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COMMENTS TO THE SHERIFF COURT RULES COUNCIL ON THE MEDIATION COMMITTEE'S RECOMMENDATIONS

Email to SCRCMed@scotland.gsi.gov.uk by Wednesday 27th September 2006.

Introduction

The Scottish Mediation Network (SMN) warmly welcomes the Mediation Committee's recommendations. While a new rule will not remove the resistance of some advisors to recommending the use of mediation to their clients, the proposed changes should encourage more practitioners to become more informed about the process which in turn may well encourage them to try it. Once people have tried mediation, our experience is that they then fully appreciate the benefits to them of this different way of resolving disputes.

There is a frequently expressed view that lawyers do not like ADR because it stands for "Another Drop in Revenue." This popular prejudice is too simplistic. More realistic motivators for resistance include: concerns about recommending a course of action that the advisor has little or no experience of and which might result in loss of control of the case (because mediation is regularly described as allowing the parties to reach decisions themselves without being constrained by the law.). Lawyers who have become expert in using mediation tell us that they now realise how much **more** control they and their clients retain when tailoring creative solutions which are mutually acceptable.

So, if introduced, these rules need to be accompanied by a programme of education for the professionals. Sheriffs, lawyers and court staff need to be clear about issues like: when mediation may or may not be appropriate, how to explain mediation to parties, what will happen at mediation meetings, and what is involved in representing a client in mediation.

In addition, anyone using mediation as part of the Court system will need to know that mediators have demonstrated an appropriate level of competence. As mediation is a relatively new occupation, work on quality assurance is still developing. We describe more about the ongoing development of a credible and independent structure for quality assurance for all forms of mediating in Scotland, below.

We have had the benefit of reading the response to this consultation by the **Scottish Consumer Council** which we consider to be very well written, clear and with a relevant evidence base. We agree with all their comments particularly about the necessary cultural change to ensure that courts are

viewed as a last resort. This view was endorsed by their Civil Justice Report from the group Chaired by Lord Coulsfield.. We also welcome the Scottish Executive's commitment to a Review of the Civil Justice System in Scotland. We are anticipate that these developments will encourage the appropriate use of mediation.

Q. 1a Do consultees consider that such a rule is necessary or desirable?

Yes, both necessary and desirable.

Q. 1b Please provide comments to explain your reasons.

People usually go to lawyers when they have a justiciable dispute. Lawyers are generally resistant to changes in the way they litigate. However, they are very good at adapting to change when necessary as they are used to working with a plethora of new law. It follows that these proposals are needed to alter lawyers' behaviour in relation to mediation.

The outcome rates and popularity of mediation with users have been consistently high during the last two decades, particularly in neighbourhood and family disputes. However, the uptake of mediation in litigated disputes, even when free, has been low. It seems to us uncontroversial that mediation is an underused option.

Q. 2a Should the rule encourage rather than compel parties to seek resolution of matters in dispute by way of ADR before resorting to litigation?

Yes

Q. 2b Please provide comments to explain your reasons.

We refer (below) to the Guidelines on the Practice of Mediation adopted by the SMN which are generally accepted in Scotland as a benchmark for the practice of mediation. Mediation is described as:

*A process in which disputing parties seek to resolve their differences with the assistance of a trained mediator acting as an impartial third party. Mediation is **voluntary** and aims to offer the disputing parties the opportunity to be fully heard, to hear each other's perspectives and to decide how to resolve their dispute themselves*

While mandatory forms of dispute resolution may be effective and helpful, they fall outside this definition. Mediation works when people participate willingly, in good faith and free from the fear that what they say in mediation will be used elsewhere. They need to be able to explore all the possibilities, as it is from

this rigorous exploration of options that solutions usually emerge.

