

Using mediation to resolve private client disputes

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Leading commercial mediator Andrew Hildebrand explains how mediation can be used effectively to manage private client disputes.

As Tolstoy observed, 'each unhappy family is unhappy in its own way'. Every family is also dysfunctional in its own way, and dealings between family members - even over legal, commercial or financial issues – can be complicated by past altercations or unresolved misunderstandings.

Most legal disputes are, at their heart, disputes between people. They may, for instance, be trust-related or about respective financial entitlements, but they are also invariably about how the people involved have been impacted.

Private client practitioners can sometimes be reluctant to take on the additional emotional burden of getting embroiled in these sorts of 'touchy feely' areas with individual family members, especially with the added conflict risk. It may be worth using an independent mediator instead.

Mediations are very effective – 90 per cent of UK commercial mediations settle – and well-suited to resolving disputes like these. They are easy to arrange and the process is confidential.

I recently mediated a contentious dispute over an author's multi-million pound estate that, six years on, had not been wound up. According to the pleadings, it was a chain of title dispute, but I met the various family members ahead of the mediation, and it was clear to me that understanding them and their history was going to be key to getting the dispute resolved.

The mediation was successful. We settled it on the day and the parties signed a binding heads of agreement. Interestingly, the family also used it to start repairing some of the fractured relationships within it. One son said that it felt like having a guest stay at Christmas and that it made the family behave better.

But mediation isn't just a litigation tool. It can also be effective hiring a mediator or facilitator at an earlier stage in order to prevent family problems escalating, or to get a family to discuss sensitive financial issues, work things out together and create a road map. That can then be discussed with their advisors and form the basis of an agreed document. (To be clear, a mediator / facilitator works alongside a client's professional advisers, but refrains from offering legal, tax or financial advice.)

In what circumstances is it worth engaging in mediation?

Hiring a mediator is worth considering in the following circumstances.

- The case isn't just about the legal issues.
- Litigation does not feel like the best way forward, eg because the case could be risky, costly or stressful, or because of possible reputational or relationship ramifications.
- A client is contemplating succession planning or giving their children monies while they are still alive, particularly if they have different financial needs.
- To reduce the possibility of a will being successfully contested. A client may, for instance, be concerned about the family fighting over the estate after their death, prompted by last year's *Ilott v Mitson* Court of Appeal decision.
- People want help in discussing sensitive financial issues.
- There are concerns that a family member may not feel that they have been properly respected or treated fairly.

Why does it work?

The whole approach is different. Unlike a judge or a litigator, a mediator is looking for what unites people, not what separates them, and for ways of changing the dynamics when they meet. In a way, the mediator's role here can be a bit like the family equivalent of a marriage guidance counsellor.

The first thing a mediator does is create a temporary ceasefire and engage with the individuals separately so that, no matter how bruised or angry they may feel, they trust the mediator enough to let the mediator help them. A good mediator knows when the parties feel that they 'get' them – and that when connections are made, things happen.

The mediator can then drive the process and act as the parties' bridge and buffer. The mediator will coax and 'reality-test' in order to turn the tide. The mediator can turn the unthinkable – which is how parties often regard the prospect of settlement at the start of the day – into the inevitable.

How can we use mediation more effectively for resolving private client disputes?

First, by getting clients to understand mediation better.

Mediation may be part and parcel of the litigation landscape, but many clients aren't particularly familiar with it. It is one of those things that is hard to understand unless you experience it. For me, until I had mediated as a client, I couldn't get my head around it, especially – and I was a deal-maker – the notion that negotiating in front of a stranger should be more effective than doing it yourself. But the more clients become used to mediating, the more they will embrace it.

In mediation, the people who are better prepared tend to do best. Having the lawyer and mediator collaborate ahead of the day can be invaluable. A position paper can tell me what your requirements and concerns are, but if you can make the time, I also want to know your thoughts about what might make the mediation work, the triggers or flashpoints we should watch out for, and what approach you would like from me.

Is this a case that needs someone to knock heads together, or is it more about scratching under the surface and finding out what's really going on or what's not being said? Do you want the standard 'one-day' model, or would you prefer me to suggest what I think will work best? For instance, if you feel that the case warrants it, I might suggest meeting each client and their team individually for a confidential conversation the week before the mediation. That way, I get to establish rapport early and prepare clients to get the most out of the day. I also find that for a private client or relationship-based dispute, it generally accelerates the process on the day, and more importantly, improves the chances of settling.

Mediating is highly effective, inexpensive and speedy. It may not make an unhappy family happy, but it can be a really useful way of helping you sort out a private client dispute.

Case study: A widower was contemplating making a will and concerned how his children might react. Instead, he decided to mediate, hoping that it might also enable him to correct financial imbalances between them during his lifetime. Ahead of the mediation, I met family members separately and confidentially to establish their aspirations, needs and concerns.

On the day, the father explained his finances and intentions and the 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 also identified what additional information they needed to obtain or discuss with professional advisors, potential problems and fall-back solutions.

Inevitably, it wasn't a linear process. We also had to manage some difficult family ructions, which to their credit, the family used as an opportunity to design and agree rules to improve dialogue between them and make future conversations more effective and less damaging.

On 15 June, Andrew is running a seminar at the Law Society on settling commercial disputes in a day. To book your place, click [here](http://cpdcentre.lawsociety.org.uk/course/6873/how-to-settle-a-commercial-dispute-in-a-day) (URL=<http://cpdcentre.lawsociety.org.uk/course/6873/how-to-settle-a-commercial-dispute-in-a-day>) .