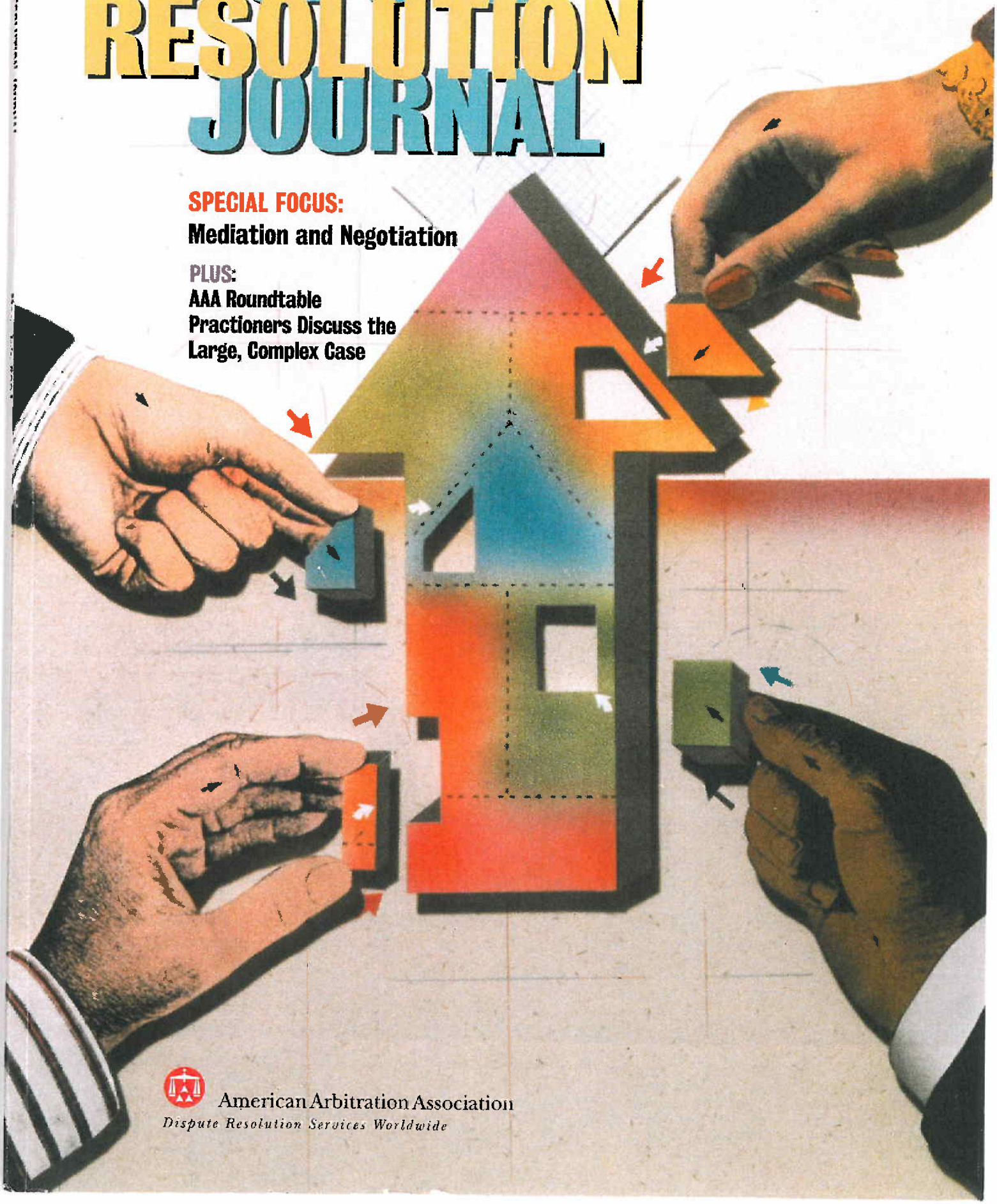
DISPUTE RESOLUTION JOURNAL

May-July 2004

SPECIAL FOCUS:
Mediation and Negotiation

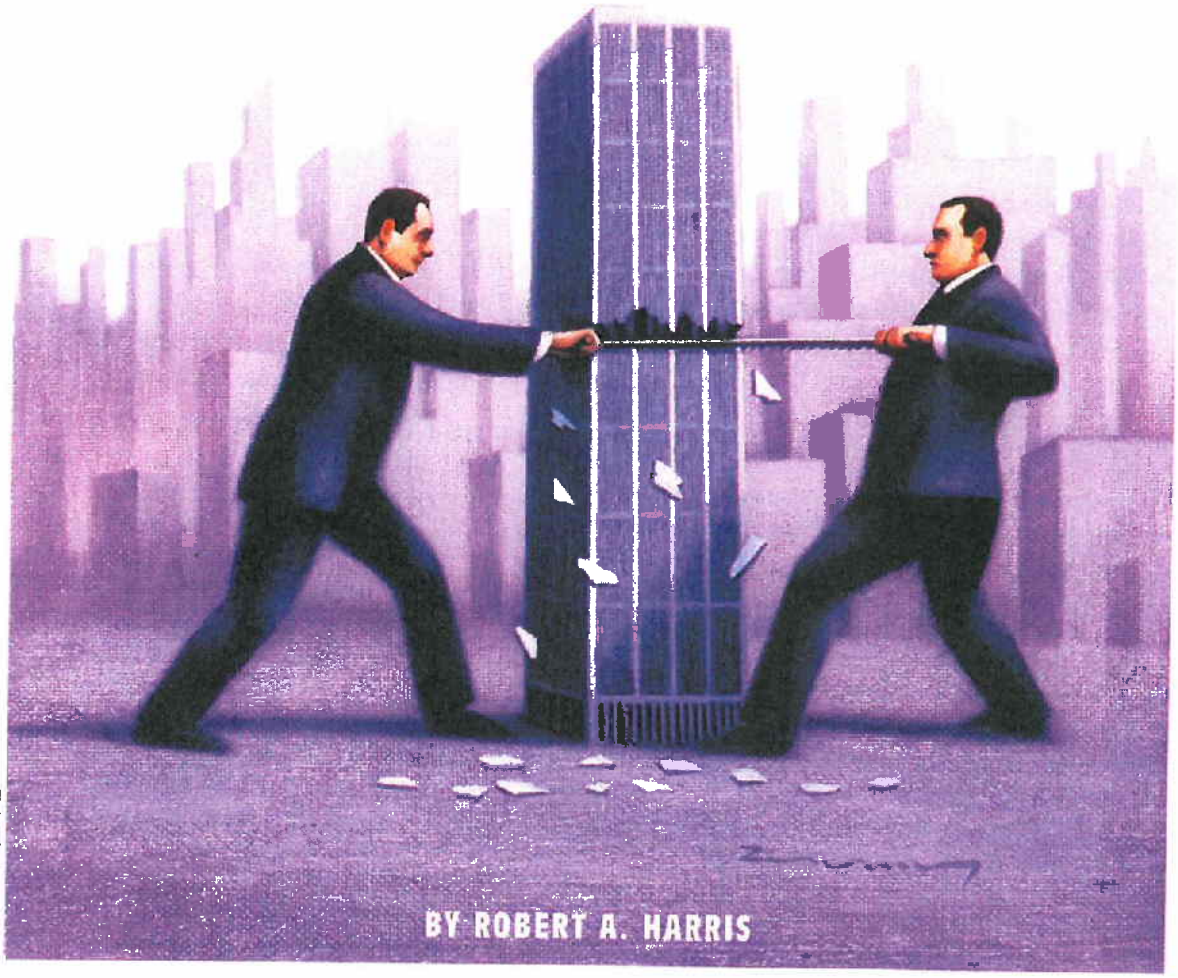
PLUS:
AAA Roundtable Practioners Discuss the Large, Complex Case



American Arbitration Association
Dispute Resolution Services Worldwide

The Passionate World of Business Divorce:

Some Tips for Counsel



Christopher Zacharow/SIS

BY ROBERT A. HARRIS

THIS ARTICLE SUGGESTS USING REPRESENTED NEGOTIATIONS TO RESOLVE ISSUES ARISING IN A BUSINESS DIVORCE, SUCH AS THE BREAKUP OF A MEDICAL PARTNERSHIP OR A FAMILY-OWNED BUSINESS. THE AUTHOR ARGUES THAT NEGOTIATING THE SPLIT-UP HAS ADVANTAGES OVER GOING TO COURT.

Much of my 22-year legal career has involved litigating and arbitrating disputes between owners of closely-held businesses, many of which are family owned. The time often comes when the owners decide they no longer wish to work together. Whether certain owners will depart, or the business will be terminated altogether, the parties usually are quite angry and frustrated and they blame each other for everything. These feelings create conditions ripe for litigation. It usually takes several months after a lawsuit is filed before passions cool sufficiently to even try to negotiate a settlement. But by that time, the parties have already incurred substantial legal fees and their business has already been damaged. Even if rationality ultimately prevails and their attorneys are able to help them negotiate a business divorce, all sides will receive a share of a badly damaged carcass.

