself from the conflict, even though the lawyer could add value by virtue of his/her familiarity with the enterprise and its history.

Another problem that frequently arises when several lawyers have been hired by various parties is that some lawyers may see their main job as adversarial advocacy while others see their job as interest-based problem solving. Adversarial lawyers usually evoke an adversarial response, and this can escalate the conflict. Mediators can sometimes get the lawyers onto the same page, and foster moderation among the more adversarial of the lawyers – but not always.

One technique that participants in a family business conflict can use is to hire the lawyers jointly. This could be done by having the family members interview all of the candidates who are interested in serving as counsel to one or more of the parties, and then the family members decide together which lawyers to hire and whom they will represent. By interviewing and hiring lawyers in this unconventional way, family members can feel more confident that the tenor of the negotiations will not sink to the lowest common denominator of adversarial activity, and that all of the lawyers support the family's goal of an amicable settlement. Mediators can also be a good resource for lawyer referrals, because they have seen numerous lawyers in action and can recommend those who have good track records at resolving conflicts constructively.

When lawyers are involved in family business mediation, the clients need to decide how involved they want their lawyers to be – in other words, will the lawyers attend every mediation session, or only a few that might involve legal issues; or will the lawyers be involved solely as consultants coaching from the sidelines and not attending the mediation sessions?

In some cases, one family member may feel that he/she wants to have his/her lawyer present, while other family members prefer not to have their lawyers present. This difference may be related to cost considerations or concern about levelling the playing field if one party feels less skilful as a negotiator. While there is no rule in mediation requiring all parties to have lawyers with them, if some do, it is essential that all participants in the mediation feel that they have the advice and support that they need in order to participate.

5. Advantages and disadvantages of mediation

From the standpoint of family business conflict, mediation offers a number of advantages. In cases where miscommunication contributes to conflict, mediators can provide coaching and serve as referees to enforce ground rules for discussion. In my experience, people generally behave (and negotiate) more reasonably when a disinterested third party is observing. (This is akin to the 'Hawthorne effect' that sociologists have established.[7]) After helping the participants better understand each

7 See Daniel Bowling and David Hoffman, "Bringing Peace into the Room", 16 *Negotiation Journal* 5, 10 (2000).

participant's underlying interests, mediators can help the family generate options, and focus on those options that best match the identified interests.

Mediators can also serve as deal brokers, speaking confidentially to individual participants, or to small groups of them, testing the waters with hypothetical proposals and thus determining whether there is a zone of possible agreement. For example, in one family business dispute involving two brothers who co-owned a mail-order business, it was clear from their history of conflict and their inability to leave past grievances behind that one of the brothers needed to assume full control of the business and begin a buy-out of the other brother's interests in the company. As their mediator, I was able to find out – confidentially, in separate meetings with each brother – how much money each would insist on as the price for withdrawal, and an agreement was reached.

Mediation holds four principal advantages over resolving disputes in court – although in many cases the choice is not mediation as opposed to litigation, but mediation as opposed to trying to manage conflict without the help of a third party. The principal advantages are:

- privacy – the parties' communications are protected by a legal privilege (similar to attorney–client privilege) in most jurisdictions;
- choice of mediator – as opposed to the random assignment to a judge or even greater uncertainties associated with a jury trial;
- speed – litigation can take years; and
- cost – mediation is almost always less costly than proceeding in court.

Among the disadvantages of hiring a mediator is the investment of time and effort. Time spent in mediation could be more profitably spent tending to the business. The mediator needs to become educated about the conflict, and, although lawyers can help, the need for direct involvement of the principals is unavoidable. In addition, there can be an emotional cost in addressing the emotional and psychological dimensions of the conflict. Even though the mediation process may be covered by legal privilege, many families find it uncomfortable airing all of their 'dirty linen' in front of an outsider. Some families may wonder whether mediation could actually worsen their situation by bringing painfully to the surface certain complaints and resentments that have been festering for years. Just as surgery may involve grave risk for the patient, so too with mediation, which might open wounds that will take a long time to heal and could complicate the task of focusing on a business's day-to-day operations.

