The Secretariat
Sheriff Court Rules Council
Scottish Executive Justice Department
Civil Court Procedure & Sheriff Court Jurisdiction
2 West
St Andrew's House
Edinburgh
EH1 3DG

Our ref: DS

21 September 2006

Dear Sirs,

We enclose our response to Consultation paper on "The Sheriff Court and Alternative Dispute Resolution".

We are responding as a firm and agree to the response being made available to the public. The response can include our name and address. We are content that you contact us again in the future.

Yours faithfully

LAWFORD KIDD
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enc

Response by Lawford Kidd Solicitors

To Consultation Paper on the Sheriff Court and Alternative Dispute Resolution.

This response prepared by Lawford Kidd is submitted principally in relation to the possible effect of the Rule change on Personal Injury cases. The firm is a leading Scottish Personal Injury Practice and conducts a substantial volume of work in both the Court of Session and the Sheriff Court. .

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

Ans. 1b: The firm does not consider that such a rule is desirable. The firm notes that the Scottish Executive has launched two pilot in-court mediation projects in Aberdeen and Glasgow. These projects, based in the sheriff court, will help people facing small civil disputes looking to resolve problems without going through court proceedings and will run for two years. The Government is funding the project and such an initiative is clearly welcome. The scheme is free for claims of a value of less than £750 and for claims with a larger value fees will be charged on a sliding scale. As no evaluation has taken place of these mediation projects it is premature for the Sheriff Court Rules Council to propose a significant change in sheriff court procedure without awaiting the findings of that survey.

More significantly at no point in the mediation committee recommendations is there any mention of the cost of mediation. The committee put forward the view that greater recognition is now required in the sheriff court rules of the role which mediation and other forms of ADR may play. We are not clear what is meant by "other forms of ADR" but there can be no proper assessment of the value of mediation without a clear delineation of the likely cost of such mediation to parties. Our own understanding is that an average mediation for even a relatively small case can cost between £500 and £1,500. Nowhere does the paper address the question of who funds these costs and whether it is financially worthwhile for the parties to incur them. It is surprising that such a rule change is proposed when currently there is no statistical information on the use of mediation in Sheriff Court actions; this firm is not aware of any other legal practice carrying out personal injury work which uses mediation in litigation at all. The reason for this is very simple: There is no procedure for recovering the costs of such mediation and legal practitioners are both trained and able to resolve most disputes directly by negotiation without requiring the assistance of a third party.

In relation to statistical information about settlement of cases it is worth considering the detailed paper produced by the Scottish Executive: Personal Injury Litigation, Negotiation and Settlement. The findings of the report from extensive interviews with experienced practitioners were that

1. **All but around 1% of PI cases are settled out of Court (page 47, para 5.5).**

2. **of other cases that proceeded in Court around 90% of litigated cases settled before proof. (Page 48 at 5.8) Further statistics are put forward suggesting that in relation to Court of Session actions between 94 and 96% of all cases were concluded prior to any diet of proof (page 59, 6.2)**

The above figures would appear to suggest that at present there is a culture of negotiated settlement of cases which means that an effective filter takes place to ensure that a minimum use is taken up of court time and that agents have developed an effective suitable procedures for settling cases without the intervention of mediation.

One major concern in connection with proposals taken to submit actions to mediation is that there is currently no provision in the table of fees to allow recovery of such mediation costs. Mediation in a personal injury claim is only likely to succeed if the insurer has indicated prior to the mediation that he is going to meet the cost of the procedure whether the mediation is successful or not. In our experience and in discussion with other experienced personal injury practitioners no insurance company has ever approached us to make such a proposal nor do we think they are likely to do so based on the current level of extra judicial settlement costs. Taking a relatively standard personal injury claim settling at say £3,500 the old extra judicial settlement scale would give a fee for the Solicitor of £775. The new Chapter 10 fee following the introduction of pre-action protocol would give a fee of £1,435. Assuming the cost of mediation for a claim at that level is between £500 and £1,500 it is clear that the cost of this is likely to be more than the actual fees generated in relation to settlement of the whole claim. It is highly unlikely that insurers are going to offer use of mediation when the fees for concluding the case are set at the above level.

One of the matters which the Consultation paper significantly lacks, as already pointed out, is that there is no basis on which a consultee can usefully comment on the mediation proposals because there is no costing given. We suspect that a number of practitioners will fail to comment on paper because they are not aware of the costs of the mediation procedure. It is surprising that a rule change is proposed which has significant cost impact without any detailed indication of the figures involved.

