CEDRCELEBRAT1ON
1O years of mediation success

The CEDR Civil Justice Audit

April 2000

The CEDR Civil Justice Audit

CEDR (Centre for Dispute Resolution)
Princes House
95 Gresham Street
London
EC2V 7NA
Tel: + 44 (020) 7600 0500
Fax: + 44 (020) 7600 0501
E mail: mediate@cedr.co.uk
Web: www.cedr.co.uk

April 2000

Acknowledgements

CEDR would like to gratefully acknowledge the contributions made by its consultants Miryana Nesic, Charles Dodson, and Tony Allen in helping to design and shape this project. We would also like to thank CEDR members Andrew Paton, John Gatenby, and Robert Neill for their thoughts and comments.

Funding for the MORI research portion of this Civil Justice Audit was made possible by a grant from national law firm, Addleshaw Booth & Co.

The focus groups were made possible by a grant from the legal publishers Butterworths Tolley, while facilities were made available by the national law firms Eversheds and Hammond Suddards.

Samuel Passow
Head of Research

Katy Lawrence
Research Associate

7 April 2000

Executive summary

The CEDR Civil Justice Audit is an independent assessment of the perceived effectiveness of the new Civil Procedure Rules (CPR) which came into effect on 26 April 1999. These amendments to the court rules of England and Wales are part of an overall effort by the Government to reform both procedural defects in the civil justice system and the economics of litigation in their entirety. Known more commonly as the Woolf Reforms, after their author Lord Woolf, the CPR aim to reduce the excessive delay, cost, complexity, uncertainty and unfairness which were perceived by many to characterise the British justice system.

This report was independently conducted by the Research Services Unit of CEDR (the Centre for Dispute Resolution) and consists of three parts: (1) a national telephone poll of 100 lawyers conducted by the MORI research organisation, (2) the testimony of 41 lawyers who attended five separate focus groups in five different cities and (3) a written questionnaire completed by ten judges from six court circuits. In all, 151 people participated. The lawyers were divided into two classifications: external lawyers, working for firms providing legal services and internal (or in-house) lawyers, working on behalf of corporations.

The quantitative answers and unabashed qualitative conclusions presented in this audit were collected during a three week period from 28 February until 17 March 2000 and are meant to serve as a 'snapshot' which captures the mood of the legal community, not as a definitive study.

Overall, the findings show that three out of four respondents' initial reactions to the CPR are positive and that there are high levels of satisfaction. There is a clear recognition that since the new rules came into effect, there has been less litigation and faster case settlement. However, there is a noticeable variation of views as to which parts of the new CPR have had the most impact on litigation, and the effect of the new Rules on legal costs. Both external and internal lawyers express strong views as to how the CPR could be improved, and genuinely welcome the chance to have their opinions aired in a public forum (the 7 April Conference at the Queen Elizabeth II Conference Centre) with both Lord Irvine, the Lord Chancellor, and Lord Woolf, Master of the Rolls, in attendance. Only one-fifth of respondents consider it too early to comment.

- The majority (76%) feel that the new CPR have made a positive change on the **culture for settlement.** External lawyers (84%) are more bullish than internal lawyers (68%).

- Overall **levels of satisfaction** towards the new CPR are even higher with a total (80%) either "very" (7%) or "fairly" satisfied (73%). Internal lawyers show an overall higher level of satisfaction with 82% compared to a figure of 78% for external lawyers.

- External and internal lawyers share similar views on whether the new CPR have affected the **levels of involvement in litigation** (16% say it has increased, 47% it has stayed the same and 36% it has decreased), **speed of case settlement** (47% say faster than before while 40% say there is no change); **the outcome of cases** (17% note that outcomes have been fairer under the new rules while 62% say the outcomes were similar to those before CPR); **and whom the new CPR have favoured** (claimants 37% or defendants 9%).

- There are some differences of opinion between external and internal lawyers. Almost twice as many external as internal lawyers feel that **Part 36 offers** have had the most impact on litigation practice (62% and 32% respectively). One-fifth of external lawyers consider **costs** to have affected litigation, compared to only 6% of internal lawyers. In contrast, three times as many internal as external lawyers consider **Fast track** to have affected the speed of litigation (24% and 8% respectively).

- Far more external than internal lawyers feel that **costs** have increased since the introduction of the new CPR, with 44% and 26% respectively. There is not a distinct pattern among the responses given by internal lawyers regarding legal costs.

- Since the new CPR, just over one-third of internal lawyers think their external counterparts are finding that **cost and risk estimates** have remained unchanged.

