THE ROLE OF TRANSFORMATIVE MEDIATION IN FAMILY BUSINESS DISPUTES

Jacob Lebovics*

I. INTRODUCTION

Two of the most important requirements for an individual’s emotional stability and well-being are a supportive and cohesive family unit and stable financial security. Unfortunately, all too often when family and employment converge in the form of a family business they cause instability to one another. This note will propose that many facets of the method of mediation called “transformative mediation,” as laid out by Robert A. Baruch Bush and Joseph P. Folger in their highly influential work, The Promise of Mediation, can play a crucial role in resolving family business disputes while enabling family cohesion moving forward.

Family businesses are an incredibly common business structure. One study found that, in the United States, there are 5.5 million family businesses which make up 75% of all the country’s jobs, about 64% of the Gross Domestic Product, and 60% of its publicly held businesses. Another study asserted that as many as 90% of all businesses in the United States have been family-owned or con-

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* Notes Editor, Cardozo Journal of Conflict Resolution; J.D. Candidate, 2019, Benjamin N. Cardozo School of Law. The author would like to thank his family, friends, and mentors for their support and encouragement. In addition, he would like to thank Professor David J. Weisenfeld for his invaluable insight and guidance in drafting this note.

1 See generally R. A. Litz, The Family Business: Toward Definitional Clarity, 8 Fam. Bus. REV. 71 (1995) (noting the different definitions of “family business” and attempting to find a clear definition). This article does not attempt to follow a specific definition but focuses on the relational aspect of a family business which is present primarily in closely held family entities. The nature of the businesses that can benefit from this article’s analysis may range from mom-and-pop storefronts to family dynasties that control multinational enterprises.

2 Steven C. Bahls, Judicial Approaches to Resolving Dissension Among Owners of the Family Farm, 73 Neb. L. REV. 14, 21–22 (1994).


4 Family Enterprise USA, Family Enterprise USA Appoints New Executive Director, PR Newswire (Sept. 17, 2013), https://www.prnewswire.com/news-releases/family-enterprise-usa-appoints-new-executive-director-224082351.html. These numbers are based on the Family Enterprise USA’s (“FEUSA”) definition of what constitutes a family business. However, there have been a number of suggested definitions for “family business.” See generally Litz, supra note 1.
trolled. Family businesses are particularly prone to conflicts, since disputes can be stimulated by a variety of factors, including sibling rivalry, prior unrelated history, children vying for parents’ attention, children’s desire to differentiate themselves from their parents, and parents’ reluctance to turn over the reins of the business that they started.

Transformative mediation is a method that focuses on mending the underlying relationship between the parties in dispute, while the mediator allows the parties to take control of the talks, fostering empowerment and recognition between themselves. This method is very well suited to disputes within families where the parties have a predilection and interest to preserve their relationship.

In Part II, this note will attempt to lay out the benefits and detriments of approaching family business disputes through litigation, alternative dispute resolution, and various methods of mediation, with a goal of explaining how transformative mediation relates to other approaches of resolving conflict. Part III will discuss the unique issues that apply to family business conflicts and how concepts from other disciplines of study can be utilized to help best achieve the goals of a family business. Part IV will propose how transformative mediation is well suited to address these conflicts and what form of transformative mediation would reach the optimal results. Part V will reiterate the conclusion of the note and indicate steps that can be taken for their practical application.

7 See id. at 42.
8 See id. at 40.
9 Id.
10 See id. at 44.
12 Id.
II. BACKGROUND

A. Possible Methods to Resolve a Dispute

For a variety of reasons, the last thirty years have seen a rise in Alternative Dispute Resolution (ADR) as an alternative to litigation.\textsuperscript{14} Litigation is increasingly seen as a last resort that looms in the background of other more efficient methods to resolve conflicts.\textsuperscript{15} This is attributed to disadvantages of the system of litigation including the increasing expense and the prolonged time it takes to resolve disputes.\textsuperscript{16} ADR is often more flexible in its method which allows for more creative solutions closely adapted to the demands of the type of conflict that it seeks to resolve.\textsuperscript{17} Litigation is formulaic and its procedural formalities can lead to results that are viewed as less just.\textsuperscript{18} It can also be less useful since it is not flexible enough to tailor to parties’ actual needs.\textsuperscript{19} The adversarial nature of litigation can lead the parties to become more relentless in their positions and poison any possibility of future relationships.\textsuperscript{20} Also, some judges have joined the push to utilize ADR in order to lighten the load of heavy docket.\textsuperscript{21} Congress recognized the need for ADR and passed the Alternative Dispute Resolution Act in 1998.\textsuperscript{22} In its congressional findings, Congress specifically mentioned benefits like “greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements.”\textsuperscript{23} Congress also recognized that certain forms of ADR can “reduce the large backlog of cases” pending in federal courts “thereby allowing the courts to process their remaining cases more efficiently.”\textsuperscript{24}

\textsuperscript{15} See generally Judy Gutman, \textit{Litigation as a Measure of Last Resort: Opportunities and Challenges for Legal Practitioners with the Rise of ADR}, 14 \textit{Legal Ethics} 1 (2011).
\textsuperscript{16} Jay E. Grenig, \textit{Alternative Dispute Resolution} § 1:2 (4th ed. 2016).
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Id.
\textsuperscript{24} Id.
Within ADR, there are many methods with benefits and detriments of their own. Arbitration is one way in which disputes can be adjudicated without some of the disadvantages of litigation. A private arbiter does not have all the formalities of the judicial system and may be faster and cheaper. However, there has been some doubt about whether arbitration is faster, cheaper, or better than litigation.\textsuperscript{25} Arbitration is fundamentally similar to litigation in the sense that it is an adversarial process that does not lead to a preservation of the relationship between the parties. One important benefit that arbitration has over litigation is its ability to keep proceedings and outcomes confidential.\textsuperscript{26} This allows the parties to maintain their public reputations.