The Paper Remark**"to leave matters as they currently stand with no rule in place concerning ADR would be unsatisfactory in the twentieth twenty-first century". We do not understand this remark: it does not put forward any rational argument for the use of mediation. Clearly everyone is aware that this is the twenty first century and that all efforts should be made to expedite the settlement of court actions in the modern age. It is not the case that the Sheriff Court Rules Council is ignoring their responsibilities to both review current procedures and secure the expeditious and efficient disposal of matters in dispute: a consultation paper has just been issued on proposals for new Procedural Rules for Personal Injury Actions in the Sheriff Court. Views and comments on that paper will be require to be made by 18 October and the current mediation proposals appear to take no account of the above and the likely impact that the proposed new procedure would have on settlement of cases. In particular the introduction of a procedure for a pre proof meeting (proposed rule xx.10) is welcome: this mirrors**

provisions in the current Court of Session Rule 43.10 which requires a pre-trial meeting to be held not later than 4 weeks before the Proof or Trial date. All practitioners in the Court of Session dealing with personal injury matters approve of this rule which has resulted in significant benefits for both parties in focussing issues without waiting for a settlement attempt "at the door of the Court". Such a procedure in the Sheriff Court is highly welcome and we suspect would help to limit the number of cases which currently proceed to Proof. Clearly a start has already been made in preparing for such a procedure by the introduction in the sheriff court of the new chapter relating to a pre-proof hearing.

Costing

Turning again to the committee's view that "to leave matters as they currently stand with no rule in place concerning ADR would be unsatisfactory in the twenty first century and the right note for the sheriff court in Scotland would be struck by giving the court power.. to require parties to consider resolving their differences by some means other than court proceedings" we would submit that this remark has no factual or rational foundation. Our belief is that very few court actions will have commenced without prior consideration of settlement: particularly in view of the likely impact of costs on the unsuccessful party and the costs initially involved in starting the court action. No-one involved in the legal processes would deny that mediation may have a useful place in resolving litigated matters once the court process has started and the parties agree. However there is sufficient flexibility in the current court procedure to allow for utilisation of mediation should parties so wish. The case can be sisted to allow mediation to take place; however as soon as where is an element of compulsion in the matter one is drawn into consideration of

A: the impact on parties' rights
B: who funds any mediation.

In relation to compulsory mediation it is interesting to note that Lord Cullen commented in his review of business of the Outer House of the Court of Session (1995) (page 60 Para 7.4) that "any proposal for compelling parties to participate in a settlement conference would represent a significant alteration in their rights. This would require to be subject to discussion between representatives of the Court and the practitioners at the highest level". Lord Cullen also remarked that one way of encouraging early settlement would be to allow a procedure of pursuer's tender. It is clear that there is a significant restriction on the applicant's rights if during the litigation the court has the power to refuse to deal with the matter and to refer the question of settlement to a third party.

No proposal for mediation can be discussed sensibly without looking at the costing of the procedure. In effect it can be considered a privatisation of the court procedure where an outside agency on a fee paying basis is introduced to try and resolve the matter before the court. We cannot see how such a procedure can be put forward on any compulsive basis; there would have to be either agreement between the parties or specific provision for payment of the mediator's fee; if the court was proposing a rule regarding mediation that

"would require the parties to consider it" there would have to be a consequent rule regarding the costs of such procedure. If the court were to pay for the procedure then that would have an impact on the costs of the Scottish Court administration; if the parties were paying for their procedure that could have a significant impact on parties costs; if the Legal Aid Board were paying for such procedure again then the costs impact on the public purse would need to be considered.

We do have a significant concern that in the sheriff court paper there is an implication that up to the present time there has been some deficiency in sheriff court procedure because there has been no specific reference to mediation. Mediation itself assumes the involvement of an intermediate agent between two or more conflicting parties. On the face of it such function is carried out by the judicial figure i.e. the sheriff. However any solicitor skilled in negotiation is well able to try and settle the matter during the court process without the intervention of a further third party apart from the court itself. It is not a welcome step to suggest that court actions require resolution by the introduction of an outside mediator.

This is particularly the case in Scotland under current personal injury procedure where a protocol has been reached between the Law Society and Insurance representatives to try and encourage early settlement. Our understanding is also that the larger mediation organisations in England are clear that parties should only attend mediation on a voluntary basis.

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?

Ans 2b: We do not consider that there should or can be a rule at the present time encouraging parties to seek resolution of matters in dispute by way of ADR before resulting to litigation. Such a rule could only be introduced if there was already wide spread use of ADR in the particular area of law. This is clearly not the case; in addition if there was a rule regarding the use of ADR there would need to be some provision in Scots Law for the recovery of pre-litigation costs should such mediation be unsuccessful. Mediation has a proper function and is used in commercial disputes and family matters. It is not widely used in consumer disputes (but could be if funding were provided) and it is not used in personal injury litigation. In our view it is therefore not appropriate at the present time to introduce any general rule in the Sheriff Court encouraging on the resolution of the dispute by way of ADR until there is further research and use of ADR, and acceptance by parties that such a process is useful.

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

Ans. 3b: The Court should not have such a power. Reference is made to our earlier remarks

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

Ans. 4b: The parties of the action should not be required to give notice with reasons in writing whether or not they consent to referral to mediation. As stated above any mediation should be voluntary.