Q. 3a Should the court have the power to require parties to an action to consider ADR?

Yes

Q. 3b Please provide comments to explain your reasons.

There is a clear distinction between requiring parties to consider mediation and requiring them to participate in mediation. Many Sheriffs routinely encourage parties to consider different ways of resolving disputes. Most agents and clients accept these interventions as useful. However, some may dogmatically refuse to consider the mediation route. It is appropriate that people are required to give their reasons for refusal so the Court may judge the validity of the rejection. Voluntary mediation only works if both parties participate. Without an incentive to engage in good faith (i.e. the potential finding of expenses against the party that unreasonably refused to mediate) power shifts to the party that says they will not mediate.

Ideally, this new rule should be introduced within the context of wider reaching reforms such as greater case management, pre-action protocols etc. This should be accompanied by awareness raising among judges, lawyers and the public

Q. 4a Should the parties to the action be required to give notice with reasons in writing as to whether or not they consent to a referral to mediation?

Yes

Q. 4b Please provide comments to explain your reasons.

A requirement to give notice would focus the parties' minds on the reasons for choosing to use or not to use mediation... It is appropriate that people are required to give their reasons for refusal so the Court may judge the validity of this rejection. We recognise that some have reservations about the need for written reasons in small claims since as it might add a further burden on parties grappling with a system which requires considerable detail for claims involving relatively small sums of money

Q. 5 Do consultees have any comments to make in relation to this part of the recommendation?

The logistics of setting up a mediation can sometimes be difficult. However, it seems appropriate that mediations should be carried out within existing Court timetables. It is important that there is no perception that mediation will cause delays or become a means for parties to prolong matters for tactical advantage.

Q. 6a Do consultees consider it appropriate to have an expenses provision in the rule relative to the awarding of expenses?

Yes

Q. 6b Please provide comments to explain your reasons.

Voluntary mediation only works if both parties participate. For some, the possibility of an adverse finding of expenses will work as an incentive to engage in good faith. We support making explicit the potential finding of expenses against a party that unreasonably refuses to mediate.

Q. 7a Is it appropriate to include a reference to ADR in each set of court rules namely

- ♦ Ordinary Cause Rules 1993
- ♦ Summary Applications, Statutory Applications and Appeals etc. Rules 1999
- ♦ Summary Cause Rules 2002
- ♦ Small Claim Rules 2002?

Yes

Q. 7b Please indicate with reasons whether the reference should be incorporated into all, some or none of the court rules.

Mediation can produce useful options for all litigants and should be available to all sorts of Court action. Colleagues in England and Wales express surprise at the use of mediation in Edinburgh Sheriff Court for small claims and summary cause cases. In their jurisdiction, mediation is much more prevalent in higher value claims.

Q. 7c If you think that the reference should only be incorporated into some of the court rules please indicate, with reasons, which set(s) of court rules.

Not applicable

Q. 8a Do consultees consider rule 33.22 should be deleted from the OCR in event of the all-encompassing rule being introduced?

Yes

Q. 8b Please provide comments to explain your reasons

Retaining Rule 33.22 would be anomalous. Its use by Sheriffs has varied across the country. Notably in Falkirk Sheriff Court, referral to Family Mediation became routine, leading to the setting up of a "duty mediator" rota by local Family Law Mediators accredited by the Law Society of Scotland and belonging to CALM. In other places, Sheriffs have expressed concern that the rule relates only to children and not to financial provision on separation. The proposed rule would go some way to addressing this disparity.

Q. 9a Do consultees have any comments to make in relation to this recommendation?

We wholeheartedly support the first principle of the draft rule that the sheriff and the parties "shall seek to secure the speedy and effective resolution of all matters in dispute."

Self evidently, agreement reached by direct negotiation between the parties is usually the quickest and most effective means of settlement. However, mediators often find that communication has broken down so that negotiation has become difficult if not impossible. We consider that it would be helpful to focus the parties' attention on to what they have done before embarking on litigation. This would emphasise the importance of using Court only as a last resort.

Q. 9b Please indicate, with reasons, whether this provision should be incorporated into:

- (a) All or
- (b) Some or
- (c) None of the court rules.

This provision should be incorporated in all of the court rules with appropriate adaptation for small claims and summary cause actions so that it is straight forward for party litigants to comply. Adapting the standard forms by inserting questions might address this issue.

