Dear CMC Member,

THE REVIEW OF CIVIL LITIGATION COSTS by SIR RUPERT JACKSON

This important report, published on Thursday 14th January 2010, with potentially significant opportunities for civil mediation, should be widely welcomed. It has identified important weaknesses in the existing structures and systems for litigation which give rise to disproportionate and perhaps unnecessary costs.

Sir Rupert Jackson, a highly experienced member of the Court of Appeal, in a comprehensive 584 page report finds that mediation as the principal method of ADR should be at the heart of every litigator’s toolkit. It should not however be compulsory, nor should parties automatically be subject to sanctions if they decline to mediate. He encourages the use of the “Ungley Order” in most circumstances as a standard direction in cases that have been issued, but believes that mediation should actually be more widely attempted pre-litigation.

Sir Rupert also calls for much greater education of the general public, court users, lawyers, businesses, and Judges of the benefits of mediation. Finally, his report recommends that a neutrally published handbook of ADR and mediation should find its way in an annual edition to every lawyer’s, businesses’ and judge’s bookshelf such that information of reputable providers, processes and procedures should be readily available to all. This new work should be issued and updated annually.

Sir Rupert welcomes the work of the small claims mediation service, pro bono mediation services, the National Mediation Helpline and the growth of mediation, particularly in the last 2 years. He recognises that costs remain an issue in some cases and looks at ways in which a greater take up of ADR can be encouraged. This includes a greater use of Early Neutral Evaluation (ENE), telephone mediation and specialist professionals particularly in personal injury litigation where the confidence of the market is still to be won.

We append below the mediation-related extracts from the Executive Summary of the Report, and the whole of the ADR chapter. These are intended to be a useful introduction to what is a very thorough analysis, but we encourage readers to look at the report in some detail, as it covers the wider costs issues that are likely to represent the future for all those involved in civil litigation. The full report is available at:

http://www.judiciary.gov.uk/about_judiciary/cost-review/reports.htm

You may also wish to know that Sir Rupert Jackson will be speaking at the CMC’s Fourth National Conference in London on 11th May 2010 - the remaining tickets are available from our Registrar, Tracey Stewart, at conference@civilmediation.org.

Yours in mediation,

Judith Kelbie Chair, Outreach Committee; Civil Mediation Council
Sir Henry Brooke Chair, Civil Mediation Council
17th January 2010 Telephone: 0207 353 3227
6.3 Alternative dispute resolution (chapter 36).

Alternative dispute resolution ("ADR") (particularly mediation) has a vital role to play in reducing the costs of civil disputes, by fomenting the early settlement of cases. ADR is, however, under-used. Its potential benefits are not as widely known as they should be. I therefore recommend that:

- There should be a serious campaign to ensure that all litigation lawyers and judges are properly informed of how ADR works, and the benefits that it can bring.

- The public and small businesses who become embroiled in disputes are also made aware of the benefits of ADR. An authoritative handbook for ADR should be prepared, explaining what ADR is and how it works, and listing reputable providers of ADR services. This handbook should be used as the standard work for the training of judges and lawyers.

Nevertheless ADR should not be mandatory for all proceedings. The circumstances in which it should be used (and when it should be used) will vary from case to case, and much will come down to the judgment of experienced practitioners and the court.
1.1 Preliminary Report. A general account of alternative dispute resolution (“ADR”) is given in the Preliminary Report at chapter 4, section 2 and chapter 43, section 6. I shall take these sections of the Preliminary Report as read and will not repeat their contents.

1.2 Mediation. For cases which do not settle early through bilateral negotiation, the most important form of ADR (and the form upon which most respondents have concentrated during Phase 2) is mediation. The reason for the emphasis upon mediation is twofold. First, properly conducted mediation enables many (but certainly not all) civil disputes to be resolved at less cost and greater satisfaction to the parties than litigation. Secondly, many disputing parties are not aware of the full benefits to be gained from mediation and may, therefore, dismiss this option too readily.

1.3 Joint settlement meetings. Another form of ADR which can be highly effective is to hold a joint settlement meeting. A scheme for joint settlement meetings in personal injury cases has been piloted in Manchester. The results show that such meetings can be effective in promoting settlements. His Honour Judge Richard Holman (Designated Civil Judge in Manchester) has concluded that, because of the expense involved, joint settlement meetings are better suited to the larger multi-track claims, possibly from £500,000 upwards.

1.4 Other forms of ADR. For a comprehensive definition of ADR, see PR paragraph 43.6.3. One other form of ADR which should be noted is early neutral evaluation. This is carried out by someone who commands the parties’ respect, possibly a judge. In 2008 the Association of Her Majesty’s District Judges put forward to the Civil Justice Council (the “CJC”) a proposal for judicial neutral evaluation. I understand that this will be the subject of a pilot in Cardiff. If the results of the pilot are favourable, then judicial neutral evaluation may pass into more general use and become an effective means of promoting early, merits-based settlements.
1.5 Relevance of ADR to the Costs Review. ADR is relevant to the present Costs Review in two ways. First, ADR (and in particular mediation) is a tool which can be used to reduce costs. At the present time disputing parties do not always make sufficient use of that tool. Secondly, an appropriately structured costs regime will encourage the use of ADR. It is a sad fact at the moment that many cases settle at a late stage, when substantial costs have been run up. Indeed some cases which ought to settle (because sufficient common ground exists between the parties) become incapable of settlement as a result of the high costs incurred. One important aim of the present Costs Review is to encourage parties to resolve such disputes at the earliest opportunity, whether by negotiation or by any available form of ADR.

2. SUBMISSIONS DURING PHASE 2

(i) Mediation generally

2.1 Confederation of British Industry. The Confederation of British Industry (the “CBI”) emphasises the strong business interest in avoiding litigation and settling disputes through ADR. The CBI sees this as having the greatest potential for savings in litigation costs.

