

CHAPTER 11

Transferring the Family Business

By Scott R. Peppet

I. INTRODUCTION

Family businesses are sometimes imagined to be quaint remnants of an earlier time, before the growth of modern publicly-traded corporations. In fact, however, family enterprise remains the norm, not the exception. By some estimates, roughly ninety percent of businesses in the United States are family owned or controlled; family enterprises comprise roughly fifty percent of paid wages and fifty percent of gross domestic product; and family businesses account for roughly one-third of the companies on the Fortune 500 list.¹ Given their importance in the economy, it is good news that family businesses are also remarkably successful: they generally outperform non-family-owned enterprise on many economic benchmarks.

At the same time, family enterprises face certain challenges different from those with which all businesses contend regularly. In particular, family businesses wrestle with the problem of transition. Although any business can go through crisis when looking for new leadership, these crises can be magnified by the family and ownership struggles that may ensue when a family business must transition from one generation to the next. In addition to these transition problems in family businesses, business *families* also face difficult succession issues. How should family ownership of the business be passed down? How can family members best work together from generation to generation to make decisions and guide the professionals running the enterprise? What role should family members play in the business, if any? Such questions can give rise to difficult and often very personal disputes.

This chapter explores the roles that lawyers representing family businesses and mediators working with family businesses can play in these transitions. It looks both at the direct application of traditional mediation practices to family enterprise and more generally at how the insights of the conflict engagement profession can aid these families in transition. An estate planning lawyer may find that training in conflict resolution will enable her to improve services provided to family business clients. Even if an estate planner does not have a background in conflict resolution, understanding the role a conflict resolution professional can play will enable

the estate planner to help a client assemble a beneficial team of advisors for a family business in transition.

This chapter explains that while mediation can certainly be helpful to family businesses in transition, there are drawbacks to traditional mediation practices that may inhibit its widespread use in this context. Family and business leaders may not want to conceive of their situation as a “dispute,” and thus may find mediation inapplicable or unhelpful. As a result, mediators may be called in too late in a dispute’s evolution to make optimal use of their talents.

Although traditional mediation practice may not be a perfect fit for family businesses in transition, conflict engagement professionals have a great deal to offer to these business families. The core skills and technologies of the dispute resolution field—communication skills, organized problem-solving, organizational change models, systems thinking—can add great value to family businesses as they go through the inevitable changes that come with transfers of ownership and control. Thus, although family businesses may not always need mediators per se, they may need the underlying perspectives and talents of the mediation field.

This chapter recommends a blended approach that combines the best of the family business consulting field with the expertise of the conflict engagement field. Before mediators attempt to help family businesses in transition, they must understand the context in which these business families live and work. Conversely, before lawyers and other family business consultants try to engage with conflict within their client families, they would do well to tap into the experience of mediators. The chapter ends by considering some of the difficult role questions raised by this blended approach. In particular, for mediators with very traditional views on the importance of neutrality in their work, intervening in family business transitions outside of the strict confines of a mediator’s role may seem unwise or even unethical.

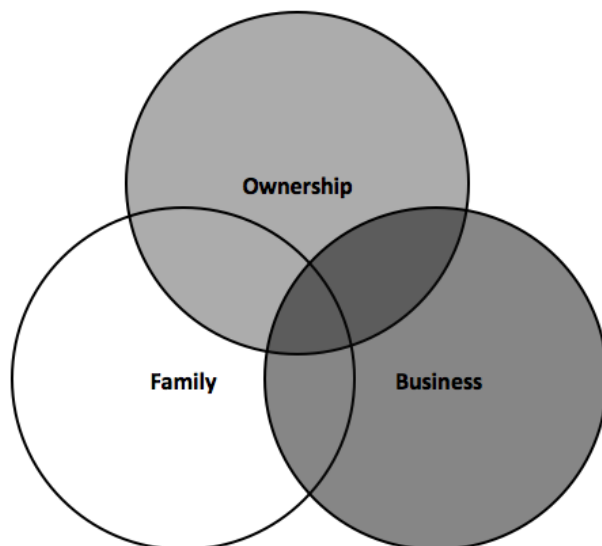


Figure 1

II. MEDIATION OF FAMILY BUSINESS DISPUTES

A. Sources of Conflict

Family businesses have a number of potential sources of conflict.² As Gersick, Davis, Hampton and Lansberg have outlined in the seminal book *Generation to Generation*,³ one can conceive of the family business system as being composed of three parts: the family system, the ownership system, and the management or business system. (See *Figure 1*.) Gersick et al. refer to these parts as the “three circles,” and thus their work has come to be known as the “three circle model” in the family business field.⁴

Each of these circles can give rise to conflict—even outside of family businesses.⁵ Any family can generate conflict about innumerable topics: views and beliefs, small grievances, finances, parenting decisions, and fairness. Similarly, any ownership group may generate conflict. Large owners may disagree with smaller owners about the direction of their asset or business; buyers may disagree with sellers; owners may conflict about rights, information-sharing, the fair price for shares, control, or influence. Finally, there can be conflict in any business: between management and employees or between employees themselves; about roles, rights and responsibilities, the allocation of resources, vision and mission, decision-making processes or outcomes, and, again, fairness.

