

Mediating for profit: a practice management tool



Philip Hesketh
looks at how you
can keep your
work in progress
down and ensure
your balance
sheets stay
healthy

When I was in practice and heading up a personal injury department, there was a constant need to meet key performance indicators (KPIs), with billing and costs recovery being the two most conspicuous. We were under pressure to shorten the life cycle of cases and speed up costs recovery in concluded matters. Management consultants offered many ideas, but none ever suggested using mediation as a practice management tool. I believe that mediating appropriate cases – cases where other negotiations have stalled – can improve your profitability. I will explain why. I will also discuss the traps lurking for the unwary in the form of *National Westminster Bank PLC v Feeney* [2006] EWHC 90066 and inclusive costs and damages offers.

Reducing WIP

Work in progress (WIP) is a good thing. It means money in the future – jam tomorrow. Unfortunately most of us need money today to pay staff, the bank, creditors and the like. The only way to convert personal injury WIP into cash is to settle cases and get your costs paid. How we envy our monthly billing colleagues in the commercial departments.

The vast majority of personal injury claims are settled by negotiating offers and counter-offers. However, when agreement cannot be reached or liability is denied, most fee earners put their head down and plough on with litigation or progressing issued cases to trial. That is the philosophy I learned and practised at Thompsons years ago.

For the managing partner the business or commercial problem with that approach (let's ignore anything the client may say about the wait for compensation) is the delay it causes and the affect on cashflow. There will follow months and possibly years of adding to unrecovered WIP, of not being paid, of not recovering disbursements. As an alternative, and with a view to avoiding the cashflow deficit, you could attempt to settle some of those claims through mediation (or joint settlement meetings, which are another effective form of ADR).

A frequent and understandable objection to this idea is that if experienced lawyers on either side have been unable to settle the claim, what is the point in trying mediation? By way of an answer, consider the success rate of one specialist personal injury provider which in over three years has achieved a settlement rate of around 90 per cent. Just one in ten personal injury mediations that they perform fails to settle on the day or very shortly afterwards. This includes liability and quantum-only disputes and happens without clients being sold short. Mediation is a voluntary form of negotiation. Settlement can only be reached if the

client agrees, and few clients ignore their lawyers' advice during mediations.

Another widely held and valid objection to mediation in fast track cases is cost and proportionality. Mediation providers have been slow to respond to this complaint but more and more are now offering telephone mediation schemes for lower value disputes. This is a particular consideration for firms whose client referrals come from outside their immediate geographical area, making a face to face mediation impracticable.

WIP has a nasty habit of being written off in CFA matters where the case is lost or a Part 36 offer is not beaten. You will have robust systems to reduce write-off to a minimum, but mediation is a hugely effective risk assessment tool. If settlement is not reached, both sides will have learned a great deal about the strengths and weaknesses of each other's case. It is far better to discover previously unknown faults and deficiencies at mediation rather than at trial.

Speeding up costs recovery

Costs are almost always dealt with at the end of a mediation. Most mediators encourage parties to exchange costs schedules in advance and approach the mediation with the expectation that costs will be resolved. This has obvious advantages for claimant firms in reducing the delay and expense of costs recovery. Insurers also prefer costs settled to ensure finality for them.

Given that nearly every mediation I do involves a 'sub-mediation' on costs it is remarkable that there are so few costs-only mediations. Costs mediations involve a neutral mediator working with the parties to find the figure which both sides can live with. It is well suited to telephone mediation. This could benefit firms struggling with volume unresolved costs matters. The mediator's fees can be offset against savings on detailed assessment fees and costs. The paying party may be prepared to pay the whole of the mediator's fee up front, in the same way they will in quantum only mediations.

Mediation costs, traps and tricks

It is essential to read your mediation

agreement carefully before mediating to avoid falling into the trap illustrated in *National Westminster Bank PLC v Feeney*. The parties had settled a claim at mediation with a Tomlin Order, the usual procedure for issued cases. The order contained the following:

"The claimant will pay the costs on a standard basis of the defendants' counterclaim dated 29 June 1998 (save as regards to the costs of the possession action), such costs be subject to detailed assessment if not agreed."

The mediation agreement said:
"21. [the mediator's fees] and the other expenses of the mediation will be born equally by the parties. Payment of these fees and expenses will be made to CEDR Solve in accordance with its fee schedule and terms and conditions of business.
22. Each party will bear its own costs and expenses of its participation in the mediation."

The court held that the successful defendant could not recover its half of the mediator's fees and expenses or its own costs of preparation and attendance at the mediation from the claimant. The Tomlin Order failed to alter the terms of the contract between the parties, namely the mediation agreement, so the terms of the contract relating to costs and fees were still applicable.

This is a particularly important point in personal injury claims where the claimant will expect to recover costs from the defendant. The usual way to deal with it is to have a clause in the mediation agreement stating that the mediator's fees and the costs of preparing for and attending the mediation will be costs in the case.

Combined offers for costs and damages

There is nothing more certain to enrage the claimant side in a personal injury mediation than an offer for 'costs and damages inclusive'. It is often a 'coats moment' – when the claimants put their coats on and go home – and the end of negotiation. Firstly, yes the defendant can do it. Just as they can make combined offers in negotiations outside the mediation or at the doors of the court. The problem for claimants and

their lawyers is how to divvy up the offer between costs and damages, effectively creating a conflict between client, solicitor, barrister and possibly ATE provider.

The key, as always, is in the preparation. Know beforehand how you are going to react if the defendant makes a combined offer. How would you react if the offer was made outside the mediation process? Why should your reaction in a mediation be any different? If your reaction would be to leave the negotiation, then warn the other side before the mediation begins. If they decide to make such an offer, they can be responsible for the consequences. Another idea is to disclose your costs schedule only after liability and quantum have been dealt with. I have had experience of this and the response from the insurers was to refuse to make any offer until they had a good idea of what the costs were likely to be. An understandable position, but one which is interpreted by claimants as an intention to make a combined offer. A way round this is to disclose the schedule on the very clear understanding that unless separate offers are made for costs and damages you will end the mediation.

Conclusions

Judicious use of face to face and telephone mediation can shorten the life cycle of cases, reduce outstanding WIP and speed up costs recovery. This will have a positive impact on the profitability of your personal injury practice. Costs can be settled at a mediation, but care should be taken with the mediation agreement and costs inclusive offers.

If you are running a department and concerned about your KPIs, consider mediation on those cases where negotiations have stalled. You may never have mediated before but you have negotiated many times, and mediation is no more than a safe, assisted negotiation. ■

Philip Hesketh is a full time mediator at www.heskethmediation.com and former APIL Senior Litigator. He is a panel member of Trust Mediation, a provider of specialist personal injury mediators. He provides training for law firms new to mediation. Contact him at phil@heskethmediation.com.