In weighing the costs and benefits of using mediation, it is worth considering that the interests of the family as a whole may differ from those of individual family members. For example, in a recent family business mediation, it was clear that the family had suffered such a severe breakdown in communication that mediation was needed in order to keep the family's extensive investments in real estate from imploding. Even so, two of the 30 family members were so mistrustful of other family members (based on past conflicts) that they needed to be persuaded that mediation was worth the effort in the interests of all.

Because mediation is a voluntary process and not an irrevocable commitment,

one option is to try mediation and then evaluate the experience. For most family businesses, mediation is an unfamiliar process; and a certain 'negativity bias' often colours our reactions to anything unfamiliar.[8] Most mediators are willing to participate in one meeting or mediation session without any obligation on the part of the clients to continuing the mediation, or continuing to use that mediator.

6. Myths about mediation

There are three particular myths about mediation that are worthy of note here:

- *Myth Number One: "If I agree to mediate, that would be viewed as a sign of weakness."* Conflicts often generate a phenomenon that psychologists call 'competitive arousal'. The phenomenon is illustrated in a *New Yorker* cartoon, in which two dogs, dressed in suits and drinking martinis, are standing at a downtown bar. "It's not enough that dogs succeed," says one. "Cats must also fail."[9] Especially in the US, the so-called 'argument culture' described by sociologist Deborah Tannen causes compromise to have a bad name.[10]

  However, mediation has become a ubiquitous feature of the business world in recent years. More than 4,000 large corporations have pledged that they will consider mediation before going to court.[11] Mediation statutes exist in every state in the US and most other countries. In other words, mediation is becoming a normal part of 'business as usual' when conflicts arise. Moreover, the proponent of mediation may, paradoxically, be perceived as coming from a position of strength if s/he genuinely wants to hear other perspectives before making a decision.
- *Myth Number Two: "Mediators just split the baby – we don't need to hire someone to do that."*

  Because mediators lack the decision-making authority of arbitrators, there is no baby for them to split.[12] If this myth is about mediators simply trying to herd people toward the middle, that may be true of inexperienced or inept mediators. The better sort are looking for opportunities to match differing needs and preferences so as to expand the pie (as in the conflict, described in section 2.3 above, over the division of an orange).
- *Myth Number Three: "If mediation isn't binding, what's the point?"*

  The fact that mediators cannot compel a resolution (and the parties retain 100% of the power over such decisions) is, as the computer geeks say, not a bug – it's a feature! The purpose of mediation is to identify options that work better for the participants than the *status quo* or alternatives available away from the bargaining table. If such mutually agreeable options cannot be identified, the wise choice for the participants is not to settle. The underlying concern that gives rise to this myth is the fear that one or more participants

8 See David Hoffman and Richard Wolman, "The Psychology of Mediation", 14 *Cardozo L Rev* 759, 789 (2013).

9 *New Yorker*, 13 January 1997.

10 See generally Deborah Tannen, *Argument Culture: Stopping America's War of Words* (1999).

11 See the website for the International Institute for Conflict Prevention and Resolution: www.cpradr.org/PracticeAreas/ADRPledges/CorporatePledgeSigners.aspx.

12 This is a biblical reference to King Solomon of Israel. See I Kings chapter 3 verses 16–28.

will not participate in good faith – ie, they might use the mediation simply to stall or stonewall – and that is a legitimate concern. Mediation participants should discuss with each other, and the mediator, their willingness to settle before investing in extensive mediated negotiations.

7. Beyond the basics (1): the emotional dimensions of mediation

In some cases, mediators are primarily deal brokers – for example, in disputes where there is no past relationship and no likelihood of an ongoing relationship, such as an accident involving a vehicle. In those cases, the issues are mostly monetary (how much compensation will be paid, on what schedule, etc). The negotiation is essentially a distributive zero-sum problem, where the only common interest is the reduction of the transaction costs associated with litigation. Mediators can add value in such settings by helping the parties assess their options and alternatives in a realistic way. The parties may have highly emotional reactions to each other's settlement proposals, and part of the mediator's job is to help the parties manage their emotions. Even so, at the end of the day the main issue boils down to money.

At the other end of the spectrum, mediators handle some cases that are primarily about managing relationships, such as when divorced parents are in conflict over how to raise their children or how to allocate parenting responsibilities. The parents have a common interest in reducing the transaction costs, but more importantly they share an interest in their children's well-being. Mediators can add value by improving the parties' communications with each other. The success of the mediation will be measured by the degree of improvement in the parents' future working relationship.