Mediation is a non-adversarial method of dispute resolution where the parties go before a third-party conciliator with a goal of coming to a mutual agreement. Advocates of mediation—particularly in the business community—endorse this non-adversarial method because they view it as a “win-win” for both parties.\textsuperscript{27} Unlike arbitration, the settlement is ultimately in the hands of the parties in mediation and the third-party is not authorized to make a ruling.\textsuperscript{28} It has some similar benefits as arbitration in that it is confidential and even more flexible. Mediation is perhaps the most popular form of alternative dispute resolution.\textsuperscript{29} Congress has recognized that certain mediation programs can be “equally effective in resolving disputes as federal trial courts,” and therefore urged district courts to “include mediation in their local alternative dispute resolution program.”\textsuperscript{30}

Even amongst mediators, there are major differences in approach.\textsuperscript{31} Historically, the only form of mediation was a “facilitative mediation,” where the mediator assisted with clarifying the views of the parties, helped the parties find common ground, and explored options for resolution without offering any advice or


\textsuperscript{26} \textit{See} \textit{Grenig, supra note 16, § 1:2.}


\textsuperscript{29} \textit{See Grenig, supra note 16, § 1:2.}

\textsuperscript{30} Alternative Dispute Resolution Act, 28 U.S.C. § 651 note, \textit{supra} note 22.

opinion in order to remain impartial. The mediator was in charge of the process while the parties were in charge of the outcome.32 This remains a widely practiced method. However a more recent trend has started to use “evaluative mediation”33 where the mediator will take a more proactive role offering his or her opinion on the likely outcome of litigation, pointing out weaknesses in a party’s case, or recommending an outcome based on their expert opinion and view of what would be fair based on legal concepts.34 This process assumes that the mediator is an expert in the field and that evaluative mediation is modeled after the process seen in settlement conferences held by judges.35

Mediation does not have many of the disadvantages described previously about litigation or arbitration. It is not adversarial, so it can preserve a relationship between parties; it is even more flexible than arbitration, since the parties have ultimate control over how to resolve the dispute36; and it is confidential, so the parties can maintain their public reputation. Most mediation is not mandated. Rather, the parties choose to try to resolve the conflict. Mediations are not even governed by a general principle developed by a third-party. There are no general rules for mediation that equate to the role that rules of civil procedure play for litigation.37 Another appealing part of mediation is that it often provides a forum where the parties feel comfortable having sincere and candid conversations.38 It can be a “safe space” with an “energetic, yet calming, optimistic intervenor.”39 This makes mediation most attractive in situations where the parties have strong incentives to come to an agreement and mend their relationship.

34 Id.
35 Id.
37 Id. Although Riskin explains that mediation is subjected to the general assumptions of “mutuality, cooperation, and fairness.”
39 Id.
B. The Theory of Transformative Mediation

The latest method of mediation to emerge, called “transformative mediation,” has received increasing attention and support since initially laid out in 1994 by Robert A. Baruch Bush and Joseph Folger in the first edition of their book, *The Promise of Mediation*.40 Their method is based on a philosophy of conflict, backed up by cognitive and social psychology,41 that the primary functions of dispute relate to the parties’ human interaction rather than the “violation of [their] rights” or “conflicts of interest.”42 Specifically, the parties are most bothered by their states of powerlessness and alienation. These characteristics reinforce each other and create a “negative conflict spiral” which leads to additional conflict.43 The theory is that what the parties require most is the reversal of the spiral, which is best enabled by the mediator strengthening their feelings of “empowerment” and “recognition.” This can best be achieved when the mediator allows the parties to take an active role in both the process and the outcome.44 Strengthening their feelings of empowerment and their ability to recognize each other’s feelings and point-of-view can mend the underlying relationship and resolve the conflict in the most permanent and effective way.45 This form of conflict resolution takes advantage of a dispute and transforms the social interaction to be constructive in nature.46

Some mediators will pick out aspects of different methods of mediation based on the needs of their parties,47 the nature of the conflict, and the mediator’s individual style.48 Purist backers of

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40 *Bush & Folger, supra* note 3, at 23, 99.
41 *Id.* at 48.
43 *Bush & Folger, supra* note 3, at 50.
44 *Id.* at 56 (“The keys to this transformation of conflict interaction are the empowerment and recognition shifts that the parties themselves make.”).
45 *Id.* at 37 (“But when parties are helped to change the quality of conflict interaction itself, so that when conflict arises people are more able to respond with self-confidence and empathy, it is possible to imagine fuller and fairer satisfaction of needs becoming a permanent condition.”) (emphasis added).
46 *Id.* at 14, 21.
48 This author’s discussion with Robert A. Baruch Bush further clarified Bush’s stance on this notion. Bush believes that transformative mediation is well suited for all forms of disputes. While he agreed that family business disputes are a paradigmatic case for transformative media-
transformation’s use due to the often inherent need for an ongoing relationship, he argued that it works well with divorces as well, even though the relationship is in the process of being terminated. Bush said he added to the second edition of his book that he and Folger conceded that there is a need for other methods besides transformative mediation, but that those methods are primarily useful for parties who have no interest in mending their human interaction, such that transformative mediation would not be effective.

49 BUSH & FOLGER, supra note 3, at 45 (“Even though each of the different theories of conflict and mediation may be valid—including the transformation theory—we do not believe that they can be combined or integrated, at either the theoretical or practical level.”).


51 See Zumeta, supra note 32, at 2.

52 Id.

53 REDRESS is the acronym for “Resolve Employment Disputes, Reach Equitable Solutions Quickly.”


55 See generally Tina Nabatchi et al., Evaluating Transformative Practice in the U.S. Postal Service REDRESS Program, 27 CONFLICT RESOL. Q. 257 (2010).