- The majority of internal lawyers (78%) feel that **mediation** should be required at some stage if a business dispute goes to court. Only half this number (40%) of external lawyers agree with the statement. However, since the new CPR, external lawyers are more likely than internal lawyers to have been involved in mediation, at 54% and 38% respectively.

- Defendants more than claimants appear to initiate the **mediations**, with around one-third of both external and internal lawyers considering this the case. In only a few cases, the claimant or court solely initiated these mediations.

- Over half of all surveyed think that judges should initiate **settlement discussions**. However, over a half of external lawyers and just under one-third of internal lawyers disagree with the statement that “judges are adequately trained for case management under the new CPR”. Internal lawyers are far more likely than external lawyers (46% compared to 28%) to feel that cases should not be “stayed” while settlement discussions are under way.

- The clear majority of lawyers (82%) think the court should **award costs** against parties who behave “unreasonably” in an Alternative Dispute Resolution (ADR) procedure. However, internal lawyers are stronger in their support for this than external lawyers (88% and 76% respectively).

- Twice as many internal as external lawyers (56%and 26%) think that the court should **award costs** against parties who refuse to take part in ADR.

- Just under one-third (32%) of internal lawyers are “every time” or “usually” advised by their external lawyers to **use mediation** rather than litigation. The same proportion of organisations use clauses in contracts that require mediation to be an initial course of action.

- The majority of external lawyers (74%) consider that the new Part 36 claimant offer provision has made **case settlement** easier. Penal Interest Rates have little impact on altering the advice given to clients in favour of settlement. Front loading of litigation costs has affected the willingness to issue proceedings among 38% of external lawyers.

Our survey of judges was not as extensive as our sampling of lawyers. Therefore we cannot make statistically valid comparisons. However, we were able to get consistent responses from which we can draw the following broad conclusions about current judicial thinking:

- Seven out of ten judges find that lawyers have embraced the new CPR well, while three said the **level of understanding** was variable.

- All judges agree that **mediation should not be made mandatory**, while two of the ten judges thought the court had the right to investigate non co-operation by parties engaged in mediations.

- Judges unanimously agree that the **court should not provide personnel as mediators**.

- Seven out of 10 judges would **not penalise with a costs order** a party that refused to take part in a mediation.

- Seven out of 10 judges would **stay a case** when requested by one or both of the parties.

CEDR has played an active role in the public consultation process regarding the reform of the civil justice system which Lord Woolf began five years ago. The information that CEDR has provided, based on its extensive experience of conducting mediation and training mediators, has helped to make ADR a permanent part of the civil justice architecture.

A complete version of the Civil Justice Audit, plus related articles on this topic, will be available on the CEDR website at www.cedr.co.uk. We invite your comments as part of our on-going effort to further dialogue on the civil justice reforms.

Table of contents

CEDR Civil Justice Audit

Aims of the Report

The aim of this Report is to provide an independent and objective assessment of how the legal community in England and Wales views the effectiveness of the new procedural rules for the British civil justice system.

Since Lord Woolf began the public consultation process for reforming the civil justice system five years ago, CEDR (the Centre for Dispute Resolution) has actively participated in the public consultation process and offered a wealth of information which has helped to make the inclusion of Alternative Dispute Resolution (ADR) methods a permanent part of the architecture of our legal system. CEDR's advocacy of ADR is based on its extensive experience in both training mediators and conducting mediations.

This survey of the attitudes and perceptions of experienced legal practitioners focuses on the effects that the new Rules have had on the cost and speed of case settlement, and in particular how the use of mediation fits into the practitioners' overall calculus. The questions were also designed to probe the success of the stated objectives of the Woolf reforms.

The Report is designed to give the reader a balance of quantitative or statistical information, obtained through the MORI poll and Judges' Questionnaire, as well as qualitative or anecdotal evidence gathered in the focus groups and in the written responses of the judges.

The anecdotal comments presented in this report were chosen because they poignantly reflect the wide range of opinion expressed during the focus group discussions. They are also meant to "give a voice" to the "faceless" statistical breakdown of opinion reflected in the MORI poll. Whilst anonymity of opinion was promised to the participants of this survey, the authors found it extraordinary how willing and eager professionals were to share their personal experiences of the civil justice system in a non-positional posture. It is in this spirit that the constructive criticism which emerges from the comments in this Report is offered to the Lord Chancellor.

At the back of this report detailed appendices are included which contain the complete results of the MORI survey, the focus group questions and the Judges' Questionnaire in the hope that this information can assist in any further detailed examination of the subject.

A complete version of the Civil Justice Audit, plus related articles on this topic, will be available on the CEDR website at www.cedr.co.uk. We invite your comments as part of our on-going effort to further the dialogue on the civil justice reforms.

