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SAVING COSTS AND TIME WITH ADR

Andrew Thomas, partner in charge of ADR at Lewis Silkin, believes mediation in legal aid cases is permissible under the current legislation, and could be a means of reducing the legal aid bill

CALLS BY THE GOVERNMENT and the Legal Aid Board for a reduction in expenditure on legal aid are all too familiar. John Pitts, the chairman of the Legal Aid Board, points out that, for instance in personal injury cases, the unit cost per case has risen by approximately twice the size of the gross domestic product of the UK in each of the last ten years. Every item of legal aid spending is under close scrutiny.

At the same time over the last two or three years, evidence has emerged of a technique which helps to shorten disputes, saves costs, and is successful in about 80% of cases. The technique is mediation. It is emerging as the most popular of the methods grouped under the

global description, alternative dispute resolution, (ADR).

Mediation appears to offer the prospect of considerable savings to the Legal Aid Board. However, the board states that legal aid is not available for ADR, because legal aid is only to be used in recognised court proceedings, and not in alternative methods.

Mediation is not a panacea for all cases. But it is already having a significant effect in a wide range of disputes. There does not seem to be any reason why mediation cannot be used by parties under the present legal aid system. Its use would resolve cases more quickly and cheaply, thereby helping to curb the rate of increase in legal aid expenditure.

The mediation technique does not involve separate proceedings. It is a form of facilitated, without prejudice negotiation. It has been described as 'turbo-charged' negotiation. The parties meet with the mediator and try to reach a settlement, but the mediator has no power to arbitrate on the dispute. Usually, after a brief introductory meeting, the parties stay in separate rooms. A mediator moves between them like a shuttle diplomatist. Anything said to the mediator in the private meetings is confidential and can only be revealed to the other party if authorised by the party giving the information.

The mediation technique has been described as 'turbo-charged' negotiation

The mediator has the advantage of hearing the view of both parties. He or she can also test the strengths or weaknesses of the parties' positions. The mediator can see if there is common ground and attempt to craft a solution which is satisfactory to both parties. If the parties reach an agreement through the mediator, it is put in writing, forming a binding contract which settles the dispute.

Mediation is merely a form of negotiation. It should be covered under the present legal aid system so that a party with a legal aid certificate can be aided through the use of mediation. There are two issues arising. First, are the fees of the legally aided lawyer payable under the certificate and, secondly, are the fees of the mediator payable under the certificate? S.2(4) of the Legal Aid Act 1998 defines representation as including: (*a*) all such assistance as is usually given by a solicitor or counsel in the steps preliminary or incidental to any proceedings; (*b*) all such assistance as is usually so given in civil proceedings in arriving at or giving effect to a compromise to avoid or bringing to an end any proceedings.

S.2(4) clearly entitles the party's solicitor to assist their client in negotiations to bring about a compromise in proceedings, so lawyers assisting their clients in mediation negotiations should be able to claim for preparing and conducting such negotiations. Solicitors should be able to assist their clients in mediation and claim on taxation in the normal manner.

If mediation negotiations are permissible under the certificate, any necessary disbursement to enable parties to effect such negotiations should be payable. The parties to a dispute normally agree to share the mediator's fee – so normally only half the fee of the mediator would be payable by the legally aided party.

There does not appear to be any fundamental objection to mediators' fees being paid under a legal aid certificate. Under the green form scheme conciliation referral fees are recoverable disbursements. The mediator's role is probably less interventionist than the conciliator's.

It appears that there is no need for any special legislation for legally aided parties to take advantage of mediation. And also that there is no need for them to get any special consent under their certificate. However, practitioners may be reluctant to proceed in the absence of a clear statement from the Legal Aid Board. Practitioners wishing to get clearance in advance could use the following methods.

Under reg 51 (*b*) (ii) of the Civil Legal Aid (General) Regulations 1989, the area director may amend any certificate when in his or her opinion it is desirable for such a certificate to be amended to assent to other steps in proceedings. Practitioners could request the amendment of the certificate to include mediation – and for payment of the mediator's fees.

Reg 61(2)(ii) allows the area director to authorise the incurring of the costs of unusual steps. Mediation is not an unusual step. Practitioners might, however, seek the area director's view for the authorisation of expenditure on their own costs and the mediator's fees. The area director might give authorisation under this regulation. Alternatively, if the area director feels the step is not unusual or involves any unusually large expenditure, he or she could decline to give authority on the basis that it was not necessary. On taxation, this could be drawn to the district judge's attention.

Reg 101 permits the area committee to authorise payment of disbursements in advance. An area committee could be asked to ask to authorise a mediator's fees in advance. The amount would be a matter for taxation, but the district judge would have the evidence that the area committee had authorised the expenditure.

If there is a refusal by the area director or area committee – on the basis that mediation was not a matter which could be legally aided – it could be made the subject of application for a judicial review. If there had been refusal by the district judge to allow matters on taxation, this could be made a matter for an appeal.

One other approach which solicitors might take, especially in personal injury cases, is to seek the insurers' solicitors agreement that they will pay the cost of any mediation in any event. This may appeal to insurance companies which, in the vast majority of personal injury cases, pay the costs anyway.

Will the use of mediation increase costs? The Legal Aid Board has expressed fears that allowing parties to utilise ADR, as well as their rights to conduct court proceedings, will increase costs. It is feared that it will allow parties two bites of the cherry with consequent increased public expenditure.

But these fears are misplaced in the case of mediation. Mediation is not a separate form of proceedings, it is merely a developed and very effective form of negotiation. With an 80% settlement, rate this obviously leads to a considerable saving in legal costs. In the cases which are not settled, there are very often offers made. These have to be reported to the Legal Aid Board. If a party is unreasonably refusing an offer, the legal aid certificate can be discharged.

Mediation also normally has the effect of narrowing issues in cases which are not settled. Again, this cuts down the amount of legal work which has to be carried out and leads to a considerable saving in costs.