56 Id. at 258.
tive mediation was implemented.57 One mediator shared that after the first two years of full implementation of the transformative mediation program at the USPS, 80% of the mediations closed after their first attempt with transformative mediation thereby leaving only 20% of the disputes to continue in the formal complaint process.58 This dwarfs the rate of 44% of disputes that did not join the mediation program and continued through the complaint process after the first attempt to settle the dispute.59 In a formal study conducted on the REDRESS program that used questionnaires to determine the results of transformative mediation, the feedback was staggering. The study stated:

About 99% of mediators indicated that in a more transformative mediation session a participant would say “I learned something new about the other person’s point of view” while about 78% of mediators indicated that in a less transformative mediation setting a participant would say “I didn’t learn anything new in the mediation.” Likewise, approximately 98% of mediators indicated that in a more transformative mediation participants would say ‘The other person listened to my views,’ while around 83% of mediators indicated that in a less transformative mediation a participant would say “The other person didn’t even listen to me.”60

C. The Theory of Activist Transformative Mediation

Upon the growth in influence of transformative mediation61 and the discussion about its merits and detriments, some scholars and mediators have developed their spin on the theory with tweaks of their own.62 Professor Isabelle Gunning suggested one notable theory, which calls for the mediator to play a more active role in

59 Id.
60 Nabatchi et al., supra note 55, at 272.
61 See Dorothy J. Della Noce et al., Clarifying the Theoretical Underpinnings of Mediation: Implications for Practice and Policy, 3 Pepp. Disp. Resol. L.J. 39, 48–49 (2002) (stating that the most prevalent mediation models are the problem-solving model and the transformative model).
order to prevent injustice. Gunning admits that her ideas are influenced by her attachments to social justice roots, which some within the mediation community have come from as well. She suggests that mediators reject what were considered the two bedrock notions of transformative mediation—party self-determination and mediator neutrality—and, instead, she encourages mediators to intervene on behalf of the less powerful party. Gunning likes the idea that we should focus on the relationship of the parties and help them improve responsiveness. However, she believes that when mediators restrain themselves from stepping in, they advance the inevitable outcome to be in-line with “dominant culture myths.” This perpetuates any power imbalance that unavoidably pervades disputes being brought to a mediator.

Although presented as a similar method as transformative mediation, activist mediation is at odds with one of the most important hallmarks of transformative mediation: the mediator’s job to remain neutral. Indeed, Robert A. Baruch Bush has criticized the idea of a mediator’s mere appearance of taking sides and strongly emphasized the importance of preserving party autonomy through mediator neutrality. Bush argues that neutrality is an integral part of ensuring that the parties feel empowered. Recognizing this argument, Gunner responds that mediators are in a position where they are “damned if they do and damned if we don’t” with regards to how much they get involved in steering the mediation talks.

63 Gunning, supra note 47, at 89.
64 Id. at 87.
65 Harper, supra note 62, at 596.
66 Gunning, supra note 47, at 90.
68 See generally Gunning, supra note 47.
69 See Burgass, supra note 11 (outlining the ten hallmarks of transformative mediation).
70 Harper, supra note 62, at 606.
71 BUSH & FOLGER, supra note 3, at 67.
72 Gunning, supra note 47, at 93.
III. DISCUSSION

A. The Study of Transformative Mediation in Family Business Disputes

There is data that shows that family businesses are able to flourish better than businesses made up of other kinds of managerial relationships. A study by Thomson Financial tracked performances of both family and non-family businesses and found that in many countries the family businesses grew two to four times as much as the non-family businesses. This may have to do with factors like the level of trust within the business, the genuine interest in intra-employee success, and the closely held nature of the businesses. At the same time, family businesses are riddled with conflict. One study found that 70% of businesses do not make it to the second generation and 90% do not transition to the third generation. Some famous family business disputes include feuds between the Koch brothers, Gucci siblings, and Martin Luther King Jr.’s children. However, many small and closely held businesses suffer from family business disputes without getting the same level of attention.

Despite the ubiquitous nature of family businesses and their great potential for success, there is a dearth of scholarship devoted to the specific subset of legal issues related to family business. At a time when many law schools are teaching classes on topics that are oddly specific and obscure, one informal survey of various top law schools failed to find a single class on family business law.

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74 Panikkoz Zata Poutziouris et al., Handbook of Research on Family Business 553 (2d ed. 2006).
77 Isadore Barmach, Gucci Family, Split by Feud, Sells Large Stake in Retailer, N. Y. Times, June 8, 1988.
79 One notable exception is the Attorney’s for Family-Held Enterprises (“AFHE”), which is an organization devoted to this topic. See generally Attorneys for Family-Held Enterprises, http://afhe.com (last visited Jan. 21, 2018).
80 Scott E. Friedman et al., Advising Family Businesses in the Twenty-First Century: An Introduction to Stage 4 Planning Strategies, 65 Buff. L. Rev. 425 (2017). See also Eric A. Chiap-
Another formal survey found scholarship regarding estate planning, tax planning, insurance planning, and buy-sell agreements for family businesses. However, all of the areas of study focused on money and not on the human aspect of the success of a family business.81

B. The Theory of Transformative Mediation Described Through an Example of a Family Business Dispute

The subtle emotional underpinnings that the transformative mediation theory is based on are best illustrated through an example of a conflict. Folger and Bush use the case outlined below to describe the situations that they propose to rectify and how transformative mediation looks in practice.82 When choosing an example, one must be mindful that this is only one of the infinite examples of family conflict, since, as Leo Tolstoy wrote in Anna Karenina: “All happy families are alike; each unhappy family is unhappy in its own way.”83

Folger and Bush use the example of Jim and Susan who are middle-aged siblings who share in the profits of a business that they are due to inherit from their father, Walter. Jim has worked at his father’s side for years, while Susan spent her early adult years looking after her family and later taking care of their ill father. They are now deeply divided about what roles they should each play in the family and in the business. Jim feels that Susan would have a bad effect on the business since she lacks experience and may feel entitled to play a larger role than what she is qualified for. He also feels that his years of work in the company entitle him to have managerial control. Susan feels that her contributions to the family, both in raising her kids and caring for their ill father who founded the company, entitle her to share both in the profits of the company and its control now that she is available to focus more on

pinelli, Stories From Camp Automotive: Communicating the Importance of Family Dynamics to Corporate Law Students, 34 GA. L. REV. 699, 710 (2000). “Corporate law casebooks are astonishingly devoid of any systematic consideration of family dynamics.”