Q. 9c If you think that this provision should only be incorporated into some of the court rules please indicate, with reasons, which set(s) of court rules.

Not applicable

- Q. 10 Consultees are invited to provide comments on the terms of recommendation three.

In-Court mediation services are effective because they are available where people need them and can share accommodation in the Court. It is important that the services are perceived to be independent and impartial.

There is, however, a serious issue about the sustainability of the mediation service in Edinburgh Sheriff Court. We cannot rely on volunteer mediators in the long term. At the moment, many offer their time free in exchange for gaining mediation experience. They will soon need remunerated work to make a living. The answer may be in a blend of paid and volunteer mediations such as the schemes being piloted in Aberdeen and Glasgow.

Court-annexed schemes should be introduced but funding, especially in lower value cases, is a central question to be addressed. Public funding will be required, particularly for small claims and summary cause cases, and mediators will not volunteer their services forever.

In addition, devising an awareness- raising and training strategy is of paramount importance to the implementation of Recommendation 4. The Scottish Mediation Network has materials shared with us by colleagues in Maryland's Mediation and Conflict Resolution Office. They have devised an education programme in mediation for Court staff across their state.

The Scottish Mediation Network has conducted a series of workshops for the NHS in Scotland when they introduced their mediation pilot for medical negligence claims. We worked closely with National Health lawyers and claims personnel who seemed to respond to information provided by us, a charitable organisation that does not provide mediation and so is not directly selling a service. A report was produced for the Advisory Board outlining the learning points from these events.

These and similar recourses should be considered as part of the plan for introducing this new rule.

Finally, we would mention the collaborative dialogue about quality assurance of mediation in Scotland initiated by our engagement paper issued on 1.2.06, developed by the exchange and consensus building paper circulated on 16.6.06 and explored during the "Big QA discussion" in Perth on 6.9.06. (A full set of papers are available by going to <http://www.scottishmediation.org.uk/about/news.asp?id=91> .)

This work represents a serious movement toward consistent quality assurance for mediation in Scotland.

Q. 11a Please indicate, with reasons, whether a new paragraph, in the terms outlined above, should be incorporated into both:

- ♦ Rule 8.3 of the Summary Cause Rules 2002 and
- ♦ Rule 9.2 of the Small Claim Rules 2002?

We offer no comments as this is outwith our remit.

Q. 11b If you think that the reference should only be incorporated into one set of the court rules please indicate, with reasons, which set(s) of court rules.

We offer no comments as this is outwith our remit.

Q. 11c Do consultees have any views on the recommendation that the said rules 8.3 and 9.2 should otherwise remain for the time being unaltered?

We offer no comments as this is outwith our remit.

Q. 12 Do consultees have any comments about the proposed rule as drafted? It should be clear to which part (s) of the rule the comments relate.

None

Q. 13 Do consultees have any comments to make on the proposed form of notice? It should be clear to which part (s) of the notice the comments relate.

None

GUIDELINES ON THE PRACTICE OF MEDIATION

Adopted by the Policy Committee of the Scottish Mediation Network on 26.5.04

1.1.1 Preamble

These Guidelines are intended to form a baseline for the conduct of all forms of mediation in Scotland. It is expected that the different strands of mediation will, if they have not already done so, develop complimentary and more detailed guidance.

Mediation is a process in which disputing parties seek to resolve their differences with the assistance of a trained mediator acting as an impartial third party. Mediation is voluntary and aims to offer the disputing parties the opportunity to be fully heard, to hear each other's perspectives and to decide how to resolve their dispute themselves.

2. Voluntary participation and self determination

A mediator shall recognise that mediation is based on the principle of voluntary participation and un-coerced self-determination by the parties.

Impartiality, independence and neutrality

A mediator shall remain impartial, independent and neutral. If a mediator becomes aware of any reason which may diminish her/his impartiality, independence or neutrality, he/she shall disclose this to the parties at the earliest opportunity and withdraw from the mediation unless the parties do not wish her/him to do so.