Family business conflicts occupy a middle ground between these two poles: relationships matter a great deal, as do financial concerns. In deciding, for example, whether the next chief executive officer (CEO) of a family enterprise will be a family member or someone else, feelings matter as do bottom-line results. In this setting, mediators face the dauntingly complex job of managing both the emotional dimensions of the conflict and the business dimensions, and the degree of success will be measured both in the bottom line and in the quality of family relationships.

Mediators use many techniques for helping participants manage emotions in the mediation process. Providing the participants with private-caucus venting opportunities can help, although the scientific literature suggests that too much venting simply reinforces the anger that the mediator is hoping to dissipate. These separate meetings also create opportunities for mediators to develop more personal connections with the participants, because they tell the mediator in less guarded ways what is at stake for them in the conflict. These private-caucus sessions are useful from the standpoint of brokered deal-making by the mediator, and they can serve the goal of preparing the way for more effective communication among the participants.

The importance of emotion in family business mediation cannot be overstated. It lies at the core of what drives most conflicts in that setting. During the years after the publication of *Getting to Yes*, mediators tried to use the principles of interest-based bargaining as a way of managing the intense emotions that arise in conflicts. The premise of the *Getting to Yes* model is that people will act in their own rational

self-interest if we can help them discern it. However, there is abundant evidence that even ordinary day-to-day decision-making is largely driven by emotion rather than rationality.[13] And when people are in conflict, their thinking becomes even more prone to cognitive biases and the distorting influence of emotion.

A good example of this phenomenon can be seen in what is known as the 'Ultimatum Game', a game-theory experiment that shows that people in every known culture of the world will turn down free money if, in a proposed deal, the other player receives substantially more.[14] The ground rules of the game are simple. One person (called the proposer) is given $100, but only on the following conditions: the proposer has to offer a portion of it to the person sitting next to him/her (called the responder), and the responder (who knows about the $100 and the ground rules) has to accept the proposed division of the $100 (but not necessarily the money). In theory, the responder should accept any proposed amount, no matter how small, because he/she would be better off with even a cent, even if that meant the proposer kept $99.99. In fact, most people in the role of proposer offer between $40 and $50, and their proposals are almost always accepted. But some proposers offer very little, and the majority of responders reject any amount that is less than $20 even though turning down the money is not in their best interests from a purely rational economic standpoint.[15]

In mediations, the parties often turn down offers that would make them objectively better off than their alternatives (such as going to court) because the proposed division of available resources seems unfair, as measured by what the other party is getting. In the Ultimatum Game, responders punish ungenerous proposers but, in doing so, unavoidably punish themselves. In short, people are not ruled entirely by economic self-interest. When one of the parties in a mediation refuses a reasonable offer "on principle", this innate sense of fairness may be at work. (Interestingly, this phenomenon is not limited to humans; in experiments in which two dogs could see that one was receiving significantly more doggie treats as a reward for performing a task, the short-changed dog stopped performing.[16])

Fortunately, neuroscientists have found that there are other circuits in our brains that light up with pleasure when we cooperate (coexisting with the circuits that indicate pleasure when we best our opponents).[17] Mediators can reinforce the cooperative impulses by asking the parties whether they would feel good about a settlement in which each party had been equally accommodating. Mediators can also reinforce the view that fairness is unavoidably subjective, and the other side might have its own quite different view of what would be fair.

One of the major social psychology principles at work in conflict situations is the

13 See generally Dan Ariely, *Predictably Irrational* (2008); Jonah Lehrer, How We Decide (2009); Daniel Kahnemann, *Thinking, Fast and Slow* (2011); and Jonathan Haidt, *The Righteous Mind* (2012).

14 The discussion is this paragraph and the next two paragraphs first appeared in David Hoffman and Richard Wolman, "The Psychology of Mediation," 14 *Cardozo L Rev* 759, 795 (2013).

15 See Alan G Sanfey, James K Rilling, Jessica A Aronson, Leigh E Nystrom and Jonathan D Cohen, "The Neural Basis of Economic Decision-Making in the Ultimatum Game," 300 *Science* 1755 (2003).

