

## Family businesses: mediation and governance as mechanisms appropriate for conflict management\*

*Empresas familiares: mediação e governança como mecanismos adequados à gestão de conflitos*

*Empresas familiares: mediación y gobierno como mecanismos adecuados a la gestión de conflictos*

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### Abstract

Given the complexity and peculiarities of family businesses, the study aims to investigate how mediation and governance structures can be used to manage, reduce, and resolve conflicts that arise in this area. To this end, the concepts of family business are analyzed, identifying the reasons for the high intensity and the harmful potential of these conflicts for companies. The main reasons for conflicts between family members are identified, and the suitability of some mechanisms to resolve them is investigated. Given the need to maintain the relationship between the parties and the benefits provided, mediation is chosen as an efficient mechanism for resolving and managing conflicts in these organizations. Furthermore, family governance structures emerge as capable means of managing relationships between family members and, indirectly, their interaction with the company. The way in which these instruments are implemented in the family business is also analyzed, as well as how a culture of mediation can be developed in this area, encouraging cooperative and dialogical attitudes. It is concluded that the appropriate resolution of conflicts must be, in most cases, within the scope of family organizations, carried out through mediation and combined with governance structures, especially family. The methodology adopted for the preparation of this essay is characterized as bibliographic, regarding the sources; qualitative, regarding the approach to the problem; and descriptive and exploratory, regarding the objectives.

**Keywords:** family business; corporate governance; family governance; conflict management.

### Resumo

*O estudo objetiva averiguar, diante da complexidade e das peculiaridades das empresas familiares, de que modo a mediação e as estruturas de governança podem ser utilizadas para administrar, reduzir e solucionar os conflitos irrompidos neste âmbito. Para tanto, são analisados os conceitos de empresa familiar, identificando as razões da alta intensidade e do potencial lesivo desses conflitos para as empresas. Identificam-se os principais motivos geradores de conflitos entre os componentes familiares e investiga-se a adequação de certos mecanismos para solucioná-los. Ante à necessidade de manutenção do relacionamento entre as partes e os*

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*benefícios ensejados, opta-se pela mediação como mecanismo eficiente para resolução e gestão de conflitos nestas organizações. Para mais, as estruturas de governança familiar despontam como expedientes aptos a administrar o relacionamento entre os familiares e, indiretamente, sua interação com a empresa. É também analisado o modo de implementação desses instrumentos na empresa familiar e como pode ser desenvolvido uma cultura de mediação neste âmbito, estimulando as atitudes cooperativas e dialógicas. Conclui-se que a resolução adequada de conflitos deverá ser, na maior parte dos casos, no âmbito das organizações familiares, realizada por intermédio da mediação e aliada a estruturas de governança, especialmente familiar. A metodologia adotada para a elaboração deste ensaio se caracteriza como bibliográfica, quanto às fontes; qualitativa, quanto à abordagem do problema; e descritiva e exploratória, quanto aos objetivos.*

**Palavras-chave:** empresa familiar; governança corporativa; governança familiar; gestão de conflitos.

## **Resumen**

*Este estudio tiene el objetivo de averiguar, ante la complejidad y las peculiaridades de las empresas familiares, de qué modo la mediación y las estructuras de gobierno pueden ser utilizadas para administrar, reducir y solucionar los conflictos irrupidos en este ámbito. Para tanto, son analizados los conceptos empresa familiar, identificando los motivos de la alta intensidad y del potencial lesivo de estos conflictos para las empresas. Se identifican los principales motivos generadores de conflictos entre los componentes familiares y se investiga la adecuación de ciertos mecanismos para solucionarlos. Ante la necesidad de mantenimiento del relacionamiento entre las partes y los beneficios ocasionados, se opta por la mediación como mecanismo eficiente para resolución y gestión de conflictos en estas organizaciones. Para más, las estructuras de gobierno familiar surgen como expedientes aptos a administrar el relacionamiento entre los familiares y, indirectamente, su interacción con la empresa. También es analizado el modo de implementación de estos instrumentos en la empresa familiar y cómo puede ser desarrollada una cultura de mediación en este ámbito, estimulando las actitudes cooperativas y dialógicas. Se concluye que la resolución adecuada de conflictos deberá ser, en la mayor parte de los casos, en el ámbito de las organizaciones familiares, realizada por intermedio de la mediación y aliada a estructuras de gobierno, especialmente familiar. La metodología adoptada para la creación de este ensayo se caracteriza como bibliográfica, cuanto a las fuentes; cualitativa, cuanto al enfoque del problema; y descriptiva y exploratoria, cuanto a los objetivos.*

**Palabras clave:** empresa familiar; gobierno corporativo; gobierno familiar; gestión de conflictos.

## **1 Introduction**

Few institutions today are as intriguing, broad in possibilities and stimulating as family businesses. These organizations stand out for their expressive presence in the world and, especially, for the fact that their foundation and existence are intrinsically related to a family or group of these, connoting a much greater degree of complexity than that experienced by non-family businesses.

Thus, if, on the one hand, the confluence between family and company has the ability to provide several benefits to organizational performance, on the other hand, when the relationship between these two systems is not well managed, the confusion of the roles played and the misalignment of objectives are capable of generating irreparable damage to the business. In fact, it is not uncommon, in this context, for conflicts to occur between family members, of the same or different generations, whose poor resolution causes a degenerative process in the organization and can result in their premature "death".

This reality is illustrated by Ward (2011), when he states that 30% of family businesses reach the second generation, 13% remain until the third, and 3% percent manage to survive beyond that. In view of the Brazilian panorama, Braga Neto (2014) indicates that 65% of the failure

of family organizations is due to conflicts between family members, and not to other factors, such as competition in the market.

While in non-family businesses decisions orbit between "right and wrong", in family organizations they are weighted in order to potentially incorporate "reason and emotion". In addition, it is common to confuse the roles played by family members: in professional meetings, they treat each other as brothers or cousins and, in family meetings, they discuss issues inherent to the organization. Added to this panorama are the cases in which old grievances, generated, for example, in childhood, are accumulated and, even if they are not related to professional matters, they spill over among family members within the company. Once the conflict begins, its effects radiate to the various sectors of the organization, causing consequences for its survival.

Thus, in view of the observation that the mixture between family and business is the reason for the emergence of different conflicts and that their mismanagement can produce the decline of family organizations, the central question of this academic essay arises: how, in family businesses, the conflicts arising from the relationship between family and business could be reduced and solved efficiently, in order to ensure the sustainability of the organization? To this end, the adequacy of the mediation mechanism for conflict resolution in the context of family businesses is investigated, questioning: how can governance structures, especially family ones, be used in favor of this objective?

The thematic relevance is justified by the predominance of family businesses in the world and the important role they play in the movement of the economic machine, through the generation of income and jobs, revealing, therefore, that it is essential to study the conditioning factors of their survival. By way of illustration, data collected by the European Family Businesses<sup>1</sup> (2012) show that, worldwide, 50% to 80% of private sector jobs are generated by family businesses, as well as, in most countries, they represent 70% to 95% of the total number of companies.

In order to systematize the study and achieve the proposed objectives, this essay is divided into three main points. In the first, it seeks to analyze the unfolding of the relationship between the business and family systems, as well as their influences on business performance. Thus, first, the criteria used to classify companies as family are studied and, then, the model of the three circles proposed by Tagiuri and Davis (1996) is presented, which compartmentalizes family organizations into three distinct and, in some points, overlapping spheres – ownership, family and management, as well as the three-dimensional standard, elaborated by Gersick et al (2017). Next, the conflict is analyzed, both from the perspective of organizational theories and in the specific panorama of family organizations, identifying the

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<sup>1</sup> Founded in 1997 at the initiative of the European Union, the European Family Businesses (EFB) is an organization composed of European national associations representing family businesses, whether small, medium or large companies. Among the objectives of the agency, awareness of the contribution offered by family businesses to society and the promotion of policies that lead to responsible entrepreneurship stand out.

main reasons for its emergence.

In view of the need to separate domestic and business matters, as well as to implement mechanisms capable of managing family relationships to mitigate the emergence of conflicts, the second moment is dedicated to the study of corporate governance structures and their challenges. Among these, the family governance expedients stand out, highlighting family meetings, family assembly, family council, *family office* and family protocol, which, to varying degrees, have the objective of managing issues concerning the family and, indirectly, the company.

A third important point is also studied the identification of the skills that companies point out as necessary for professionals today. Then, its relationship with attributes inherent to the exercise of conflict mediation is investigated, highlighting its relevance in this process. The importance of developing these skills within family businesses is studied, proposing the formation of a family and business culture based on mutual dialogue and cooperative attitudes.

The methodology of this essay is bibliographic and theoretical, with a qualitative, descriptive and exploratory approach. The research was based on the analysis of books, articles and legislation, national and foreign, focusing on family businesses, mediation and corporate governance. The objective is to deepen the theme and propose a practical solution to the problem studied.

