

# Family Dynamics Consultants and Lawyer-Mediators Early Intervention Works for Family Businesses

By George F. Burns

**T**wenty years ago, the week before Christmas, the phone rang. It was my client asking me to dismiss immediately a lawsuit that he had brought against his brothers and his father regarding various family disputes in their construction company. “It just isn’t worth it.” And I knew exactly what he meant. Christmas was coming, and the lawsuit, though it had some merit, simply was not worth its ravaging effect on the family, an otherwise happy family that had prospered in the post-World War II period and had built on that prosperity in the decades thereafter. I was relieved to get the call and dismissed the case that day. Nothing good came of the lawsuit, except perhaps the collection of my legal fees.

This is not the only such case I have encountered in my career—there have been many since. But only recently, in the last decade or so, have I devoted a significant amount of my practice to avoiding and resolving family business disputes. Over that period, I have come to believe that we lawyers should apply the existing ethical and professional framework for delivering litigation-related advice to family businesses, and rethink how we evaluate our effectiveness.

Lawyers are traditionally not ranked on the basis of their avoidance of legal fees and contests that never had to be incurred or fought. It puts one in mind of the critique of baseball’s traditional baseball statistics described by Michael Lewis in *Moneyball*—it took Billy Beane of the Oakland A’s to transcend hidebound tradition and start tracking statistics like on-base percentage and other data that had more to do with actually winning games. The same is true in the legal profession. This or that victory in a case may be ranked or listed in a resume, but there is no quantification of what it took to win (not to mention lose). As Voltaire said “I’ve been ruined twice in my life; once when I lost in litigation, and once when I won.”

We need our own on-base percentage statistic to score lawyer performance in family business dispute resolution. As noted below, one day of exposure to a family dynamics consultant and lawyer–mediator more than pays for itself in depositions never conducted, complaints

never drafted, and tense shareholder meetings never endured. It is time to give fair weight to all the skills and gifts that lawyers have to offer in this area, including the ability to discern those situations in which nonlegal skills should come first.

## Why Family Litigation Is Different

Even though it is often said that there are no winners in litigation, some litigation is worth pursuing. But in the world of family business litigation, to lose a case, even to win a case, is to lose family affections and loyalties for a long time, often permanently. There is no monetary victory to offset such permanent damage to the family. Because family business litigation is the worst kind of litigation, it also yields the highest benefit from mediation, for at least these reasons:

### *Key Facts Are Often Known or Knowable*

Family business disputes almost never involve matters of fact. Shareholders have rights of accountability and transparency, and indeed, most family businesses honor those rights, and those that do not can be made to do so without a great deal of legal effort. The stakeholders almost always know each other—often all too well. The informality of fact-gathering in a mediation context makes a lot more common sense than Shareholder Brother No. 1 hiring a lawyer to take the deposition of Shareholder Brother No. 2. The issue is often not what happened or what will happen, but rather, what does it mean? Good lawyers know what facts are important, and conscientious and ethical lawyers do not spend their clients’ money proving the obvious.

### *Objective Benchmarks and Established Legal Principles Often Tell the Family What the Facts Mean*

Most family business disputes turn on matters of opinion or expert testimony (e.g., is my older CEO sister receiving too much compensation from the company compared to the market?). The most effective dispute resolution approach stresses objective measurement of the merits and drawbacks of this or that course of action, whether through a board of independent directors, an independent CPA, an independent appraiser, or other sources of industry measurement such as trade associations. A jealous sibling is less likely to take another sibling’s word that the latter’s compensation is fair—industry compensation surveys are more likely to do the trick. Similarly, the law



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books, as well as accounting and financial and tax books, are full of established principles of business and corporate law, such as fiduciary duty and the business judgment rule. If properly explained to the family, these precepts provide further objective guidance. Lawyers are well qualified to find objective benchmarks and present them to the family, and often opposing counsel can find common ground on these principles.

### ***Family Emotion and History Are the Primal Forces***

These factors make family business conflict a prime candidate for mediated solutions, but only if other family issues are addressed. Family litigation is rife with irrationality and emotion, all fueled by family history and the unique family dynamics that grow out of that history. Patterns of blame and recrimination establish themselves (e.g., Uncle Joe is the problem; Brother Bob is the oldest sibling and he started out as a good CEO, but his trophy wife has ruined him). Lawyers are not qualified or trained to manage these overriding factors, and yet traditionally lawyers plow ahead gathering facts and figuring out what the facts mean without acknowledging that the irrational and emotional make family members blind to reason and analysis so dear to the legal temperament. Until the family is emotionally ready to absorb facts, legal principles and objective analysis, all the lawyers' efforts are likely to be at best inefficient and at worst destructive. Only a family dynamics consultant, trained in psychology with specific experience in how family members interact, can create the right environment in which lawyers can deliver effective services.