Rob Harris is an attorney with the Connecticut firm Zeldes, Needle & Cooper. His practice involves litigation, arbitration and mediation of business disputes. He serves on the roster of the American Arbitration Association. He has served as the chair of the ADR Section of the Connecticut Bar Association for the past three years, and he contributes a monthly column on ADR issues to the Connecticut Law Tribune.

Business divorces involve a myriad of legal issues: Have the parties fulfilled their financial and fiduciary obligations to each other? Are there employment agreements that have continuing obligations, such as provisions against competitive employment and customer solicitation? What will happen to the employees of the business, especially when one business is being divided into two? Will the business, assuming it is going to continue, have to move to different premises? (This could be the case if the premises were leased or subleased from the divorcing parties.) What financial obligations are owed to the owner of the premises? Do the parties have a buyout agreement?

In negotiating the resolution of a dispute involving the owners of a small business, strong emotions can tremendously complicate the process. Emotional feelings can cloud the judgment of otherwise rational people who are in the midst of a conflict serious enough to make them want to terminate their business arrangement. The anger and resentment often associated with a business marriage that has gone sour can adversely affect the ability to make sound business decisions.

The stress of the situation can make well-respected, analytical and courteous businessmen and businesswomen behave like kindergartners fighting over toys. I once monitored two physicians dividing up the contents of their office, down to the telephone handsets, the magazine racks, bulletin board, and the plants. The high point of the inanity came when the departing doctor insisted on taking three plastic file racks that were attached to the doors of the examining rooms —leaving unsightly screw holes— rather than accept the monetary equivalent of these minor items of property.

A key difficulty inherent in a business divorce is the necessity that the principals collaborate at the same time as they are feuding. For example, if the business is a medical practice, the warring doctors must continue to provide medical services to their patients, interact with the nurses and other staff, and conduct day-to-day operations, until the separation is consummated. As a result of the ill feelings, businesses undergoing such traumas rarely operate smoothly. There is

the constant threat that one owner will say something to the other that either is intended or perceived to be inflammatory.

An attorney retained to help achieve a separation should never forget that, for the client, victory amounts to having the name of the new business on the door within a relatively short period of time, with a minimal amount of expense, uncertainty and disruption of services. The client usually doesn't care how this goal is realized—whether by stellar argument presented to a judge or jury, or by a monitored division of waste baskets, bulletin boards and telephone handsets.

While certain business divorces may be destined for litigation (for example, those involving outright theft or fraud by one of the owners), the vast majority of business divorces can be accomplished through negotiation and/or mediation without the need for litigation. This not only minimizes client expense, but it also achieves the client's goals more expeditiously and allows for business to continue and lives to be reclaimed.

An attorney who is unprepared to interact with emotional clients should pause before undertaking a case of this type. The attorneys who are most effective in representing clients in business divorces are attuned to the emotional aspects of the conflict. They recognize that their client's and the opposing party's objectivity may be impaired on issues relating to the dispute.

Obviously, the decision to pursue an adversarial dispute resolution process (i.e., arbitration or litigation) or to negotiate or mediate belongs to the client, not to counsel. Counsel should explain each option so that the client fully understands the ramifications of the decision.

From my experiences in assisting business owners to end their relationships with co-owners, I have come to believe in the utility of the following principles:

Frank Rexilie/Artville/Getty Images

1. Don't Be Someone You're Not. Not all attorneys have the temperament or skill-set conducive to representing one of the principals in the negotiation or mediation of an emotional and impassioned dispute with a co-owner. In these cases, economic issues are often the stepchild of years of pent up anger and resentment. The client will telephone frequently with questions, demands, worries and concerns, many of which may seem trivial and petty. This can try the patience of the most patient attorney.

Consequently, don't undertake the representation unless you are a good "hand holder" who knows how to calm an emotional client, and who enjoys helping parties work through emotional issues.

2. It Takes Two to Tango. It is a truism that a negotiated resolution requires the agreement of all parties. Counsel usually faces two battles in trying to help a client reach a negotiated resolution. The first is persuading the client to consider alternatives to litigation or arbitration. The second is persuading the other side to do the same.

In disputes where economic issues predominate, a party's perceived self-interest is often sufficient to motivate a prompt and businesslike negotiated resolution. However, this is less likely when the dispute is between the owners of a closely-held or family business. By the time one of the parties decides to consult you, he or she often has endured an extended period of frustration and wants a strong advocate who will take immediate forceful action, i.e., filing a lawsuit. In order to persuade the client to entertain negotiation or mediation, you must demonstrate to the client that forgoing or deferring litigation will not constitute weakness.