81 Id.

82 BUSH & FOLGER, supra note 3, at 41–42. The example was based on a real case, but the names and details were altered to preserve confidentiality. Many of the details have been left out in order to distill the main parts of the conflict and best illustrate the ideas behind transformative mediation through the example.

the business. She feels that her absence from the business in earlier years helps her have a fresh perspective to add diversity of opinion to the mix. Susan would also like to get her husband involved in the business, since his employer recently laid him off.84

This situation elegantly exemplifies ideas in conflict theory. Such theories are primarily about power, rights, or needs. Jim wants to protect what he perceives as his right and power to maintain control of the direction of the company. Susan feels, however, that her lack of power, by being on the outside of the company, puts her in an unfavorable position to uphold her rights based on her efforts for the family. She also seeks to fulfill her need of setting up her husband’s employment. With these intertwining struggles playing out, Bush and Folger note that there is another overwhelming feeling between both parties that primarily guides what they are looking for in resolving their conflict. Bush and Folger observe that when asked “[w]hat affects you most in the conflict you’re involved in?” Jim and Susan respond by describing different aspects of their deteriorating relationship.85 Susan is bothered by the fact that Jim does not value the work that she did for the family. She is frightened by how this causes her to feel angered towards her brother and cannot allow herself to appreciate what Jim has done for the business. She recognizes that all she can see from her brother’s side is his ego and will for power. Jim is bothered by how little Susan values his role in the family business. He is annoyed by what he perceives as his sister being opportunistic at the expense of the family business.

These emotions illustrate that what people find most distressing about conflict is how it makes them feel powerless and alienated.86 The parties can best benefit from a process that will foster empowerment and recognition, which will propel each party out of the self-absorption that they are feeling. As a result, this will mend the relationship and allow them to find a solution to their conflict.87

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84 Bush & Folger, supra note 3, at 41–42.
85 See id. at 46 for a more detailed description of their response.
86 See id. at 48–49.
87 See id. at 23.
C. Debate Between Proponents of a Pure Transformative Mediation Approach Versus a More Activist Transformative Mediation Approach

As discussed in Section II.C supra,88 scholars like Professor Gunning advocate for a more active approach by the mediator while conceding that a relational view of conflict is important.89 Gunning justifies this activist approach with concerns that a power imbalance requires the mediator to step in.90 Given the inevitability of power imbalance, the mediator’s approach will almost assuredly be activist.91 However, Bush and Folger argue that it is important for the mediator to resist the temptation to step in even when they perceive a power struggle, because recognizing the power imbalance and defending one side will undermine the neutrality that is so important for building the empowerment and recognition that the parties must achieve on their own.92 One scholar claims that Bush takes this to an extreme to argue that a mediator should not intervene in a family dispute where a business-savvy husband uses his expertise to back his wife into a financially disadvantageous settlement.93 Some scholars believe that this level of deference to the idea of mediator neutrality is misguided.94 Gunning maintains that the more powerful party will tend to benefit from a mediator’s neutrality, because a neutral approach keeps the status quo, which reinforces the narrative under which the more powerful party has the advantage over the weaker party.95 This intervention would only apply to situations where injustice is unfolding, but the mediator should never impose his or her opinion with regards to what issues are important and when or how to set-

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88 See supra Section II.C.
89 See Gunning, supra note 47, at 90.
90 Id. at 91.
91 Harper, supra note 62, at 606.
93 Harper, supra note 62, at 606. See also Robert A. Baruch Bush, Dilemmas of Mediation Practice: A Study of Ethical Dilemmas and Policy Implications, 1994 DISP. RESOL. 1, 17–18 (1994). This author is uncertain which example Harper refers to. One example on page 14 discusses a husband with significant business expertise in dispute with a woman who never worked. Bush uses that case to show that even if the mediator feels sympathetic towards one party, she should exhibit restraint in order to maintain impartiality. It’s unclear whether the instance of clear, coercive behavior would change the analysis.
94 Harper, supra note 62, at 606.
95 Id. at 607.
tle the dispute.\textsuperscript{96} One result of following this approach would be that no party that sees themselves as the more powerful party would agree to submit to this method of mediation assuming there was transparency as to what approach would be applied. Proponents of activist mediation still reason that impartiality is nearly impossible to achieve,\textsuperscript{97} so efforts to remain neutral are not successful and only work to the detriment of the weaker party.\textsuperscript{98}

D. \textbf{Special Issues That Cause Disputes in Family Businesses}

There are many unique causes for family disputes. One major cause of family disputes is the “incongruity between traditional ‘family values’ and ‘business values.’”\textsuperscript{99} Business values are all about productivity and efficiency, while family values are about support and character building. In a business setting, many would argue that candid feedback, even when in the form of reprimanding an employee, is necessary and productive. However, when done by a parent to a child, a reproach can be received with too much resentment or feelings of inadequacy. Also, since businesses are mostly concerned with creating a system that will be most productive, they put less of an emphasis on fairness and more emphasis on what will work for the business. Sometimes a dispute that arises in the home setting where fairness is of primary concern will get mixed up with the business. Questions arise like those from our example above with Jim and Susan: Should the family member who took time off from the business to take care of an elderly relative be entitled to their managerial role in the company when the elderly relative dies? Or should we be most concerned with whom-ever would be best suited to make the best decisions when deciding on how to delegate the managerial powers within the corporate

\textsuperscript{96} Id. at 604.

\textsuperscript{97} The question of whether impartiality is impossible to achieve may depend on the definition of “impartiality.” A discussion between Justice Antonin Scalia and Justice Ruth Bader Ginsburg may shed light on this issue. In \textit{White v. Minnesota Republican Party}, 536 U.S. 765, 768–821 (2002), Justice Scalia wrote that judicial impartiality can be understood in three ways: (1) having no bias or favor towards either party; (2) the impossible—having no preconception in favor or against any particular legal view; and (3) open-mindedness—a willingness to be persuaded despite any preconceived notions. Justice Ginsburg added in her dissent: (4) having no interest in the outcome of the dispute. In determining whether it is possible for a mediator to be impartial, applying this possible definition may be helpful.

\textsuperscript{98} Harper, supra note 62, at 603.

structure? Should compensation be completely based on contributed productivity of the business or should it consider roles that contribute to the health and well-being of the family? One expert summed up the difference between family businesses and their counterparts by saying that in family businesses, “the controlling family’s influence, interests, and values have overriding importance.”

