

Working it out

Mediating may not make an unhappy family happy, but it can be a useful way of helping you sort out sensitive private client issues before they escalate.

Andrew Hildebrand explains



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What does mediation mean to a private client solicitor? Not much, probably. We tend to think of it as part of the litigation process and, contentious probate specialists aside, generally try to avoid litigation. Ironically, the real benefit of mediation in a private client context is that you can use it to prevent problems escalating into litigation.

Mediation is quick, effective and inexpensive. A mediator can help parties resolve all sorts of issues, not just legal or commercial ones. This can be particularly helpful where families or business partners are involved, or where issues are complicated by underlying considerations like conflicting hopes or perceptions, past altercations or unresolved misunderstandings.

As solicitors, we naturally view things through a legal prism, but there's often something else that is really going on. I started getting instructed to mediate private client disputes concerning artists, writers and musicians and their families or estates, because of my copyright law expertise. I discovered that, however a dispute is labelled, once you meet the relatives (which I sometimes find helpful to do ahead of a mediation), understanding them and their history is often the key to resolving the dispute. Clients frequently need something akin to the commercial equivalent of marriage guidance, particularly where relationships are involved, people are taking things personally, or communication has been poor. Yes, mediation is about getting to grips with the legal and commercial issues of the dispute, but, with trust-related or financial entitlement issues for example, it can also be about scratching under the surface and unravelling what else is going on, particularly where individuals have been, or fear that they will be, impacted.

Crucially, in order to drill a little deeper into a dispute, something else



first needs to happen. You need to engage with the individuals – on all sides (separately, preferably) – so that no matter how bruised, angry or mistrustful they are, they all trust you enough to let you help them – and if you think about it, there aren't many people other than a mediator who can make that happen, let alone anyone who can also help them see things from a slightly different perspective. It's important to consider the possibility of mediation at an early stage, and certainly before the situation deteriorates or procedures become costly or protracted.

If, like many non-contentious practitioners, you are concerned about getting embroiled in your client's emotional dramas, or risking possible conflict by acting for different family members, don't be. That's the mediator's job. They are there to act as everyone's bridge and buffer, so that you don't have to do so (and they aren't looking to create a continuing relationship with your clients, either).

If you bring in a mediator early on who has the necessary experience and emotional IQ, they can help family members work through sensitive issues together and stop conversations descending into the usual family arguments. Compare that to going to court. Even if a judge finds in your client's favour, they cannot address the human side of the dispute, which is partly why fractured relations typically then end up in tatters.

It doesn't have to be a typical 'one-day' commercial mediation, either.

Case study: private client mediation

A widower was contemplating making his will. Concerned how his children might react, he wanted to explore the possibilities of correcting financial imbalances between them during his lifetime. He decided to mediate.

Ahead of the mediation, I met family members separately and confidentially so I could establish their aspirations and concerns. On the day, the widower explained the state of his finances and

how he intended distributing his estate between his family. His children explained their respective needs. We discussed what they wanted to achieve as a family, and considered the available options and associated property transactions. By 6pm, we had created a road map and identified what additional information the family needed to obtain and discuss with their professional advisers, plus any potential problems and possible fallback solutions.

It wasn't a linear process. We also had to manage some difficult family ructions. To their credit, the family used this as an opportunity to design and agree rules to improve dialogue between them and make future conversations more effective and less damaging. During our mediation I was particularly struck by a comment made by the younger son who said that it felt like having a guest stay at Christmas and that it made the family behave better.

It isn't about 'hot-housing' parties until the sandwiches curl up and sugar levels drop. It can be designed around the family and be as flexible and informal as they want it to be. If any parties are elderly, measures should be taken to ensure that the senior is competent and able to participate meaningfully in mediation, and to accommodate any disabilities (especially any that are communication-related), or concerns the elderly person may have (eg how long a mediation session should last) about the process.

But it isn't just the elderly who need special considerations. Increasingly, people need help addressing inter-generational issues, which means that the mediator needs to pay special attention to the contrasting values, needs, and interests of everyone involved, and be sensitive to a possible history of poor conflict resolution within the family.

The mediator will gauge how people are feeling and, because the process is informal, can check during a session whether people would prefer to continue or take a break. I sometimes mediate in someone's home if it makes people feel more comfortable, or spread discussions over a couple of sessions to give everyone time to reflect on what they have heard and how they now feel.

Some decisions need considerably more thought – succession planning in a family business, for example. This holds particularly true where a founder of the business is the epicentre of the daily activity of the business, and de-centralising could be important. They may be reluctant to address this, especially if there is no heir apparent. For the good of the business, its stakeholders and individual family members, the sooner one starts planning for mediation, the better.

Sorting things out before the death of that person can be vital – and not just for financial reasons or to avoid protracted family battles. If you owned a business, wouldn't you want to ensure that the integrity of the business is retained once you've gone, and that key people are looked after? If you were an artist, and ensuring how your body of work was kept and curated were key for you, you would need to make sure that your intentions were properly safeguarded during your lifetime because, once you died, distinctions between 'meaning' and 'money' could easily become blurred.

Where participants do not have enough information to hand to make the necessary decisions, I can help family members consider their various options and the likely implications, and plan what they are going to need to build a road map (see case study above) that they can then discuss and hone with their advisers. (To be clear, mediators work alongside professional advisers and refrain from offering legal, tax or financial advice.)

WHEN IS IT WORTH HIRING A MEDIATOR?

Hiring a mediator is worth considering in a number of instances, including:

- when it isn't just about legal or commercial issues
- when litigation might not be the best way forward, for example, because a case could be risky, costly or stressful
- when a client doesn't want problems becoming public, or to face the

prospect of a contested estate

- when a family needs help addressing inter-generational issues, or working through difficult decisions about the care of a family member
- when a client wants help resolving problems with a business partner, to salvage the relationship, or separate amicably without ruining themselves or the business
- when a client is contemplating succession planning or giving their children monies while they are still alive, particularly if the children have different financial needs
- when, for whatever reason, it feels like things are getting worse.

MEDIATING TO RESOLVE PRIVATE CLIENT DISPUTES

There are a number of steps you can take to use mediation more effectively in resolving private client disputes.

First, help clients understand mediation better. Ninety per cent of UK commercial mediations settle. Mediating isn't about compromise. It isn't a sign of weakness either.

Second, prepare properly. In mediation, people who are better prepared tend to do best. A short position paper is valuable. Better still, time permitting, involve your mediator ahead of the day. Explain your requirements and concerns, your thoughts about what could make the mediation work, and any triggers or flashpoints to watch out for. What approach would you like your mediator to take? Do you need someone to knock heads together, for instance? Should the mediator meet family members or business partners separately ahead of a mediation? I find that doing so generally accelerates the process on the day, and more importantly, improves the chances of settling.