



## OpenAIR@RGU

### The Open Access Institutional Repository at Robert Gordon University

<http://openair.rgu.ac.uk>

This is an author produced version of a paper published in

Private Client Advisor (ISSN 2045-8142)

This version may not include final proof corrections and does not include published layout or pagination.

#### Citation Details

##### Citation for the version of the work held in 'OpenAIR@RGU':

CUNNINGHAM, J., 2014. Adapt and thrive. Available from *OpenAIR@RGU*. [online]. Available from: <http://openair.rgu.ac.uk>

##### Citation for the publisher's version:

CUNNINGHAM, J., 2014. Adapt and thrive. *Private Client Advisor*, 20 (1), pp. 16-19.

#### Copyright

Items in 'OpenAIR@RGU', Robert Gordon University Open Access Institutional Repository, are protected by copyright and intellectual property law. If you believe that any material held in 'OpenAIR@RGU' infringes copyright, please contact [openair-help@rgu.ac.uk](mailto:openair-help@rgu.ac.uk) with details. The item will be removed from the repository while the claim is investigated.

# **KEEP YOUR FRIENDS CLOSE - TRENDS IN THE PROVISION OF LEGAL ADVICE TO FAMILY BUSINESSES**

**Dr James Cunningham**  
*Robert Gordon University,  
Department of Management, Aberdeen Business School,  
AB10 7QE, Scotland  
Phone: +44 (0) 1224 263 455  
[j.e.a.cunningham@rgu.ac.uk](mailto:j.e.a.cunningham@rgu.ac.uk)*

Family businesses are unique, peculiar and without question set-aside from non-family rivals. Dealing with them can be an emotional rollercoaster for both practitioner and client. The academic discussion surrounding family firms over the past fifteen to twenty years has attempted to develop a particular understanding of their support requirements. However, by way of a disclaimer, much of the academic research in this area has been sporadic in nature. Inconsistent views on best practice when dealing with family business clients is symptomatic of a broader concern in the field of family business research; where definitional warring and scholarly bias do little to clarify the minefield of issues a practitioner may come across. Pragmatically, this article refines the academy's understanding of family businesses by illuminating the evolving roles of the legal advisor and presenting some of the more specific ways in which advisors must adapt their approach when dealing such 'special' clients.

## **The role of the advisor: counsellor or solicitor?**

Many business advisors are comfortable in providing their service on a problem-solution basis, mostly initiated by the client firm. This situation also suits inherently wary and often financially limited family firms, who approach legal services only at the point where it is deemed absolutely necessary, i.e. time of crisis, irreparable dispute, and leadership succession. However, this traditional view of the legal service provider is challenged by many researchers, citing instead that a prolonged and consistent relationship is the best way to ensure business continuity. Images of Tom Hagen's life-long service to the Corleone family in *The Godfather* trilogy may be a caricature, but as with all well-developed fictional characters, this is rooted in the reality of a family firm's needs.

The family business advisor's role needs to find a way of dealing with individual issues without causing heightened anxiety; making compassion and understanding of disputed roles

key to any resolution. The advisor's professional qualifications become less important against a closeness of relationship and, ultimately, trust.

This means that advisors, legal or otherwise, are now challenged to recognise the unique elements of a family business and position themselves to provide holistic advice, often beyond the traditional parameters of their profession. However, a word of caution, dual-relationships can often emerge which test the boundaries of a professional relationship. Like the GP who finds it difficult to diagnose a friend, so to a close legal advisor may find it difficult to present the realities of a situation to their often unrealistic clients.

Nonetheless, the benefits and opportunity in developing long-standing relationships with family business clients are clear. The legal advisor must become a multi-dimensional character employing broader skills and undertaking longer relational contracts than short-term litigation-based advice. However, this positive view of the newly formed 'family business counsellor' comes with caveats. The main difficulty of the role is not in the professional development of the legal advisor, but in 'selling' this softer form of service to resource constrained family enterprises.

### **The role of litigation**

The key notion from much of the 'new' approach to family business advising is an awareness and understanding of any emotional implications of the advisor's recommendations, in contrast to specific issue resolution. However, this pulls many in the legal profession out of their comfort zone. Pushed by their client for a quick turnaround, a lack of understanding of their business client can mean that legal advisors reach for their default position of quick-fix litigation, without considering the deep-rooted disputes causing business problems and which litigation will only seek to worsen.

Consequently, legal service providers must be very careful in developing their roles and expectations within the family business. In particular, it is recommended that advisors should work to dispel the '*myths*' of the litigation process and offer alternatives of greater benefit to businesses, while generating less emotional turmoil than expensive and stressful court proceedings.

For instance, the existence of a prenuptial agreement may be glamorous and appealing; however, in reality this process can often involve painful negotiation and only limited protection. More appropriate for an already emotion-laden family firm may be written option agreements to buy stock at a fixed price, or a liquidity agreement whereby stock can be bought back from disgruntled shareholders at a price determined by a pre-existing formula, ensuring fair valuation. Such pre-set approaches can reduce suspicion from minority shareholders that the deal they are being offered is unfair. Also, this can provide a very quick remedy for disputes, or even in the scenario of uninterested offspring.

One further, and particularly stressful, problem to the family business owner is the issue of estate planning and succession. Here, again, quick-fix solutions have led in the past to an assumption of equality among offspring with controlling interests often left to previously non-active spouses. This is a mistake, which overlooks the subtleties of family firm dynamics. The emotional turmoil which ensues from such inappropriate legal situations contributes greatly to the failure of most family firms at the time of succession. Treating children equally does not necessarily mean leaving all an equal stake. Other forms of benefit can be passed to non-active members, such as insurance or inheritance schemes, a desire for control should not be assumed.