Family businesses are certainly susceptible to each of these types of conflict. Family members may need to interact more frequently than in non-business-owning families, due to the nature of having a shared legacy and a shared asset. Such interaction may give rise to more disagreements: How should the family vacation home be shared? Should the family require all members to enter into prenuptial agreements with their spouses? If a given branch or member of the family becomes alienated, how should that affect their involvement in the business? These sorts of family matters can be made more difficult by the reality that business families must, at some level, stay together—there is often little real opportunity to walk away from such relationships if family members share ownership or management of a business together. This can increase the emotional pressure within the family, making these disputes more acute.

In addition, in the family business context the overlap of these spheres can also create conflict. At the intersection of the Family circle and the Ownership circle, for example, family members may own shares in the family business but not work there. (A family shareholder who is also an employee would be at the center of Figure 1, in the overlap of all three circles.) These family members may want or need liquidity: they do not receive a salary from the business, but may have considerable wealth tied up in it. They may thus want the business to distribute larger dividends each year to its shareholders. The management, however, may disagree, seeking to retain earnings to help grow the business organically. A family-owner-employee helping to run the business may side with management because she sees the need for capital to further growth, but may then open herself up to attack from family members who accuse her of taking her stance only because she receives a salary and does not need the dividends as they do.

Other such conflicts are easy to imagine. Three siblings who own a business together and share management responsibility may disagree about whether to hire one of their children, or how to include the next generation in management. Family members working together in a business may disagree about strategy or conflict about a decision, but avoid discussing their disagreements openly for fear of hurting their familial relationships. One branch of an extended family may pass down its ownership shares to a new generation early—another branch may wait much longer until the death of the parents in that branch. This can lead to conflict or confusion between cousins, who may have very different understandings of the business and its ownership or may be told very different things by their parents. Finally, non-family professional management can conflict with family members over many aspects of a family enterprise, in particular if managers feel that the family is meddling in the business and not allowing management to “run the business like a business.”

In short, the confluence of family, ownership and business management can easily generate conflict.

B. Can Mediation Help?

1. Traditional Mediation and Family Business Conflict

Mediation in its traditional form is certainly well-suited to address some of the conflicts that develop in family businesses.⁶ When disagreements escalate enough to be recognized as disputes mediation offers a means to resolve such disputes privately, relatively quickly, at low cost, and with potentially less threat to the familial relationships at stake as compared to

the likely relational damage inflicted by litigation. As Chapter 1 discussed, mediation offers many advantages over both litigation. A mediator may be able to help parties address both substantive and relational issues and may be able to defuse a family conflict that threatens the family business, or vice versa. The neutrality, confidentiality, and collaborative focus of most mediation approaches lend themselves well to this problem-solving function.

2. Why Mediation May Not Fit the Problem

a. The Family May Not See a “Dispute”

Hiring a mediator requires the individuals involved to see their conflict as a dispute, themselves as disputants, and their need as resolution or compromise. There are obviously many family business disputes in which the players have reached this point. At the same time, in many cases families in business together have low-level disagreements that can brew for extended periods—in some cases years or even decades. If two siblings disagree about the purpose of their family’s business assets, or about how best to introduce their children to the family’s wealth, or about whether the family’s historical investment in a certain industry requires that the family continue to remain invested in that industry, they may not see themselves as “disputants” or parties in need of a mediator. Indeed, the introduction of a traditional mediator—a neutral third party designed to help them negotiate their differences—may seem foreign and even, in some cases, escalatory. Thus, traditional mediation may not always “fit” in the family business context.

b. Family Business Transitions Are a Gradual Process

The problem of “fit” for traditional mediation is particularly acute in the context of family business transitions. Often we conceive of family business transitions as “successions”—dramatic events in which the proverbial baton is handed over from founder to heir, sometimes with a clash of wills as successors struggle for power or one generation battles with another. In that scenario, mediation of family business transitions may make sense: there is an obvious and tense dispute that a mediator can help to address.