Methodology

This report was independently conducted by the Research Services Unit of CEDR (the Centre for Dispute Resolution) and consists of three parts: (1) a national telephone poll of 100 lawyers conducted by the MORI research organisation, (2) the testimony of 41 lawyers who attended five separate focus groups in five different cities and (3) a written questionnaire completed by ten judges from six court circuits. In all, 151 people participated. The lawyers were divided into two classifications, external lawyers, working for firms providing legal services and internal (or in-house) lawyers, working on behalf of corporations.

The quantitative answers and unabashed qualitative conclusions presented in this audit were collected during a three week period from 28 February until 17 March 2000 and are meant to serve as a 'snapshot' which captures the mood of the legal community, not as a definitive study.

MORI poll: MORI, an independent research firm based in London, called 899 law firms and corporations in England between 1 March and 9 March 2000. They completed 100 telephone interviews involving 23 questions each, plus two screener questions to establish if the respondent was eligible to take part. Of that sample, 50% were the heads of litigation at external law firms and 50% were corporate or in-house lawyers. Each interview lasted no more than ten minutes, and all the people who completed the poll said they were actively involved in litigation and claimed to know "a great deal" or a "fair amount" about the new Civil Procedure Rules. Of the total respondents, 59% had been involved in litigation for more than ten years. Names of external lawyers were chosen from the CEDR database of the top 340 national law firms (ranked by size and turnover) of which 66% of the respondents were from the top 200 law firms in London and 34% were from regional firms. The list of 559 corporate lawyers was drawn from both the CEDR and Dun & Bradstreet databases and they worked for organisations with an annual turnover of £10 million or more. In total, 83% of the respondents were from the South of England, 11% from the Midlands and 6% from the North. All the fieldwork for the MORI poll was carried out by FACTS International in Kent, with fully trained and experienced interviewers using CATI (Computer Assisted Telephone Interviewing).

Focus groups: We conducted one focus group in each of five cities in England between 28 February and 3 March 2000: Leeds (21% of total participants), Manchester (14%), Birmingham (17%), Bristol (17%) and London (29%). Each session consisted of ten questions based on the architecture of the MORI poll and lasted 1.5 hours. They were facilitated by Samuel Passow and Katy Lawrence from CEDR's Research Services Unit. In total, 41 people participated in the focus groups; 26 external lawyers (63%) and 15 corporate or in-house lawyers (37%). All participants were based in the cities where they were interviewed and were chosen by CEDR for their range of experience with litigation and the CPR. The questions were not shown to the participants prior to the sessions and all participants, while acknowledged in this report, were promised anonymity in their individual answers. The questions and answers in the focus groups were recorded simply as responses from external or internal lawyers. They were transcribed by court reporters and produced a total of 183 pages of single-spaced transcript.

Judges' Questionnaire: A two-page survey was sent to the 30 Designated Civil Judges, consisting of 14 questions that required brief written answers. The questionnaire was despatched with a cover

Aims of the Woolf Reforms

In order to put any analysis or discussion of this Civil Justice Audit into perspective, it is necessary to review the aims of the CPR reforms, as set out by Lord Woolf in his final report entitled *Access to Justice:*

- The system should be **just** in the results it delivers.
- The system should be **fair** in the way it treats litigants.
- The system should offer appropriate procedures at a **reasonable cost**.
- The system should deal with cases with **reasonable speed**.
- The system should be **understandable** to those who use it.
- The system should be **responsive** to the needs of those who use it.
- The system should provide as much **certainty** as the nature of the particular case allows.
- The system should be **organised**.
- The system should be **adequately resourced**.
- The system should be **effective**.

To achieve these goals, Lord Woolf envisaged a new litigation “landscape”, defined by a case management system that encompassed the notion of proportionality in the five following ways:

- Litigation would be avoided wherever possible.
- Litigation would be less adversarial and more co-operative.
- Litigation would be less complex.
- The timescale of litigation would be shorter and more certain.
- Parties of limited financial means would be able to conduct litigation on a more equal footing.

