NEWS IN BRIEF

What is Mediation?

Mediation is becoming a household word these days. The courts and the public alike have woken up to the alternatives to traditional, court-based methods of resolving disputes. There is now a willingness to explore different ways of working through the minefield of opposing views, differing personalities, strong emotions, fear and impasse.

There are many areas of law for which mediation is now being used – family law, workplace, commercial and personal injury, to name but a few. This article concentrates on mediation in private client practice. Private clients can be affected in a very personal way by the approach adopted to handling a dispute, and the ripples of its aftermath. In certain cases, this can be fundamental to the quality and way of life of the people involved.

THE BENEFITS OF MEDIATION

Mediation is cheaper and quicker than the court process. It avoids the hostility, resentment and bitterness that can arise as a result of an imposed solution by a court. It is therefore particularly helpful where the dispute is between family members, because it helps to foster stronger communication in future. It is, after all, better for all concerned where terms are reached by consensus, having been specifically negotiated on a basis that all concerned can live with. The parties also keep control of their own destiny: the decision-making is made by the parties themselves, and gives them more certainty than handing the outcome over to a judge to decide.
In private client cases, mediation can help resolve all sorts of contentious issues. Which care or residential home should an elderly relative be moved to? How should the finances of an incapacitated adult be managed? Who should be granted power of attorney or instructed as deputy? Should an incapacitated person be removed from a residential home? Should an incapacitated adult's home be sold? Does a person have capacity to marry or to give consent to sexual intercourse? Should there be a declaration for deprivation of liberty? Should medical treatment for an incapacitated person begin, or should it be withheld?

A PROPOSED MODEL FOR PRIVATE CLIENT MEDIATION

In this context, I utilise my training and experience from two models of mediation, family law and civil and commercial. I adapt and merge these two models in order to form what some call the 'hybrid 'model. My aim is to design the process which best fits the parties and gives the mediation the greatest chance of success. Each of the two models are explored further below.

In family law mediation, there tend to be a number of several short sessions, typically lasting 1.5 hours each. As a general rule, only the parties themselves and the mediator are present in the actual mediation sessions – the parties have access to their solicitors throughout the mediation process, but the solicitors aren't usually present in the actual sessions. The parties sit in the same room, together with the

mediator, for the sessions, unless there is a good reason that this should not be the case. In those circumstances, it is possible to have a 'shuttle mediation', where the parties are in separate rooms and the mediator moves between them. The aim of every mediation is to reach agreed terms, with a view to those terms ultimately forming a binding agreement. At the conclusion of the mediation sessions, the proposed terms are set out in a 'without prejudice' document known as a 'memorandum of understanding'. The parties then have the opportunity to take independent legal advice from their solicitor on the proposed terms. The terms are then incorporated into a 'consent order', and the court is invited to make an order accordingly. There is no binding agreement until the parties have had the opportunity to take independent legal advice and the court has made an order.

By contrast, civil and commercial mediation will often consist of just one long session, which may last a whole day or even longer. The parties may, if they wish, bring with them a 'team' – their lawyers, if lawyers have been instructed, plus any experts in support of their case. They start off in separate rooms with their 'teams', and the mediator brings them together, at various stages, as deemed most supportive to the success of the mediation as a whole. Where an agreement is reached at the end of the mediation, the solicitors will draw up the 'heads of agreement' there and then, with the help of the mediator, this will then be presented to the court for a court order for it to be binding, full and final.

THE PROCESS

For a successful mediation, all parties need to commit themselves to the process; be prepared to think creatively and laterally, with a view to finding solutions; be open to exploring all options; and want to resolve the issues before them.

If that is the case, the first step I take is to meet with each client individually before any joint mediation session takes place. This helps me to work out how best to approach the mediation and design the best fit for all the parties. The two most important aims for that meeting are outlined below.

The first is to afford me the opportunity to assess how best to approach the mediation from each person's point of view. I invest time and energy in this meeting, as I feel it is critical to the potential success of the mediation. This meeting gives me the chance to gain critical information – for example, what is important to each of the parties; what would make them feel most comfortable at the subsequent joint meetings; whether they feel they must have a 'bottom line'; and whether it is possible to identify / narrow issues and de-escalate conflicts. I can also identify any vulnerable parties and explore with them whether they need support and if so, how they might get it. The central focus is on how to make the process best meet these particular needs, with a view to maximising the chances of success. I need to be satisfied that there is a realistic chance of success, and how it can best be achieved.
The second aim is to help the parties understand the basic principles of mediation, and what will be expected of them. Broadly, both approaches to mediation outlined above rely on the same basic non-negotiable principles. Some of these include the following.

1. The parties come to mediation of their own free will, and commit to it through their own choice; it is entirely voluntary.
2. The mediator is impartial and does not give legal advice – the parties have their own solicitors for this. The process should always be conducted in a balanced and impartial way.
3. Mediation is future-focused – it only revisits the past, where relevant, to facilitate moving forward and making progress, but not to resolve past issues.
4. The pace of the mediation is dictated by the parties themselves.
5. Mediation provides a safe place for the parties to explore options, with a view to finding the right answer for all concerned.

CONFIDENTIALITY

Both models also share the principle of confidentiality, insofar as what is actually discussed in the mediation is concerned. There are, however, certain limited exceptions: first, where it becomes evident that a crime is being or is about to be committed; and second, where there is risk of harm to a child.

It should, however, be noted that the two models differ with regard to confidentiality as between the mediator and the parties. In family law mediation, the process is 'open': no information (with the exception of an address and telephone number) is confidential between the mediator and the parties, so the mediator cannot withhold from one party information given to them by the other party. In civil and commercial mediation, there may be one-to-one sessions with the mediator and one party alone, before the main joint session(s), with a view to the mediator obtaining a greater understanding of the issues or being better able to express that party's view to the other party. The information gained by the mediator in this situation is confidential unless the mediator is specifically authorised by the other party to disclose it.

ANOTHER OPTION

There are some situations for which there is no legal remedy at all. These situations frequently involve members of a family in their capacities as beneficiaries, executors or attorneys, or as concerned children of an incapacitated person. Such issues can fester and destroy families forever. In these circumstances, the parties could consider a slightly different option: conflict resolution or relationship coaching. This approach, which amounts to a quasi-mediation, offers the parties the opportunity to come up with new ways forward, so that they can adapt to the changes under discussion or the consequences of any decisions they need to make.

Mediation, in all its variations, is the way of peace. I cannot recommend it highly enough as the first port of call wherever there is potential for conflict, for those open to its basic principles and wanting to find real and lasting solutions.

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