In reality, however, family business transitions are often slow, gradual processes that take place over many years.⁷ The older generation may begin to realize that it is no longer focused solely on growing or maintaining the business, but instead wants to attend to issues that can become more important in the later stages of life: philanthropy, transmitting family values

on to the next generation, spiritual study, or recreation and travel. It may slowly back away from the family business and ask the next generation to take more responsibility, either through direct involvement in management or through oversight of professional managers. Although the older generation may believe that the younger generation is always eagerly awaiting this change, often the opposite is the case: heirs may feel unprepared for these responsibilities, unsure how to best “step up” without stepping on their parents’ toes, and overwhelmed by the burdens that involvement with the family’s affairs can place on their already busy lives. They do not always *want* the baton, nor know what to do with it as it approaches.

In these more ponderous and complex transitions, traditional mediation can seem a bit out of place.⁸ There may not be a singular moment of conflict in which calling a mediator makes sense. Instead, the family members, owners, and business managers involved in these more typical transitions must slowly reach some consensus on the best way to move the family and business forward across the transition between generations, through the countless small interactions and conversations that most likely will form the basis for that consensus. It would often seem odd to invite a traditional mediator into the hallways and meeting rooms of the business or the living rooms or dining tables of the family where these conversations occur.

c. The Family May Not Want a Neutral

Bernie Mayer has argued⁹ that not everyone in conflict wants a third-party neutral. This may be particularly true in the context of family business transitions. Because mediators serve as neutrals, a mediator working in the traditional role may not be what the family wants.

The mediation field generally accepts without question the value of neutrality. Neutrality has two components: impartiality as between the parties (that the mediator not favor one side) and that the mediator be disinterested in the outcome (that the mediator not impose her own views, beliefs, or positions on the parties).¹⁰ In the classical understanding of mediation neutrality, mediators must not be biased, and they should bring to the mediation an “absence of feelings, values, or agendas.”¹¹ They must, in other words, suppress their own views of the “right” outcome, accepting instead whatever outcome the parties arrive at (so long as neither party committed some sort of fraud, coercion, or other process unfairness).

This approach has some appeal in the context of settling a dispute that would otherwise be litigated—the mediator helps the parties negotiate an outcome but does not interfere in that agreement’s substantive terms.

Mediation assumes that the parties are capable of representing themselves adequately (or are represented by counsel), and thus their consent to the mediated outcome is sufficient to ensure that the outcome is a “good” one. The mediator’s own views have no place—she is not responsible for the outcome, she is responsible only for assisting in the process.

But will this appeal to family businesses in transition? Maybe not. In some cases, of course, family and business members may have so sharp a dispute—with counsel already engaged—that they do need this sort of purely neutral assistance. They are wrestling with intra-family litigation or its equivalent, and a traditional mediator can help. But in the many family business transitions discussed above that never reach this very conflictual state, the family members involved may need help, but actively *want* to know the mediator’s views, beliefs, and perspectives. In other words, they may not *want* a disinterested mediator—they may want someone who is actively interested in helping their family business transition successfully, using all of that professional’s skills, talents, and knowledge. Moreover, they may recognize, implicitly or explicitly, that they cannot solve the problems they face on their own—thus their motivation to seek outside assistance. A pure neutral who offers help only by looking to the “parties” own ideas and solutions may seem less than optimal if the parties seeking outside advice recognize that their own ideas and solutions are inadequate.

Gibson, Thompson, and Bazerman have argued that in mediations “[i]nappropriate agreements are frequently achieved as a result of mediator preoccupation with neutrality.”¹² By “inappropriate” they mostly mean economically suboptimal: the parties fail to reach the most value-creating agreement possible. They argue, as has the author of this chapter, that “the practice of mediation is currently obstructed by a herd of sacred cows, in the guise of ‘mediator neutrality’ We propose that mediators should be acknowledged as impartial intervenors in disputes, and that their intervention is aimed at promoting rational outcomes by, among other things, reducing bias and promoting optimal settlements.”¹³

Family businesses in transition present complex substantive and relational problems that can span multiple families, business organizations, ownership structures, and generations. Feelings are strong, perceptions can divide sharply, roles may be confused, and communication can be hampered by family histories and legacies of past problems. When members of such family business systems need help, they may want someone who brings opinions, experience with other similar family crises, wisdom and judgment. A traditional mediator’s insistence on neutrality may be perceived as an unhelpful cop-out.

