Mark Field looks at reasons to consider a mediation in preference to a joint settlement meeting.

"We are happy with a JSM". "We see no reason to use mediation." "We are so far apart that a mediation would be pointless." These are typical responses of practitioners to a proposal of a mediation. As a method of dispute resolution, mediation was given a particular focus following the introduction of the Civil Procedure reforms of Lord Woolf and again, with the Jackson Reforms. So, the concept is well known to practitioners and they now know that they should not decline an offer of mediation (*PGF II SA v OMFS Company 1 Ltd [2013] EWCA Civ 1288*).

Yet it appears that when faced with an invitation or court order to engage in alternative dispute resolution (ADR), many practitioners prefer to engage in a JSM rather than a mediation. Why do something different when they are happy with a JSM?

A JSM is equivalent to court corridor negotiation, without the pressure of an impending trial. Its success depends on the reasonableness of counsel for the parties. The parties themselves are not directly involved in the negotiations, merely receiving reports from counsel as the negotiations progress. Thus the whole focus of the negotiations is upon counsel, who will often feel that conceding anything more than minor points or small amounts will be construed by the other as a weakness; the adversarial system is close to the heart of all litigation lawyers. But in a mediation, the focus is upon each of the parties – the parties themselves are at the very centre of the mediation process.

And so they should be; it is after all their action. So, in a personal injury claim, the claimant can speak directly to the defendant's insurer. It is an opportunity for the claimant to make a real impression upon the insurer in a way that is not possible at a JSM. I have witnessed a claimant at a mediation remove her prosthesis and demonstrate to the insurer what she had to go through each day just in fitting her prosthesis. She then gave a graphic description of how the loss of the limb had affected her domestic and especially her social life. Before the accident, the claimant had been heavily involved in activity sports and motorcycling; her injuries had had a devastating effect upon her ability to participate in these activities. The way in which she spoke had a far greater effect upon the insurer than the witness statement and expert evidence that had hitherto been disclosed. There could not have been a better audience for the claimant than the insurer who would write the cheque.

Where the parties are so far apart that resolution by any method other than a trial seems unlikely, a mediation is preferable to a JSM because it enables the mediator to explore the middle ground in a way which, if done by a party's counsel at a JSM, would be regarded by the other counsel as a sign of weakness.

A mediation also provides an opportunity for other issues to be resolved between the parties – issues which a lawyer might not regard as particularly important, but which can be important to a party, such as the giving of an apology. Saying "sorry" alone is not sufficient, and when conveyed by one lawyer to another for onward transmission to the client it becomes almost meaningless. But in a dispute between members of the same family or between warring neighbours, an apology may not only help towards the resolution of the current dispute, but can lay the ground for better relations in the future.

Since mediation is a voluntary process (either party can end the mediation at any time), it is hard to see why practitioners are reluctant to embrace it. Even if the mediation is not successful on the day, it almost invariably leaves the parties with food for thought and frequently a settlement can be reached in the days following the mediation.

The costs of the mediation itself are usually in the case and the mediator's fee should not deter the parties – it is a reasonable sum when compared with the post-issue court fees now levied on a claimant. In fact, where the defendant is insured, the insurer will usually underwrite the mediator's fee in full.

So, in answer to the question that I posed at the beginning, there is every good reason why practitioners should do something different and embrace mediation more enthusiastically.

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