



Working It Out

By Andrew Hildebrand

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

What does mediation mean to most instructing professionals? Not much probably. We tend to think of it as just a litigation tool. A quick, effective, inexpensive way of resolving contentious litigation, but essentially a litigation tool. Which is a shame because the real benefit of mediation is that you can use it to prevent problems escalating into litigation and often salvage the underlying relationship.

A mediator can help parties resolve all sorts of issues, not just legal or commercial ones. That can be particularly helpful where families, business partners or family businesses are involved. Or where issues are complicated by underlying considerations like conflicting hopes or perceptions, past altercations or unresolved misunderstandings.

Lawyers frequently 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 expertise. I discovered that, however a dispute is labelled, once you meet the people involved (which I find can be invaluable ahead of a mediation), understanding them and their history is often 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 where communication has been poor. Yes, mediation is about getting to grips with the legal and commercial issues but, with trust-related or financial entitlement issues for example, it can also be about scratching under the surface and unraveling what else is going on, particularly where individuals have been, or fear that they will be, impacted.

Mediate early and you can prevent problems escalating

I mediate a lot of partnership and founder disputes for people who have built successful businesses but are now falling out. By mediating early, as well as testing whether the business relationship is salvageable, you can also work with the partners on establishing what needs to change to get the relationship, and the business, back on a safe footing – and unlike any other form of dispute resolution, you can create solutions that are tailor-made for them and their business.

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. 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. Once you have earned that trust, you can then act as their bridge and buffer and drive the process to get their issues sorted.

It is important to consider the possibility of mediation at an early stage, and certainly before the situation deteriorates or the procedures become costly or protracted. Because as I have seen, say within professional partnerships, what starts as a difference of opinion, not infrequently about possibly making marginal adjustments to the bonus remuneration scheme, can soon descend into heated discussions about whether people wish to stay in partnership with each other.

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

Design the mediation around the individuals

It doesn't have to be a typical 'one-day' commercial mediation either. It isn't about hot-housing parties until the sandwiches curl up and sugar levels drop. It can be designed around the individuals involved 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 about the process, (eg how long a mediation session should last).

But it isn't just the elderly who need special considerations. Increasingly, people need help addressing inter-generational issues. That 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. Where changing circumstances are likely to be involved, it is important to make the discussions all-inclusive, to give everyone an opportunity to discuss possible options, but also to secure buy-in to those decisions people have agreed to take.

A mediator will check during a session how people are feeling and whether they would prefer to continue or take a break. I sometimes mediate family sessions in someone's home if it makes people feel more comfortable, or spread discussions over a couple of sessions to give them 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 is the epicentre of the daily activity of the business and de-centralising could be important. He or she may be reluctant to address this, particularly 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 your business is retained once you've gone, and that key people are looked after? Knowing that, once you die, distinctions between 'meaning' and 'money' can easily become blurred, if you were an artist, and ensuring how your body of work was kept and curated were key for you, wouldn't you want to make sure that your intentions were properly safeguarded during your lifetime?

Where participants do not have enough information to hand to make the necessary decisions, I can help business partners and 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 below) that they can then discuss and finess with their advisors. (To be clear, mediators work alongside professional advisers and refrain from offering legal, tax, financial, or other expert 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 an elderly 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 you need someone to knock heads together and keep everyone on track until a binding agreement has been reached
- to chair tricky meetings or multi-party stakeholder discussions, especially where people have different interests or are about to have to deal with change
- 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.

Using mediation to resolve partnership, family business and private client disputes

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

1 Help clients understand mediation better. Ninety per cent of UK commercial mediations settle. Mediating isn't about compromise. Or a sign of weakness either.

2 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 you would 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.

3 Do it face to face. Let the individuals have their say and see each other's body language. The discussions may be more emotional as a result, but they can have a cathartic effect that makes a lasting agreement possible. More importantly, the very act of negotiating can build trust.

Conclusion

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

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This article is based on Andrew's article for the February 2017 edition of PS, the magazine of the Private Client Section of the Law Society (<http://communities.lawsociety.org.uk/private-client>)

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 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 advisors, 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.



Andrew Hildebrand is a leading UK mediator. He mediates independently and through In Place of Strife. He is a member of the Civil Mediation Council.

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Andrew is also running a series of seminars, starting on Wednesday 6th December, 2017 with "How to resolve a partnership or private client dispute in a day".

For details, please call 0207 286 0272.