III. CONFLICT ENGAGEMENT PROFESSIONALS AND FAMILY BUSINESS TRANSITION

A. When Traditional Mediation Is Not the Answer

This chapter has explained that conflict is inherent in family business systems, that mediators can play a role in mature disputes in such systems, but that in many other instances a mediator may not be the obvious choice of family business members. Does this mean there is no role for mediators in this interesting context? No. It does suggest, however, that mediators may need to take a different role if they wish to engage family business members effectively. A lawyer may involve a mediator with a family business client, or the lawyer herself may find that conflict engagement training will enable her to provide more effective assistance to the client.

Even if mediation, per se, may not always be a perfect fit for family businesses in transition, the knowledge, skills, and conceptual tools of conflict engagement professionals can greatly assist these families. Mediators may be helpful, even if mediation is not. The key, however, is for mediators to let go somewhat of their insistence on neutrality, and to think of themselves *as* conflict engagement professionals. Mayer, again, defines “conflict engagement specialists” as “people who have special knowledge of the dynamics of conflict, conceptual tools that assist people in developing constructive approaches to conflict, and a range of roles they can play and intervention strategies they can use in assisting people who are involved in conflict.”¹⁴ Such professionals clearly have a great deal to offer family businesses in transition. This section reviews some of the skills that conflict engagement professionals can use to help business families.

B. Listening, Empathy and Perspective-Taking

The conflict field has long focused on the challenges of effective communication—listening, empathy, effective assertiveness—as well as the associated problem of how to help those in conflict see things from an adversary’s point of view. These are obviously associated: one empathizes better if one has some perspective-taking ability—without the cognitive and emotional ability to understand the other, “listening skills” become empty tricks. These skills can be used by a lawyer working with the family over many years or by a specialist, called in for a particular purpose.

The communication skills of a mediator can help business families in many ways. A conflict engagement professional might coach family or business members through difficult conversations or conflicts, even if not

serving as a neutral mediator. Or she might offer training at a family retreat, thereby providing the family with a shared vocabulary and useful tools for better communication. Finally, she might intervene more substantively *using* these communication and perspective-taking tools. For example, many business families struggle with how best to incorporate in-laws into family decision-making and information-sharing. Should in-laws be privy to family conversations about ownership or management? Should they participate in family governance? How should they be treated? A conflict engagement professional might naturally use this issue as a teaching opportunity by helping the family to consider the “in-law problem” from two perspectives: that of the family “dealing with” the in-laws, and that of the in-laws struggling to understand and incorporate into the family. (See Figure 2.)

IN-LAW’S POINT OF VIEW	BUSINESS FAMILY’S POINT OF VIEW
<p><i>What difficulties can joining a “business family” pose for an entering in-law?</i></p>	<p><i>What difficulties can an entering in-law pose for a business family?</i></p> <ul style="list-style-type: none"> • <i>Difficulties for the business</i> • <i>Difficulties for parents</i> • <i>Difficulties for the spouse</i>

Figure 2

Figure 2 is a simple perspective-taking exercise similar to those used by Roger Fisher, William Ury, and Bruce Patton in the groundbreaking negotiation text *Getting to Yes*.¹⁵ There is nothing complex about it—and yet it offers a powerful means to constructively engage a family business in what can be a very difficult discussion. This is, again, different from waiting until a crisis involving an in-law boils over and then engaging a mediator to attempt to “resolve” the dispute. Instead, this is using the tools and conceptual apparatus of the conflict field to help a family better engage with conflict.

C. Problem-Solving and Decision-Making

The conflict field has long worked to help negotiators and others better solve problems, think creatively, and make wise decisions.¹⁶ Conflict engagement professionals make use of various conceptual tools in this regard, such as decision-analysis or other ways to organize one's thinking to better solve problems. In addition, the field has various frameworks for understanding negotiation, often rooted in research or experience and based on proven pedagogy. For example, conflict engagement professionals may borrow from the interest-based or "principled" approaches made popular by Roger Fisher and the Harvard Negotiation Project in *Getting to Yes*, which emphasizes a "7 Elements" approach to understanding negotiation; or they may use depend on Howard Raiffa's *Negotiation Analytics*; or Lax and Sebenius's "three dimensional" approach to negotiation.¹⁷ Regardless of the specific framework employed, conflict engagement professionals are adept at helping others learn to think more rigorously and systematically.

D. Collaboration, not Succession

These negotiation analytics are particularly helpful because research demonstrates that collaborative problem-solving approaches to conflict are extremely important to the long-term well-being of family businesses.¹⁸ Family members, business managers, inside and outside owners, lawyers and other advisors, and various other constituents must learn to work together collaboratively if a family business is to succeed over generations. Collaboration becomes *increasingly* important over time, because control typically becomes more diffused and consensus-based.