2.2 Centre for Effective Dispute Resolution. The Centre for Effective Dispute Resolution (“CEDR”) states that there are something like 4,000 mediations per year, excluding small claims mediations, which number about 2,000. CEDR is concerned that too few cases settle during the pre-action protocol period. Procedural judges need to raise questions of their own motion about whether mediation has been tried before issue and where dissatisfied with the replies “impose a sanction on either or both parties”. Even if there is a good reason why mediation cannot take place preissue, judges are entitled to ensure that a provision for mediation is inserted into the case management timetable at the appropriate stage. CEDR adds:

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2.3 Civil Mediation Council. The Civil Mediation Council (the “CM Council”) promotes mediation in all areas of dispute resolution. In its submission dated 21st July 2009 the CM Council states that returns from 52 of its provider members report 6,473 mediations so far this year, which is an increase of 181% over the 2007 baseline. There were 8,204 mediations conducted in 2008 by members. In its submission the CM Council outlines the benefits of mediation in a number of discrete areas, such as Mercantile Court cases, neighbour disputes, chancery litigation etc.
The CM Council states that it is currently holding discussions with the Ministry of Justice (the “MoJ”) about the future organisation of the National Mediation Helpline (“NMH”) scheme. The CM Council commends the excellent work done by the Small Claims Mediation Service, which last year won a CEDR award and an EU award for excellence. It states that personal injury and clinical negligence practitioners have been particularly resistant to mediation, but even they are now becoming less resistant. The CM Council refers to specific mediation schemes, in particular:

- Law Works provides *pro bono* mediation. It has 150 trained mediators on its panel. This is a resource which is very seriously under-used.
- Inter-Resolve is a company which provides a low cost telephone mediation service.

The CM Council believes that public awareness of mediation needs to be increased, especially among small and medium sized businesses, insurers, central and local government bodies. The courts should have in place effective procedures to refer to Law Works litigants who qualify for *pro bono* assistance.

2.4 Representatives of the CM Council came to see me on 23rd July 2009. At that meeting they reinforced the points made in their paper. They expressed the view that more lawyers would be willing to provide *pro bono* mediation services through Law Works. This is a project which should be encouraged, although commercial mediation should not thereby be downgraded. One of the representatives at that meeting subsequently sent in helpful supplementary submissions.

2.5 Lloyd’s underwriters. The Lloyd’s Market Association (the “LMA”) represents all businesses which underwrite insurance at Lloyd’s of London. The LMA states that ADR is used only in a very small percentage of cases. The LMA believes that a cultural change is necessary, so that lawyers will embrace ADR more readily. Claims Against Professionals (“CAP”) is a body comprising some of the leading professional indemnity insurers from the Lloyd’s and Companies’ markets. In a survey of CAP members 65% agreed with the proposition that a party should be required to participate in ADR even when it is unwilling to do so.

2.6 Association of Her Majesty’s District Judges. The Association of Her Majesty’s District Judges states:

“The Small Claims Track Mediation Service provided by HMCS25 has assisted in resolving claims in advance of the final hearing listed before the District Judge. We take the view that consideration should be given to a system of compulsory referral to the HMCS mediation service where all the parties in a Small Claims Track case are unrepresented. There is a high settlement rate. Where claims do not settle by such mediation, the parties can have their day in court. Perhaps the cost to HMCS of this service could be met at least in part by a partial (as opposed to a complete) refund of the hearing fee that the Claimant will in any event have paid. More referrals to this mediation service will free up more District Judge time.”
2.7 Association of Northern Mediators. The Association of Northern Mediators (the “ANM”) identifies the key benefits of ADR as follows: saving time, saving direct and indirect costs, preventing damage to business relationships and reputation, alleviation of stress, achieving remedies beyond the powers of the court and (if no settlement is achieved) narrowing issues for trial. The ANM points to the rising number of mediations and concludes that there should be greater encouragement for parties to enter into ADR before issue of proceedings. The ANM suggests that the rules should give greater prominence to ADR at the pre-action protocol stage, especially towards the end of that stage. The ANM believes that some members of the judiciary have not fully appreciated or embraced ADR. The ANM agrees that ADR should not be made compulsory, but would welcome universal adoption of Master Ungley’s direction on ADR (the “Ungley order”). It maintains that not all businesses involved in lower value disputes are aware of what ADR has to offer.

2.8 Individual mediators. Two experienced mediators, one a member of the CJC and one a member of the Civil Procedure Rule Committee, sent in a joint submission on mediation issues. They state that the majority of businesses are not regular court users and not generally aware of what ADR has to offer. The problem is compounded because many lawyers have no experience of ADR. They urge that ADR should be brought into the mainstream of case management and should become an integral part of our litigation culture. They comment that there are many cases where case management ought to involve ADR, but apparently does not: for example Peakman v Linbrooke Services Ltd [2008] EWCA Civ 1239. They state that the NMH is probably on the way to being a satisfactory substitute for the various court-based mediation schemes which it replaced.

2.9 Law Society. The Law Society states:

“The Law Society continues to support the use of all forms of ADR in circumstances where it may be assist the parties to come to terms and they are willing to do so. We also support the principle of ‘legal proceedings as a last resort only’. However, mediation is not the panacea which some consider it to be and is not appropriate in all cases. Neither should it be made mandatory. Indeed, there are views among practitioners that there is no consistency about which cases are suitable for mediation – some may well be mediated which are more suitable for trial, and vice versa. We consider that firmer guidelines are needed on what is and is not suitable for mediation.”

The Law Society points out that all solicitors engage in negotiations, which are the simplest form of ADR. Many civil litigation solicitors are also mediators, but they frequently report that mediation can increase the costs of a case. Therefore the Law Society considers that more research is required.

