1. It is clear that the proposed rule is not "necessary". The sheriff court would continue to function without the proposal being effected. The question is one of desirability. In answering this question in the affirmative, I should note that such a rule is not "essential". Mediations would continue to occur in Scotland without it. There are, however, many potential benefits which could be obtained in promulgating such a rule, if the increased use of mediation is regarded as of benefit in general.

2a. It is to be doubted, whether, at law, attempts to compel parties to seek resolution of matters in dispute by way of ADR before resorting to litigation could be enforced without challenge. This is particularly the case where many such purported rules were to be promulgated by Acts of Sederunt rather than Act of (the UK) Parliament. Separately, to the extent there may be said to be an ethos of mediation, included as part of that ethos is an anticipation of parties coming to any mediation "in good faith", in a genuine attempt to resolve their disagreement, dispute or disputes. That ethos could be subverted by any compulsion towards mediation.

There is a risk that to "encourage" parties may give rise to parties participating out of fear of the consequences of not so doing. A sheriff is in a very powerful position, properly and necessarily, when it comes to the resolution of disputes. Parties may feel that an adverse inference could be drawn if they fail to go to mediation, even in circumstances in which they thought they had a compelling and cogent reason not to go to mediation. This is something which has been considered as part of the drafting process. It is to be hoped that sheriffs would not lose sight of this. Also, if parties have a reason they would prefer not to disclose, they are left potentially exposed.

The initiating Writ or Summons in a court case can of course be utilised as a first step in any mediation procedure, and any formal addition to the rule anent ADR could be worded to use this, without necessarily compelling parties to ADR prior to a Writ or Summons being raised. The presence of a Writ/Summons is often an important "spur" to defending parties to take serious steps in an attempt to resolve the matter. Requiring parties to agree to and indeed attend a mediation or ADR procedure before such a Writ/Summons could be raised would allow a defending party an excuse to delay matters, and to fail to deal with the issues.

3a The court ought to have the power to require parties to an action to consider ADR. With this power comes a responsibility to take a fair-minded approach to the particular circumstances of the case, and in assessing any reasoned resistance to ADR. Any resort to mediation ought not to, necessarily, require a sist of the action. Mediations can be run in parallel with the court procedure to ensure pursuers/claimants are not disadvantaged by delay, or suffer the consequences of use of ADR as yet another tool in a defender's war of attrition.

4a Parties to the action should be required to give notice with reasons in writing, and therefore whether or not they consent to a referral to mediation.

It is understood that in certain jurisdictions this type of procedure is adopted, but the reasons are lodged with the court in a sealed envelope. Experience in other jurisdictions tends to show that this, coupled with a corresponding potential for a

cost/expenses sanction, may be a blunt instrument, and perhaps is insufficient to force parties seriously to consider ADR.
Parties should be given an early indication if the reasons they give in refusing to consent to referral to mediation are open to question. They ought to be given the option of reconsidering their position. In practice, of course, they always have that option. Without an underlying sanction, it is difficult to see where the "sting" will come in refusing to consent to mediation/ADR.

5 Noted above, the failure to impose sanctions, could render the proposals of limited, or no, assistance/effect.

A party at mediation, is not at any point compelled to settle the matter in dispute. It is always open to them to refuse to settle the dispute, to return to the litigation forum. Experience suggests that notwithstanding this, many initially recalcitrant parties do in fact manage to resolve their disputes at mediation. This factor ought to be kept in mind when considering how and whether to urge parties to consider mediation.

6 It is preferable, for purposes of fairness, precision and clarity, to have an express reference within the rule to any expenses implications, rather than leaving legal practitioners and sheriffs to draw their own implications and conclusions. In addition, sheriffs may be reluctant to impose expenses sanctions where express reference is not made. Sheriffs may feel or find that the lack of express reference allows them a greater of different measure of discretion to that which is intended.

7 At lower values of claim, mediation service providers, whether in the private or public sector, may require to revise the terms of their engagement, to ensure, cost-effectiveness. Given the cost to the public sector of having a sheriff determine a small claim, it is anticipated that mediation, small claims may benefit the taxpayer as well as parties.

8 No comment - I do not deal with family matters.

9. What is the purpose of this recommendation? In the vast majority of litigations, parties will have attempted some form of negotiation or discussion, to resolve their dispute. They may presume that requiring averments in their Initial Writ is intended to force parties to take additional steps. If so, this should be spelt out. If not, there is little point in it. As with the previous comments, a general overhanging "implication" of there being some difficulty or problem at court if you have not attempted ADR, is not desirable. As a general proposition, there is no actual difficulty with requiring parties to include averments on this subject. Could these averments become the subject of Proof? (undesirable). The underlying rationale behind this suggestion is a little unclear. If it is to be included as a rule, then guidance should be given the reasoning behind it, to allow legal practitioners and other to deal with in appropriately.

10 This is unobjectionable, subject to funding issues

It is important that it is made clear in the rules that mediation is to remain wholly confidential, and, in the event of failure to settle the matter, the details of the

mediation are not disclosed to the sheriff, nor any part of them. (nor ought he/she request such information to be disclosed).

A certification scheme for mediators would require to be set up - the quality of mediation service providers, and training, would be essential.

11 If the paragraph is to be preserved, the amendment is desirable.

I have significant experience of mediation in commercial disputes, and can say that it has been an overwhelmingly positive experience. Clients generally achieve their objectives in a faster and more cost-effective manner, and in a way which give them a significant say in the ultimate outcome. Parties do not always find the process a pleasant experience, but they tend largely (not wholly) to be positive about it, on reflection after the event.

The cost of commercial mediation can effectively prohibit its use in smaller-value claims.

I should also note that I am a partner in dispute resolution in [redacted], and a CEDR-accredited mediator. The views expressed are mine, and are not to be taken as necessarily those of the firm as a whole.