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## **2 Family businesses: developments in the relationship between family and business**

Family businesses are marked by confusion between, on the one hand, the professional role of the technician or manager, rational and objective, and, on the other, the family obligations of father, mother, son, brother, cousin, which presume a permanent relationship permeated with affection (Bernhoeft, 1989, p. 10-12). This peculiar trait of family businesses, that is, the mixture between two institutions governed by different logics, when not well managed, can be detrimental to business performance, but, when accompanied by a good governance structure, it is also capable of giving them advantages compared to non-family firms.

The patriarchal social structure, which had prevailed for a long period in Brazilian society, entrusted all the functions of leadership to the figure of the *pater familias*, who was responsible for providing for the needs of those under his responsibility. Precisely in order to meet the demands expressed by the family members, the patriarch identified, in the organization of the means of production, the alternative to guarantee the subsistence of the family nucleus. With the success of his enterprises, the father of the family came to be seen as "a successful man, considering the business perspective, and as the one who provides the family with the necessary resources for

its survival and, many times, far beyond" it (Dias, 2015, p. 96).

It turns out that this phenomenon, initially linked to the agricultural sectors, has expanded to the most diverse branches of production, trade of consumer goods and provision of services, giving rise to a significant increase in the number of companies in the Brazilian reality. Another crucial transformation to the understanding of these family businesses in Brazil occurred with the evolution of the concept of family which, over the years and with social changes, began to involve a new degree of complexity. In this sense, different formats of family groups began to coexist in the same culture, representing a different composition of the traditional and patriarchal nuclear group, both by its members and by the redefinition of family roles, adding to the new distribution of power (Machado, 2005, p. 319).

The combination of these two factors, that is, the expansion of the areas to which the family business is dedicated and the changes in its configurations, denoted an even greater degree of complexity to the already complex family businesses, triggering the need for the development of specific studies and the indispensability of a multidisciplinary approach. In this sense, the most diverse areas – such as Psychology, Law, Business Administration, Economics and Sociology – began to deal with these studies.

The magnitude of family businesses, in the global context, is revealed through the numbers: 95% of the businesses developed in Asia, the Middle East and Spain are controlled by families; in mature industrial economies, such as France and Germany, more than 80% of companies are domestically owned; in the US economy, marked by pulverized stock markets, 60% to 70% of commercial organizations are controlled by family groups (Vries; Carlock; Florente-Treacy, 2009, p. 9)<sup>2</sup>.

In Brazil, this reality is no different, given the fact that data from the National Department of Trade Registration indicate the creation, from 1986 to 2004, of approximately 8,915 million companies, and it is estimated, according to research by the Support Service for Micro and Small Enterprises of Ceará (Sebrae), that 90% of these are family businesses, giving rise to two million direct jobs in Brazil and denoting a significant contribution to the Gross Domestic Product (Prado, 2011, p. 9).

In addition, the Global Family Business Index, prepared by the Center for Family Business at the University of St. Gallen (2017, online), in cooperation with the Ernest Young Center of Excellence for Family Business<sup>3</sup>, by bringing together the 500 largest family businesses<sup>4</sup> around the world, provides strong evidence of the power and relevance of these

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<sup>2</sup> The authors, in order to achieve these numbers, consider a family business to be any business organization in which decisions and leadership are influenced by one or more families.

<sup>3</sup> Ernest Young serves as a global network of independent member firms providing professional audit, tax advisory and business advisory services. Alongside PricewaterhouseCoopers (PwC), KPMG and Deloitte, it is part of the group of the four largest accounting firms specializing in consulting and auditing in the world, the so-called Big Four.

<sup>4</sup> In the case of private companies, those in which the family controls more than 50% of the voting rights were considered family-owned. In the case of publicly listed companies, those in which the family controls at least 32%

organizations for the functioning of the economic machine<sup>5</sup>. The results for June 2017, its latest edition, bring 15 Brazilian companies to this list: JBS (27th), Odebrecht (37th), Andrade Gutierrez, (43rd), Banco Itaú (86th), Banco Bradesco (117th), Braskem (128th), Gerdau (136th), Votorantim (199th), Camargo Corrêa (290th), Marfrig (318th), Porto Seguro (351st), Globo (375th), Companhia Siderúrgica Nacional (401st) and Cosan (486th).

As pointed out, one of the greatest challenges faced by family businesses is the compatibility of the two dimensions involved – family and company – originally marked by antagonism: the latter is characterized by individualism and competitive spirit, while the former values the maintenance of relationships through union and harmony (Oliveira; Albuquerque; Pereira, 2012. p. 178). From this antagonism, the constant conflicts of interest glimpsed in the scope of family businesses arise, triggering the need to adopt effective mechanisms to manage and solve them.

## **2.1 Family businesses: diversity of concepts**

The search for a precise concept of family businesses has proven to be, over the years, a challenging task, but essential for the differentiation between these and non-family types. Numerous attempts to articulate the definitions of these organizations, both conceptually and operationally, have been made, justifying, in fact, the reason why several scholars are engaged in the revision of concepts, in the elaboration of attempts to consolidate the analyzed thoughts and in the proposition of new conceptions for family businesses.

The definition of family business must identify the singular character of these organizations, precisely because it is this condition – or the belief in it – that makes the management of these businesses a field susceptible to differentiation and study, as taught by Chua, Chrisman and Sharma (1999, p. 22). The unique character of family businesses, According to the authors, it is not represented exclusively by the fact that the members of a family own or manage a business, but by the pattern of ownership, governance, administration and succession that, materially, influences the objectives, strategies, structure and manner in which the firm is formulated, designed and implemented.

In a work dedicated to the planning of studies carried out on family businesses, Allouche and Amann (2000, p. 39-40) gather some questions, whose combination of answers would be able to promote the understanding of what family businesses are: What are the limits of the concept of family? Should a restrictive or extensive conception of such a concept be

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of the voting rights were considered family-owned.

<sup>5</sup> The Index found that the 500 companies together are responsible for an annual sale of 6.5 trillion US dollars, enough to be the third largest economy in the world, in addition to employing approximately 21 million people. Of these firms, 74% come from the United States of America and Europe, and 44% of them are owned by the fourth generation or more. Available at: [http://familybusinessindex. with/](http://familybusinessindex.with/). Accessed on: June 27, 2017.

adopted? Is the meaning of family business limited to single-family control or can it be extended to multi-family control? Since what moment can a company be considered family-owned? Should it be seen as such from the first generation of founders or only when there is a testamentary passage to the second generation? What is meant by control? Should it be understood as capital control? And in what proportions?

Thus, even in the face of the excessive plurality of approaches, it is perceived that the concepts most used by the doctrine, for the definition of family businesses, are able to satisfactorily encompass the answers to these questions. However, as already pointed out, they are numerous and marked by heterogeneity, since the parameters used to guide the reach of the formulations are quite varied. Thus, the following criteria are identified as the most used criteria to support the meanings of family businesses: ownership, control, transmission, company name, existence of subsystems, generation of entrepreneurs and mutual influence, sometimes only one being adopted, sometimes a combination of these (Alloche; Amann, 2000, p. 45). The initial systems, designed to expose the characteristics that distinguished companies as family-owned, defended the existence of two overlapping systems – family and management – endowed with rules, admission standards and their own value structure. According to this line of thought, the competition between both spheres, that is, between the family and business circles, would be the main responsible for the occurrence of conflicts between the members involved (Stol; Ferreira, 2006, p. 94).

The coexistence of these two systems – family and management – is admitted by most scholars on the subject, indicating that relativized powers are what make the family business a peculiar object and, therefore, distinct from non-family businesses. A sociological approach to the family as a system is adopted, whose key concepts come from the mutual influence of the components, hierarchy, limits, equifinality and *feedback* of this system (Davel; Colbari, 2000, p. 50).

This simple definition of ownership and management under the control of a business family<sup>6</sup>, according to Borges, Lescura and Oliveira (2012, p. 328), had its use reduced, pointing to an evolution of this field of examination. According to the authors, the preference of scholars for definitions linked to family succession and ideation, based on social or kinship notions, reveal denser and deeper dynamics, inherent to the very nature of family organizations.

In this sense, Leach (1999, p. 22-23) defends the argument that, with regard to the conceptualization of family businesses, overly rigid points of view should be avoided, since considering only participation in ownership or the composition of management often

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<sup>6</sup> Alloche and Amann (2000, p. 45) cite the works of the following authors to illustrate the adoption of management and ownership criteria for the definition of the concept of family business: Renato Tagiuri and John Davis, Stanley Cromie, Ben Stephenson and David Monteith, Wendy Handler, Joseph Astrachan and Thomas Kolenko.

emphasizes an inadequate perspective and leads to erroneous conclusions. By this understanding, it is taught that the recognition of the family business as such, through the most evident cases – relatives control the operations of the organization because they own more than 50% of the shares or because they occupy important positions in the management – cannot result in the negligence of the less evident cases, that is, those "[...] in which the firm's operations are affected by the family bond – a company in which the father-son, brother-sister, in-laws and cousins relationships have a significant impact on the future of the organization".

The definition proposed by Donnelley (1964, p. 161-162) brings seven factors that, if one or more are present, qualify a company as family-owned: I) one of the criteria for choosing the successor is determined by the family bond; II) the children or wives of the directors hold positions on the Board of Directors; III) the company's institutional values are identified with a family, either formally or informally; IV) the shares of the family members are exposed as a result of the company's reputation; V) the family members involved in the business they are compelled to keep their actions for reasons that are not only financial; VI) the *status* of the family influences the position held in the company; VII) the bond of each member with the company is defined by the chosen career.