2.10 Bar Associations. The Commercial Bar Association (“COMBAR”) agrees with the observation in the Preliminary Report that in the context of business disputes parties and their advisers are well aware of what ADR has to offer. A number of respondents to the COMBAR questionnaire expressed that view. COMBAR considers that
mediation should be de-formalised; however, this is a matter for parties and mediators to attend to, not for rules or legislation. The Bar Council expresses very similar views to COMBAR on these issues.

(ii) Mediation for personal injury claims

2.11 Trust Mediation Ltd. Trust Mediation Ltd (“TML”) is a specialist provider of fixed costs mediations in personal injury cases. All of its mediators are not only experienced in mediation, but also have long experience of personal injuries litigation. TML estimates that in 95% of personal injury cases mediation will never be necessary. Compulsory mediation is therefore inappropriate. However, TML does recommend that in the remaining 5% of cases where the resolution of disputes is delayed and costs escalate, mediation should become the “natural tool to draw from the litigator’s toolkit”. TML’s experience shows that mediation almost always succeeds, even in apparently entrenched cases where there are enormous differences, if skilled and fluent mediators apply effective “reality testing” techniques against objective criteria. In addition, the cost of the mediation process is a small fraction of the cost of a trial and the solutions derived from mediations are often much more satisfactory than those which a court could impose. Mediation also provides an opportunity for the costs of proceedings to be agreed. TML states that it has obtained successful results through mediation: between January 2008 and June 2009 it conducted mediations in 53 cases with an 88.7% success rate. Users have ascribed this success rate to the fact that the mediators are skilled and deeply experienced personal injury practitioners.

2.12 Representatives of TML came to see me on 23rd July 2009. I suggested to them that mediation is a facilitative process, designed to arrive at a mutually acceptable outcome rather than the legally correct result; accordingly mediation in this particular area carried with it the risk that claimants would be undercompensated, for example in respect of future care costs. The representatives essentially had two answers to this challenge. First, in practice the results of such mediations always did reflect fair compensation for the claimant. Secondly, closure was in itself extremely important for the claimant. The representatives also expressed concern that when one party refuses to mediate, the district judge does not encourage mediation.

2.13 Sir Henry Brooke reinforces the submissions of TML by furnishing an account of a recent mediation which he conducted in a fatal accident case. Both the process and the outcome brought considerable satisfaction to all parties involved.

2.14 CEDR. CEDR has provided a separate paper on mediating personal injury and clinical negligence claims, making the following points. Mediating personal injury and clinical negligence claims is the norm in many overseas jurisdictions. The outcomes which claimants typically seek in personal injury cases are: full or partial vindication in respect of the accident; damages constituting proper compensation; a chance to say what impact the accident has had on them; a response from the defendant delivering some acknowledgement; and a reasonably swift and risk-free outcome. The outcomes which claimants typically seek in clinical negligence cases
are: an apology; an explanation as to what happened; reassurance of reform to ensure that there is a reduced or eradicated chance of the same thing happening again; and (occasionally) revenge in the form of regulatory intervention. The objectives which defendants seek may vary depending on the nature of the litigation. Insurers seek a commercial solution and minimal expenditure. Employers sued by employees may have different objectives: to protect the business by keeping their workforce stable and satisfied; to avoid floodgate claims; to be seen as a caring employer; not to lose the services of valuable employees; and to learn from mistakes and be seen to be sensitive to health and safety matters. These objectives are best achieved by mediation. All types of personal injury cases are suitable for mediation, from small claims to substantial group actions. The mediator adds value at all stages of the process. There are specialist mediators for clinical negligence claims. The utility of mediation in clinical negligence has been demonstrated by a pilot. Nevertheless, mediation is insufficiently used in clinical negligence.

2.15 Solicitors. A firm of solicitors with offices across the south of England, which acts for both claimants and defendants in personal injuries litigation, states that mediation is particularly efficacious in that field but is grossly under-used. The firm does not favour compulsory mediation, but does favour orders requiring the parties to discuss the case with a view to mediation. Mediation should not be a routine stage in every case, but the courts should be more pro-active in directing the parties to discuss mediation in appropriate cases. The firm believes that a major cause of the slow adoption of mediation is the innate conservatism of the solicitors’ profession. The firm states:

“Our own experience is that mediation is very popular with individuals who have benefited from its cathartic process in personal injury claims.”

The firm endorses the submissions of CEDR about the great benefits which mediation can bring to those involved in personal injuries litigation. The firm hopes that further provision will be made for mediation in the rules, in particular in a fixed fee regime within the fast track.

2.16 Liability insurers. One major liability insurer writes:

“We agree that in the context of personal injury cases there remains a need for better education and information about ADR and mediation in particular. In the context of PI claims, mediation is an under utilised tool. Feedback from claimant solicitors who mediate regularly say that:

a. claimants like it as it is not as daunting as a trial and they can have their say in a less threatening environment;

b. it improves cash flow by bringing about early resolution.

From an insurer’s perspective mediation is a constructive way of seeking to bring about resolution of a case. It provides an opportunity to risk assess the merits of a particular claim and make decisions based on that assessment. Mediation can be
carried out earlier in the process; one does not need to have all the evidence completely together in order to form a view that may lead to settlement.

The consensual approach to mediation also means that both parties come out of mediation with a resolution that is satisfactory to them.”

This insurer would like to see court ordered mediation. It believes that, in respect of mediation, the present approach of the judiciary is not sufficiently robust.