Occasionally, the problem is avoided because the parties' agreement includes a negotiation or mediation requirement as a condition precedent to commencing litigation. But when there is no such clause, you must use your talents to help a client view the dispute objectively. Sometimes, it helps to enlist the assistance of the client's spouse or confidant when discussing the pros and cons of dispute resolution strategies that do not involve litigation (but remember the conversations will not be protected by the attorney-client privilege). Of course, you should make sure your client understands that a decision to postpone litigation is not irreversible; if negotiations fail, litigation or arbitration remains an option.

Assuming your client desires to negotiate, then you face the challenge of convincing the other side. It is easier to begin this process when counsel for the parties know each other and have a relationship that lends itself to an overture.

Otherwise, it may be productive to work through an intermediary. For example, the accountant for the business may be a trusted advisor to both sides, who may be able to persuade the other side that negotiation would be a productive way to resolve the dispute.

Even if the parties' agreement provides for disputes to be arbitrated, the parties can still agree to pursue negotiation. When arbitration claims are filed with the American Arbitration Association, the case administrator usually will inquire whether the parties have any interest in mediation. If you know that your client wishes to mediate, you can proactively advise the case manager of the interest in mediation, so that the issue can be raised with the other side at the outset.

3. Avail Yourself of the Mediator's Assistance in Interacting with Your Client. Disputes between business owners often benefit from the assistance of a mediator. Business owners often say that their dispute is solely economic, when, in reality, it is highly emotional, and it is emotional issues that are the biggest roadblocks to settlement. Unless these issues are addressed, the dispute is unlikely to be resolved.

Divorce attorneys understand this dynamic. They know that passionate feelings can impede a settlement. While commercial litigators often represent angry clients, they may lack the sensitivity to work through the emotional aspects of a dispute. If you lack the qualities to deal productively with these issues, you can bring in an experienced mediator to facilitate the parties' discussion while providing a forum to also address the economic issues.

An added benefit from the mediator's involvement is that the mediator can also help the parties better understand what they should expect from their counsel. Clients usually expect unqualified support, a champion for their cause and unfettered advocacy. However, when the goal is to negotiate a settlement, what is needed is "mediation advocacy," a necessary component of which is a willingness to compromise. However, an attorney who too vigorously advocates compromise runs the risk of losing a client's confidence. A mediator can serve as a useful third voice in this discussion by explaining to your client that compromise may be in his or her best interest.

4. Be the "Good Cop." Regardless of the objective merits of the dispute, the adversary no doubt believes your client is wrong and is the cause of the problem. As your client's advocate, you are likely to be perceived as the personification of evil. To counter this perception, it is helpful to communicate calmly and non-judgmentally.

"An attorney who is unprepared to interact with emotional clients should pause before undertaking a case of this type."

Make it clear that you are open to discuss the merits of all positions. This disarming approach can soften the adversary enough to hear your client's side of the story.

Remember that the substance and—perhaps more important—the tone of your correspondence and telephone calls with opposing counsel will be relayed to the adversary. So it is important to speak and act reasonably. An early meeting of all parties and counsel will provide a good opportunity to signal your reasonableness to the other side. Being the voice of reason and moderation will not undermine your ability to serve as an advocate. To the contrary, it will establish your credibility and create the perception that you will be an honest broker, an essential ingredient to a negotiated resolution.

5. Be Realistic About Negotiation's Limitations. A judicial decree or arbitration award provides concrete directions to the parties and often ends their relationship. A negotiated resolution may not do that and this can lead to new areas of disagreement. For example, how the mail for the terminated business is handled can lead to problems, particularly if the mail is sent to a post office box to which both former owners will have access. Disputes can also arise from personal guarantees given by both owners if one assumes the entire loan or lease obligation but the lender or lessor refuses to release the other former owner from the guarantee. While the parties may negotiate a resolution because they perceive the result to be better than a litigated or arbitrated award, it is unrealistic to expect peace and harmony to prevail. Eventually, the parties get on with their lives, but that usually takes time.

Conclusion

When the relationship of small business owners falls apart, they will have to face all sorts of economic and emotional issues. If not resolved by dispassionate negotiation, the dispute can end up in protracted and expensive litigation. Counsel who can help these parties reach an acceptable division of the plants in the office should consider this a victory for the parties. ■