

Response to Para 5 b) 6 of the CJAG Consultation Document.

Re: The Scottish Court Civil Review “the Review” and mediation.

A proposal.

By David Semple LLB.
17th September 2010.

Professional background.

I practised law in Scotland for a period over 30 years, of which 20 years were as a specialist commercial property solicitor and 10 years as a corporate / commercial solicitor. I was accredited as a mediator in 1995 by CEDR. I have also attended a mediation course in Woodbury College, Vermont. I have always had taken a great interest in commercial activity and in 1997/8 was President of the Glasgow Chamber of Commerce. I retired from the legal profession in 2000 and now have various commercial interests, executive and non executive, which have enabled me to gain an outside perspective on what I had experienced from the inside.

I am chairman of Catalyst Mediation Ltd, a commercial mediation service provider in Scotland. Catalyst Mediation’s subsidiary, Court Mediation Services Ltd, ran Mediation Pilot Schemes in the Glasgow and Aberdeen Sheriff Courts on behalf of the Scottish Government from March 2006 till July 2008 (Report by Ross and Bain on the In-Court Mediation Pilot in Glasgow and Aberdeen Sheriff Courtsⁱ). We run mediation training through a subsidiary, Catalyst Mediation Training Ltd.

I have been on the Board of the Scottish Mediation Network since its inception.

I believe that mediation is a wholesome way of resolving disputes and that wider use of it would enable citizens, businesses and organisations in Scotland to have a better quality of life.

Mediation and the world scene.

It is beyond doubt that mediation is being adopted widely throughout the world. My view (having been at many domestic and international conferences and having read a great deal on the subject) is that Scotland lags further and more rapidly behind other jurisdictions in its use of mediation. The Business Experts Law Forum (BELF) Report of Nov 2008ⁱⁱ is critical and recommends that judges should routinely recommend the use of mediation. In many countries, there is a combination of judiciary and executive led initiatives to encourage the use of mediation.

The benefits of mediation have been well explored – and many of the advantages are referred to in the Review.

Lawyers.

Lawyers are perceived as important gatekeepers. It has been experienced elsewhere in the world that, until the minds of lawyers are concentrated on mediation, it is largely ignored. Many examples exist of evidence that lawyers need a stimulus.

For example, in Europe, Para 3.7.1 of the CCBE Code provides: “The Lawyer should at all times strive to achieve the most cost effective resolution of the client’s dispute and should advise the client at appropriate stages as to the desirability of attempting a settlement and/or a reference to alternative dispute resolution”. This provision, although adopted by the Law Society of Scotland, relates only to

the handling of cross border disputes No such rule of the Law Society of Scotland exists in relation to solicitors dealing with matters domestically.

In many jurisdictions, there are professional rules or pressure from the Bench to encourage lawyers to utilise mediation.

How to achieve?

In my submission if mediation is to be used more widely, it is essential that a method is found which, at the very least, draws the attention of litigants and potential litigants to its existence, attributes and drawbacks and, better, actively encourages its use. I understand that there are various objections from many on the Bench to such encouragement coming from them. Some of these might be:

- People who bring their cases to the court, do so for their cases to be judged. It is not appropriate for judges to recommend another forum;
- Some lawyers use the mediation process to gain some tactical advantage;
- If mediation fails it can increase the cost of the process;
- The problems arising from the emergence of satellite litigation around the development of new rules relating to reasonableness to refuse to mediate;
- The court may be encouraging litigants to use mediators over whose quality they have no control or knowledge.

Proposal.

I propose that there be instituted a Rule of Court, applicable in all Courts (to avoid forum shopping), that the parties are required specifically to aver that they have taken an informed decision not to use mediation in the dispute prior to the action being raised/ defences lodged. Failure properly to comply would lead to an award of expenses against the party in breach in respect of the step at which the breach was uncovered and the case would be set down for an early date to give the party in breach time to comply or if the parties have used mediation, to aver the date of the mediation and the outcome of the mediation (if any) without specifying anything said in that mediation as this is confidential information.ⁱⁱⁱ

Compliance or otherwise would not be difficult to establish with some basic questions from the Judge (if this were required, from a list from which to choose).

The advantages of this are as follows:

- The attention of the parties must be drawn to the need to take an informed decision about mediation prior to an action being raised/ defended;
- Lawyers will be obliged to familiarise themselves with mediation to enable them properly to advise;

- The Judge's only role is to keep a check that the averment is properly made and does not become a meaningless box ticking exercise (in other words, that the court is being respected);
- The judges are not taking part in a reference of parties to mediators whose quality they are not aware of;
- Mediation is not mandatory – only the duty to take an informed decision about whether or not to use it;
- The issue of whether the other side is likely to take tactical advantage will be an element of the adviser's advice in relation to the use of mediation in any particular case;
- The proposal is light touch, requiring no material public expenditure;
- The remedy against those improperly making the averment is only in modest expenses – not relating to the reasonableness or otherwise of submitting to mediation but only to whether the rule of court has been observed. The judge's decision is simple and final. The existence of a sanction, however modest, will be sufficient to concentrate the minds of advisers.
- There will be no satellite litigation (as in England) relating to the reasonableness of the decision of the parties not to mediate. This will not be the criterion.
- It appears that this proposal would not conflict with the proposals of the Court of Session Rules Council and Sheriff Court Rules Council, which were not carried through but were deferred pending the outcome of the Review. (Chapter 7 para.15 of the Review)
- The proposal is in line with recommendation the recommendation in para 7.5 of the Ross and Bain Report referred to above.

Thank you for reading this proposal.

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ⁱ Scottish Government Social Research 2010

ⁱⁱ <http://www.scotland.gov.uk/Resource/Doc/243135/0067662.pdf>

ⁱⁱⁱ I have not paid attention to detailed drafting, seeking acceptance of the principle.