The Austrian Institute for SME Research (Mandl, 2008, p. 13)<sup>7</sup>, in its report *Overview of Family Business*, indicates, after analyzing 33 European countries, that there is no single definition of family business applicable to each conceivable area, and there is, in fact, a wide heterogeneity of understandings used in socioeconomic research. To this end, the working group of the aforementioned Institute opted for a definition with multiple layers, indicating that a company will be family owned if: I) the majority of the votes are in the possession of the natural person(s) who established the firm, in the possession of the natural person who acquired the capital stock of the firm or in the possession of their spouses, parents, children or their heirs; II) the majority of votes can be direct or indirect; III) at least one representative of the family or a relative is involved in the management of the firm; IV) listed companies meet the definition of a family business if the person who established or acquired the firm (share capital) or their families or descendants own 25% of the voting rights arising from their share of the capital stock. In addition, the definition extracted from the work of Sciascia and Mazzola (2008) is pointed out, who, in the Italian context, carried out an investigative study of the effects of family involvement in ownership and management (respectively, *family involvement in ownership* – FIO – and *family involvement in management* – FIM) on the performance of the firm. According to the

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<sup>7</sup> The Austrian Institute for SME Research specializes in social and economic research focused on small and medium-sized enterprises (SME), offering studies and analysis of the structures and economic development of sectors and regions, in the fields of entrepreneurship, innovation and technology, the labor market, and the international economy. In addition, it promotes evaluations of projects, programs and public institutions, as well as offers a database on structures and development of sectors of the Austrian economy.

authors, companies are family when the members control the business, occupying management and ownership positions and, in addition, they establish that the FIO and FIM variables can be measured, respectively, by the percentage of equity held by the components of the company family and by the percentage of family managers.

Examining the Brazilian texture, it is clear that, despite the prominent place they occupy in the economic, political and social scenarios, companies of the genre studied are not foreseen by the Brazilian legal system as a specific type endowed with a defined conceptualization, that is, there is no exclusive legal characterization for this format<sup>8</sup>. Faced with this reality, Prado (2011, p.14) clarifies that family companies are constituted under the most diverse legal frameworks and have the most distinct characteristics, ranging from small or micro companies to business groups and conglomerates.

In fact, Borges, Lescura and Oliveira (2012, p. 323) elucidate the fact that, although the theme of ownership, as a more traditional view of family business, is recurrent in the definitions, the idea of family business from succession, although more restricted, is the one most used by national authors. For these authors, a greater interest in a concept linked to succession "[...] demonstrates a move away from the concept simply associated with property, evidencing a deeper and more complex interest in understanding the dynamics of these organizations" (Borges; Lescura; Oliveira, 2012, p. 323).

Following this sense, Leone (2005, p. 9) characterizes the family business as one in which succession is governed by the hereditary factor, without, however, disregarding the need for family members to participate in the ownership or management of the business and for institutional values to be linked to the figure of the founder or the family surname. Continuing along this line, Machado (2014, p. 237) indicates that the subjective element identified in family businesses is the intention to maintain family participation, while, as objective elements, there is the existence of a company and a family group.

Rounding off the most recurrent concepts, Prado (2011, p. 20) points out that the company is family when:

I) identifies with a family for at least two generations; II) succession and management are linked to the hereditary factor; III) the institutional values and culture of the company are identified with those of the family; IV) ownership and shareholding control are predominantly in the hands of one or more families.

Although it is recognized the mastery with which a large part of the doctrine proposes

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<sup>8</sup> Pimenta and Abreu (2014, p. 46) clarify that, "[...] even if they do not have a specific legal characterization in the Brazilian legal system, family companies are the object of analysis by the jurisprudence of the Superior Court of Justice, and institutes are applied to them that would not be applicable to the others. Among these institutes, they cite "immunity from seizure of assets owned by the company, recognition of legitimacy of the son of a partner of a family company to redeem foreclosed assets owned by the legal entity and possibility of partial dissolution of a closed family corporation".

standardized concepts for family businesses, intending, with this, to delimit the object of study, standardize the treatment granted to these organizations and identify the characteristics that distinguish them from non-family firms, this work chooses to understand the family business in a simplified way.

Thus, the understanding is adopted that the family organization necessarily involves three independent spheres, but overlapping with each other – family, property and management<sup>9</sup> – and is therefore understood, for the purposes of this academic experiment, as any type of power and business management that can be affected by family issues, especially with regard to the family's intention to bring new generations to the business<sup>10</sup>.

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### **3 Conflicts in family businesses and governance in the company**

Conflict is recognized as an integral part of the human condition itself, being, in fact, considered a true opportunity for change and, therefore, marked by intense dynamism. In the context of companies, considered dynamic and complex organisms, the reality is no different: conflicts are inherent to their nature and important for their development and survival over time.

This complexity becomes even greater when analyzing family businesses, because, in this scenario, the occurrence of conflicts is even more natural, often resulting from the confusion of roles and the mixture between business and family relationships. Although conflict situations can be predicted, they are not necessarily avoidable, and in fact a screening must be carried out. It is important to know the main molds and developments of these conflicts, to adopt an adequate mechanism for their resolution and management, ensuring efficient results for the business.

In this sense, in order to obtain a broader and less lacunate understanding of the nature of conflict and the way in which it is perceived, an analysis of the development of views of conflict by organizational theories is developed in this topic, as well as a study of the reasons for its intensification in family businesses, so that, Thus, the appropriate mechanisms for its resolution can be researched.

Peter Hall and David Sockie (2001, p. 4) defend the idea that the managerial structures and strategies adopted by each of these organizational systems are equipped with peculiarities, varying according to the context in which they are inserted.

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<sup>9</sup> The model of the three circles – family, property and business – will be covered in the following topic.

<sup>10</sup> It is important to highlight the idea that some authors, such as Carvalhosa (2008, p. 309-310), understand that companies formed by the reunion of families – multi-family families – cannot be considered as family-owned, because "[...] bring together distinct family groups, with the objective of carrying out common economic enterprises". This understanding, however, does not seem reasonable, because the number of founding families is not an essential element for its characterization, although the existence of only one is recurrent. In fact, for the purposes of this study, multifamily organizations are understood as family-owned, as they are characterized as a power structure or business management under the influence of family forces.

Regardless of the corporate type they adopt, it is common for family-owned companies to be governed by family principles and devoid of a professional administration. This is revealed, for example, by the absence of criteria to guide the entry of family members into the staff, by the lack of training of the family members who are part of it, or even by the lack of succession planning. These traits that link its image and management practices to basically family principles and values mean that, both internally and externally, the relationships developed are mostly informal (Viegas; Bonfim, 2016, p. 74).

By establishing assumptions through which organizations can be managed, governance emerges "[...] as a set of legal, cultural and institutional arrangements" (Blair, 1995, p. 3), which has as one of its scopes to remedy misalignments that have erupted in the business sphere, whether of interest or information, for example. Although there is no standardized definition for corporate governance, Correia and Amaral (2006, p. 47) point out that most theorists consider it "[...] as mechanisms developed for the company to be managed, directed and controlled in line with the interests of its *stakeholders*, that is, all individuals or groups that may affect or be substantially affected by the well-being of the company"<sup>11</sup>. It is important to highlight, as Tomazette (2014, p. 259) does, that "[...] In none of the corporate types used by family companies is there a great rigidity in the management structure, that is, the partners or shareholders end up having great power to decide how this management will be organized", being, however, essential that they take into account good corporate governance practices. The author also adds that compliance with the principles of governance<sup>12</sup> applies not only to companies that are part of the capital market, but also to all companies, due to the benefits they can create.

In the case of family businesses, one of the focuses of governance structures should be the separation between the family's personal affairs and institutional issues, seeking to avoid the confusion of roles and, consequently, the conflicts that it entails. In this sense, as an offshoot of corporate governance, there is family governance, focused on the management of family affairs and the relationship between the family and the company. Among the possible mechanisms of family governance, the following stand out: family meetings, family assembly, family council, *family office* and family protocol.

It is also necessary that the governance system provides for the adoption of a method capable not only of resolving, but also of managing the emergence of conflicts in this area. As already pointed out, the character of continuity of family relationships, imprinting the need to

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<sup>11</sup> According to Wald (2002, p. 55), corporate governance is the creation of the rule of law within a society, as it creates a system of control of the powers exercised within it.

<sup>12</sup> In the Code of Best Corporate Governance Practices, the Brazilian Institute of Corporate Governance (2015, p. 20), establishes that "the basic principles of corporate governance permeate, to a greater or lesser extent, all the practices of the Code, and their proper adoption results in a climate of trust both internally and in relations with third parties". The principles listed are: transparency, equity, accountability and cooperative responsibility.

investigate the hidden agenda of the parties through dialogue, makes mediation emerge as the appropriate mechanism to resolve the conflicting situations commonly that arise.

