

FAMILY DUELS

Mediation is the quickest and most cost-effective way of resolving a contentious private client dispute or preventing one from escalating



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As F Scott Fitzgerald wrote, 'Family quarrels are bitter things'. Disputes that might be regarded as purely financial or legal in the commercial world tend to take on an additional layer of complication when families or business partners are involved. Conflicting hopes or perceptions, past altercations and unresolved misunderstandings can easily make matters worse. You can go to court but even if a judge finds in your favour, he or she can't address the human side of it. Relations that were already fractured often end up in tatters. In the old days when things got awkward, you would ask the family lawyer to pop over but nowadays private client practitioners are sometimes wary of the added conflict risk or the emotional burden of getting embroiled in 'touchy feely' areas with individual family members.

But there is another option, and a very effective one: mediation. Ninety per cent of UK commercial mediations settle, they are easy to arrange and the process is confidential. You can still get what you want financially, and you address other issues too. Better still, you don't even need to wait until the damage has been done. By bringing in someone independent who has the experience and emotional IQ to work with you and your family, you can prevent problems escalating. Get the family ironing out differences between beneficiaries and trustees or executors, or addressing succession issues and

maybe balancing commercial issues and family dynamics within the family business. The mediator will manage the process and help you talk things through safely and productively so that they don't descend into the usual family arguments.

Most legal disputes are, at their heart, disputes between people. They may be trust-related or about respective financial entitlements, but especially when families or long-term partners are involved, they are also invariably about how the individuals involved have been, or fear that they will be, impacted.

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 meeting the various relatives ahead of the mediation, 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 ruptured relationships.

According to Fitzgerald, family disputes 'don't go according to any rules'. The problem is they often do, and in a descending spiral all too familiar to that family. 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.

When is it worth hiring a mediator? Certainly, when litigation does not feel like the best way forward, such as because the case could be risky, costly or stressful, or damaging to a reputation or relationship; and also when you would like help discussing and resolving sensitive financial issues. What if you are having problems with a business partner and want help either salvaging the relationship or separating without ruining yourself or the business? Or if you are contemplating succession planning (in the family business, for example) or giving your children monies while you are alive, particularly if they have different financial needs? Such circumstances cry out for mediation rather than litigation. And what about when you want to reduce the possibility of family members fighting over your estate?

Until you experience mediation first-hand, it is hard to appreciate why it should be so effective. In my case — and I was a dealmaker — before I mediated as a client I couldn't get my head around the notion that negotiating in front of a stranger would be more effective than doing it myself. I thought that mediating was about compromise, and that offering to mediate would make me look weak. Then, a year into litigation and £400,000 later, I tried it and it worked.

Unlike a judge, a mediator looks for what unites people, not what separates them, and for ways of changing the dynamics between them. Because when connections are made, things happen.

The first thing a mediator does is create a 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 gets to grips with the legal and commercial issues, but can also scratch under the surface and unravel what's really going on. In some ways, it can be like the commercial equivalent of marriage guidance. The mediator drives the process, acting as people's bridge and buffer, coaxing, reality-testing and guiding them through to settlement.

The mediator's job is to turn the tide so that the prospect of settlement shifts from being unthinkable

to being inevitable. In one case I handled a widower who was contemplating his will. Concerned how his children might react, he also 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 to establish their aspirations and concerns. On the day, he explained his finances and intentions and his children explained their needs. We discussed what they wanted to achieve as a family and considered the options and associated property transactions. By 6pm, we had created a road map and identified what additional information they needed to obtain and discuss with advisers, potential problems and possible fallback solutions. (To be clear, a mediator works alongside professional advisers but refrains from offering legal, tax or financial advice.)

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

Because mediation is so successful, it is now part and parcel of the litigation landscape. Ninety per cent of High Court cases end up in mediation. Parties and their lawyers are required to consider it early in proceedings, while judges will often halt proceedings and direct parties to mediate instead — or issue costs orders against people who unreasonably refuse to do so, even if they end up winning the case. In 2014, one 'winner' was slammed with a £250,000 costs bill by the Court of Appeal.

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. *J*

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Illustration by Russ Tudor