Another unique cause of family business disputes is the role-blurring between a family member’s position in the family and his or her position in the business. An older sibling who may be less capable or may have less experience in a particular area of business may have trouble deferring to his younger sibling when he can better handle a business need. A child may want to subject himself to a parent’s authority and respect their wishes in a family setting but may feel that the parent’s experience in the business setting is outdated and ill advised. Studies show that generational involvement can help bring in new ideas that will ensure longevity in the business and that when the younger generation is integrated into the business, they will be better suited to take over the company when the older members become incapable. Unfortunately, older family members who are often founders of the business are commonly unwilling to involve younger family members into the business, and this is partially because they view the role of the younger family members at home as incongruent with their role in the business. It can become difficult for family members to demarcate their changing roles when bouncing back and forth from family and business situations.

On a deeper level, family members may find themselves in internal identity conflict when they feel that their roles in the family and the business come into conflict. These roles are reinforced by behavioral expectations within each social context. Identity conflict can lead to adverse consequences to an individual’s psy-

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101 Rhodes & Landsky, supra note 6, at 15.
103 Dean Shepherd & J. Michael Haynie, Family Business, Identity Conflict and an Expedited Entrepreneurial Process: A Process of Resolving Identity Conflict, 33 Entrepreneurship Theory & Prac. 1245 (2009). Shepherd & Haynie attempt to resolve the issue of identity conflict in family business situations by drawing from scholarship in “Identity Control Theory.” They suggest that family businesses develop and nurture a “meta-level identity” that is a distinct identity for the overlapping roles of the otherwise conflicting family and business identities.
104 Id. at 1246.
chological well-being, the functioning of a family unit, and the performance of the business.\textsuperscript{105}

Additional causes for family business discord arise because often family members are “locked in” to their business, making them less flexible to avoid conflict\textsuperscript{106}. Family members may have been groomed for their roles without opportunity to develop more generally applicable skills that would qualify them for employment elsewhere. In other instances, it may be difficult for them to leave because of the effect that it would have on their family status. Sometimes a reservation to leave will be based on how it may affect their ability to inherit shares in the business\textsuperscript{107}. This adds another wrinkle to the difficulty of resolving disputes.

One last common source of conflict in family business disputes is the phenomenon called “intimacy paradox.”\textsuperscript{108} Family members who know each other on a deep and emotional level are skillful in avoiding tension and create “don’t go there” agreements\textsuperscript{109}. This can have the adverse effect of allowing tension to fester deep within a party’s emotions and build up until it comes out in a painful climax\textsuperscript{110}. A similar counter-intuitive phenomenon is when a family has a problem with reciprocal “altruism.”\textsuperscript{111} While most businesses find cohesion in economic trade-offs between colleagues, family members are more prone to altruistic motives in being considerate to each other and having each other’s backs. This works well when the levels of altruism are mutual, but when there is individualistic altruism, one party might end up taking advantage of the altruism of his family member colleague in the business\textsuperscript{112}.

\textsuperscript{105} Id. at 1247.

\textsuperscript{106} William S. Schulze et al., Exploring the Agency Consequences of Ownership Dispersion Among the Directors of Private Family Firms, 46 ACAD. MGMT. J. 179, 183 (2003).

\textsuperscript{107} Id. at 181–82.

\textsuperscript{108} Rhodes & Landsky, supra note 6, at 11.

\textsuperscript{109} Id. Rhodes and Landsky explain that family members learn to enjoy each other’s company without bringing up issues that touch on one another’s insecurities. They develop communication patterns where there are unspoken agreements not to discuss certain matters. This is what the authors refer to as “don’t go there” agreements.

\textsuperscript{110} Id.


\textsuperscript{112} See generally William S. Schulze et al., Altruism, Agency, and the Competitiveness of Family Firms, 23 Managerial & Decision Econ. 247 (2002).
E. Conflict Theory: Process, Task, and Relational Conflict

By approaching a subject from multiple disciplines, one can achieve a broader and more comprehensive understanding of a topic.\footnote{Why Teach with an Interdisciplinary Approach?, PEDAGOGY IN ACTION, https://serc.carleton.edu/sp/library/interdisciplinary/why.html (last visited Jan. 26, 2018).} Valuable and applicable insight can be taken from the study of conflict theory and what experts in the field have contributed to the study of family business disputes. In 2004, Franz W. Kellermanns and Kimberly Eddleston discussed some of their thoughts about family business disputes from the lenses of conflict theory experts in their article, \textit{Feuding Families: When Conflict Does a Family Firm Good}.\footnote{Franz W. Kellermanns & Kimberly Eddleston, \textit{Feuding Families: When Conflict Does a Family Firm Good}, 28 ENTREPRENEURSHIP: THEORY & PRACT. 209 (2004).} They explain that although some prior research view conflict as the “root of all evil” and the primary reason that holds organizations back from flourishing,\footnote{See Richard Beckahrd & W. Gibb Dryer Jr., \textit{Managing Continuity in the Family-Owned Business}, 12 ORGANIZATIONAL DYNAMICS 5 (1983).} in truth, there are certain kinds of conflict that are beneficial, particularly to family businesses. Kellermanns and Eddleston posit that moderate levels of process and task conflict are good for productivity, while relational conflict only plays a detrimental role.\footnote{See generally Kellermanns & Eddleston, supra note 114.} These forms of conflict affect each other and can be manipulated in ways that ensure the best opportunity for success.

Task conflict is disagreement about the goals and strategies that one should pursue. When there are differences in opinion about the direction of a company, more possibilities are considered. When weighing alternatives through adversarial perspectives, the benefits and detriments are better understood and sharply clarified.\footnote{See id. Karen A. Jehn, \textit{A Multimethod Examination of the Benefits and Detriments of Intergroup Conflict}, 40 ADMIN. SCI. Q. 256 (1995). See also Adam Grant, \textit{Kids Would You Please Start Fighting}, N.Y. TIMES, NOV. 4, 2017.} The added level of complexity caused by the simultaneous consideration of family and business interests makes achieving moderate levels of task conflict even more important.\footnote{See Renato Taguiri & John A. Davis, \textit{On the Goals of Successful Family Companies}, 5 FAM. BUS. REV. 43 (1992).} However, too much task conflict can lead to a disparity of ideas that causes deadlock. Too many arguments about the direction of the business may eliminate the ability to pursue any single course of action.\footnote{Kellermanns & Eddleston, supra note 114, at 215.
Process conflict is when there are differences in opinion on how a particular goal should be accomplished.\textsuperscript{120} This includes figuring out the optimal way each member’s talents and skills can be used.\textsuperscript{121} This may be of particular importance to a family business that does not hire based on talents and skills, but rather on family connection, so bolstering the collective productivity requires more ingenuity like skills development through mentoring and guidance.\textsuperscript{122} Diversity of opinion sharpened through adversarial disputes can help find the right system of process in the same way it does for task. Moderate levels of process conflict are optimal since high levels of conflict cause deadlock in decision making as well.\textsuperscript{123}

