

**Response from Society of Solicitor Advocates
to
Sheriff Court Rules Council
Consultation on the Sheriff Court and Alternative Dispute Resolution**

Question 1A

Do consultees consider that [the draft Rule 9A.2] is necessary or desirable?

The Society supports the aim to secure the speedy and efficient resolution of all matters in dispute. One of the most useful features of the Commercial Court procedure in Glasgow Sheriff Court has been the willingness of the Sheriffs to take a proactive interest in the resolution of the matters in dispute. This is done both by giving an early indication of their views including advising parties which issues would seem capable of resolution and by taking a common sense approach to allowing parties time to try to reach resolution where this has been identified as useful. To encourage Sheriffs dealing with Ordinary Causes to adopt the same approach is commendable.

The Society would have concerns about the Court making an order either *ex proprio motu* or on the motion of any party which came very close to any proof which was set down. The possibility of a great deal of preparation work having been done at the client's expense only for the other side to make a motion for mediation at the last minute is not attractive. The new Chapter 28A procedure which came into force on 18 August 2006 provides for a pre-proof hearing to be set down. We would suggest that this hearing would provide an appropriate point in time to draw a line under any such alternative dispute resolution opportunities and allow parties to then focus on the proof, all other avenues having been explored.

Question 2A

Should the Rule encourage rather than compel parties to seek resolution of matters in dispute by way of ADR before resorting to litigation?

The Society would be extremely concerned about any rule which compelled parties to seek resolution by way of ADR. Parties and their representatives must be left with the discretion to attempt to resolve matters in whatever fashion they see fit. To do otherwise would strike a serious blow to parties' rights and interests.

Question 3A

Should the Court have the power to require parties to an action to consider ADR?

The Society sees no harm in the Court having the power to require parties to consider ADR as this will either prove to be appropriate in the circumstances or not as the case may be. In some cases it is envisaged that a very informal indication by the Sheriff that ADR might be appropriate could be overlooked by parties and the Society therefore supports the making of an order which would require parties to at least consider the possibility.

Question 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?

The Society believes that to require people to explain their reasons for not consenting to a referral to mediation is a step too far. There are a number of reasons why mediation may not be appropriate and a lot of these may not be appropriate to identify to the Court and to the other side. Professional advisers must be left with the discretion to either explain things clearly to the other side if they see fit or to simply advise that mediation is not considered appropriate in the circumstances. To require parties to give reasons errs too much towards compulsion and is not thought to be productive.

Question 6A

Do consultees consider it appropriate to have an express reference in the Rule relative to the awarding of expenses?

The Society does not think that reference to an award of expenses is appropriate. If the discretion of advisers is to be maintained then it should not be appropriate for failure to agree to mediation to be a matter on which parties can be sanctioned. There are a number of reasons, as referred to above, why parties might not wish to use alternative dispute resolution and to introduce a sanction simply makes the requirement compulsory by the back door. The Society would be opposed to any such initiative.

Question 7A

Is it appropriate to include a reference to ADR in each set of Court Rules?

Yes

Question 8A

Do consultees consider that Rule 32.22 should be deleted from the OCR in the event of the all encompassing Rule being introduced?

Yes. The Society considers that the Rules should not be inconsistent in this regard and there should not be an element of compulsion involved for one area and not for others. As made clear above, the Society is against any element of compulsion being involved.

Question 9A

Do consultees having any comments to make in relation to [the recommendation that an article of condescendence be included averring steps taken by other forms of dispute resolution with a view to avoiding the need for litigation]?

The Society would be against this proposal. The Society's view is that one of the main reasons why the number of commercial actions being raised in the Court of Session has fallen so dramatically is because the pre-action protocol has acted as a huge obstacle to raising commercial actions. The problem with that protocol is that it attempts to be all things to all men in that it makes the kind of detailed correspondence between parties which is appropriate in some circumstances compulsory for all. There are a number of instances of which the Society is aware where advisers have simply chosen not to raise a commercial

action because the requirements in relation to pre-action correspondence are so onerous. This does not aid the speedy resolution of disputes but hampers them. To introduce a requirement for efforts at dispute resolution to be detailed in this sort of way introduces a similar obstacle. Surely it is in everyone's interests for Court actions to be raised and dispute resolution to be investigated before and during the action without any stringent requirements being imposed on the form that this should take. The Society would not wish to see this Rule introduced into any of the Court Rules.

Question 10

Comments on the provision of an in Court mediation service.

It is unlikely that the in-court mediation service will be used in relation to commercial disputes. The Society understands that the service piloted in Edinburgh, Glasgow and Aberdeen has been extremely useful in relation to disputes between individuals. Providing the in-court mediation service would assist that type of case and for commercial cases a more formal type of mediation could be chosen, if appropriate. The Society would therefore agree that the provision of the in-court mediation service would facilitate dispute resolution in many cases.

Question 11

Comments on the holding of discussions by the Sheriff in private and not in open Court.

The Society firmly believes that Sheriffs are perfectly capable of dealing with a negotiator's role and thereafter adjudicating upon the case. They would therefore support the role of the Sheriff in this regard and support the suggestion that in carrying out the duties the Sheriff would be permitted to hold discussions in private.

Question 12

In relation to the wording of the draft Rule the Society is happy with the wording proposed but, as commented on above, the Society does not support any sanction in expenses.

Question 13

In relation to the proposed form of notice the Society would not wish a box to be included in which reasons should be given for any party's position in relation to dispute resolution.

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