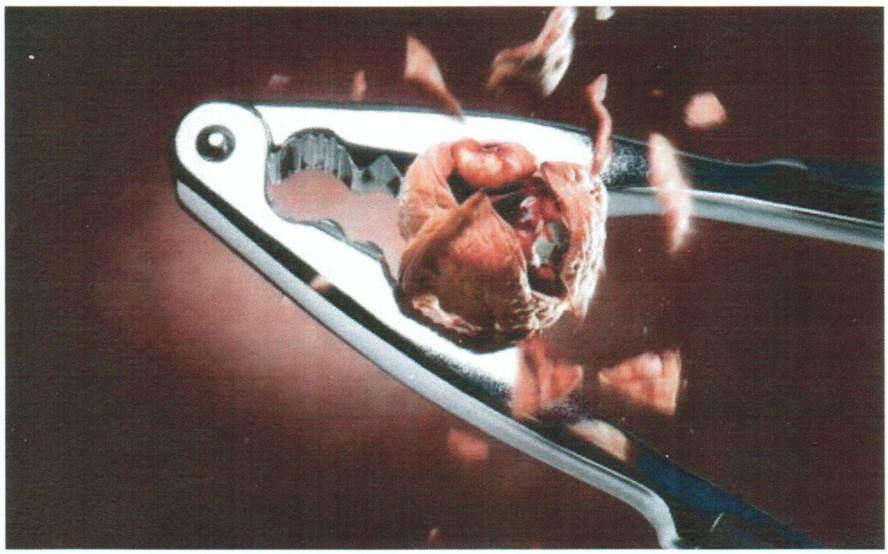
Cracking it!

Andrew Hildebrand explores how mediation can demonstrate tactical strength



IN BRIEF

- Sending a double-edged message that you are confident of your legal position and also open to finding a commercial solution should be seen as an indication of tactical strength.

Deciding when and whether to mediate a client's case can be a delicate balance. There are times though, and I don't just mean those occasions where you feel that litigation may not be the best option, when mediation can complement your practice, such as when a relationship client is more likely to thank you for avoiding litigation, or where the amounts involved are relatively small and litigating is unlikely to be cost-effective. In those sorts of cases, clients will appreciate you delivering a quick, commercial result, just as they will if conventional legal remedies are likely to take too long or don't offer what they want.

Mediation can also make sense where emotions are involved and the most effective way of sorting out a dispute entails getting to the heart of the problem. Maybe the parties don't want what, to you, looks like an obvious solution, or despite your concerns about a case, they want their "day in court".

The problem may be because the other side won't listen. They may be convinced they are right, or they might not understand what solutions are or aren't possible, particularly if they aren't familiar with your client's business. If a quiet word with their lawyers doesn't do the trick, it may be time to introduce someone independent to give them a private dose of reality. Mediation can also be the answer when a client's dispute involves overseas parties, especially if the alternative involves suing or enforcing abroad.

> *"Offering to mediate can be a smart way of focusing the other side's attention and breaking the deadlock. Sometimes all it needs is a crack".*

Year-end pressures

With year-ends approaching and an eye on the bottom line, clients may respond favourably when they see that you are also taking stock of their outstanding disputes in case their litigation can be taken off the books, or an accounting provision can be substantially reduced.

In the wake of the Jackson reforms, judges are making sure that parties get used to the idea that costs should be kept proportionate to the dispute. Cost capping is clearly here to stay and judges are also increasingly imposing cost sanctions against parties who unreasonably refuse to mediate. The Court of Appeal pushed that boundary further last November stating that silence in the face of an invitation to participate in alternative dispute resolution (ADR) is, of itself, unreasonable conduct likely to justify a cost sanction regardless of whether an outright refusal may have been justifiable (*PGF II SA v OMFS Company 1 Ltd* [2013] [2013] EWCA Civ 1288). You can still decline an invitation or suggest that it would be better to mediate at some later time but you need to explain why in writing, preferably based on the *"Halsey"* guidelines, and if you believe that a lack of information is the obstacle, show some consideration as to how you think that could best be overcome.

Case management & ADR

In his *Chancery Modernisation Review: Final report*, published last December, report, Lord Justice Briggs focused on the relationship between case management in the Chancery division and the parties' use of ADR. He recommended that case management conferences (CMCs) should normally include a thorough review of alternative dispute resolution (ADR) options including (subject to confidentiality requirements) monitoring progress of any chosen ADR option and that before the first CMC, in certain proceedings, parties should have to articulate their views about the potential for ADR, including suitability, timing, and type of ADR (e.g. facilitative or evaluative).

Speaking at a dispute resolution seminar organised by the Intellectual Property Office and Wiggin LLP on 13 February, I got a sense of how positively some judges now regard mediation. Our keynote speaker, Mr Justice Arnold spoke enthusiastically about mediation and ADR and concluded by telling the audience: "It works, so go and do it". Dismissing the notion that offering to mediate might be interpreted as a sign of weakness, he suggested that sending someone a double-edged message that you are confident of your legal position and also open to finding a commercial solution is more likely to be seen as an indication of tactical strength.

Such judicial input is indicative of a growing recognition that offering to mediate can be a smart way of focusing the other side's attention and breaking the deadlock. Sometimes, all it needs is a crack. **NLJ**

Andrew Hildebrand is a leading independent commercial mediator and IFTA arbitrator (*www.hildebrandmediation.com*). For information on training as a mediator, please visit *www.ciarb.org*.