2.17 Defendant solicitors. A firm of defendant solicitors states that ADR might be mediation or, alternatively, a joint settlement conference. Unfortunately many claimant solicitors are simply “preparing for trial”. The firm believes that this mentality is encouraged by the Civil Procedure Rules, which should be re-focused towards resolution with trial as a last resort. In the firm’s experience 90% of cases settle within a short time of a joint settlement meeting. Another firm of defendant solicitors writes:

“[We] welcome any encouragement to litigants to undertake ADR during the litigation process in appropriate cases. Part of the reason for the poor take up is insufficient knowledge of the process and the perceived cost. Further education is needed rather than rule changes.

[We] do not support compulsory ADR as not all cases are suitable.”

2.18 The Forum of Insurance Lawyers (“FOIL”) takes a positive view of both mediation and joint settlement meetings. FOIL believes that in order to encourage greater use of mediation, it is not rule change that is needed but culture change. FOIL does not believe that compulsory mediation would be a satisfactory way forward.

2.19 Clinical negligence. The Medical Defence Union (the “MDU”) states in its submission that ADR works best in cases where quantum is the only issue between the parties. The MDU believes that mediation should take place early in the proceedings, but once expert evidence is in the arena. It proposes that standardized directions should be rolled out across the courts, including the Ungley order.

3. **ASSESSMENT**

3.1 Benefits of ADR not fully appreciated. Having considered the feedback and evidence received during Phase 2, I accept the following propositions:

(i) Both mediation and joint settlement meetings are highly efficacious means of achieving a satisfactory resolution of many disputes, including personal injury claims.

(ii) The benefits of mediation are not appreciated by many smaller businesses. Nor are they appreciated by the general public.
(iii) There is a widespread belief that mediation is not suitable for personal injury cases. This belief is incorrect. Mediation is capable of arriving at a reasonable outcome in many personal injury cases, and bringing satisfaction to the parties in the process. However, it is essential that such mediations are carried out by mediators with specialist experience of personal injuries litigation.

(iv) Although many judges, solicitors and counsel are well aware of the benefits of mediation, some are not.

3.2 Not a universal panacea. Mediation is not, of course, a universal panacea. The process can be expensive and can on occasions result in failure. I adhere to the general views expressed in the Preliminary Report at paragraphs 4.2.1 to 4.2.6. The thesis of this chapter is not that mediation should be undertaken in every case, but that mediation has a significantly greater role to play in the civil justice system than is currently recognised.

3.3 Timing of mediation. It is important that mediation is undertaken at the right time. If mediation is undertaken too early, it may be thwarted because the parties do not know enough about each other’s cases. If mediation is undertaken too late, substantial costs may already have been incurred. Identifying the best stage at which to mediate is a matter upon which experienced practitioners should advise by reference to the circumstances of the individual case.

3.4 Judicial encouragement of mediation. In spite of the considerable benefits which mediation brings in appropriate cases, I do not believe that parties should ever be compelled to mediate. What the court can and should do (in appropriate cases) is

(a) to encourage mediation and point out its considerable benefits;

(b) to direct the parties to meet and/or to discuss mediation;

(c) to require an explanation from the party which declines to mediate, such explanation not to be revealed to the court until the conclusion of the case; and

(d) to penalise in costs parties which have unreasonably refused to mediate. The form of any costs penalty must be in the discretion of the court. However, such penalties might include

(a) reduced costs recovery for a winning party;

(b) indemnity costs against a losing party, alternatively reduced costs protection for a losing party which has the benefit of qualified one way costs shifting.

3.5 Need for culture change, not rule change. I agree with the view expressed by FOIL and others that what is needed is not rule change, but culture change. I do not agree
with the proposals made by CEDR for sanctions, including sanctions against all parties. Nor do I agree with the CEDR’s proposal for “compulsion” to be exercised over judges. Judges must have discretion to give such case management directions as they deem appropriate in the circumstances of the individual case.

3.6 The pre-action protocols draw attention appropriately to ADR. The rules enable judges to build mediation windows into case management timetables and some court guides draw attention to this facility. Many practitioners and judges make full use of these provisions. What is now needed is a serious campaign
   (a) to ensure that all litigation lawyers and judges (not just some litigation lawyers and judges) are properly informed about the benefits which ADR can bring and
   (b) to alert the public and small businesses to the benefits of ADR.

3.7 Fragmentation of information. One of the problems at the moment is that information about ADR is fragmented. In the course of the Costs Review I have received details about a number of providers of mediation from different sources. By way of example, Law Works Mediation Service sent me details of the excellent pro bono mediation service which it runs. TML provided similar details to me of its own services. Details of the NMH are available on the HMCS website. CEDR has sent to me a brochure about the excellent mediation services which CEDR offers. Wandsworth Mediation Service has sent to me details of the valuable mediation services which it provides to the community in Wandsworth, either pro bono or on a heavily discounted basis. And so forth.

3.8 Need for a single authoritative handbook. There already exist MoJ leaflets and material about ADR. There is also a helpful HMCS mediation “toolkit” in the form of the Civil Court Mediation Service Manual on the Judicial Studies Board (“JSB”) website. In my view there now needs to be a single authoritative handbook, explaining clearly and concisely what ADR is (without either “hype” or jargon) and giving details of all reputable providers of mediation. Because of the competing commercial interests in play, it would be helpful if such a handbook were published by a neutral body. Ideally, this should be done under the aegis of the CJC, if it felt able to accept that role. If possible, the handbook should be an annual publication.

The obvious utility of such a work means that it would be self-financing. It needs to have a highly respected editor, perhaps a recently retired senior judge. It needs to become the vade mecum of every judge or lawyer dealing with mediation issues. It should be the textbook used in every JSB seminar or Continuing Professional Development (“CPD”) training session. I am not proposing any formal system of accreditation, although that would be an option. However, inclusion of any mediation scheme or organisation in this handbook will be a mark of respectability.