Family businesses often go through three evolutions from generation to generation.¹⁹ First, a founder and wealth-creator serves as the "controlling owner" of the family and the business. He or she starts the business, grows it, manages it, and often owns it completely (or with a few investors or partners). He is also likely to be the *de facto* head of the family—the patriarch or matriarch. In that initial stage of a family business system, control is centralized: decisions all pass through the controlling owner, and thus decision-making is relatively straightforward. Dad decides.

As a controlling owner lets go or passes away, however, families often transition to a new type of ownership and control. Often ownership fractures: the patriarch, for example, may split his one-hundred percent ownership among his three children, each owning a third. Management authority may also diffuse, as professional leadership takes the reins and decision-making becomes more like non-family businesses. In this second stage, often called the "sibling partnership," the former children of the founder must learn to work together to run both the family business and the

business of the family. Sometimes family systems attempt to revert to a controlling owner, with one prominent family member “taking charge” or “succeeding” the founder. But often this is not possible or desired, and instead the sibling partnership must learn to collaborate in new ways to maintain the family enterprise.

Finally, as these siblings get older and let go or pass away, their children—the original “cousins” in the third generation—may come to the fore. In this stage, called the “cousin consortium,” an even more diffuse group must work together. By this point there might be a dozen or more owners, as each of the three original siblings in our example passes on ownership shares to his or her children. As these dozen cousins become adults and have families of their own, the family business system must now be able to work through the complexities of family, business, and ownership governance despite this growing size. There are successful examples of sixth and seventh generation families with hundreds of shareholding members making efficient and productive decisions together, but it takes collaboration indeed.

This evolution cries out for the problem-solving and collaboration skills that conflict engagement professionals employ. To the extent that business families can incorporate these skill sets into their governance and decision-making early and continue to teach them to each new generation, they will have much greater success.

E. Dispute Systems Design

Fourth, conflict experts become accustomed to thinking about disputes as the product of systemic forces, not merely as the consequence of mismatched personalities. When two members of a family business disagree and need the help of an outsider, a conflict expert can help them with the immediate issue—but she can also help the family as a whole consider whether something in the governance, information-sharing, ownership, or management systems is contributing to the generation of such disputes. Rather than seeing the disagreement as a one-off random occurrence, she can help the family to investigate whether there are processes and structures that are either causing such conflicts or that could be put in place to dampen or help channel them.

This is the field of dispute systems design,²⁰ and it goes beyond the transaction-by-transaction role that mediators can play to look more deeply at the structural causes of and solutions to conflict. Families in business often need this sort of advice and assistance. Rather than fight over the

valuation of privately-held shares in the family enterprise, they may need a buy-sell agreement that clearly specifies a process for future valuations and buy-outs. Rather than conflict over whether one sibling working in the business should have hired her child as an intern despite the child's apparent lack of qualifications, the family may need a clear set of rules about family employment. Rather than play out their disagreements in the newspapers or in a public proxy fight for control, they may need a preemptive dispute resolution system that incorporates private mediation and arbitration devices to keep family disputes from boiling over. By working these sorts of procedures and structures into the family's governance, conflict engagement specialists can add a great deal of long-term value to family enterprises.

F. Consensus Building

Finally and perhaps most fundamentally, conflict experts understand consensus: what it is, how to achieve it, and what it is not.²¹ As mediators in the most basic sense, conflict engagement professionals must wrestle with what it takes to build agreement among diverse constituents and how to teach such constituents a consensus-creating process.

This is of critical importance for family business systems. As such systems evolve from the controlling owner stage to become a sibling partnership and then a cousin consortium, decision-making must be consensus based. This does not mean that decisions must be unanimous—that would be unwieldy and invite strategic holdouts. Instead, it means that the decision-making group must be able to work through an interest-based process that attempts to reconcile and meet as many stakeholders' interests as possible, and that ultimately everyone agrees that they can live with the best outcome achieved even if their particular need is not perfectly satisfied. In a sibling partnership or cousin consortium, understanding what consensus requires and *practicing* how to achieve it are ongoing and critical tasks.

IV. CONFLICT ENGAGEMENT PROFESSIONALS AND FAMILY BUSINESS ADVISORS

A. Consultants

Many types of consultants, in addition to estate planning lawyers, offer their services to business families: therapists, financial advisors, business lawyers, family office professionals, meeting facilitators, child development experts, and so on. Most have experience with a sub-set of the

issues faced by such families, and they can do great service for such families by providing advice and skills for that sub-set of concerns.