In order for efficient conflict resolution to occur, the prior contractual stipulation of a mediation clause or a mediation commitment is indicated, mitigating the harmful potential of conflicts. Thus, it can be foreseen by the terms of governance, the option for the performance of a lawyer will be strategic and useful to the company and family members, given the importance of his role, both for the formation of the legal business and for the diagnosis of the case and monitoring of the mediation process.

This contractual provision for mediation can work as a real incentive to change the company's culture and the behavior of family members, because the option for a mechanism that favors dialogue and collaboration between the parties promotes a non-adversarial culture, enabling the development of useful skills not only for mediation, as well as the performance of activities within the company.

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#### **4 Family governance as an important instrument for the separation of roles in the family business**

As family businesses grow, the complexity of family configurations increases, which directly contributes to the increase in the degree of complexity in the business sphere. It happens that, generally, the company does not grow in the same proportion as the needs of the heirs (Bornhodt, 2005, p. 93), making the adoption of formal mechanisms for coordination and planning of family aspects that influence business performance substantial, thus proceeding to the implementation of a family governance system.

The main proposal behind the creation of these instruments is to identify the personal and professional goals of those involved, formalize their commitment to the development of the company and assist in the creation of a shared perspective of the future among family members, both in the business and family spheres (Ward, 2011, p. 137). In this sense, the choice of which mechanisms will be implemented should be made consensually and transparently, by the family members, with support in the analysis of the stage in which the company is.

Adopting the proposal of Rodrigues and Marques (2013, p. 52), six distinct mechanisms are distinguished, which, to a greater or lesser extent, harmonize with the phases experienced in family businesses. These mechanisms are: family reunions, family assembly, family council, *family office* and family protocol. The adequacy and necessity of each of them are conditioned to the degree of complexity assumed by the company and, in addition, the creation of one does not imply the exclusion of another, since they are coexisting mechanisms.

As mentioned, the adoption of each of these expedients is conditioned by the level

of complexity experienced by the firm, so that the family governance structure must not only evolve with the company's own development, but truly undergo transformations whenever the institution experiences transitions, following and adapting to the new context of the company (Lien; Teng; LI, 2015, p. 3).

#### **4.1 Family Reunions**

Family reunions represent the initial phase of the governance structure, thus adapting to the first years of family businesses, when families are still made up of only one cell. These meetings are informal and unbureaucratic conversations, with a pre-established frequency, in consensus, by the family members, and may occur in typical situations of conviviality, such as during joint meals. Through conversation and constructive discussions, hopes and ideals for the future of the family are created, contributing to the formation of common values and goals and representing the first step in business and family planning. In addition, even before any formal planning, this communication channel between family members allows the education of younger people on business-related issues, such as, for example, knowledge of the company's history, the types of leadership skills sought and the conditions to join the company (Ward, 2011, p. 140). The informal conversations of these meetings create a basis of organizational and family culture that, in the future, will prove to be essential for the survival of the company, ensuring continuity in the family (Weiste, 2013, p. 17-18).

After the initial moments of creation and solidification of family businesses, the entry of children brings a new configuration to this panorama, requiring a change in the family governance structure employed. From this stage, the importance of implementing more complex mechanisms is overstated, initiating a new cycle of planning and organization, as shown below.

#### **4.2 Family Assembly**

The *family assembly* or *family forum*, more formal than the meetings, guarantees the space for all family members to expose and debate, preferably, personal or family issues that are not directly related to the company, but that, indirectly, may affect it. Subjects commonly dealt with in this area include marriages, divorces, personal financial difficulties, health problems that lead to the person's distancing from their position in business (Prado, 2011, I. 23), difficulties in relationships with parents, and children's doubts about their career options.

The list of activities of the family forums includes presentations made by managers,

whether or not they are members of the family, for example, to discuss, without making decisions, the direction the company is taking (Davis 2001, on-line); the performance of basic training in the main competencies sought by the company; and the promotion of social activities to increase family identity; cohesion and trust among relatives (Villalonga *et al.*, 2015, p. 649). On this occasion, family members also receive updates related to the company, which can be, for example, the report of achievements obtained or the communication of changes in the physical space.

Thus, as Scalzilli and Spinelli (2014, p. 410) point out, the main function of the family assembly is to promote good coexistence among family members and ensure the effective application of the principles and norms adopted in the family protocol, which will be addressed later. In the same sense, when pointing out family governance guidelines, the International Finance Corporation (2018, p. 29) expresses the notion that the holding of the family meeting contributes "[...] to avoid potential conflicts that could arise between family members due to unequal access to relevant information or other resources."

As a rule, these forums take place once or twice a year and are open to all family members, regardless of their relationship with the company, although it is recommended that a minimum age criterion be established for participation (Zellweger, 2017, p. 103). Although they are not rigid structures, Prado (2011, l. 24) recognizes the importance of these assemblies having a formal regulation, "[...] even if minimal, such as the form of convocation and the frequency of the meetings, place of meeting (which should not be the company), matters and quorums for deliberation, drafting and filing of minutes, disclosure or not to non-participating family members, etc."

Davis (2001, on-line) teaches that, when the family is composed of 15 or more adults, during the family forum, there may be deeper discussions about the company, and it is even possible to create plans and policies. For the author, when the family grows beyond this point, benefits are seen in the creation of a *family council*, whose members, as a rule, will be elected by those who participate in the assembly.

### **4.3 Family Council**

The *family council*, also called *the family supervisory board* or *the internal council*, is a deliberative body, generally provided for in a corporate agreement, whose purpose, after identifying the interests and defining the presence of the family members in the business, is to protect their assets and prevent issues of an exclusively family nature from interfering in the management of the business (Bornholdt, 2005, p. 95).

Its institution, as expressed, occurs when the degree of complexity of the issues, marked by the large number of family members, requires a broader and more organized

representative body of governance. In this sense, the implementation and criteria used for deliberations in the internal councils may be provided for in the corporate agreement. Still, however, it is recommended to draw up a regulation, either to suppress the lack of agreement or to complement it (Bornholdt, 2005, p. 101).

The peculiarities of each company have a direct influence on the composition, structure, and functioning of supervisory boards, thus there is no standard configuration for all organizations (International Finance Corporation, 2018, p. 30). As established in the Governance Manual for Family Businesses prepared by the International Finance Corporation (2008, p. 30), the *family council* must meet two to six times a year and adopt a manageable size, from five to nine members, who will be elected by the *assembly*, based on their qualifications and availability to carry out the duties of the body.

In its Code of Best Practices, the Brazilian Institute of Corporate Governance (IBGC)<sup>13</sup> (2015, p. 36) recommends that family businesses implement a *family council*, conceptualizing it as a "[...] group formed to discuss family issues and align the expectations of its members in relation to the organization". It is emphasized, based on this document, that the activities of this body are not to be confused with those exercised by the *board of directors*, because the latter is solely focused on the organization.

Also, according to the IBGC Code of Best Practices (2015, p. 39), the board of directors is defined as the "[...] Collegiate body in charge of the decision-making process of an organization in relation to its strategic direction. He plays the role of guardian of the principles, values, corporate purpose and governance system in the organization, being its main component". In addition, it is the responsibility of the board of directors, according to the best interest of the company, to monitor the board of directors, acting as a link between it and the partners<sup>14</sup>.

As a competence of the board of directors, among many pointed out by the IBGC

<sup>13</sup> The Brazilian Institute of Corporate Governance (IBGC) "is an organization exclusively dedicated to the promotion of corporate governance in Brazil and the main promoter of practices and discussions on the subject in the country, having achieved national and international recognition" (Steinberg, 2003, p. 145).

<sup>14</sup> When talking about a board of directors, it is common to come up with the image of a body without much importance, characterized by informality and composed of the oldest partners or unqualified family members. In fact, when the Brazilian economy was still incipient, the performance of this Council was considered mere compliance with legal formalities and the choice of its members was used to allocate more important relatives, "namely those who had a large participation in the capital, but did not have the interest or the ability to manage, understanding nothing about the business and, much less, on any economic or business issue" (Mamede; Mamede, 2012, p. 174). It turns out that the evolution of the Brazilian economy and market, added, among other factors, to governance activism, implied the need to give due understanding to the role of the board of directors and its members. In this sense, over the years, they ceased to be seen as fraternizations between "sometimes distant relatives who celebrated an administration they did not know" (Mamede; Mamede, 2012, p. 174), so that, currently, active, useful and efficient boards of directors in the performance of their responsibilities are considered vital for the good management of the company (Bernhoeft; Gallo, 2003, p. 107). The IBGC (2015, p. 43) recommends an odd number of directors, from five to 11, who will be elected by the partners – it is indicated that it should be formed mostly by independent directors, hired through formal processes.

(2015, p. 40-41), the following stand out: I) discussing, formatting, clearly defining the company's purpose, principles and values; II) preserve and, if necessary, promote transformations in the company's culture and identity; III) strategically directing and monitoring the board of directors in the implementation of strategic actions; IV) strengthen organizational competencies, adding new ones or reformulating them to face challenges; V) to plan the succession process of the board members, the chief executive officer and the executive board; VI) to define the remuneration and incentives policy of the Executive Board; VII) ensure that the board of directors develops a policy for attracting, developing and retaining talent that is aligned with the strategic needs of the organization; VIII) periodically review the organization's governance practices. Thus, the distinction between the *family council* and the *board of directors* is clear: unlike the latter, the former is not part of the company's management system, but works with the scope of organizing the family's expectations in relation to society. It is intended, therefore, with the family council, to make the company a factor of aggregation and strengthening of family ties, contributing to avoid possible conflicts between interests make it impossible to live with the family and, consequently, harm the company's objectives.