### **Who Is Your Client?**

The typical family business lawyer will represent the family business itself, some members of the family individually, and often, a variety of trusts. Indeed, the lawyer may also be acting as trustee. Throughout the whole inquiry into what the lawyer's role is, whether an objective assessor of a situation or an advocate, the first question is: who is your client? Very often the question has only one answer: you are either representing all of the clients where they have common interests, or none of them.

And this becomes crucial when the lawyer decides, as this article suggests, to bring in a family dynamics consultant, who in almost every case should work for the family as a whole and not some subset of the family. The individual members of the group may eventually need separate counsel and even separate psychological counseling as they solve whatever family problem confronts them.

Another often-overlooked area is the need to pay attention to the maintenance and protection of important privileges such as the attorney-client, work product, and settlement communication privileges and the client's right to confidentiality. Again, sensitivity to these privileges at the very beginning is the wisest course.

Documentation ought to state that this or that communication is protected by the attorney-client privilege, or at a minimum is advanced in furtherance of settling a dispute or preventing a dispute. All of these privileges require or presuppose some kind of attorney-client relationship, so it is important, once again, to be clear which lawyer is representing which client. Zealous advocates are attentive to these important privileges (who's representing whom and within what scope, to whom should communications be made and how); on this front it is the nonlitigation lawyers, often the family business lawyers, who blur the various roles they and the family members are playing, risking destruction of the privileges and complicating matters even more if actual litigation later occurs.

Most business lawyers struggle even to remember that the privilege rules exist—it is not a world they live in. It does not occur to them, as they work in good faith to smooth things over, that they may be compromising important rights and choices of existing and future clients. They may even risk disqualifying themselves from acting as counsel later on for any family members, or even the business. Disqualification is highly likely if the later engagement is reasonably perceivable as adverse to stakeholders who reasonably thought the lawyer was everyone's personal lawyer as well as the business's lawyer.

### **Objectivity Versus Advocacy**

A lawyer is constantly moving between two poles: objectivity on the one hand and advocacy on the other. One cannot be an effective advocate without being objective, just as a chess player has to anticipate what the other side's next move is. The obverse is not true, however. To be objective does not necessarily mean that one must be an advocate. The first thing a family business lawyer must do is objectively assess whether there is any role for advocacy.

Rule 2.1 of the Model Rules of Professional Conduct provides that lawyers may advise clients about more than just the law, considering other factors such as the "moral, economic, social and political factors" that may be relevant to the client. Family considerations are plainly one of those things.

Although I am stretching a bit here, any client suffering from family dysfunction is a client with diminished capacity, which would allow the lawyer to seek outside expertise and evaluation to protect the client under Rule 1.14(b) of the Rules. How many settlements fail when family emotions take over?

When the lawyer reasonably believes that resentment is fueling the legal conflict or that the conflict is more a method of dealing with the symptoms of some deeper underlying family fault line, then the client deserves to hear the lawyer recommend nonlegal help through family counseling.

Lawyers counseling family businesses cannot forget that zealous advocacy, alone, is often the least effective service. The ethical rules remind us of our right, indeed our duty, to inform the client of our nonadvocacy skills. In short, avoiding traditional advocacy can be the best advocacy of all for the family and the business.

### **First, Do No Harm—The First Stage of Family Business Conflict**

The medical profession has an ethical rule, the Latin expression "*Primum, non nocere*" (First, do no harm). In the context of a potential family business conflict, what does this mean? I suggest the following:

1. Express more than the usual skepticism of the net benefit of litigation (or other aggressive legal action).
2. Do not fan the flames of family resentment.
3. Strongly encourage the client to get nonlegal assistance, including family counselors.
4. Set the tone with opposing counsel that invites a reciprocal spirit of dispute avoidance and conciliation.
5. Consider win-win solutions that benefit your client and keep family harmony as a fundamental part of the strategy.

In the initial interview, when litigation possibilities are being assessed, a lawyer does not know whether he or she is going to be a zealous advocate or a sensitive negotiator. The lawyer ought to encourage patient negotiation with the client as far as he or she can in the family setting, before firing the cannon. None of this is to suggest that the client is not entitled to a full exploration and description of legal rights and obligations. In fact, the contrary is true. It is precisely when one is promoting negotiation and conciliation that one has to be most aggressive in laying out in extreme form the possible benefits that a full-blown assertion of rights might bring. Then you are in a position to say that even in the best case scenario, the law might not yield a gratifying outcome.