3. Conflicts of Interest

A mediator shall disclose all actual and potential conflicts of interest reasonably known to the mediator whether before or during a mediation and shall withdraw from the mediation unless the parties do not wish him/her to do so.

4. Competence

A mediator shall be responsible for undertaking sufficient training, supervision and continuing professional development to maintain necessary mediation skills. A mediator shall mediate only when she/he believes that he/she has the necessary skills to carry out the mediation.

5. Confidentiality

Confidentiality in mediation is important to encourage all participants to speak truthfully and candidly, and to enable a full exploration of issues in dispute. Unless compelled by law, a mediator shall **not disclose any of the information given during the mediation process.**

6. Understanding of mediation

6.1 A mediator shall ensure that the parties understand:

- the purpose and procedure of the mediation;
- the role of the parties and the mediator;
- any fee arrangement;
- The obligation of confidentiality.

7.

8. Advertising and solicitation

In advertising or offering services, mediators shall not guarantee settlement or promise specific results. All information provided by mediators about their education, background, mediation training and experience shall be accurate.

9. Gifts and favours

A mediator must not accept from or exchange any gift or favour with any party in any mediation. A mediator must use judgement that reflects the high ethical standards which mediation requires.

10. Discrimination

People should always be treated with respect and without discrimination.

Complaints and Professional Indemnity Insurance

A mediator shall provide information about the process for handling any complaint made about their conduct or service, and about any professional indemnity insurance cover they may have.

About the Scottish Mediation Network

The Scottish Mediation Network is a company limited by guarantee registered in Scotland, Company No. SC258173, and recognised as a charity by the Inland Revenue. As at 1st August 2006, we have 135 individual members and 65 organisational members, all of whom endorse the SMN's *Guidelines on the Practice of Mediation in Scotland*.

Our Vision

We are working to embed mediation into the way that conflict and disputes of all forms are handled in Scotland.

Mediation is a process in which disputing parties seek to resolve their differences in a mutually acceptable way with the assistance of a trained mediator acting as an impartial third party.

Our Values

We value:

- ❖ working together collaboratively
- ❖ mutual respect
- ❖ clear and open communication
- ❖ voluntary participation
- ❖ an inclusive Network and
- ❖ financial prudence

Our Purpose

The Objects clause of the Scottish Mediation Network's Memorandum of Association states, in summary, that we aim:

To promote mediation and other related forms of conflict management for the benefit of the public, individuals and society in Scotland and elsewhere and to:

- ❖ Encourage awareness, understanding and appropriate use of mediation;
- ❖ Support and promote education, training and research in skills and best practice in the use of mediation;
- ❖ Create and encourage links among the various fields of mediation; and
- ❖ Promote and organise standards of professional conduct and training.

www.scottishmediation.org.uk

Information about the Director

Ewan A Malcolm, W.S., LI.B (Edin), Dip L.P., N.P.

Ewan set up the Scottish Mediation Network office in September 2002 and in 2005 was appointed as its first Director.

The main focus of his development work is to host a collaborative discussion and devise a process to move toward linking quality assurance and qualifications across all spheres of mediation in Scotland. Ewan is also charged with facilitating consensus-building conversations about linking the development of excellent practice in training across all spheres of mediation. He also leads a team responsible for developing a strategy for improving public awareness of mediation, which includes delivering workshops and presentations.

He was in private practice as a solicitor for nearly two decades and started his mediation training in 1995. Ewan is trained as a commercial, a family and a community mediator. In his own time, he freelances as a mediator in high value family and commercial disputes. He also volunteers with both the Edinburgh Sheriff Court and the Edinburgh Community Mediation Services, where he is working toward his SVQ in mediation. Ewan has presented training across the UK and is an associate member of the Chartered Institute of Personnel and Development.

Publication of this document and evidence

We are content that this document be published and would welcome the opportunity to assist the Council further.

Acknowledgements

Invaluable comments have been contributed by a number of members of the Scottish Mediation Network. Responsibility for the final version of this response rests with Ewan Malcolm.

Ewan Malcolm
Director, Scottish Mediation Network
September 2006