#### **4.4 Family Office**

As with other family governance structures, the foundation for the creation of the *family office* finds shelter in the management of the family sphere. In the general context, it can be understood as a professional organization dedicated to the management of personal wealth and the life of wealthy families (Amit *et al.*, 2008, p. 3). When seen from the perspective of family businesses, the *family office* is conceived as the administrative structure that monitors investments of the family linked to the company and that provides different services to its members (Jaffe; Lane, 2004, p. 95).

With the aim of centralizing the management of a significant family patrimony (López; Vázquez; López, 2011, p. 44), the *family office* is responsible for carrying out various functions, such as counseling, financial planning, and the definition of family governance strategies and structures. As specific tasks of this body, the administration of tangible and intangible assets, the efficient allocation of resources, the control of values, coordination of philanthropic activities, tax advice, maintenance of seasonal residences, training etc. stand out, among others.

Werner (2011, p.116-117) observes that, as a general rule, the performance of these services is outsourced, and may, however, depending on the company's structures, be carried out by its operational force. In addition, the author highlights some advantages of adopting a *family office*: the personalization of the services provided, according to the needs and profile of the family;

the confidentiality of the tasks performed; the consolidation of family values and mission; the strengthening of the separation of family and business assets; and cost control. The demand for a *family office* usually originates from the need to adopt "[...] managerial and accounting controls of the various family members, individually or integrated, aiming at tax and succession planning, in addition to other endogenous demands of the family" (Werner, 2011, p. 116). Its administration is under the responsibility of the family council and, when it is constituted, it is necessary to select the family members who will work in it, as well as to define their remuneration and indicate the decision-making process chosen when it is necessary to some change in its structure.

#### **4.5 Family protocol**

The family protocol, according to Tapies and Ceja (2011, p. 1), is a written document that contains a set of rules and procedures that regulate the relations between family and company. When creating a family protocol, the family strives to identify and explain the main reasons for its commitment to the company, the philosophy that inspires the family and its relationship with the business (control, ownership, management, etc.), the objectives possessed by the family and the firm, as well as the rules that regulate the relationship between these two systems (Gallo, Tomaselli, 2006, p. 298).

The elaboration of the family protocol, according to Furquet (2013, p. 114), is an opportunity for family members to initiate a dialogue and communication about their common project: the family business. For this reason, the family protocol is not only a cod-chain of legal agreements, but a true process based on frank and honest communication between the various members of the different family generations.

The success of a family protocol depends on prior reflection, where interests, motivations and aspirations common to all, as well as to each of the members of the business family, are listed. With a substitute for this reflection, which is indispensable, the business family is able to reach a consensus on principles of common action and in accordance with the family philosophy, which is the only way that can ensure the subsequent successful and effective application of the rules and criteria that have been used.

Among the reasons for its elaboration, Cardona and Balvín (2014, p. 254) would invent the following: maintenance of family cohesion and harmony, functioning as a necessary connecting element between the intricate elements in family businesses; it allows for an examination of conscience by the family to determine its objectives; reconciles family and business interests; establishes a succession plan; regulates the assets, avoiding the confusion of the private property of the family members with the company's assets; and facilitates business management.

The first stage of elaboration of a family protocol is the diagnosis. At this stage, it

is up to a specialist or a group of professionals to conduct individual and collective interviews with family members, in order to analyze the family and the company and prepare a report with the conclusions found. During this period, among the relevant sources, the company's results, the strategy adopted, the legal status of the firm, the characteristics of the family, the existence of capable successors and the openness of the generation in opening the way to the youngest.

In the second phase, called development, the problems that families go through are identified and policies are articulated to deal with them, with the main objective being the participation of family members in the decision-making process (Botero *et al.*, 2015, p. 226). To this end, at this stage, it is appropriate to hold debates spaced out over a period of six to 18 months, seeking to address the most diverse themes, possibilities and their implications. As it exposes the possibility that a consensus is only apparent, masking false agreements, it is advisable to hire a specialist – the importance of the lawyer's performance for the implementation of the governance system is reaffirmed – to prepare the protocol using questionnaires.

At the time of implementation, when the protocol is already prepared and signed, there is a need for the family to understand how to use the protocol in their decision-making procedure. In the event that it is foreseen that "frankness" is a family characteristic, family gatherings should be guided by this characteristic; If there is a forecast of holding the Board of Directors every two months, it must do so. Next, according to Botero *et al.* (2015, p. 226), the protocol is monitored and evaluated, which consist of: using the protocol and evaluating how it influences situations that require decision-making, followed by the evaluation of what works and what needs to be changed.

As Gallo and Tomaselli (2006, p. 298-299) explain, the typical structure of a family protocol can be divided into two sections. The first contains the foundation of the family's common project regarding the future of the company and creates the space for the rules that will be defined and implemented. Its four pillars constitute the common vision of the family's future, namely: reasons to continue as a family business and maintain the family's values; the type of relationship that one wants to maintain with the business and, consequently, the type of relationship that is intended to be maintained in the future; realistic expectations of family members regarding the company; conditions and circumstances that will determine the end of the family business.

In the second session, the norms and rules for preserving trust between family members are included, giving rise to consistency and predictable behaviors in the relationship between family members and the business, in accordance with what was established in the previous session. These regulations are generally related to family work, the exercise of power, both in the company (governance and control bodies, voting agreements, etc.) and in the relationship between the company and the family (Family Council, Family Assembly, etc.), and,

among others, matters related to money (purchase and sale agreements, dividend policy, philanthropy, etc.).

The elaboration of a family protocol is very similar to the mediation procedure. This is because the finalization of the family protocol, as well as the creation of an agreement, does not represent the only purpose of these processes. In fact, both in mediation and here, the main objective is to promote dialogue between the parties, allowing them to get to know each other better and to establish a friendly relationship based on consensus. The scope of these structures and procedures, as explained in relation to the family protocol, requires the adoption of collaborative behaviors based on dialogue, allowing the recognition of one family member by the other and the identification of common interests and objectives. In fact, the company gains a lot from the development, both on the part of each of its personal assets and by the various sectors, of a culture based on the principles of mediation, as will be shown below.

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## 5 Culture of mediation: skills development in the family business

The benefits brought by family governance structures can be enough to motivate companies to adopt them. The change of the people who make up society, however, is a more complex task. As Steinberg (2003, p. 24) elucidates, the first transformation of governance must occur in people and in their way of acting, whether in the face of issues strictly related to business or in relation to their position before other subjects.

In this sense, for the adoption of governance systems to occur efficiently, it is necessary that the personal asset develops competencies inherent to the business activity, thus promoting the training of those involved with the business activity. These skills, among which complex problem solving, critical thinking, creativity and communication stand out, are identified with characteristics that are indispensable to the exercise of mediation. In fact, the development of these skills is linked to the quality of the attitude of those who make up the family business, allowing them a less adversarial, more analytical and more dialogical position.

In 2013, Accenture, a leading company in the field of information technology and management consulting, conducted a survey – *Skills and Employment Trends Survey: Perspectives on Training* – whose objective was, through interviews with 400 executives of large companies in the United States, family or not, to identify and analyze global trends in hiring, team building and training strategies. Through this study, it was revealed that most companies face difficulties in finding professionals trained with the skills they are looking for, thus failing to fill idle vacancies<sup>15</sup>.

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<sup>15</sup> This phenomenon, in which the supply of vacancies is higher than the demand, since the candidates do not have the skills sought by employers, is called *skills gap*. According to the research under analysis, companies face serious consequences arising from this phenomenon, such as loss of market share to competitors, reduced profits, decreased

It was also found that 72% of the executives interviewed consider training to be one of the best modalities to develop the skills essential for the success of companies in the current scenario and that 51% of the participating companies intend to increase the investments directed to this training. As essential skills for professionals, the companies interviewed indicated the following:

Graph 1 – Skills most sought after by companies



Source: Accenture (2013).

In the same context, *The Future of Jobs survey*, conducted by the World Economic Forum in 2016, revealed that, in 2020, 35% percent of the skills that are currently considered important for professionals in companies will have been modified. These changes, according to the study, represent the results of the Fourth Industrial Revolution, characterized by the fusion of technologies, blurring the lines between the physical, digital and biological spheres and causing a disruption in existing structures. As the 10 skills considered most important, the following stood out:

Table 1 – Ranking of skills in 2020.

TOP SKILLS IN 2020  
(NUMBER OF RELATIVES = POSITION OCCUPIED IN 2015)

01	Complex Problem Solving (1)	06	Emotional intelligence (-)
02	Critical Thinking (4)	07	Decision Making (8)
03	Creativity (10)	08	Service Orientation (7)
04	People Management (3)	09	Trading (5)
05	Interaction with others (2)	10	Cognitive flexibility (-)

Source: World Economic Forum (2016).

consumer satisfaction, and delay in the development of new products and services (Accenture, 2013, p. 2).