Relational conflict is the perception of personal animosity and incompatibility.\textsuperscript{124} It can include feelings of annoyance, irritation, and frustration while working with the other party.\textsuperscript{125} The effect of relationship conflict is that instead of focusing on productivity and growth, the parties dig in to their positions of opposition and do not work together with colleagues in cohesion. Instead they harbor feelings of resentment, distrust, and suspicion.\textsuperscript{126} This can be particularly important in a family business where relationships have a long history and unique complexity. Kellermanns and Eddleston propose that relational conflict should be alleviated as much as possible.\textsuperscript{127}

Kellermanns and Eddleston go on to explain how the resentment and distrust caused by relationship conflict can have an ill-effect on the exchange of ideas that foster healthy task and process conflict.\textsuperscript{128} This works on both ends, because members will not feel like they want to contribute when they feel resentful, and their counterparts will be slow to listen when they feel distrust.\textsuperscript{129} Family members are also too busy fending off their perceived threats

\textsuperscript{120} See Jehn, supra note 117.

\textsuperscript{121} Id.


\textsuperscript{123} Kellermanns & Eddleston, supra note 114, at 212.


\textsuperscript{126} Karen A. Jehn, A Qualitative Analysis of Conflict Types and Dimensions in Organizational Groups, 42 Admin. Sci. Q. 530 (1997).

\textsuperscript{127} Kellermanns & Eddleston, supra note 114, at 213.

\textsuperscript{128} Id.

\textsuperscript{129} Id.
instead of focusing on how they can best contribute to productive endeavors. Families with high levels of conflict find it difficult to communicate and expend too much time on unnecessary activities. By ridding a family of relationship conflict, the family can achieve the optimal levels of task and process conflict to help them flourish.

F. A Framework for Mediators Working with Emotional Issues in Family Disputes

As explained, transformative mediation can be an effective tool for dispute resolution in the high emotional conflicts within family businesses. One scholar suggests that we look to Roger Fisher and Daniel Shapiro’s excellent work, Beyond Reason: Using Emotions as You Negotiate, for a framework of the types of emotional issues that may arise in a mediation as well as how to deal with them. Fisher and Shapiro describe five core emotions that are universally in play during a negotiation: appreciation, affiliation, autonomy, status, and role. Firstly, mediators should focus on whether each party feels understood and valued. This is achieved when the parties listen to each other and try to understand the reasoning behind their words. Feelings of appreciation will lead to collaboration. Secondly, mediators should foster feelings of affiliation between the parties. This should be natural to parties from the same family who have an ingrained personal connection. Instead of feeling like adversaries, the parties should develop a genuine feeling of connectedness with each other whereby working together towards a mutual goal would be easier. Third, mediators should foster mutual respect for autonomy by allowing each side to be sure that ultimate decisions are in their hands and their hands alone. No one appreciates being told what

130 Jehn, supra note 126, at 531.
131 CARSTEN K. W. DE DREU & EVERT VAN DE VLIERT, USING CONFLICT IN ORGANIZATIONS 9, 95 (1997).
132 Kellermanns & Eddleston, supra note 114, at 214.
133 LaRose, supra note 13.
135 Id. at 17.
136 Id. at 52.
137 See id. at 53 (pointing out that the word “affiliate” comes from the Latin verb that means “to adopt or receive into a family”).

to do, so respecting autonomy will make each party more amenable to successful negotiations. Fourth, mediators should foster positive emotions and self-esteem by mutual acknowledgement of status. “Status refers to our standing in comparison to the standing of others.” It should be pointed out wherever each member has specific status in a given field, while avoiding competition of status, which results in negative emotions. Lastly, mediators should see to it that each party feels that they have a fulfilling role that has clear purpose; is personally meaningful; and incorporates skills, interests, values, and beliefs in tasks. Mediators who practice transformative mediation can use these ideas as a rubric for fostering empowerment and recognition and achieving the optimal outcome in their dispute resolution process.

IV. PROPOSAL

A. Transformative Mediation Addresses the Unique Issues That Arise in Family Business Disputes

The unique issues that affect family business disputes can best be resolved by taking a transformative mediation approach to conflict resolution. When analyzing each of the hallmarks of transformative mediation, it becomes clear how they work particularly well with the distinctive issues seen in family business disputes. Transformative mediation focuses on the underlying relationship, which tends to cause these disputes and uses conflict as an opportunity for growth in a way that families are particularly amenable to. The goal of preserving the relationship and the process of empowerment and recognition are perfectly suited to family business disputes.

The goal of preserving the relationship is exactly what families want from mediation. The conflicts usually stem from problems in the relationship since that’s where the unique qualities of a family business tend to fall apart. This explains why mending the relationship is the best way to resolve the immediate dispute, but mending the relationship also ensures that the family can continue to live harmoniously together. They are invariably going to have

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138 Id. at 95.
139 Id. at 96.
140 Id. at 115.
141 RHODES & LANSKY, supra note 6, at 11.
more interaction in both personal and business settings, so they want to mend the relationship which would allow them to continue properly.\footnote{Id. at 13 (discussing the “permanency” of the relationship between family members).}

As mentioned, one important part of the theory of transformative mediation is that it requires the mediator to step back and allow the parties to take control of both the discussion and the process.\footnote{INSTITUTE FOR THE STUDY OF CONFLICT TRANSFORMATION, supra note 42.} This helps build empowerment of the parties, which helps them reverse the feelings behind the poisoned relationship. This particularly helps in disputes within families for a few reasons. Families are best suited to work out their deep and complicated relationships with each other. They would also often reject a third-party from controlling talks within their family in any way. Empowerment is achieved by clarity of goals of each party. Family members, with their vast experience together, are in the best position to clarify their goals between themselves.

