

Morris Review
GC/08
1 Horse Guards Road
London
SW1A 2HQ

9 August 2004

Dear Sir Derek

I am responding on behalf of CEDR, The Centre for Effective Dispute Resolution, to the consultation document dated June 2004 on your review of the Actuarial Profession. We are aware that our response will be published on the appropriate website and will be publicly available.

CEDR's Experience and Scope of Response

CEDR is an independent non-profit organisation. Our mission is to encourage and develop mediation and other cost-effective dispute resolution and prevention techniques in commercial and public sector disputes and civil litigation. We are the largest operator in this sector in Europe. Considerable information about CEDR and alternative dispute resolution (ADR) is available on our website www.cedr.co.uk

Our response to the consultation document is limited to issues related to mediation.

Specific Response

1. We do not comment on specific actuarial issues save to say that many industries consider that their industry is complex and heavily influenced by regulatory or public issue matters. Yet many such industries are able to resolve their contractual and other problems utilising mediation and other forms of alternative dispute resolution (ADR). Increasingly we are beginning to see use of mediation in a regulatory context.
2. A brief case study of the Enforcement Division of the Financial Services Authority may be instructive.

3. During 2001 CEDR was contracted by the Financial Services Authority (FSA) to design, build and then operate a mediation scheme on behalf of the Enforcement Division of the FSA. Rather over simplified, at the time the FSA issues a Warning Notice to an individual or firm, that individual or firm then has the option (in most circumstances) to enter into a mediation between themselves and the FSA before a final Decision Notice is issued by the Regulator. Full details of the scheme are available on the FSA website www.fsa.gov.uk . We believe that this was the first use of mediation in the context of regulation of a financial services industry within Europe. A review of the pilot scheme was conducted by the FSA with input from ourselves and can be found in the FSA Consultation Paper 199 dated September 2003 (chapter 8) also available on the FSA website.
4. We believe that there are lessons from the FSA's use of mediation in a regulatory context that could be transferred to the regulatory responsibilities of the actuarial profession.
5. There is no doubt that any finding of misconduct or disciplinary action against an actuary will have an impact on that actuary's ability to obtain work in future. This is exactly parallel to the situation where the FSA issues a final decision notice which will impact upon the reputation of an individual or financial firm. In the case of the FSA Enforcement Division it was found that the intervention of a neutral third party mediator to assist negotiations between the regulator and the regulated prior to a final decision had the following benefits in some situations.
 - a) The mediation process enabled better understanding of the prioritisation of sub-issues within the regulatory matter in dispute by both parties.
 - b) It allowed both parties to express views on the severity and impact of proposed sanctions and to ensure parity of bench marking against previous sanctions for similar circumstances of misconduct.
 - c) The process enabled both parties to discuss without a ranker the final wording of any public notice or announcement to be made.
 - d) It enabled both parties to discuss the timing and publication of public notice.
 - e) The mediation process allowed for balanced discussion of proposals for corrective action, retraining, and other remedial actions to be taken by the firm or individual concerned.
6. Although possible in theory, the FSA experience shows that mediation is unlikely to change a 'guilty' decision into a 'not guilty'. In practice the mediation process helps to allow both the regulator and the regulated party to be heard better by the other. The role of the neutral is partially to assist in prioritisation of issues and facilitate clarity of understanding by both parties.

7. If mediation were to be used by the actuarial profession in its regulatory role, it would be important to ensure that the mediator was a totally independent and neutral. You should also ensure that your mediators are trained in the mediation process and well as having a broad understanding of the principles involved. It may also be helpful if the mediator also has an understanding of actuarial process, but this is not essential.
8. It is probable that such a mediation process would be appropriate in more high profile, high value or complex cases of disciplinary action.

Summary

We recognise that this a small contribution to your very wide-ranging review. We hope that it is a contribution which will bring to your market the lessons learned successfully elsewhere. Obviously, we would be very happy to discuss these thoughts more fully with you.

Yours sincerely

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Director

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