16 See Friederike Range et al, "The Absence of Reward Induces Inequity Aversion in Dogs", 2008 *Proceedings of the National Academy of Sciences*.

17 See Louise Knapp, "Study: Brains Want to Cooperate", Wired (24 July 2002) (available at http://xrl.us/bpzsvm).

principle of reciprocity,[18] and it is deeply ingrained in us. Social scientists have begun to demonstrate that human evolution has played a role in reinforcing norms of fairness and reciprocity.[19] Accordingly, mediators may be swimming upstream when they try to persuade people to abandon their 'gut instinct' about what's fair, based on purely economic criteria of what is in their best interests.

A more promising approach to dealing with emotional reactions to conflict can be found in the Internal Family Systems (IFS) model pioneered by psychologist Richard Schwartz.[20] In that model, as applied to mediation, people are encouraged to explore those elements of their psyche that come to the fore in a negotiation – rather than treating the person's emotions as a unitary phenomenon. For example, each of us has a part of our psyche that fears being mistreated, perhaps harking back to an experience in the school playground of our youth. We may have another part that is good at managing our money, balancing our bank current account and making wise choices when we go shopping. There may be other, more impulsive, parts that lead us to make poor shopping choices. And there may be yet other parts that yearn for reconnection with family members with whom we are in conflict.

In the IFS model, people are encouraged to find an inner mediator (so-called 'self' energy, in the parlance of the model) to assist these various parts to act in harmony. One of the benefits of the IFS model is the recognition that there are no 'bad' parts – all of them serve us, or can be guided towards serving us, in productive ways in certain settings. For example, the part of us that fears mistreatment can by over-stimulated and hyperactive in some settings and thus stand in our way; but when it plays a more appropriate role in our internal system, it serves us by being vigilant and also noticing (altruistically) the mistreatment of others.

The goal of the IFS model is to help people become 'self-led'. The self in this model is that part of our psyche that is calm, curious, centred, and free of agenda other than healing. One of the metaphors that Schwartz uses in describing self energy is the conductor in an orchestra: all of the performers are needed but they need to be working in harmony, and if any one of them is hyperactive, or (worse) tries to take over conducting the orchestra, havoc will ensue.

One of the mediation techniques that can help people identify parts of their psyche and speak for them (rather than from those parts) is to ask people to write down the views of that part regarding settlement. So, for example, a mediation participant could be asked to write the advantages and disadvantages of a particular settlement from the vantage point of his/her wealth-maximising part. S/he could be asked to do the same exercise, on a separate page, from the vantage point of an angry part, and maybe one more page on behalf of a part that longs for reconnection. These are just examples (because the participants may have parts other than these that have been activated by the conflict), but the exercise has the following effect: the act of writing enables people to take a step back from their visceral reactions and to take time to

18 See generally Robert Cialdini, *Influence: The Psychology of Persuasion*, chapter 2 (1998).

19 See, eg, Martin Novak, "Five Rules for the Evolution of Cooperation", 314 *Science* 1560 (2006).

20 For an excellent discussion of the IFS model, see Richard Schwartz, *Introduction to the Internal Family Systems Model* (2001). See also David Hoffman, "Mediation, Multiple Minds, and Managing the Negotiation Within", 16 *Harv Negot L Rev* 297 (2011).

examine them. To use the parlance of Daniel Kahnemann's book *Thinking, Fast and Slow*,[21] writing helps people shift from highly emotional, fast-track 'System-1' thinking to the slower, more deliberate, and more rational patterns of 'System-2' thinking.

Of course, to elicit self energy and self-leadership in the people that mediators work with compels the mediator to be aware of, and manage, his/her own out-of-kilter parts. Mediating in a family business can be especially evocative for mediators because of parts of their psyche that developed in them as a result of their own family experiences.

8. Beyond the basics (2): styles of mediation

The scholarly and practice-oriented literature of mediation focuses on the following styles: facilitative, evaluative/directive, and transformative.[22] Although, as in any field of endeavour, there are purists who espouse a particular style of mediation and use no other, many mediators would describe their styles as eclectic. For example, some commercial mediators move from a facilitative style at the beginning of a mediation (as they are learning about the case and the parties and starting to build trust) to a more evaluative/directive style if the parties need some measure of pressure to prevent an impasse, while at the same time being alert for transformative moments that might in some cases lead to settlement.