The sort of handbook which I have in mind will be a work of equivalent status to the annual publications about civil procedure. Most judges and litigators would have the current edition of the proposed handbook on their bookshelves.
3.9 **Training of judges and lawyers.** The education of judges and lawyers in the merits of mediation is a gradual process, which has been occurring over the last 20 years and which will continue. Both the JSB and the various CPD providers have an important role to play in this regard. In my view, it is important that in delivering training to judges and lawyers who lack first hand experience of mediation, experienced mediators (such as those who have contributed to Phase 2 of the Costs Review) should play an active part.

3.10 **Public education.** So far as the general public and small businesses are concerned, the problem is of a different order. It is very difficult to raise public awareness of what mediation has to offer. I fear that no television company would be persuaded to include a mediation scene in any courtroom drama or soap opera (helpful though that would be). The best and most realistic approach would be to devise a simple, clear brochure outlining what ADR has to offer and for that brochure to be supplied as a matter of course by every court to every litigant in every case.34

4. **RECOMMENDATIONS**

4.1 For the reasons set out above, I do not recommend any rule changes in order to promote ADR. I do, however, accept that ADR brings considerable benefits in many cases and that this facility is currently under-used, especially in personal injury and clinical negligence cases.

4.2 I recommend that:

(i) There should be a serious campaign

(a) to ensure that all litigation lawyers and judges are properly informed about the benefits which ADR can bring and (b) to alert the public and small businesses to the benefits of ADR.

(ii) An authoritative handbook should be prepared, explaining clearly and concisely what ADR is and giving details of all reputable providers of mediation. This should be the standard handbook for use at all JSB seminars and CPD training sessions concerning mediation.
## Footnotes/references

21. I have seen such cases.

22. But see also paragraph 2.3 below.

23. This figure presumably includes the CEDR mediations referred to in paragraph 2.2 above. CEDR is represented on the CM Council.

24. This was based on returns from fewer information sources.

25. Her Majesty’s Courts Service.

26. Which includes principally mediation, but also structured negotiations and other settlement techniques.

27. Discussed at PR paragraph 30.3.4.

28. i.e. Of those 53 cases, 47 settled on the date or shortly thereafter as a result of the mediation and six did not settle.

29. Which was shared by myself until Phase 2 of the Costs Review.

30. This is the essence of the Ungley order. The point has been made by some commentators that most cases ultimately settle and therefore this provision seldom bites. Whilst I see the force of this, the provision nevertheless has value. At the stage of refusing to mediate a party does not know whether the case will ultimately settle.


32. For example, a telephone mediation scheme established by the Bodily Injuries Claims Management Association in 2008. See chapter 22 above, paragraph 6.2(vi).

33. At [http://www.jsboard.co.uk/publications.htm](http://www.jsboard.co.uk/publications.htm)

34. It could be included with the allocation questionnaire.
6.3 Alternative dispute resolution (chapter 36). Alternative dispute resolution ("ADR") (particularly mediation) has a vital role to play in reducing the costs of civil disputes, by fomenting the early settlement of cases. ADR is, however, under-used. Its potential benefits are not as widely known as they should be. I therefore recommend that:

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CHAPTER 36. ALTERNATIVE DISPUTE RESOLUTION

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3. INTRODUCTION

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“A degree of oversight and if need be compulsion may even be needed to be exercised over procedural judges in terms of implementing such a policy.”

CEDR considers that mediation should be built into the case management timetable in all cases except where good reason is given for excusing it. CEDR notes that at the moment some district judges and masters are enthusiasts for mediation, but others are not. Therefore more training is needed for judges in this regard. CEDR provides examples of instances where high litigation costs already incurred proved to be an insurmountable obstacle to settlements which may otherwise have flowed from mediation.

2.3 Civil Mediation Council. The Civil Mediation Council (the “CM Council”) promotes mediation in all areas of dispute resolution. In its submission dated 21st July 2009 the CM Council states that returns from 52 of its provider members report 6,473 mediations so far this year, which is an increase of 181% over the 2007 baseline. There were 8,204 mediations conducted in 2008 by members. In its submission the CM Council outlines the benefits of mediation in a number of discrete areas, such as Mercantile Court cases, neighbour disputes, chancery litigation etc.

The CM Council states that it is currently holding discussions with the Ministry of Justice (the “MoJ”) about the future organisation of the National Mediation Helpline (“NMH”) scheme. The CM Council commends the excellent work done by the Small Claims Mediation Service, which last year won a CEDR award and an EU award for excellence. It states that personal injury and clinical negligence practitioners have been particularly resistant to mediation, but even they are now becoming less resistant. The CM Council refers to specific mediation schemes, in particular:
Law Works provides *pro bono* mediation. It has 150 trained mediators on its panel. This is a resource which is very seriously under-used.

Inter-Resolve is a company which provides a low cost telephone mediation service.

The CM Council believes that public awareness of mediation needs to be increased, especially among small and medium sized businesses, insurers, central and local government bodies. The courts should have in place effective procedures to refer to Law Works litigants who qualify for *pro bono* assistance.

2.4 Representatives of the CM Council came to see me on 23rd July 2009. At that meeting they reinforced the points made in their paper. They expressed the view that more lawyers would be willing to provide *pro bono* mediation services through Law Works. This is a project which should be encouraged, although commercial mediation should not thereby be downgraded. One of the representatives at that meeting subsequently sent in helpful supplementary submissions.

2.5 Lloyd’s underwriters. The Lloyd’s Market Association (the “LMA”) represents all businesses which underwrite insurance at Lloyd’s of London. The LMA states that ADR is used only in a very small percentage of cases. The LMA believes that a cultural change is necessary, so that lawyers will embrace ADR more readily. Claims Against Professionals (“CAP”) is a body comprising some of the leading professional indemnity insurers from the Lloyd’s and Companies’ markets. In a survey of CAP members 65% agreed with the proposition that a party should be required to participate in ADR even when it is unwilling to do so.