Through the analysis of the results obtained in these researches, it is perceived that the skills pointed out as most necessary for professionals today, as well as those indicated as trends for the next three years, are identified with inherent and indispensable characteristics for the exercise of mediation.

Therefore, when considering the scope of family businesses, it is necessary to recognize the importance of professionals, especially family members, developing these skills, inherent to the role of mediator, both to increase the company's performance due to the training of the company's members, and to develop a less adversarial and more cooperative culture.

### **5.1 Complex problem-solving and critical thinking**

A study conducted by Forbes in 2013 listed critical thinking and complex problem-solving skills, respectively, as the first and second most necessary or even indispensable skills for the proper functioning of organizations. In the same sense, these two competencies were highlighted by the World Economic Forum (2016) – *The Future of Jobs* – as the two trends that will be most requested by companies in 2020. In turn, Accenture (2013) – *Skills and Employment Trends Survey: Perspectives on Training* – emphasized the importance of the ability to solve complex problems, showing it as the most prestigious skill in the professional field.

Joachim Funke (2012, p. 682) indicates that the resolution of complex problems occurs when, through cognitive and behavioral activities, the barriers between a given initial state and the desired goal are reduced. According to the author, in contrast to the resolution of accessible problems, in complex cases, the initial state, the objective sought and the barriers change dynamically over time, sometimes being hidden or unknown. In this sense, it is said that an individual is endowed with the ability to solve such demands when he or she is able to use cognitive, emotional and social resources, as well as his or her knowledge, to find a viable and efficient solution to the situation.

According to Raya Bidshahri (2017, online), the foundation for solving complex problems is directly related to the ability to think critically. This is because, before an individual can solve any adversity, he must first be able to analyze the situation critically and question its roots. In contemporary society, however, it is observed that there is a prevalence, at different levels of education, of the production of instantaneous answers about the formulation of questions, whose objective would be to identify the reasons behind each question and, from there, propose efficient solutions.

Critical thinking is recognized by Giedre Vasiliauskaite as the most important skill of the century. Thus, it occurs because the professional who thinks critically is able to communicate clearly, to formulate the correct questions, to identify the real problem behind the

issue, and, in addition, has the ability to look at situations from different perspectives, constructing thinking in a structured way.

It should be noted that the new management models value the individual differences of those who make up the companies, so that work teams are usually divided based on the different skills and knowledge of each subject. Following this thought, Idalberto Chiavenato (1999, p. 417) explains that cross-functional or multifunctional teams consist of the grouping of employees from various departments, with the aim of solving mutual problems, working together to carry out projects or specific tasks.

In this context of multidisciplinary and organization based on specific work, it is perceived that those who are in charge of the teams will not always be able to offer all the information that the other members of the team seek, revealing the need for all members of an organization to be able to think critically, being, therefore, able to seek, by themselves, the answers to their questions and to propose efficient solutions to achieve the desired objectives.

The ability to think critically, to seek why the problem has occurred and to establish criteria for weighing what should or should not be considered, is the foundation of the culture of mediation. In this sense, for example, Vezzulla (2003, p. 117) asserts that "to be a mediator is to recognize that one does not know how to. Similarly, Almeida (2014, p. 75) points out that questions – the basis of critical thinking – are the most significant intervention of self-composition mechanisms, as they lead to the creation of ideas, reflections and information, which are the support of the mediation procedure.

Critical thinking, according to Nosich (2001, p. 5-6), develops through the following stages: a) questioning the essence of matter; b) search for answers to such questions, through argumentation; c) belief in the explanations found. These three phases are naturally identifiable with the steps followed by the mediator professional during the mediation, who should promote the approximation of the parties so that they recognize the conflict and, then, with their awareness stimulated, identify the essence of this situation and achieve a new coexistence and new meaning for the relationship, culminating in a harmonious agreement.

The imperative that the mediator has critical thinking and problem-solving skills is quite clear when Sales (2004, p. 90) discusses the need for the mediator to be able to recognize human confusions and then develop techniques to deal with this insecurity. According to the author, the mediator must carry out the work of listening and possibilities of approach to discover the real interests of the parties, as well as to disarm the elaborate discourse of the client prepared to fight, formulating questions with a liberating effect, that is, capable of producing greater information and details, expanding the view of the problems.

The idea is highlighted that, by developing the skills discussed here, people learn to see other biases and to identify false arguments and inconsistencies of thought, which, in the context of family businesses, proves to be extremely important. These characteristics are

essential to ensure the proper functioning of these organizations, since they enable family members, constantly exposed to a large flow of verbal information, to manage and critically analyze the content, before simply absorbing it.

## 5.2 Creativity and communication

While the 2013 Accenture report places creative thinking in seventh position, the World Economic Forum study indicates this skill as the third most sought after skill in professionals in 2020. In addition, in a 2012 survey conducted by the American Association of Management – *Critical Skills Survey* – creativity and innovation emerged in fourth position on the list of skills most sought after by organizations, being preceded by critical thinking, communication and collaboration, in that order.

It is important to highlight, as Levitt (2002, on-line) does, the notion that creativity and innovation are related, but not confused. The latter corresponds to the implementation of the ideas produced by the former, so that, when the former is not well managed by the companies, the chances of developing successful innovations may be reduced.

It so happens that, given the speed with which changes currently occur in the organizational context, innovation – a consequence of the creative process – represents a prerequisite for success and even, one could say, for the very survival of business (American Management Association, 2006, p. 2).

Creativity represents a necessary means, both for the mediator and the parties involved in the mediation process, as it allows them to develop the ability to find innovative and previously unseen solutions to the problems presented. Conflict, in these cases, should be used as the key to open the creative potential of those involved in the mediation.

The mediator has the human being as the raw material of his work, so that he must be in continuous learning. By recognizing the complexity of the world in which he lives and, especially, by identifying the depth of the conflicts faced by the parties, the mediator must act as a dialectical being, that is, he must admit third possibilities, analyze the multiple and varied aspects of the divergence and not limit himself to resolving the dispute from the point of view of the legal norm.

As Pligher (2007, p. 92) teaches, the search for a better perception and definition of the *status* that is being mediated requires from the mediator a flexible attitude that is open to diversity and ambiguities, and it is necessary to give space to the social, cultural and subjective dimensions of the parties, which refers to the characteristics of the creative person, which are: tolerance of ambiguity, absence of rigidity in behaviors and thoughts, confidence in feelings and perceptions, search for self-realization, adaptation to the environment, search for continuous organization of the personality, among others.

In the same way, communication will be involved in the mediation to the extent that the search for these solutions and the recreation of contexts enables the expansion of affective, cognitive and action territories. This search for new possibilities, redefining problems, outlining perspectives, expanding practices and resignifying situations, conforms a communicative and creative process inherent to the mediating activity.

In this way, Fabiana Spengler (2012, p. 39) establishes that the main challenge faced by mediation is not to give rise to warm and cozy relationships, conflict-free societies or a harmonious world order, but, instead, its main challenge is to find mechanisms that enable a communicatively peaceful coexistence. Thus, dialogue is the main work instrument of the mediator, who must be able to open the conversation, so that the parties in dispute have space to express their respective positions.

In the organizational sphere, as Mello (2010, p. 200) establishes, communication has the potential to become an instrument and also an intelligence process, a source of value generation and competitive advantage. As it permeates all organizational dimensions – human, economic, market, cultural and social – it becomes inextricably linked to corporate performance as a whole. Dialogue promotes mutual trust among those who work together, and the basis of this trust is transparency, which, according to Tapscott and Ticoll (2005, p. 28), is constituted by open, honest and direct communication.

When communication skills are not developed satisfactorily, informational asymmetry is created, resulting in conflicts between the members of the company. Given the complexity of the mix between family and business, it is essential to develop communication skills, as it allows the formation of truly democratic environments, which overcome dialogue and allow the intersection of different points of life, between divergent worldviews (Sabbatini, 2016, p. 76).

Thus, the ability to solve complex problems, critical thinking, creativity and communication are important skills, both for a good performance of the company, through the change of attitude and perception of the people who compose it, and for the development of a culture of mediation. Training in these skills can be promoted, for example, by family governance bodies, with the proper competence to carry out training, such as, for example, the *assembly or the family council*.

It is emphasized that the development of skills is important for all generations and for all family members, because even those who do not work in the company can benefit from the adoption of a more cooperative behavior model, thus reducing the emergence of conflicts. In addition, encouraging this friendly and professional attitude allows the new generations to be prepared for their entry into the company, reducing the chance of damage caused by the lack of professionalization and training.

## 6 The mediation agreement as an instrument of governance

Mediation, as already expressed, is an appropriate mechanism for resolving problems arising within the scope of family businesses, ensuring a quick, mutually beneficial, less costly and more efficient response for the parties. Its function, however, is not limited to the moment after the outbreak of conflicts. In fact, its principles and techniques work as a true framework for the performance of the professionals involved, especially family members, who are the main parties involved in conflicts, given the nature of society. In this sense, the implementation of family governance structures and the development of competencies inherent to the non-adversarial culture allow companies to experience a different way of acting, acting, in the face of conflicting situations or the possibility of their occurrence, in order to seek aggregating and beneficial solutions for all parties. It is, therefore, essential that autocratic attitudes based on individualism give way to participatory culture.

