DRAFT RESPONSE TO PROPOSAL ON USE OF MEDIATION IN SHERIFF COURT

The Forum of Scottish Claims Managers (FSCM) welcomes the opportunity to contribute to the consultation on the proposed change to the Sheriff Court Rules regarding mediation.

The following comments regarding the use of mediation apply in the main only to actions involving personal injury or RTA claims where no personal injury is involved. We believe different considerations may apply to other types of actions such as family disputes, commercial actions etc.

FSCM would welcome any move to avoid unnecessary litigation. It is wasteful both in terms of expense and resource. Additionally FSCM would encourage parties to reduce the life cycle of any litigated case by engaging in a form of mediation at which *serious* attempts should be made to settle. If settlement is not possible then at a minimum the issues in dispute ought to be narrowed. In personal injury actions that mediation ought to be in the form of a pre Proof meeting.

It would be the view of FSCM however that a formal Mediation process, such as ADR would not be appropriate in the majority of personal injury actions .ADR and other forms of formal mediation are expensive and in low value cases (which form the majority of personal injury actions raised in the Sheriff Court) the costs involved would be wholly disproportionate. The experience of our colleagues in England and Wales where mediation is more established than in Scotland would support that view.

It is our belief that the Rules of the Sheriff Court should contain a provision that allows the Sheriff to call upon parties to hold a settlement meeting at a particular point in time prior to Proof In the event of settlement not being reached, it will be for parties to demonstrate to the Court's satisfaction that a serious attempt to settle has been made. If in the opinion of the Court either party has failed in that duty then the Court has the discretion to impose a costs penalty on that party.
If parties decline an invitation to take part in a settlement meeting or unreasonably delay then they should be compelled to give their reasons for so doing in writing to the Court and the other party. Again if the Sheriff concludes that the reasons given are unconvincing then a costs penalty may be imposed
Indeed we would go further and say that if on examination of the papers the Sheriff determined any unreasonable action on the part of either party had initiated the litigation process, then he should have the power to awards costs penalties in those circumstances also.

Formal Mediation/ADR may have a part to play in some personal injury actions however, but to maintain proportionality in terms of costs, it is unlikely that it would be appropriate in an action with a value under £50K. In consideration of this we are of the view that the court would have to satisfy itself that the value of the claim is likely to exceed this value, as opposed to the value the pursuers may put on the matter.
That leads to another question that ought to be considered and that is who pays for the (formal) Mediation process. Will it be provided free by the Court or is the intention

to ‘outsource’ it to a private ,commercial organisation? If the latter, how and by whom will that be funded?
The imposition of such formal processes would in the view of FSCM add another layer of expense to an already expensive process.

Litigation ought to be the last resort. Unnecessary litigation is a drain on valuable Court time and resource, is costly and as the consultation document itself recognises, produces ‘winners’ and ‘losers’. Mediation often brings about a settlement that is to the satisfaction of both parties and helps contain costs. It also of course helps free up Court resource for more complex/expensive/appropriate cases. Mediation in the form of pre Trial settlement meetings as provided for in the Court of Session Rules has proven to be successful in reducing both the number of Proofs or Trials taking place and in the number of ‘at the Court door’ settlements which themselves are hugely wasteful in terms of time and cost.

FSCM is committed to reducing the adversarial nature of the claim process. That is evidenced by our promotion of, and belief in the Voluntary Pre Action Protocol for Personal Injury Claims agreed with the Law Society of Scotland and followed by all members of FCSM. The aims of the Protocol include enabling parties to get to a position where fair and reasonable offers can be made and cases settled early without litigation. Commencement of litigation need not mean an end to the negotiation process and mediation-in the form of pre Proof meetings in the majority of cases-can help reduce the time and cost involved in reaching settlement for all interested parties.