8.1 Facilitative mediation

Mediators who use a facilitative style are not seeking to direct the outcome, but only to enable the parties to reach an outcome that meets their needs and goals.[23] These mediators resist answering the following types of questions from the parties (which are common):

- What do you think we should do?
- What do most people do?
- What would a court do?
- What do you think is fair?

Facilitative mediators believe that they are responsible for the effectiveness and integrity of the process, but the parties are responsible for the substantive outcome. A facilitative style of mediation is commonly seen in community mediation programmes, where the mediators come from a variety of professional backgrounds and there are fewer lawyers serving as mediators.

8.2 Evaluative/directive mediation

Evaluative/directive styles of mediation are commonly found among mediators who are former judges and, in some instances, lawyers.

An evaluative style of mediation can range from its starkest extreme, in which

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21 Daniel Kahnemann, *Thinking, Fast and Slow* (2011).

22 This section is taken from David Hoffman, *Mediation: A Practice Guide for Mediators, Lawyers, and Other Professionals* (2013), sections 1.7.1–1.7.3.

23 See, eg, Leonard Riskin, "Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed", 1 *Harv Negot L Rev* 7 (1996).

the mediator makes a prediction of what a court will do with the case or with a particular issue, to the more subtle end of the spectrum in which a mediator might ask probing questions designed to provide reality testing if the parties seem to be unduly optimistic about their likely outcome in court.

Directive mediators are more likely than facilitative mediators to help the parties generate options, formulate proposals, and even advocate for particular solutions.[24]

8.3 Transformative mediation

In 2004, mediators and scholars Robert A Baruch Bush and Joseph Folberg published the second edition of an influential book entitled *The Promise of Mediation: The Transformative Approach to Conflict*,[25] in which they argued that the goal of mediation should not be settlement but empowerment and recognition of the parties. They described their approach as transformative because the focus was on the power of the conflict resolution process to change the parties' perspectives, feelings about themselves, and feelings about the other parties.

Using a transformative style, mediators allow the parties to determine not only the outcome of the dispute but also the process. A significant number of mediators in the US, though far from a majority, have adopted this style of mediation, and the US Postal Service calls for mediators in its REDRESS mediation programme, which handles internal conflicts among employees, to use this technique. Many mediators find that even if this is not their orientation, there are transformative moments in some mediations – for example, moments in which a genuine and spontaneous apology reconnects the parties in a profound way.

9. Conflict as opportunity

Conflict is inevitable in any family business. Conflict fosters change, and any system in which conflict is suppressed may stagnate. Mary Parker Follett, an early negotiation theorist, said that "all polishing is accomplished through friction".[26] And US President John F Kennedy sounded a similar theme in his oft-quoted statement that "when written in Chinese, the word 'crisis' is composed of two characters. One represents danger and the other represents opportunity".[27]

Successful management of conflict is not inevitable and requires thoughtful choices. One option for family enterprises is to include mediation clauses in the company's operating agreements, requiring the use of mediation before any member of the enterprise pursues litigation.

10. Conclusion

When conflicts emerge in family businesses, the use of outside resources is sometimes needed, and this chapter has discussed some of the available options for such help, ranging from facilitators to mediators to family business consultants.

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24 See, eg, Marjorie Corman Aaron and Dwight Golann, "Merits Barriers: Evaluation and Decision Analysis" in Dwight Golann (ed), *Mediating Legal Disputes: Effective Strategies for Neutrals and Advocates* (2009).

25 Revised edition published by Jossey-Bass in 2004.

26 Pauline Graham (ed), *Mary Parker Follett: Prophet of Management* (1995), p68.

27 Remarks at the Convocation of the United Negro College Fund, Indianapolis, Indiana, 12 April 1959.

Mediation is an underutilised, but highly effective, tool in resolving family business conflicts. It is a voluntary process that builds on the insights about interest-based bargaining that were developed in *Getting to Yes*, and adds tools such as active listening, reframing and private caucusing to repair relationships and generate sound business options.

Sustaining Family Enterprise

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Consulting Editor **Richard L Narva**