2.6 Association of Her Majesty’s District Judges. The Association of Her Majesty’s District Judges states:

“The Small Claims Track Mediation Service provided by HMCS25 has assisted in resolving claims in advance of the final hearing listed before the District Judge. We take the view that consideration should be given to a system of compulsory referral to the HMCS mediation service where all the parties in a Small Claims Track case are unrepresented. There is a high settlement rate. Where claims do not settle by such mediation, the parties can have their day in court. Perhaps the cost to HMCS of this service could be met at least in part by a partial (as opposed to a complete) refund of the hearing fee that the Claimant will in any event have paid. More referrals to this mediation service will free up more District Judge time.”

2.7 Association of Northern Mediators. The Association of Northern Mediators (the “ANM”) identifies the key benefits of ADR26 as follows: saving time, saving direct and indirect costs, preventing damage to business relationships and reputation, alleviation of stress, achieving remedies beyond the powers of the court and (if no settlement is achieved) narrowing issues for trial. The ANM points to the rising number of mediations and concludes that there should be greater encouragement for parties to enter into ADR before issue of proceedings. The ANM suggests that the rules should give greater prominence to ADR at the pre-action protocol stage, especially towards the end of that stage. The ANM believes that some members of the judiciary have not fully appreciated or embraced ADR. The ANM agrees that ADR should not be made compulsory, but would welcome universal adoption of Master Ungley’s direction on ADR (the “Ungley order”). It maintains that not all businesses involved in lower value disputes are aware of what ADR has to offer.
2.8 Individual mediators. Two experienced mediators, one a member of the CJC and one a member of the Civil Procedure Rule Committee, sent in a joint submission on mediation issues. They state that the majority of businesses are not regular court users and not generally aware of what ADR has to offer. The problem is compounded because many lawyers have no experience of ADR. They urge that ADR should be brought into the mainstream of case management and should become an integral part of our litigation culture. They comment that there are many cases where case management ought to involve ADR, but apparently does not: for example Peakman v Linbrooke Services Ltd [2008] EWCA Civ 1239. They state that the NMH is probably on the way to being a satisfactory substitute for the various court-based mediation schemes which it replaced.

2.9 Law Society. The Law Society states:

“The Law Society continues to support the use of all forms of ADR in circumstances where it may be assist the parties to come to terms and they are willing to do so. We also support the principle of ‘legal proceedings as a last resort only’. However, mediation is not the panacea which some consider it to be and is not appropriate in all cases. Neither should it be made mandatory. Indeed, there are views among practitioners that there is no consistency about which cases are suitable for mediation – some may well be mediated which are more suitable for trial, and vice versa. We consider that firmer guidelines are needed on what is and is not suitable for mediation.”

The Law Society points out that all solicitors engage in negotiations, which are the simplest form of ADR. Many civil litigation solicitors are also mediators, but they frequently report that mediation can increase the costs of a case. Therefore the Law Society considers that more research is required.

2.10 Bar Associations. The Commercial Bar Association (“COMBAR”) agrees with the observation in the Preliminary Report that in the context of business disputes parties and their advisers are well aware of what ADR has to offer. A number of respondents to the COMBAR questionnaire expressed that view. COMBAR considers that mediation should be de-formalised; however, this is a matter for parties and mediators to attend to, not for rules or legislation. The Bar Council expresses very similar views to COMBAR on these issues.

(ii) Mediation for personal injury claims

2.11 Trust Mediation Ltd. Trust Mediation Ltd (“TML”) is a specialist provider of fixed costs mediations in personal injury cases. All of its mediators are not only experienced in mediation, but also have long experience of personal injuries litigation. TML estimates that in 95% of personal injury cases mediation will never be necessary. Compulsory mediation is therefore inappropriate. However, TML does recommend that in the remaining 5% of cases where the resolution of disputes is delayed and costs escalate, mediation should become the “natural tool to draw from the litigator’s toolkit”. TML’s experience shows that mediation almost always succeeds, even in apparently entrenched cases where there are enormous differences, if skilled and fluent mediators apply effective “reality testing” techniques against objective criteria. In addition, the cost of the mediation process is a small fraction of the cost of a trial and the solutions derived from mediations are often much more satisfactory than those which a court could impose. Mediation also provides an opportunity for the costs of proceedings to be agreed. TML states that it has obtained successful results through mediation: between January 2008 and June 2009 it conducted mediations in 53 cases with an 88.7% success rate. Users have ascribed
this success rate to the fact that the mediators are skilled and deeply experienced personal injury practitioners.

2.12 Representatives of TML came to see me on 23rd July 2009. I suggested to them that mediation is a facilitative process, designed to arrive at a mutually acceptable outcome rather than the legally correct result; accordingly mediation in this particular area carried with it the risk that claimants would be undercompensated, for example in respect of future care costs. The representatives essentially had two answers to this challenge. First, in practice the results of such mediations always did reflect fair compensation for the claimant. Secondly, closure was in itself extremely important for the claimant. The representatives also expressed concern that when one party refuses to mediate, the district judge does not encourage mediation.

2.13 Sir Henry Brooke reinforces the submissions of TML by furnishing an account of a recent mediation which he conducted in a fatal accident case. Both the process and the outcome brought considerable satisfaction to all parties involved.