In addition to these service-providers, however, business families sometimes understand that they need another level of assistance—not technical help with their finances or legal problems, but deeper, more persistent help from a mentor, trustee or counselor who can work with the family over time as it goes through the inevitable difficulties of transition. These family business consultants rarely advertise; they take clients for a lifetime and thus have little need to make rain. Theirs is a slower, deeper, and more sacred practice than the financial advisor seeking to sell a family on a structured financial product; they are engaged to service and help the family over time as it struggles to preserve its business and itself.²² Family business advisors can come from many backgrounds, but estate planning lawyers and conflict engagement professionals may be especially well-suited to render this type of assistance.

B. Estate Planning Lawyers

Estate planning lawyers often have a long-standing relationship with their clients. A lawyer may work with a family for many years and may handle estate planning issues for two or more generations. An estate planning lawyer working with a client with a family business may also get drawn into business matters, both legal and otherwise. One issue faced by lawyers is the extent to which their role can encompass non-legal work. In the view of many lawyers, elaborate tax planning that ignores family dynamics may not be useful to the clients. Increasingly lawyers are recognizing the importance of family issues, including conflict.

A lawyer who wants to do a better job in managing conflict in connection with a family business, may want to take on additional training and work in conflict resolution. Simply taking a 30-hour course in mediation does not make someone a conflict resolution expert, but understanding how mediation can be used to resolve disputes can be invaluable. A lawyer with a better understanding of how to manage conflict may help a client retain a conflict resolution professional to consult with the family on an on-going basis. In the lawyer's own advising work with the client, the lawyer may be better able to help the client with communication and identifying issues. Whether the lawyer consults with the family business directly or works with a conflict engagement professional, the family will benefit if the lawyer brings a good understanding of the dynamics of conflict within family businesses to the consultation.

C. Conflict Resolution Professionals

Conflict engagement professionals have a great many skills, tools, concepts, and experiences to offer business families in transition. At the same time, it should be obvious that conflict specialists have a great deal to learn from the consultants and advisors who have long worked with multi-generational business families. This context is tricky and it requires humility and study. An approach that blends the best of the conflict world with the best of the family business consulting world may reach the optimal results, but such an approach takes time to piece together and practice.

Although conflict experts should be cautious when entering the family business world, conflict engagement professionals ultimately have a great deal to offer such families, and perhaps are some of the best candidates to serve as the long-term trusted advisors that business families seek.

Like all other service providers assisting business families, mediators and other conflict engagement professionals might consider the possibility that they could serve such families in this deeper way. At one level, mediators can certainly add value by bringing dispute resolution services to business families in need. At the same time, conflict engagement specialists can go beyond merely servicing families in dispute. They can serve as the longer-term advisors and counselors that business families need to help them through multi-generational transitions.

In fact, mediators and conflict specialists are among the most well-suited of the professional class to this deeper function sought out by business families. Because of the skills and conceptual tools outlined above, conflict engagement professionals have an intrinsic advantage in working long-term to help these families manage their business or wealth successfully. In addition, such professionals have often gone through sufficient personal development, therapy, and training to be able to work successfully as long-term relationship managers with these families. Conflict is a good teacher: repeated exposure to managing different perspectives, heated emotions, and analytic disagreements can wear down one's own assumptions, preconceptions, and interpersonal weaknesses, making one a more versatile and analytically adept person. Because the grindstone of conflict can slowly polish a personality, the best of the conflict field are often very good counselors.

At base, there is a profound commonality between the deepest practices of the conflict or mediation field and the practices of the best family business consultants. Articulating this confluence is difficult; like many profundities it is easier experienced than described. The best of each field are dedicated to helping others through their confusions, humbly but firmly,

with both compassion and wisdom. They are empathetic but not soft, with good judgment but not judgmental. They understand that human systems are almost indescribably complex and unpredictable, and yet they have seen the behaviors and patterns that lead business families astray and can raise warnings and point the way. If this sounds mystical, perhaps it is; the art of mediating in its truest sense is not about technique as much as presence.

Business families in transition can benefit from the assistance of either mediators with family business experience or family business experts with conflict engagement skills. A blended approach combines the best of each world, bringing together the different ways in which traditional mediators or conflict specialists learn to work with the perspectives and knowledge of the family business community. At that convergence, certain similarities appear. One, for example, is that experts in both fields are adept at asking transformative questions. Although this is a simple example, it is perhaps the best way to illustrate the similarities between these two fields of practice.