Q.5. Do consultees have any comments to make in relation to this part of the recommendation? (That settlement should take place within the constraints of the current court time table).

Ans. 5 We consider that consideration of settlement or referral to dispute resolution could take place within the constraints of the current court time table and that there could be a specific provision allowing for a sist of the action or interruption of the Court process for mediation to take place.

Q.6.a consultees consider appropriate to have an express reference in the rule relative to the awarding of expenses?

Ans. 6b: We do not consider it appropriate to have an express reference in the rule relative to the awarding of expenses. In personal injury disputes at the present time in Scotland mediation is not used and our own experience is that neither insurers nor claimant bodies have proposed the wide spread use of mediation when matters are regularly settled by discussion and cases negotiated between parties agents. Reference is made to our remarks on the pre-action protocol.

IMPACT ON THE CONSUMER

One matter which this paper does not address is the likely impact on the consumer or client faced with the compulsory use of mediation. In personal injury litigation the question of cost is of fundamental importance to the client. The simple reason being that if the agent does not cover full costs it is likely to have an impact on the eventual payment made to the client. The introduction of compulsory mediation procedure without proper empirical experience and research could result in claimants having significant deductions from damages, if for example, the mediation process has been unsuccessful or there is no clear provision for the recovery of mediation costs in either the pre-litigation or court process itself. In Scotland at present the personal injury claimant is already significantly at a disadvantage compared with the English claimant. The latter claimant has the benefit of a court procedure allowing for the recovery of after event (ATE) insurance cover; the solicitors proceeding on a speculative basis can recover from insurance company the additional costs of funding the speculative claim. This is not possible in Scotland and the consumer at present is already losing out. This is a matter of significance which ought to be at the forefront of any proposed legislative change rather than the introduction of mediation of possible further cost impact on the claimant.

Q.7a Is it appropriate to include reference to ADR in each of the Court Rules?

Ans.7b: We consider that there could be reference to ADR in the Court Rules for sisting of the action to enable this to take place. In relation to Summary Cause and Small Claim actions because of their relatively low value we cannot see that ADR would be practicable unless the Court itself was providing ADR at no cost. This we would welcome but it would clearly have an impact on government spending on Court administration.

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

Ans.8b: We consider that Rule 33.22 should be left as it stands in due of the fact that we do not consider any element of compulsion should be present in relation to mediation or ADR.

Q.9a Do consultees have any comments to make in relation to this recommendation (the introduction of a new paragraph (5a)

We do not consider it such a rule is either necessary or appropriate. Firstly it would have a significant impact on parties' rights to litigate. Secondly the use of the word "steps" indicate that some form of narrative will have to be included in the court action indicating what attempts have been taken to try and resolve the matter. This has never been a requirement of Scots Law. The proposed rule appears to equate mediation with negotiation. This is not a proper comparison: mediation involves parties using an outside agency to try and resolve the dispute with concomitant costs. If it were the case that the Rules Council decided that there should be averments detailing what efforts had been made to settle a case generally prior to litigation then that is a separate fundamental change to court process which should be dealt with in a distinct consultation paper and not included in a proposed rule change relating to alternate dispute resolution. In particular in personal injury litigation it is very often necessary to raise court proceedings to protect the time bar without any attempt at negotiation. The introduction of such a rule would have a significant impact on the pursuer's position and would inevitably mean that there could be significant impact on expenses where an action is raised without time bar without early negotiation. It is unclear how this rule would deal with such a situation: the current focus in court pleadings has been to restrict these and make them shorter (as is the case in the current court of session personal injury rules). Expanding the pleadings by narrating pre-litigation attempts to settle the case would be unwelcome and may well prejudice parties rights (see Cullen p26 para 4.8: all actions should be initiated by abbreviated pleadings).

Ans:9b and C: We do not consider that this rule should be incorporated at all.

Ans:10 We consider that the Provision by the Court of an in Court mediation service in the manner piloted in the sheriff court houses of Edinburgh, Glasgow and Aberdeen should take place and that a proper review can take place of the use of mediation in Sheriff Court Procedure once the pilot schemes have been suitably assessed.

Ans:11a: We do not welcome litigation being conducted in private where the court is dealing with the matter directly. This particular paper appears to be focussed on the use of outside parties to resolve disputes and the position of sheriffs directly involved in mediation or settlement should be dealt with in a separate paper with considerations of the issues involved. We do not consider therefore that there should be any amendment to the rules.

Ans: 12 We do not consider that the proposed Rule 9.a is appropriate.

We are concerned at the reference in the Rule to "mediation or to another form of dispute resolution". There is no definition of what is meant by "another form of dispute resolution". We do not consider it appropriate that the court imposes on parties a means of dispute resolution involving significant costs outwith the court procedure unless the parties agree.

We do consider that the court should be given power to sist the action for the purposes of mediation where the parties are agreed.

We do not think that a court should have any power to make orders for expenses in relation to the parties' agreement or non agreement to taking part in mediation procedure.

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