The unique cause of role-blurring in family business disputes\footnote{Sharma et al., supra note 100.} is also best resolved through transformative mediation. To be resolved affectively, this issue requires deep emotional realization. That recognition can best be achieved internally by the parties themselves without clear guidance by a third-party mediator. It is not an issue that requires an equitable solution where a mediator’s legal expertise would help as they hope to do when using an evaluative method of mediation. Even a facilitative method of mediation where the mediator takes control of the process is not well suited. When the parties subject themselves to the mediator’s process they don’t feel the empowerment required for them to be content enough to make the emotional evaluations that would lead to the most comfortable solution for all parties.

A second hallmark of transformative mediation is to foster recognition between the parties.\footnote{Id.} When the conflicting parties are family members they have a distinct predisposition to recognize each other’s perspectives. They may also be better at understanding each other’s prospective given their history together. If they build mutual recognition it can lead to empowerment and reverse the negative conflict spiral that started and strengthened the conflict.

Empowerment and recognition can also help alleviate issues created from the “intimacy paradox” and the lack of cohesion in
altruistic motives. When parties get together to discuss conflicts at their own terms, it opens up a conversation that could have otherwise been taboo. The confidence and mutual understanding can lead to discussions that will help the parties avoid pent up feelings that can come out in more difficult manners in the future. The empowerment also allows parties to feel comfortable with talking about their different views and not bottle them up in an unhealthy way. Empowerment and recognition can similarly be used to level the altruistic playing field. The more the parties are confident to have frank conversation and open to understand the other party’s perspective, the less one party will be willing to take advantage of the others altruistic feelings.

B. A Purer View of Transformative Mediation with Minimal Activism is the Best Approach for Family Business Disputes

As discussed supra in Section III.B, there is a debate amongst scholars as to how much, if any, mediator activism is warranted in each dispute. Professor Gunning, who recommends an activist approach, acknowledges that it’s “fair for mediators to choose different kinds of mediation to suit the parties and their desires and their needs.” The desires and needs of family members in a family business dispute warrants more neutrality and less activism on behalf of the mediator. As explained, in the instance of family disputes the need for empowerment and recognition is particularly high and the involvement of a third-party is particularly unwelcome.

One of the primary objectives of proponents of activist mediation is to defend those parties who will be victims of social injustice. This characteristic is not usually present in disputes amongst family members. Granted that the social injustice can apply to any weaker party in a dispute, the more powerful party in the family dispute still tends to deeply care about their less powerful family member counterpart in an otherwise healthy family relationship.

146 See supra Section III.B.
147 Gunning, supra note 47, at 89–90.
148 Id. at 89.
149 See Harper, supra note 62, at 603 (using “minority” and “less powerful” interchangeably).
That being said, it may still be unadvisable for a mediator to restrain him or herself when one party is being bullied unfairly. While certain levels of unequal bargaining are inevitable, and for the sake of remaining neutral the mediator should not try to equal the power balance by taking sides, the more powerful party should be able to accept that he is abusing his power when pointed out to him since they ultimately care to preserve the family relationship moving forward.

C. *Transformative Mediation Can Foster the Healthy Disputes and Minimize the Toxic Ones*

After Kellermanns and Eddleston present their models for positive and negative effects of conflict, they admit that their article does not address how family firms can go about achieving the optimal levels of process and task conflict while ridding themselves of relational conflict.\(^{150}\) Transformative mediation may be the perfect tool to do just that. While other methods of mediation might fast-track what seems to be a valid solution to a problem, they don’t foster task and process conflict to continue in a healthy manner. Evaluative and even facilitative mediation are focused on specific solutions to problems.\(^{151}\) They focus on the parties resolving all forms of conflict and strive to make interests align as completely as possible. If the parties are guided towards a solution, whether by direct guidance or guidance through the process, then they will not be incentivized to keep their opposing views on process and task intact. Transformative mediation zeros in on the relationship, and the relationship alone, while allowing healthy differences of opinion to remain.

Transformative mediation’s focus on the relationship also has the indirect effect of allowing task and process conflict to flourish in a moderate way. Through empowerment and recognition, strengthened by the parties’ control of the mediation process, they will be more comfortable to voice opposition when such opposition is necessary. Their strengthened recognition will help them better play their adversarial role when healthy debate takes place.

\(^{150}\) Kellermanns & Eddleston, *supra* note 114, at 222.

\(^{151}\) See generally Zumeta, *supra* note 32.
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D. The Role of a Transformative Mediator

With the understanding of the unique issues outlined above and the goal of the process of transformative mediation in family business disputes, every mediator must develop their own approach to a given conflict.152 Important questions to consider are, “What level of flexibility works best for each occasion? Is it wise to change one’s approach depending on the parties involved or for a mediator’s approach to develop throughout the process?”153 Experts have varying views regarding these questions.

One ADR expert, Karen LaRose, explores these questions in her 2012 piece called Family Business Conflict: Flexible Solutions.154 She outlines how mediation is a better approach than litigation when attempting to resolve family business disputes for similar reasons as we have discussed.155 She also quotes scholarly work that suggests that family businesses have a unique need for mediation since “the personal nature of family relationships impair the ability of the disputants to communicate with each other in an effort to resolve their problems.”156 LaRose also acknowledges how transformative mediation is “a good choice” for initial stages of resolving the dispute saying that “it is essential to dive under the surface to see what lies below, and transformative mediation is the best strategy to attack the underlying layer of conflict.”157 However, she proceeds to say that “Once the underlying family issues are addressed the business issues can be addressed using a flexible strategy that may employ a more directive facilitative mediation strategy.”158 She quotes L.A. Prince’s approach to family business mediation, which is anathema to a purest transformative mediation practitioner. Prince emphasizes procedural flexibility saying that the “evolutionary nature of mediation permits the framework to be defined as the process unfolds, modified to fit the needs and per-

152 Murray, supra note 31, at 32, 33.
154 LaRose, supra note 13.
155 Id.
156 Id. (quoting John M. Haynes & Thomas M. Usdin, Resolving Family Business Disputes Through Mediation, 10 Fam. Bus. Rev. 115, 115 (1997)).
157 Id.
158 Id.
sonalities of the family members, and, indeed the nature and level of the conflict.” 159