As Kenneth Cloke, a noted mediator, has put it:

“Deeply honest and empathetic questions clarify each side’s interests and desires, challenge their poses and assumptions, and increase their capacity for listening. With deeply honest questions, you can help them reframe their communications and reveal the elements in their conflict stories that rely on demonization or victimization, or result in defensive, aggressive, or passive poses. ... The object of each question is to lead people to their *own* answers, not the answers you want them to reach, or pre-ordain. To succeed, you need to let go of your own masks and poses, expectations and ideals, the answers you would give, and the ones you know are right.”²³

Compare this to the following from *Family Wealth* by Jay Hughes, one of the seminal texts in the family business field:

“Mentoring is about asking questions, not about giving answers. A mentor’s questions should guide us to the deepest possible learning about ourselves. ... We grant them the right to ask us the questions we least want to answer.”²⁴

These leaders in their respective disciplines have reached a common ground: a level of development as helpers from which they can understand how to confront their own fears, beliefs, and needs sufficiently to arrive at the probing questions that will help move forward the clients they hope to help.

One should not overstate the argument: there are many mediators ill-suited to the long-term counseling role described here. But this does not change the basic point. At their best, a conflict professional may be just the type of person capable of helping business families with transition.

V. COMPLICATIONS FOR TRADITIONAL MEDIATORS

Although traditional mediation may not always be needed in family business transitions, a mediator's skills and tools may nevertheless be helpful, particularly if combined with the insights of the family business field. Indeed, conflict professionals may be among the most suited to give the long-term, deep assistance that business families need and often want as they go through intergenerational change. By shedding the traditional confines of the mediator's role, conflict engagement professionals can take on this deeper and more lasting engagement with a business family.

This raises inevitable complications, at least for those mediators who believe firmly in the importance of traditional conceptions of mediator neutrality. Without the mediator's role boundaries, a skeptic might say, how is the mediator supposed to know how to help? How should the mediator ground her newly-liberated ability to offer substantive advice, solutions, or suggestions? The neutral role eliminates these questions—the mediator is a process expert, not a substantive guide. She does not need to justify her substantive counseling because she does not offer it. But in the positioning described here, she is set loose from that neutral stance. To what should she moor her views and prescriptions?

A simple answer to this question is not possible. How one person knows how to help another, how to say the right thing at the right moment, or how to ask the deep question that illuminates the situation, is certainly mysterious. The bedrock principle must be “do no harm:” the mediator should work actively to intervene only in ways that he predicts in good faith and based on his experience will help move the family business system forward, not make it regress or stall. The mediator can constantly seek valid feedback and data to test whether the offerings are in fact helping. The mediator should resist the temptation to self-aggrandize by making herself appear the expert, smarter than the clients; seek professional help to continue her own development as a human being so that she can better aid others; and constantly check her interventions and approaches with others who can mentor and guide her.

But also, the mediator should be brave. Leaving the safety of the mediator's traditional role is akin to leaving a sheltered harbor for the open

seas. There is trepidation, but also a great deal to be explored. Shipwrecks happen, hopefully without casualty. But great deeds are done as well. Mediators—or conflict engagement professionals—can do good work with and for business families in transition, if only they will allow themselves the freedom to do so.

¹ For a careful analysis of different definitions of “family business” and different accounts of the prevalence and performance of such business, see Joseph H. Astrachan & Melissa Carey Shanker, *Family Businesses’ Contribution to the U.S. Economy: A Closer Look*, in POUTZIOURIS ET AL., EDS., HANDBOOK OF RESEARCH ON FAMILY BUSINESS 56, 62-62 (2006) (comparing narrow and broad definitions of what constitutes a family business).

² For a discussion of sources of conflict, see Ritch L. Sorenson, *Conflict Management Strategies Used by Successful Family Businesses*, 12 FAM. BUS. REV. 325 (1999); Pramodita Sharma, *An Overview of the Field of Family Business Studies: Current Status and Directions for the Future*, in POUTZIOURIS ET AL., EDS., HANDBOOK OF RESEARCH ON FAMILY BUSINESS 25, 39 (2006) (providing overview of research on conflict in family firms). *See also* DIRK R. DREUX & JOE M. GOODMAN, BUSINESS SUCCESSION PLANNING AND BEYOND 45-47 (1997) (mapping areas of conflict in family business transitions); DENNIS T. JAFFE, WORKING WITH THE ONES YOU LOVE 89-91 (1991) (same).

³ KELIN F. GERSICK, MARION M. HAMPTON, IVAN LANSBERG & JOHN DAVIS, GENERATION TO GENERATION: LIFE CYCLES OF THE FAMILY BUSINESS (1996). I have had the pleasure of working with John Davis and Marion M. Hampton, and wish to acknowledge their influence on my thinking about family business dynamics.

