

## Outside Counsel

# Navigating Commercial Disputes In Mediations: Family Businesses

Family business disputes can be some of the most complex cases to mediate. By their very nature, they involve not just financial matters but also a number of deep emotional issues related to the disputants. They generally have a direct impact on immediate family members who often influence the parties behind the scenes. Mediation is almost always the most compelling dispute resolution mechanism for these types of disputes. Mediators can, and often do, approach these cases differently than other commercial disputes. In this article, I outline some of the particularities of family business disputes and suggest some guidelines that mediators may want to consider when mediating them.

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MYRNA BARAKAT FRIEDMAN is a commercial arbitrator and mediator. She can be reached at [mbarakat@mb-cap.com](mailto:mbarakat@mb-cap.com) ([BarakatADR.com](http://BarakatADR.com)).

By  
**Myrna  
Barakat  
Friedman**



**Acknowledge the elephant in the room.** Generally, when family disputants approach a commercial mediator, they are focused on the financial matters they want to resolve. Obviously, the mediator's mandate is thus squarely limited by the scope of that dispute. That being said, the financial issues are generally one aspect of a complex set of intertwined financial and emotional relationships, and thus merely the tip of the iceberg.

Indeed, behind the financial disputes lie long standing, often deeply rooted, sensitive issues ... sometimes even going back to

the disputants' early childhood years. I believe it's important for a mediator to consider acknowledging such emotional issues at the onset of the mediation session. Not necessarily to address them (at least not then and there) but simply to ensure that they are recognized by all. In doing so, the mediator reminds the parties that their decision-making may be heavily guided by such emotional baggage.

At times, it also reminds them of dimensions that may be more important to them in the long run than the specific financial matter on which they're focused. Most importantly, it gives them an opening to air things out and possibly, in due course, broaden the scope of the mediation to include some of these emotional tensions.

**Be fully aware of the full spectrum of financial relationships.**

Parties may approach mediation with a narrow business matter they want to resolve. Generally, however, there are a number of other financial relationships that link the disputants. It's important that the mediator have full visibility of all the business and financial relationships that tie the disputants, including any that fall outside of the scope of the mediation. This information may come in handy when working with the parties to craft solutions.

Indeed, it gives the parties and the mediators additional ammunition that may be useful in crafting a settlement beyond the confines of the specific business matter that is the subject of the mediation. It also gives the parties an opening to broaden the scope of the mediation to address all of their financial matters. It may overwhelm parties to consider doing so at the onset.

That being said, it could also give them hope and a tool to try to address all of their issues once and for all in due course. This could be especially effective if the mediation on the narrow matter is successful or, if still in process, perceived by the parties as advancing in the right direction.

**Remind the parties that mediation is their only opportunity to**

**resolve their dispute using tools beyond the scope of their underlying arrangement.** For all disputes, mediation is generally the last, and possibly only, dispute resolution mechanism that allows the parties to craft solutions without being squarely bound by their contractual or legal obligations. For family business cases, this ability to look outside the legal framework to find solutions can be particularly useful. Indeed, it allows such disputants to leverage

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their various financial ties and familial relationships when brainstorming solutions.

For example, consider the case of two siblings who own several businesses together and are looking to separate but can't agree on terms. With mediation, in considering settlement options, they can explore a number of permutations that fit the specifics of their circumstances even if they weren't contemplated in any of the documents they had previously inked.

Such solutions could include using different family assets as "trading" currencies for the separation, staggering the buyout over a number of years or even generations, involving other family members in the business to reduce conflict, and numerous other variations that leverage the particular attributes of the family structure.

**Discuss with the parties the consequences should they not resolve their disputes.** As part of their pre-mediation statements, I ask family disputants to share with me their family tree. I believe it's important for mediators to know the exact nature of the relationship between the disputants. They should also have clarity on the makeup of the broader family unit, including those who may be deceased, those who may be affected by the outcome of the mediation and those who may impact the parties in their settlement negotiations and decisions.

At the very least, a mediator should have basic information regarding parents, spouses and children. Generally, at least one, and often both disputants, have children. This is key and something I believe is important to mention to disputants both in

an open session and in a private caucus. Indeed, reminding family disputants that their children would inherit their dispute if they don't resolve it in its totality can be a harsh but necessary fact to highlight the importance of the mediation.

I therefore generally emphasize that a dispute between two that is unresolved upon their death will become a dispute among four, five, or however many children they have.

**Reassure the parties that their disputes are not uncommon and are resolvable.** Family disputes can last for years and weigh heavily on the parties. By the time the disputants turn to mediation, they have generally tried, and failed, to solve their issues using a number of other methods over a significant period of time. They often start mediation with considerable bitterness, psychological fatigue and distrust built up over a considerable period of time. It can be difficult for them to imagine a solution that they can both accept.

They may therefore approach mediation with considerable, understandable skepticism. It's challenging to give them real hope in the process, which is

necessary for success. Reassuring such parties that their disputes are not unique, and sharing with them examples of similar complex family disputes that have been resolved, gives them much needed optimism, or at least tempers some of the pessimism. In doing so, the mediator may also want to ensure that they set realistic expectations.

Regarding process, this could mean impressing on the parties the importance of patience with

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a process that may require multiple sessions and some breaks to give them time to digest topics discussed during a session. It may also require parties having to do some homework at times to fill informational gaps. With respect to the objective, a mediator may want to tell the parties that they may need to accept the harsh fact that not all prior detrimental behavior will necessarily be

explained or understood. Accepting that reality may prove to be essential for the disputants to move on and focus on the future of a relationship.

Families across the globe have, since the early ages, used some "informal" form of mediation to resolve their disputes. Historically, they would generally turn to a trusted family friend or community leader to help them resolve their issues. Such mediation has morphed into a structured forum for dispute resolution that continues to be a particularly attractive option for families. With the help of an effective mediator, it's the only dispute resolution mechanism that gives the disputants and their families the opportunity to address the full spectrum of financial and emotional issues that are in play. It's also their last real chance to overcome them and possibly mend the family relationship.