2.14 CEDR. CEDR has provided a separate paper on mediating personal injury and clinical negligence claims, making the following points. Mediating personal injury and clinical negligence claims is the norm in many overseas jurisdictions. The outcomes which claimants typically seek in personal injury cases are: full or partial vindication in respect of the accident; damages constituting proper compensation; a chance to say what impact the accident has had on them; a response from the defendant delivering some acknowledgement; and a reasonably swift and risk-free outcome. The outcomes which claimants typically seek in clinical negligence cases are: an apology; an explanation as to what happened; reassurance of reform to ensure that there is a reduced or eradicated chance of the same thing happening again; and (occasionally) revenge in the form of regulatory intervention. The objectives which defendants seek may vary depending on the nature of the litigation. Insurers seek a commercial solution and minimal expenditure. Employers sued by employees may have different objectives: to protect the business by keeping their workforce stable and satisfied; to avoid floodgate claims; to be seen as a caring employer; not to lose the services of valuable employees; and to learn from mistakes and be seen to be sensitive to health and safety matters. These objectives are best achieved by mediation. All types of personal injury cases are suitable for mediation, from small claims to substantial group actions. The mediator adds value at all stages of the process. There are specialist mediators for clinical negligence claims. The utility of mediation in clinical negligence has been demonstrated by a pilot. Nevertheless, mediation is insufficiently used in clinical negligence.

2.15 Solicitors. A firm of solicitors with offices across the south of England, which acts for both claimants and defendants in personal injuries litigation, states that mediation is particularly efficacious in that field but is grossly under-used. The firm does not favour compulsory mediation, but does favour orders requiring the parties to discuss the case with a view to mediation. Mediation should not be a routine stage in every case, but the courts should be more pro-active in directing the parties to discuss mediation in appropriate cases. The firm believes that a major cause of the slow adoption of mediation is the innate conservatism of the solicitors’ profession. The firm states:

“Our own experience is that mediation is very popular with individuals who have benefited from its cathartic process in personal injury claims.”
The firm endorses the submissions of CEDR about the great benefits which mediation can bring to those involved in personal injuries litigation. The firm hopes that further provision will be made for mediation in the rules, in particular in a fixed fee regime within the fast track.

2.16 Liability insurers. One major liability insurer writes:

“We agree that in the context of personal injury cases there remains a need for better education and information about ADR and mediation in particular. In the context of PI claims, mediation is an under utilised tool. Feedback from claimant solicitors who mediate regularly say that:

a. claimants like it as it is not as daunting as a trial and they can have their say in a less threatening environment;

b. it improves cash flow by bringing about early resolution.

From an insurer’s perspective mediation is a constructive way of seeking to bring about resolution of a case. It provides an opportunity to risk assess the merits of a particular claim and make decisions based on that assessment. Mediation can be carried out earlier in the process; one does not need to have all the evidence completely together in order to form a view that may lead to settlement.

The consensual approach to mediation also means that both parties come out of mediation with a resolution that is satisfactory to them.”

This insurer would like to see court ordered mediation. It believes that, in respect of mediation, the present approach of the judiciary is not sufficiently robust.

2.17 Defendant solicitors. A firm of defendant solicitors states that ADR might be mediation or, alternatively, a joint settlement conference. Unfortunately many claimant solicitors are simply “preparing for trial”. The firm believes that this mentality is encouraged by the Civil Procedure Rules, which should be re-focused towards resolution with trial as a last resort. In the firm’s experience 90% of cases settle within a short time of a joint settlement meeting. Another firm of defendant solicitors writes:

“[We] welcome any encouragement to litigants to undertake ADR during the litigation process in appropriate cases. Part of the reason for the poor take up is insufficient knowledge of the process and the perceived cost. Further education is needed rather than rule changes.

[We] do not support compulsory ADR as not all cases are suitable.”

2.18 The Forum of Insurance Lawyers (“FOIL”) takes a positive view of both mediation and joint settlement meetings. FOIL believes that in order to encourage greater use of mediation, it is not rule change that is needed but culture change. FOIL does not believe that compulsory mediation would be a satisfactory way forward.

2.19 Clinical negligence. The Medical Defence Union (the “MDU”) states in its submission that ADR works best in cases where quantum is the only issue between the parties. The MDU believes that mediation should take place early in the proceedings, but once expert evidence is in the arena. It proposes that standardized directions should be rolled out across the courts, including the Ungley order.
3. ASSESSMENT

3.1 Benefits of ADR not fully appreciated. Having considered the feedback and evidence received during Phase 2, I accept the following propositions:

(i) Both mediation and joint settlement meetings are highly efficacious means of achieving a satisfactory resolution of many disputes, including personal injury claims.

(ii) The benefits of mediation are not appreciated by many smaller businesses. Nor are they appreciated by the general public.

(iii) There is a widespread belief that mediation is not suitable for personal injury cases. This belief is incorrect. Mediation is capable of arriving at a reasonable outcome in many personal injury cases, and bringing satisfaction to the parties in the process. However, it is essential that such mediations are carried out by mediators with specialist experience of personal injuries litigation.

(iv) Although many judges, solicitors and counsel are well aware of the benefits of mediation, some are not.

3.2 Not a universal panacea. Mediation is not, of course, a universal panacea. The process can be expensive and can on occasions result in failure. I adhere to the general views expressed in the Preliminary Report at paragraphs 4.2.1 to 4.2.6. The thesis of this chapter is not that mediation should be undertaken in every case, but that mediation has a significantly greater role to play in the civil justice system than is currently recognised.

3.3 Timing of mediation. It is important that mediation is undertaken at the right time. If mediation is undertaken too early, it may be thwarted because the parties do not know enough about each other’s cases. If mediation is undertaken too late, substantial costs may already have been incurred. Identifying the best stage at which to mediate is a matter upon which experienced practitioners should advise by reference to the circumstances of the individual case.