The consideration of alternatives should highlight that there are more emotionally sensitive routes for firms in dispute than financially-driven litigation. Family businesses are more vulnerable to long-term relationship ruptures caused by drawn out court cases, leading to personal resentment and damaging cultures. Such notions are the underlying premise of a heightened mediation role for the advisor. Solicitors and estate planners are at the intersection of the family and business systems, with such services attempting to create sustainable governance models which not only meet the demands of the business technicalities, but are also sensitive to the emotional and support needs of the family. The tools available to legal advisors vary; however the mediation role which is now assumed causes its own concern.

### **The role of mediation**

Mediation is offered as a constructive alternative to destructive litigation, the legal consul acts as the objective middleman in dispute dialogues. In the 90s the late John Haynes of the *Academy of Family Mediators* set out four key principles by which potential mediators should live:

1. The earlier a dispute is resolved, the less damage it can cause – financially and emotionally.
2. The individuals involved in the dispute are the ones most capable of coming up with the best solution to their problems.
3. Family members can best preserve their future relationships if they can resolve their disputes without resorting to adversarial process (litigation).
4. When family members are involved in a dispute, personal feelings impair their ability to communicate. The potential for ‘give and take’ is maximised when an objective third party is involved in the dispute.

However, since then, mediation appears to be an underappreciated tool when dealing with family business clients. This is unfortunate, as it is suggested that 75% - 80% of disputes can be resolved through mediation, with most cases resolved in less than a day. Although each mediator will act in different ways, typically the parties of the dispute will be separated, with each side telling their story and offering their own solutions. Thereafter, the impartial mediator will be critical toward each party’s proposals, eventually uncovering an optimum conclusion to suit all. Designed to save time and money, many writers consider mediation to be the best form of legal counsel for family firms. This may be best sold to the client along the lines of ‘*attorney-mediator*’, thus legitimising the ‘softer’ sides of mediation with legal professionalism; creating lasting advisor-client relations. However, this approach is not without its critics.

As with every form of consultation, conflict resolution based on one tool alone can be dangerous. More staged approaches are forwarded as an evolutionary and setting-sensitive form of approach. The role of the legal professional is required with post-negotiation mediation and arbitration. It is vitally important that this appears early in the conflict. Only when mediation and arbitration fail should litigation be brought in as a solution, so as to avoid physical violence (yes, it does happen!).

In providing a spectrum of options, the staged approach allows for those cases where family members may be too emotionally fragile to participate in the mediation process, at which point statue-led resolutions can be brought back into favour.

Another criticism of *pure* mediation is that legal professionals may be in no position to act as mediator, when the role is far greater suited to a qualified family therapist. The challenge for legal advice is to balance the appropriateness of their service provision with the benefits of relational mediation. For this reason, much of the recent writings of family business advising tend focus on 'how' mediation can be brought into the advice process, rather than assuming this of a legal advisor. The fashion of late is to form an advisory team with all necessary components of the service offering present.

### **The role of the advisory team**

The weaknesses of individual family firm advisors are often contrasting and serve only to confuse and damage the client; for instance, where legal advice may lack in emotional sensitivity, family therapists may suffer from a lack of administrative and statutory know-how. The ability to combine these elements in one advisory team provides greater sensitivity to the specific needs of each client; thus instilling a broader base of support than previously offered. Team advising reaffirms the move away from short-termist, problem-solution activities to the development of long and continued relationships, also helping to break the 'entrenchment factor' evident in many family-influenced enterprises.

The key element here is trust. And many family firms have trust issues: trusting their own instincts over that of others; even over-trusting professionally-trained peoples they regard as guru figures. As the literature on family business progresses, the latest round greatly advocates the team approach to legal advice as an architect of trust. This is also found to be the case internationally. Studies in cultures as diverse as Canada, Saudi Arabia, and Turkey have all noted the success of collaboration and multi-disciplinary teams in advising family businesses; with the legal advisor seen as the master conductor, applying both structure and support in equal measure. The lead in such development is, perhaps stereotypically, the United States; where a burgeoning family business consultation market has developed over the past 10 years, through both market need and a more established recognition of the uniqueness of family influenced business.

Engagement with team advising requires the legal profession to venture out-with their established boundaries, roles become ambiguous and task goals unclear; the ultimate success factor is the will of both advisors and clients to interact and build relationships on this unfamiliar territory. Success stories remain the exception. While there is optimism in the UK

that this form of team advising will grow, current evidence suggests that family business legal advisors maintain the persistent minds-set of task-based solutions and litigation instruction. Perhaps the alignment of multi-disciplinary teams, riddled with competing philosophies and ego, is out of reach for most legal service providers. Alternatively, the need for a living wage may constrain most family businesses to allocate resources on a singular *needs-must* basis, rendering the long-term demands of team consultation unaffordable. Either way, in its current state the emotive family business landscape continues to be ill-equipped for the inevitable turmoil that lies ahead.

### **Keep your friends close...**

Family firms need friends. They are incapable of viewing their business objectively and controlling the emotions which provide them with such distinction. When a family firm is functioning well, the world is a bright and rosy place; when it is functioning poorly, they are engulfed in inescapable anguish. Limited financial resources mean that they will often ask for legal advice only once the situation has become irreparable. At this stage the legal advisor resorts to default and brings in litigation-based solutions which, although effective at steadying the ship, can lead to painful attacks, deeper resentment, and disastrous consequences. The challenge for legal advisors is to provide a broad and emotionally-sensitive offering before it gets to this stage. Building long-term relationships will allow for an intimate understanding of the needs of the client. In turn, this will allow a clearer review of the alternatives for conflict resolution, or even conflict avoidance. The first hurdle is for the legal firm to ensure they have the breadth of capabilities needed to provide this service offering; the second is to sell it to the family firm before it is too late.