Among the changes necessary for the implementation of the culture of mediation, there is the need to transform the legal space of companies. It is necessary that the culture of litigation be replaced by the search for consensus. Thus, as Levy (2013, p. 160) explains, it is necessary that these sectors are not limited to the execution of their routine activities of consulting, advising and legal directions, but that they act with an open mind, recognizing the importance and adequacy of the various vehicles available for conflict management, adapting to the purposes of governance and exercising the necessary competencies for the twenty-first century.

Thus, the option of family businesses to have a legal sector, which bases its performance on the principles of mediation, is undoubtedly important for its proper functioning and, at the same time, constitutes a good Corporate Governance Practice. This is because, among the functions of these professionals, there are: the elaboration of their statutes, and they may, from their formation, choose the mechanism that will be used for the resolution of disputes; the creation of a private mediation agreement, either through a mediation clause or commitment or through the use of staggered clauses; the analysis of the specific case and the indication to customers of the most appropriate procedures for the situation; assistance in the choice of mediator; and the monitoring of the mediation process.

The premise for the use of mediation is the mutual willingness of the parties to find, through cooperative attitudes and active dialogue, guided by a mediator, a win-win resolution to the conflict. As already mentioned, this mediation process can be developed both in the judicial sphere and in the private sphere, always privileging the private autonomy of the parties.

Although the option for private mediation is not conditioned to the existence of a mediation agreement, Arnaud Stimec (2007, p. 139) recommends the adoption of one, because, by foreseeing and outlining the legal contours that will be adopted during the

procedure, it guarantees greater legal certainty to the parties involved. This mediation agreement is understood as the contractual provision signed between two or more capable persons, establishing that they undertake "[...] to participate in a mediation procedure to try to amicably resolve a conflict that deals with a negotiable right, existing or that will exist between them, prior to state or arbitral judicial protection" (Levy, 2013, p. 178).

Even if there are positions in the opposite direction<sup>16</sup>, it is decided to classify the nature of mediation as contractual<sup>17</sup>. This is because, as Walsir Rodrigues Júnior (2007, p. 83) does, "[...] it comes from the agreement of wills of the interested parties, who choose a mediator to assist them in the solution of the conflict, therefore, it creates obligations for each of the participants, such as, for example, the payment of mediation expenses and mediator's fees". This contract may be of two different types: mediation clause or mediation commitment.

The mediation clause, unlike the courtesy clauses<sup>18</sup>, is not a simple range of recommendations to the parties, but is, in fact, "[...] of a true obligatory legal relationship by which the parties undertake to submit any conflict that may arise between them, to mediation, as a means of attempting an amicable settlement". (Levy, 2013, p. 185). Therefore, through this clause, the parties assume the obligation, in the event of the occurrence of a conflict, to resort to a third mediator, before referring to a jurisdiction, whatever it may be (Lascoux; Tavel, 2009, p. 275)<sup>19</sup>.

In fact, the agreement of a mediation clause proves to be useful in the business

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<sup>16</sup> As Fernanda Levy (2013, p. 178) explains, the first questions regarding the mediation agreement concern its legal nature, whether jurisdictional, jurisdictional equivalent or contractual. For the author, "[...] Certainly, mediation does not have a jurisdictional nature, because [...] the mediator does not apply the law and decides the conflict in substitution of the will of the parties. Although through the mediation agreement the parties can reach the settlement of the conflict, mediation does not aim to state the right, conferring, through a third party, an imposed decision". Ivan Ruiz (2003, p. 179) states that "[...] As mediation and jurisdiction can serve the same purpose, as to their effects – social pacification – it is understood that, at least in this regard, mediation functions as a jurisdictional equivalent". In line with what is defended in this work, that is, with the contractual legal nature of the mediation agreement, Fernanda Levy (2013, p. 180) states that "[...] Although in a broad sense the legal nature of mediation can be considered as a "functional equivalent" to the jurisdictional function, because the two have the same primary function of social pacification, the true essence of the mediation agreement is contractual, as it originates from the meeting of wills that seeks legal effects".

<sup>17</sup> Two distinct positions are distinguished regarding the breadth of the concept of contract: one broad and the other restricted. According to Orlando Gomes (1990, p. 10), in this first sense, "[...] the idea of contract applies in all branches of Law and encompasses all legal figures that arise from the concurrence of wills, whatever their modality or effectiveness". In the restricted sense, the author points out that, "[...] in a more limited sense, the concept is reserved for legal relationships of a patrimonial nature that gravitate in the orbit of the Law of Obligations". In this work, the first meaning exposed is adopted, because the content addressed in the mediation agreement may sometimes contain content of an off-balance sheet nature, which, however, according to the broader concept of contract, would not be able to refute its contractual legal nature.

<sup>18</sup> According to Fernanda Levy (2013, p. 168), "[...] A courtesy clause is considered to be the provision by which the parties stipulate that they will undertake amicable talks, before seeking other available means of dispute resolution, to resolve conflicts that may arise related to the contractual relationship existing between them. As an expression of cordiality between contractors, they refer to rules of good practice and politeness and, in this sense, are called courtesy. It is, in fact, a general rule of good coexistence, a way of acting that should permeate all relationships, legal or not, to allow that, in the face of interpersonal differences, it is possible to dialogue amicably and in true good faith".

<sup>19</sup> In the same vein, the Quebec Institute of Mediation and Arbitration (2012) defines that a "[...] An arbitration clause is a clause whereby the parties agree in an agreement, from the moment it is signed, to submit to mediation or another method of conflict resolution all conflicts arising from its application. This means that the parties foresee in advance that disputes that may arise between them must first be submitted to mediation, before any recourse to the court" (Translated).

environment, especially in family businesses, as it prevents practical and peculiar conflicts of their nature from being automatically taken to the decision of a third party, judge or arbitrator, thus avoiding the binding of the parties with decisions not valued in the exact measure of their interests. In addition, as Patrícia Fuoco (2015, p. 280) explains, when still there is no conflict established, "[...] the contracting parties are more susceptible to discussing appropriate ways to resolve any conflicts".

Confirming this understanding, a survey conducted in 2011 by Cornell University's Scheinman Institute for Conflict Resolution, in conjunction with the International Institute for Conflict Prevention & Resolution and the Straus Institute for Dispute Resolution, revealed that, for more than half of the companies interviewed, the main stimulus for the use of alternative dispute resolution mechanisms is the existence of a prior contract.

In this sense, Fernanda Levy (2013, p. 187) states that "[...] the mediation clause is autonomous in relation to the main contract in which it is inserted, that is, the invalidity of the contract does not necessarily lead to the invalidity of the mediation clause, under penalty of having tainted the development of its function, that is, to lead the parties to mediation". It should be noted, however, that when the contract is invalid, the clause will also be invalid, since, deriving from the autonomy of the parties and being a legal transaction<sup>20</sup>, the validity requirements expressed in article 104 of the Civil Code apply to the mediation clause, which are: to be entered into by a capable person; have a lawful, possible, determined or determinable object; obey, precisely or not, the defense in law. The mediation clause must include the qualification of the parties, the conflicts that will be resolved through mediation, whether it will be *ad hoc* or institutional, the criteria for choosing and replacing the mediator, the parameters used and the duration of the procedure, the place and language adopted during the sessions, the participation of lawyers and other specialists, confidentiality agreement and its limits, division of costs between the parties, the ethical limits of the mediator's performance, the possibility of comediation and, among other things, others, the provision for taking urgent measures (Levy, 2013, p. 188-189).

It is interesting to highlight the fact that the obligation of this clause is limited to attendance at a first elucidative meeting, even if the parties decide to decline their participation in the next moment<sup>21</sup>. In view of this reality, Fuoco (2015, p. 281) indicates that these contracts,

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<sup>20</sup> According to Marcos Mello (2007, p. 153), "[...] legal transaction is the legal fact, whose core element of the factual support consists of a conscious manifestation or declaration of will, in relation to which the legal system provides people, within predetermined limits and of varying amplitude, the power to choose a legal category and to structure the effective content of the respective legal relations, as to their emergence, permanence and intensity in the legal world".

<sup>21</sup> "A prior mediation or conciliation clause can be analyzed as to its contractual effectiveness and be constituted by two obligations. An obligation of result as to the origin, that is, it gives rise to the need to institute a mediation procedure, determining that the parties are proactive in appointing the mediator or conciliator, that they provide for the rules of the conciliation procedure, that they take steps to assist the mediator or conciliator, to provide necessary documents, to designate work meetings, etc. And, once mediation or conciliation is instituted, to seek with loyalty and good faith a solution to the conflict that derives from the main contract, having a constructive attitude,

establishing the use of mediation, can "[...] It also works as a real incentive for a change in culture, since it binds the parties to participate in an elucidative meeting, when there will be the first contact with the Institute".