⁴ John Davis and Tagiuri first published the three circle model in 1982.

⁵ *See* MANFRED F.R. KETS DE VRIES & RANDEL S. CARLOCK, FAMILY BUSINESS ON THE COUCH: A PSYCHOLOGICAL PERSPECTIVE 25-38 (2007) (using the Three Circle Model to explore sources of conflict).

⁶ *See* John M. Haynes & Thomas M. Usdin, *Resolving Family Business Disputes Through Mediation*, 10 FAM. BUS. REV. 115 (1997) (discussing the advantages of mediation); Franz W. Kellermanns & Kimberly A. Eddleston, *Feuding Families: The Management of Conflict in Family Firms*, in POUTZIOURIS ET AL., EDS., HANDBOOK OF RESEARCH ON FAMILY BUSINESS 358, 365 (2006) (discussing the advantages of mediation and other third-party interventions in family business conflicts).

⁷ *See* QUENTIN J. FLEMING, KEEP THE FAMILY BAGGAGE OUT OF THE FAMILY BUSINESS 160 (2000) (comparing “evolutionary” to “revolutionary” successions).

⁸ *See* GRANT GORDON & NIGEL NICHOLSON, FAMILY WARS: CLASSIC CONFLICTS IN FAMILY BUSINESS AND HOW TO DEAL WITH THEM 237 (2008) (noting that “[i]n very few of our cases did any of our firms look for external mediation, and when they did ... the family [was] unwilling to follow the sensible advice they were given”).

⁹ *See* BERNARD S. MAYER, BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION (2004).

¹⁰ See Scott R. Peppet, *Contractarian Economics and Mediation Ethics: The Case for Customizing Neutrality Through Contingent Fee Mediation*, 82 TEXAS L. REV. 227 (2003) (discussing these concepts in more depth).

¹¹ See Sarah Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 LAW & SOC. INQUIRY 35, 42 (1991).

¹² See Kevin Gibson, Leigh Thompson & Max H. Bazerman, *Shortcomings of Neutrality in Mediation: Solutions Based on Rationality*, 12 NEGOT. J. 69 (1996). See also KENNETH CLOKE, *MEDIATING DANGEROUSLY: THE FRONTIERS OF CONFLICT RESOLUTION* 12 (2001) (“While process as well as content decisions should be open to the parties, there is a danger of mediators abdicating to superficiality.”).

¹³ *Id.*

¹⁴ See MAYER, *supra* note 9 at 12 (defining “conflict engagement specialists,” which are re-named here as conflict engagement professionals).

¹⁵ See ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 23 (1981) (utilizing a similar simple chart to help encourage perspective-taking).

¹⁶ There is far too much work in this area to begin to provide sufficient citations. One can start with HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982); MAX H. BAZERMAN & MARGARET A. NEALE, *NEGOTIATING RATIONALLY* (1992); ROBERT H. MNOOKIN, SCOTT R. PEPPET & ANDREW S. TULUMELLO, *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2000); HOWARD RAIFFA, JOHN RICHARDSON & DAVID METCALFE, *NEGOTIATION ANALYSIS* (2002).

¹⁷ See DAVID A. LAX & JAMES K. SEBENIUS, *3-D NEGOTIATION: POWERFUL TOOLS TO CHANGE THE GAME IN YOUR MOST IMPORTANT DEALS* (2006).

¹⁸ See Sorenson, *supra* note 2 (providing results of survey of family businesses, showing that those with collaborative approaches to conflict performed better).

¹⁹ See IVAN LANSBERG, *SUCCEEDING GENERATIONS: REALIZING THE DREAM OF FAMILIES IN BUSINESS* (1999).

²⁰ See WILLIAM L. URY, JEANNE M. BRETT & STEPHEN B. GOLDBERG, *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT* (1993).

²¹ See *generally* LAWRENCE SUSSKING, SARAH MCKEARNAN & JENNIFER THOMAS-LARMER, *THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT* (1999).

²² For those not familiar with the family business world, perhaps the best introduction to or description of these types of helpers can be found in JAMES E. HUGHES JR., *FAMILY WEALTH: KEEPING IT IN THE FAMILY* (2004).

²³ KENNETH CLOKE, *MEDIATING DANGEROUSLY: THE FRONTIERS OF CONFLICT RESOLUTION* 39 (2001).

²⁴ JAMES E. HUGHES JR., *FAMILY WEALTH: KEEPING IT IN THE FAMILY* 164 (2004).