3.4 Judicial encouragement of mediation. In spite of the considerable benefits which mediation brings in appropriate cases, I do not believe that parties should ever be compelled to mediate. What the court can and should do (in appropriate cases) is

(a) to encourage mediation and point out its considerable benefits;
(b) to direct the parties to meet and/or to discuss mediation;
(c) to require an explanation from the party which declines to mediate, such explanation not to be revealed to the court until the conclusion of the case; and
(d) to penalise in costs parties which have unreasonably refused to mediate. The form of any costs penalty must be in the discretion of the court. However, such penalties might include

(a) reduced costs recovery for a winning party;
(b) indemnity costs against a losing party, alternatively reduced costs protection for a losing party which has the benefit of qualified one way costs shifting.
3.5 Need for culture change, not rule change. I agree with the view expressed by FOIL and others that what is needed is not rule change, but culture change. I do not agree with the proposals made by CEDR for sanctions, including sanctions against all parties. Nor do I agree with the CEDR’s proposal for “compulsion” to be exercised over judges. Judges must have discretion to give such case management directions as they deem appropriate in the circumstances of the individual case.

3.6 The pre-action protocols draw attention appropriately to ADR. The rules enable judges to build mediation windows into case management timetables and some court guides draw attention to this facility. Many practitioners and judges make full use of these provisions. What is now needed is a serious campaign

(a) to ensure that all litigation lawyers and judges (not just some litigation lawyers and judges) are properly informed about the benefits which ADR can bring and

(b) to alert the public and small businesses to the benefits of ADR.

3.7 Fragmentation of information. One of the problems at the moment is that information about ADR is fragmented. In the course of the Costs Review I have received details about a number of providers of mediation from different sources. By way of example, Law Works Mediation Service sent me details of the excellent pro bono mediation service which it runs. TML provided similar details to me of its own services. Details of the NMH are available on the HMCS website. CEDR has sent to me a brochure about the excellent mediation services which CEDR offers. Wandsworth Mediation Service has sent to me details of the valuable mediation services which it provides to the community in Wandsworth, either pro bono or on a heavily discounted basis. And so forth.

3.8 Need for a single authoritative handbook. There already exist MoJ leaflets and material about ADR. There is also a helpful HMCS mediation “toolkit” in the form of the Civil Court Mediation Service Manual on the Judicial Studies Board (“JSB”) website. In my view there now needs to be a single authoritative handbook, explaining clearly and concisely what ADR is (without either “hype” or jargon) and giving details of all reputable providers of mediation. Because of the competing commercial interests in play, it would be helpful if such a handbook were published by a neutral body. Ideally, this should be done under the aegis of the CJC, if it felt able to accept that role. If possible, the handbook should be an annual publication.

The obvious utility of such a work means that it would be self-financing. It needs to have a highly respected editor, perhaps a recently retired senior judge. It needs to become the vade mecum of every judge or lawyer dealing with mediation issues. It should be the textbook used in every JSB seminar or Continuing Professional Development (“CPD”) training session. I am not proposing any formal system of accreditation, although that would be an option. However, inclusion of any mediation scheme or organisation in this handbook will be a mark of respectability.

The sort of handbook which I have in mind will be a work of equivalent status to the annual publications about civil procedure. Most judges and litigators would have the current edition of the proposed handbook on their bookshelves.

3.9 Training of judges and lawyers. The education of judges and lawyers in the merits of mediation is a gradual process, which has been occurring over the last 20 years and which will continue. Both the JSB and the various CPD providers have an important role to play in this regard. In my view, it is important that in delivering training to
judges and lawyers who lack first hand experience of mediation, experienced mediators (such as those who have contributed to Phase 2 of the Costs Review) should play an active part.

3.10 Public education. So far as the general public and small businesses are concerned, the problem is of a different order. It is very difficult to raise public awareness of what mediation has to offer. I fear that no television company would be persuaded to include a mediation scene in any courtroom drama or soap opera (helpful though that would be). The best and most realistic approach would be to devise a simple, clear brochure outlining what ADR has to offer and for that brochure to be supplied as a matter of course by every court to every litigant in every case.34

4. RECOMMENDATIONS

4.1 For the reasons set out above, I do not recommend any rule changes in order to promote ADR. I do, however, accept that ADR brings considerable benefits in many cases and that this facility is currently under-used, especially in personal injury and clinical negligence cases.

4.2 I recommend that:
   (i) There should be a serious campaign
      (a) to ensure that all litigation lawyers and judges are properly informed about the benefits which ADR can bring and (b) to alert the public and small businesses to the benefits of ADR.
   (ii) An authoritative handbook should be prepared, explaining clearly and concisely what ADR is and giving details of all reputable providers of mediation. This should be the standard handbook for use at all JSB seminars and CPD training sessions concerning mediation.

21 I have seen such cases.
22 But see also paragraph 2.3 below.
23 This figure presumably includes the CEDR mediations referred to in paragraph 2.2 above. CEDR is represented on the CM Council.
24 This was based on returns from fewer information sources.
25 Her Majesty’s Courts Service.
26 Which includes principally mediation, but also structured negotiations and other settlement techniques
27 Discussed at PR paragraph 30.3.4.
28 I.e. Of those 53 cases, 47 settled on the date or shortly thereafter as a result of the mediation and six did not settle.
29 Which was shared by myself until Phase 2 of the Costs Review.
30 This is the essence of the Ungley order. The point has been made by some commentators that most cases ultimately settle and therefore this provision seldom bites. Whilst I see the force of this, the provision nevertheless has value. At the stage of refusing to mediate a party does not know whether the case will ultimately settle.
32 For example, a telephone mediation scheme established by the Bodily Injuries Claims Management Association in 2008. See chapter 22 above, paragraph 6.2(vi).
33 At http://www.jsboard.co.uk/publications.htm.
34 It could be included with the allocation questionnaire.