SHERIFF COURT RULES COUNCIL CONSULTATION
ON
THE SHERIFF COURT AND ALTERNATIVE DISPUTE RESOLUTION

Response to Questions

Preliminary Note: As my expertise is with the U.S. civil litigation system rather than that of Scotland, I am not always able to address specific questions regarding rule amendments. I can speak generally to the issue of the use and impact of ADR and will do so below.

Q.1a Do you consider that a rule encouraging ADR should be incorporated into each set of rules applicable to the conduct of civil business in the sheriff court?
Q.1b Please provide comments to explain your reasons.

It could be desirable to have a mechanism whereby the availability of mediation is made clear to the parties to litigation. In some cases mediation can save time and money and help the parties arrive at a mutually acceptable solution. It may be that this requires only education of the legal profession rather than a formal rule. The availability of free or low-cost mediation services could also encourage greater use of mediation. I completely agree that any rule should encourage rather than compel ADR.

Should a rule be desired, it should not encourage (particularly through the use of penalties) pre-litigation mediation. First, at that point in time the potential pursuer or defender may lack important information relevant to the dispute. Any resolution made under such conditions may easily fail to reflect the merits of the case, especially if the information deficit is one-sided. Second, studies have demonstrated that extensive early preparation requirements may merely front-load rather than eliminate costs.

More fundamentally, the Council should keep in mind that speed and efficiency are not the only goals of the civil justice system. One purpose of the courts is the peaceful resolution of disputes, and in their role of simply resolving disputes, minimizing costs in terms of time and money are both important. However, the courts also serve a function of dispensing justice. The results of litigation are the means through which our countries enforce the rules of civil society. They also provide a baseline of adjudicated results that allow parties to settle disputes "in the shadow of the law." Recommendation 2.4 notes that judicial decisions usually produce "a winner and a loser." This can be a desirable result, not an unfortunate consequence of failure to settle.

In the U.S., we have begun to worry that trials have become too infrequent. The American Bar Association has launched a major study of the problem – the Vanishing Trial Project. Preliminary reports on the issue can be found on the ABA's website at http://www.abanet.org/litigation/taskforces/cji/nosearch/home.html. Some of the reports comment specifically on the role of ADR programs, including the need for a great deal more specific empirical research and the difficulty of meaningful generalizations.

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

The rule should encourage rather than compel. Across-the-board encouragement of pre-litigation resolution is not appropriate. Some cases require the disclosure of information available through the litigation process in order to arrive at resolutions that are more just. Compelled mediation is the least likely to provide productive negotiations and greater efficiency.

Q.3a Should the court have the power to require parties to an action to consider ADR?
Q.3b Please provide comments to explain your reasons.

It can be appropriate for the court to require parties to consider ADR. In some situations, however, such a requirement will only contribute to cost and delay. The court would have to be trained to exercise this discretion wisely. There should not be any sanction for a party who chooses not to participate in ADR.

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

No. The only reason for a written explanation would be for future use in connection with sanctions, which I do not believe are appropriate. A complete explanation of the reasons might reveal privileged communications between lawyer and client.

Q.5 Do you have any comments to make in relation to the recommendation regarding the timetable?

I agree with the Committee that consideration of settlement or referral to dispute resolution should take place within the constraints of the current court timetable. Otherwise, ADR activities can be used to increase cost and delay. In fact, the rule's suggestion that the matter be sisted when the parties agree to mediation might be not be helpful in many cases. Studies have shown that the single act that is most likely to result in the settlement of cases is the setting of a firm and timely date for trial (proof).

Q.6a Do you consider it appropriate to have an express reference in the rule relative to the awarding of expenses?
Q.6b Please provide comments to explain your reasons.

The failure of a party to agree to ADR should NOT become a ground on which an award of expenses should be made. Litigation is not a pathology, the resort to which should be punished. More pragmatically, the court will not have the information necessary to determine whether a party's conduct was "unreasonable." There would be a great danger that courts' discretion will be inconsistent and unpredictable in this area.

Because the judges are the triers of fact in these cases, great care should be exercised in judicial involvement in settlement activities. A sheriff who has been active in negotiations that involves revelations of facts, strategy, and the like should refer the case to a different sheriff for trial.

Q.7a Is it appropriate to include a reference to ADR in each set of court rules?
Q.7b Please indicate with reasons whether the reference should be incorporated into all, some or none of the court rules.
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.

This question is mostly beyond my ability to make specific recommendations. I can say, however, that unless the mediation services are provided at no cost it should not be required in the kind of small amounts in controversy involved in the summary cause and small claim cases.

Q.8a Do you consider that rule 33.22 should be deleted from the OCR in the event of the all-encompassing rule being introduced?
Q.8b Please provide comments to explain your reasons.

Family law matters can be different from other litigation in important respects that could make a separate rule on ADR appropriate. In cases involving minor children, it could be more important to strongly encourage mediation because the parents will have to continue to cooperate with each other in the best interests of the children even after court proceedings have terminated. On the other hand, it would be very wrong to compel an abused spouse to mediate with the abuser. Considerations such as these support separate treatment of family cases, whether by rule, practice directions, or special judicial training.

Q.9a Do you have any comments to make in relation to the recommendation that at the outset of an ordinary action the initial writ should indicate any steps taken to resolve the dispute with a view to avoiding the need for an action?
Q.9b Please indicate, with reasons, whether this reference provision should be incorporated into all, some, or none of the court rules.
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.

As noted above, I do not believe that any kind of formal system that requires pre-litigation processes is wise. If the reason for this disclosure in the writ is to set the stage for sanctions for failure to settle, it would be a bad idea. If it's intended to help the court decide whether to suggest mediation, a conversation with counsel when the issue arises would be far more informative and timely.

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

I'm not familiar with the in-court mediation service in Edinburgh, Glasgow and Aberdeen and so can't comment on this proposal.

Q.11a Please indicate, with reasons, whether a new paragraph, in the terms outlined above, should be incorporated into the summary cause and small claims rules.

If the sheriffs are going to attempt to help the parties settle, it could be helpful to allow such discussions to occur in private rather than in open court. Judicially-guided settlement negotiations, like mediation, can involve frank discussions of the strengths and weaknesses of parties' cases. It can include the revelation of otherwise-privileged communications. This kind of conversation could be much more productive in chambers than in open court.

For the same reasons, as mentioned above, provisions should be made for a different sheriff to preside over the proof of a case if he or she is involved in this kind of settlement negotiations.

Q.12 Do you have any comments about the proposed rule as drafted?

Rule 9A.1 should be amended to include the other important function of litigation: the pursuit of justice. While speed and efficiency are important, they are not the only values of the civil justice system. Therefore, the rule should instead read:

"The sheriff and parties shall seek to secure the just, speedy and efficient resolution of all matters in dispute."

Rule 9A.4(1).

In many cases, mediation of the case will not require such a substantial amount of time that it would justify postponing other deadlines. The rule's treatment of sisting as the normal course is therefore undesirable. It would therefore be preferable to rewrite the rule to say something like:

"Where an order is made under rule 9A.3(2), the court ordinarily need not sist the action for the purpose of such referral, but when the referral will require substantial additional time may sist it for a specified period."

Rule 9A.5, allowing expenses to be denied for unreasonable conduct, should be omitted for the reasons discussed above.

Q.13 Do you have any comments to make on the proposed form of notice?

When the court has requested the parties to consider some form of ADR, it could be appropriate to require a document that reflects whether the parties have agreed to do so. However, as discussed above they should not be required to state the reason that they do or do not consent. This portion of the form should therefore be deleted.