The mediation commitment, on the other hand, is signed when there is already a conflict and the parties agree to submit it to the mediation procedure. Thus, Caram, Eilbaum and Risólia (2006, p. 416) say that this commitment "[...] implies that the parties have accepted the existence of the conflict, that it is difficult to resolve it by themselves, and that they have requested the intervention of a third party with knowledge, not about the content of the dispute, but about the conduct of the process"<sup>22</sup>.

In cases where there is already a mediation clause, the commitment will not be mandatory, but will serve to confirm the willingness of the parties to take the commitment to mediation. In cases where there is already a judicial proceeding in progress, taking advantage of the possibility of suspension provided for in article 265, item II, of the Code of Civil Procedure, the parties may sign the mediation commitment by term in the records or by private instrument, which must be accompanied by the request for suspension of proceedings.

In this case, as stated in article 265, § 3, of the Code of Civil Procedure, the suspension of the proceedings will be limited to a period of six months, and the parties will be allowed, at any time, to conclude the mediation procedure, regardless of whether an agreement is reached. When no consensus is found, the process will return to its normal course, being taken to the judge. Also, when an agreement is drawn up, article 269, III, of the Code of Civil Procedure is established, ratifying and, subsequently, extinguishing the proceeding with resolution of the merits.

Finally, it is imperative to draw attention to the fact that, even considering mediation as the appropriate mechanism for resolving conflicts arising within the scope of family businesses, there is no way to affirm that. The use of this procedure will result, in all cases, in the elaboration of cooperative agreements. In this sense, although they are not widely used in the national scenario, it is necessary to consider the possibilities of combining conflict resolution mechanisms, such as, for example, the adoption of a staggered mediation and arbitration clause<sup>23</sup>.

To encourage the use of staggered clauses in the country, the IBGC (2014, p. 39), in the Booklet of Good Corporate Governance Practices in Privately Held Companies,

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representing an obligation of means" (Lemes, 2001, p. 359).

<sup>22</sup> Translation of the original to which it was carried out: "*Esto implies having accepted the existence of the conflict, its difficulty to resolve it by itself soils and having requested the intervention of a third party with a knowledge, no on the content of its dispute or on the conducción de un proceso*".

<sup>23</sup> According to Fernanda Levy (2013, p. 203), "[...] the Brazilian scenario of the use of the two mechanisms in combination is quite different from the international one, because while in Brazil the data point to the low incidence of the combined application of the methods, in countries such as England and the United States their use is wide and increasing". Illustrating the English scenario, Neil Andrews (2010, p. 469) points out that, currently, many companies prefer the use of arbitration in combination with another alternative dispute resolution mechanism.

recommends the adoption of staggered clauses, indicating that conflicts arising in the business sphere should preferably be resolved by mediation and, if there is no agreement, they should be submitted to arbitration.

According to Bühring-Uhle, Kirchhoff and Scherer (2006, p. 240), the combination of mediation and arbitration offers advantages in relation to the quality and predictability of solutions, since it represents a security procedure, allowing the parties, if a satisfactory agreement is not reached, to exercise their right through a reasonable and predictable Law, by the relevant customs of trade or by any incidental technical matter.

Along the same lines, Fernanda Levy (2013, p. 197) expresses the argument that the combination of these two mechanisms is a "[...] resource that integrates the dialogue and/or decision that promises to mitigate the wear and tear generated by the conflict, facilitating communication between those involved, even if they do not reach the agreement and the arbitration decision is necessary". Therefore, the combination of mediation and arbitration is advantageous because, "[...] Under certain circumstances, these clauses have the potential to encourage early settlement of disputes with the minimum of acrimony, facilitating the initial discussions in less adversarial conditions" (File, 2007, p. 33)<sup>24</sup>.

A large number of possibilities for interaction between mediation and arbitration procedures are emerging: mediating first and, if it fails, arbitrating; initiate arbitration and allow mediation at some point during that proceeding; mediate, arbitrate some unresolved issues, and then mediate again; mediate, and if it does not work, ask for an 'advising opinion', given by the mediator, which is binding as a decision, except when one of the parties vetoes the opinion within a period of time, etc. (Elliot, 1995, p. 1).

Faced with this possibility of options, Levy (2013, p. 200) points to the need for a "[...] strongly specialized legal guidance so that the chosen model really reflects the greater objective of the parties in resolving the controversy through the inclusion of an amicable means, without representing a risk of its expansion". For this reason, it is stated that the lawyer's role and governance structures in family businesses share the same essence, which is the mitigation of asymmetries and conflicts of interest between management, property and family (IBGC, 2014, p. 15).

That said, it should be established that the use of the mediation commitment, whether in any of its kinds, reflects the family business's option for the adoption of a dialogical and non-adversarial culture, based on the development of certain competencies, as already mentioned. This choice is radiated to the other business sectors, so that the work environment starts to have competent people governed by a consensual logic, encouraged to promote participatory dialogue whenever there is the possibility of a misunderstanding. The need to reduce the number of conflicts

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<sup>24</sup> Translation of the original: "*Under certain conditions, these clauses have the potential to encourage early resolution of disputes with minimum acrimony by facilitating initial discussions in less adversarial settings*".

is also highlighted, given that the exercise of active listening, the search for real interests, the reformulation and acceptance of the other's place become inherent attributes of professionals, including family members.

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## 7 Conclusion

The analysis of family businesses allowed us to recognize the importance of these organizations for the maintenance of the world economy, as well as highlighted the fact that the difficult separation of the spheres of family and company causes innumerable conflicts, the most common consequence of which is the end of the organization. It was found that the statements and criteria proposed to conceptualize this type of company are varied and uneven, so that the option for a certain meaning usually varies with the intended objective and the focus of the study.

The variety of these concepts, as noted, also depends on the extension denoted to the family institution. Thus, it was inferred that the formation of traditional nuclear families, governed by patriarchy, has been undergoing changes. Currently, the Law houses the concept of democratic family which, characterized as a less hierarchical group and independent of blood ties, is a space open to dialogue and the development of personality, with mutual respect being its founding principle.

It was inferred, from the combination between the two models proposed by the aforementioned Harvard professors – Tagiuri, Davis (1996) and Gersick *et al.* (1997) – that family businesses are composed of three dimensions – ownership, family and management – and the development of each of them, over time, occurs regardless of the situation in which the other finds itself, without, however, ceasing to influence it. With the analysis of these axes, it was found that: the degree of complexity of the company and the family are directly related, that is, when there is an increase in one, there will also be an increase in the other; and the higher this level, the more intense and likely the occurrence of conflicts will be.

Through the study of conflict situations under the prism of organizational theories, it was revealed that, in the course of the formation of this knowledge, different understandings were lent to them: the Classical School and the School of Human Relations, with their peculiarities and different views, saw, to different extents, in the conflict, a structural deficiency of the organization, and should therefore be repressed; the Modern Organizational School, on the other hand, perceives conflict as an opportunity for growth, considered essential to the development and efficient business performance. In addition, it was identified that conflicts in family businesses can be related to the most diverse matters, but, among these, the ones that stand out the most are succession, gender inequality and the formation of multifamily partnerships.

After understanding the systematization of the studies of conflict resolution mechanisms, the analysis of the main adjudicatory and consensual models – state jurisdiction, arbitration, conciliation, mediation and negotiation – was carried out, investigating their concepts and the advantages offered by each of these mechanisms. The lower costs, the greater space for the proposal of creative and innovative options, the flexibility of the parties to prepare the agreement, the maintenance of relationships, the transformation of the mediators' perceptions, the reestablishment and strengthening of communication, the rescue of values and business and family goals, the rapid speed of resolution of the impasse and confidentiality emerged as advantages that mediation can bring to the scope of family businesses.

It was found that mediation, exploring the hidden agenda of people, stimulates the resignification of roles and works on the disagreements between the parties, seeking improvements and sustainability for the relationship of those involved. In view of this panorama, it is concluded that mediation represents the appropriate mechanism for the resolution of conflicts in the family environment, because, for business success and family harmony, it is essential to maintain relationships between family members and the development of dialogue, identifying the real causes of the disagreement and acting to achieve mutually beneficial resolutions.

Mediation, by proposing the resolution of conflicts through cooperative solutions, contributes to the improvement of coexistence between the parties, as well as to the clarification of errors of perception, so that, contributing to reduce the emergence of conflicts, its use consolidates it as a strategic tool of corporate governance. In addition, it was inferred that this mechanism would be stimulated through the adoption of a mediation agreement, regardless of the type chosen – clause, mediation commitment or escalated clause. In this way, it is possible to engage the legal sector in the exercise of the principles of this consensual instrument, in addition to implying the need for these professionals – and all others involved in the company – to develop the skills inherent to professional performance today, as pointed out by research mentioned in the section.

By way of conclusion, it is therefore clear that mediation and family governance combined represent powerful corporate governance structures, with the management and resolution of conflicts as their main objectives, as well as the adoption of initiatives and the use of tools capable of introducing and solidifying, within the scope of family businesses, the non-adversarial culture. It is therefore concluded that the adequate resolution of conflicts should be, in most cases, within the scope of family organizations, carried out through mediation and allied to governance structures, especially family.

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