While I agree that there should be room for flexibility, which would best be left to the mediator’s discretion while experiencing the nuances of the conflict, care must be taken that transitioning to a facilitative approach doesn’t undermine the empowerment and recognition that was achieved in the early stages. Transformative mediation is based on a theory of conflict and requires its methods to encompass the entire process. Building feelings of empowerment and recognition is a long and arduous process within which any crack risks tearing the entire endeavor down. The ideas of transformative mediation cannot be viewed as a tool that can be utilized or shelved at the will of the mediator. You are either on board with the process or you are following an entirely different underlying theory of practice. A mediator should not feel the urge to direct negotiations, or even the process, in order to get to a substantial agreement. As explained earlier, the goal should be to preserve the relationship and an agreement can be viewed as what results on its own. Indeed, Prince’s approach is to seek the goal of his view of mediation which he sees as “characterized by the modest goal of resolving the specific substantive issue being disputed.” 160 I would argue that Bush’s approach of viewing settlement as a byproduct is more advisable here, especially since there may be value in preserving some level of conflict when it is task or process conflict.

There may be more room for flexibility when deciding whether to employ transformative mediation before the mediation begins. One instance where this would be advisable is when the mediator senses that the parties do not have interest in mending their relationship. Rather they seek a solution where they can part ways in the most equitable fashion. Transformative mediation only facilitates mending a relationship, so if the parties do not do it on their own, it will not be effective. A facilitative or evaluative approach will meet the parties’ needs more effectively in this scenario. 161

160 Id. at 213.
161 This author discussed a similar idea with Robert A. Baruch Bush, whom I interviewed on October 22, 2017. Bush mentioned that his opinions had evolved slightly between the first edition in 1994 and the second a decade later. One addition to the book comes in Chapter 2 where they write, “It is important to acknowledge that we do not (and could not) claim that only the transformative theory is valid, and the others are not.” I asked Bush whether other theories
Karen LaRose seems to understand empowerment and recognition as playing a slightly different role. She says that empowerment and recognition are important for “moving forward in the relationship,” and “forgiveness and reconciliation” are needed to “solve issues and create or maintain trust.”\textsuperscript{162} She then describes the importance of allowing the parties to control the process by saying that “intervention needs to be viewed by all parties as fair, and the best way to get to fair is by the parties to define the process themselves.”\textsuperscript{163} But empowerment and recognition play a much deeper role as described by Folger and Bush. Allowing the parties to control the process is not just a practical way to get to mutually agreeable terms, it is a way for the parties to be free from feelings of alienation and begin to think about the needs of others. This is the most important factor for the parties’ emotions and for the dispute to be effectively resolved.

E. The Court’s Role in Encouraging Transformative Mediation and Family Business Disputes

Courts are well-positioned to play a critical role in steering family business disputes to mediation programs that implements transformative mediation methods. As courts have become more involved in ADR, buttressed by legislation and the growing popularity of mediation,\textsuperscript{164} a debate has emerged as to whether courts should adopt mandatory or voluntary mediation programs.\textsuperscript{165} While this debate is beyond the scope of this note, it may be a good position from which to analyze whether it is advisable for judges to play a role in encouraging transformative mediation for family business disputes. There is a strong argument that, whether through mandatory or voluntary programs, judges should encourage spe-

\textsuperscript{162} LaRose, supra note 13.
\textsuperscript{163} Id.
\textsuperscript{164} Dorcas Quek, Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program, 11 CARDOZO J. CONFLICT RESOL. 479, 479 (2010).
\textsuperscript{165} Id. at 480.
cific methods of mediation for disputes of a particular nature. These programs may be inside or outside of courthouses.

Some scholars are concerned that mandatory mediation undermines the value of self-determination that is so important in mediations.166 As we have seen, self-determination takes on particular importance in transformative mediation where empowerment is of primary concern, so concerns of judge’s meddling in the process may be heightened. However, there is a distinction between coercion or encouragement “into” mediation as opposed to “within” mediation.167 This is especially true when “parties' reticence towards mediation is due to unfamiliarity with or ignorance of the process” of mediation.168 Courts can play a role “in helping [parties'] overcome their prejudices or lack of understanding” with regards to the mediation process.169 The argument that there is a distinction between encouragement “into” mediation as opposed to “within” mediation is also backed up by empirical studies that find almost no difference between settlement rates for mandatory and voluntary mediations.170

If mandatory mediation does not adversely affect self-determination, then certainly merely encouraging transformative mediation for certain kinds of disputes should not affect self-determination. Also, some civil procedural rules will give judges more authority to steer a case to mediation if they determine that “mediation can be of benefit to the litigants or the courts.”171 Therefore, if judges are informed about how transformative mediation is well suited to family business disputes, they can refer cases accordingly with wide latitude, and should not be afraid that their actions might lead to less self-determination of the parties or lower settlement rates.

V. Conclusion

When analyzing the philosophy of transformative mediation and defining its distinct properties, we can clarify the strengths and

166 Id. at 481 (stating that “any attempt to impose a formal and involuntary process on a party may potentially undermine the raison d’être of mediation”).
167 Id. at 485.
168 Id. at 483.
169 Id.
171 Quek, supra note 164, at 505, quoting FLA R. CIV. P. 1.710(b).
weaknesses of its use. The nature and causes of family business disputes line up well with the solutions afforded by transformative mediation. Mending the underlying relationship by fostering empowerment and recognition through allowing parties to take most of the control of the process and discussion would work well for family business disputes. Lessons deemed from conflict theory corroborate this conclusion by showing how the toxic conflicts will be minimized while maintaining the healthy conflicts that are important for the success of the business. Judges can also play a role in recommending mediators that are trained in transformative mediation when family business disputes arise. Although some state and federal mediation programs train mediators to facilitate disputes and eschew evaluation together, there is no known court system that requires the implementation of transformative mediation.\textsuperscript{172} If mediators are educated about the methods and strengths of transformative mediation and when they can best be utilized, then they would implement these methods when appropriate.

\textsuperscript{172} Hensler, supra note 27.