Ideally, when the first clouds of conflict begin to gather, a family should engage a consultant on family dynamics and a lawyer-mediator. This course is totally counterintuitive. Everyone's natural reaction is to run off and hire a lawyer and head for the ramparts, which may be a wise thing to do, but it is unwise to leave it just there. Without excluding the benefits of individual counsel for each member of the family with a stake in the game, a wise family retains a family dynamics consultant and lawyer-mediator as early as possible for the following reasons:

1. With a proper engagement letter delineating who the lawyer-mediator's "client" is, many, if not all, sensitive communications are protected by the settlement communication privilege and by the right of confidentiality that arises from the hiring of a lawyer. This in

and of itself has a unifying effect, as opposed to the fragmentation that inevitably results when each stakeholder hires his or her own counsel. The ethical rules expressly provide that a mediator is not the attorney for any one of the contestants, and indeed, the mediator must inform the parties of this fact.

2. Taking this step early also accentuates the family-wide duties of the family dynamics consultant and lawyer-mediator. When a family waits until it is in the midst of an actual conflict, then a proposal by any one of the combatants to bring in a consultant-mediator team is tainted and compromised. The fresher the start and the earlier the start, the better.

3. An early engagement heightens the chances that the short-term crisis that might lead to a deeper conflict can be averted. Just as is true as in troubled marriages, the point of contention in family business is often disproportionately small given the height of the emotions. I know from working with family business psychologists that it does not matter how small the issue du jour is; it can be an opportunity for understanding just how the family dynamics work and what the root causes of the conflict are. At the same time, a relatively small-risk issue gives the family an opportunity to see how the family dynamics consultant can salve the short-term wounds and set up a protocol for the handling of even bigger conflicts down the road.

4. With the protection of the settlement communication privilege, all stakeholders are free (and indeed have no excuse) for not speaking their minds regarding the family and the business. No veteran litigator would hesitate to acknowledge that even an unsuccessful mediation yields a great deal of benefit. Instead of a host of burning issues that every stakeholder is paying an individual lawyer to prove or disprove, suddenly even in a "failed" mediation the issues are narrowed dramatically. The same dynamic works with an early family business mediation. It also provides an opportunity for reaffirmation of common values and goals. Just as you are delineating what divides the stakeholders, you are also re-embracing what they have in common.

Disputes are inevitable and unavoidable even for happy families and successful businesses; the realities of birth and death guarantee this. How does one manage them? Honest assessment and streamlining of the existing methods of dispute resolution will pay off, not only in the long run but also often in the short term. For example, a family shareholder agreement might have a dispute resolution clause calling for mediation and arbitration, while some other important corporate document does not. There may be no delineation whatsoever as to how mediation is to be handled. In the most fractious and procedurally burdensome kind of family business litigation, the families face multiple tribunals for resolution of disputes: court on some issues, arbitration on others, mediation on yet others. But even aside from legalities,

a working protocol on how family members are to treat each other at meetings, how they are to speak about each other to third parties in the outside world, and how information is to be shared is of incalculable value, and the earlier the better.

### **Risks in Engaging Family Counselors and Lawyer-Mediators**

Like any other investment, the decision to engage a family dynamics consultant and a lawyer-mediator is not risk-free. It costs money. In the short term it might deepen the divisions, just as any kind of serious diagnosis of a patient often reveals maladies worse than the patient felt or detected.

But, to extend the medical analogy, there is very little lost in having an annual checkup and getting a clean bill of health. The only real risk, therefore, is that dangerous conditions and root causes might be identified and dealt with; just as is true with an unhealthy human being, there is always some short-term anguish associated with the recommendation that there be some form of surgery.

Granted, some patients are too weak for surgery, just as some family businesses are too weak for this kind of intervention. Such situations, however, are extremely rare, and some intervention is likely better than none, even in those extreme cases.

Bringing in a consultant-lawyer mediator team can mean that the existing crew of family advisors and influencers will have to cede some control and power. In many cases this is a good thing, but it is hard for the

holders of that power to see it that way. The retention almost inevitably will rile things up to some degree. It might create a temporary loss of management focus. When a business is owned by a trustee or heavily influenced by a long-term advisor, say a patriarchal lawyer or that sort of person, however much in good faith that person wishes to operate, it is almost certain that he or she will tend to be more open to the arguments and pressures of one faction of the family over the other. For example, if long-time legal counsel is a trustee and answers to management of the company every day while also fulfilling his duty as trustee on a familywide basis, the potential for conflict is obvious. For these very same reasons, that advisor may be reluctant to bring on a familywide advisor, whether it be the family dynamics consultant or the lawyer-mediator, and yet doing so is a very healthy thing. A fresh approach, free of family history and past family dynamics, presents the best chance of a lasting resolution.

### **What Does the Situation Call For?**

A lawyer can draft the best complaint in the world, take the best deposition, conduct the best closing argument, but all is for naught if those tools are simply not what the situation calls for. There is a time for a legal approach, and the best time is after a nonlegal professional has determined how best to manage family emotion and history. Then and only then can the lawyer proceed with confidence that his or her hard-earned skills are giving the client maximum benefit. ♦