Focus group participants

Leeds (28 February)

Stephanie Burras	Pinsent Curtis
Peter Crossley	Hammond Suddards
Simon Kamstra	Addleshaw Booth & Co
Gerard Khoshnaw	Dibb Lupton Alsop
Claire Lassman	Yorkshire Bank
Richard Matthews	Eversheds
Caroline Mitcheson	Halifax Building Society
Graeme Stonehouse	Kelda Group
Caroline Wildman	BUPA

Manchester (29 February)

Geoff Clarke	Co-operative Wholesale Society
Clare Dwyer	Addleshaw Booth & Co
David Gray	Dibb Lupton Alsop
Dominic Kay	Airtours
Ian Meredith	Hammond Suddards
Peter Millican	Northern Rock

Birmingham (1 March)

Robert Benoist	Panic Link Plc
Martin Halsall	Part Co Ltd
Nicola Mumford	Wragge & Co
Samantha Pallett	Eversheds
Colin Russ	Dibb Lupton Alsop
Neil Williams	Pinsent Curtis
Sarah Wilson	Edge Ellison

Bristol (2 March)

Jonathan Calverly	Eversheds
Adrian Llewelyn-Evans	Burgess Salmon
Peter Fisher-Jones	Eversheds
Simon Lloyd	Bristol & West
Sarah Smith	Burgess Salmon
Helen Staines	Beachcroft Wansboroughs
Owen William	Clarke Willmott & Clarke

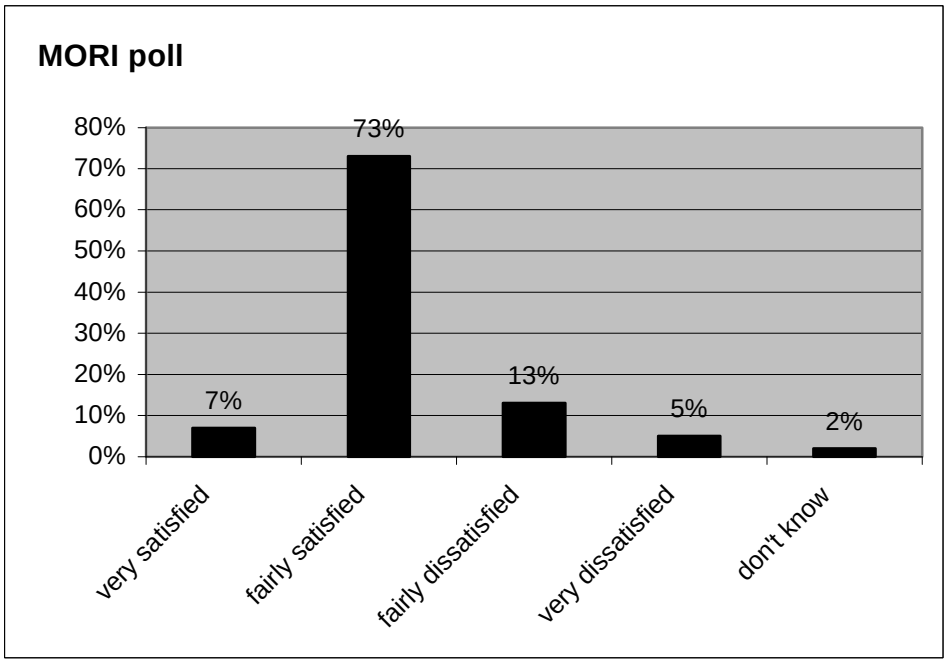
London (3 March)

Jane Andrewartha	Clyde & Co
Andrea Dahlberg	Simmons & Simmons
Christian Duggan	KPMG
Anthony Fincham	CMS Cameron McKenna
Nicola Hay	Eversheds
William Lewis	Barclays Bank
Thomas Martin	Herbert Smith
Sue Plumb	Pinsent Curtis
Jes Salt	Solicitors Indemnity Fund
Phillipa Simmons	Royal Bank of Scotland
Andrew Sutherland	Laing Plc
Andrew Witts	Dibb Lupton Alsop

Results

Levels of satisfaction with the CPR

Question: Overall, how satisfied are you with the new CPR?



Focus group statements

Internal lawyer: If there is one thing that you can take back to the Lord Chancellor it is that there is nothing fundamentally wrong with the new rules, they are in fact very, very positive. By and large all solicitors have entered into the spirit of the rules, but the courts are under-resourced and the administration is very slapdash.

External lawyer: The biggest impact the CPR have had on our practice has been the removal of control of timing from lawyers to the court.

External lawyer: My biggest bugbear is proportionality. There is a lack of consistency between the way some assessments are being carried out. This needs to be addressed as a matter of urgency because District Judges are not pointing out when certain aspects of your costs are disproportionate, they are simply offering a certain amount. I do not think this is satisfactory at all.

Internal lawyer: The way the Civil Procedure Rules are drafted should not allow delays and the Rules are not causing the delays. It is the courts that are causing the delays.

Internal lawyer: "Joe Public" still has to pay the initial costs and have the wherewithal to actually go through the whole process. Under the old system you could pull out and you would usually get a drop of hands, but there are costs penalties now.

Focus group statements/satisfaction with the CPR (continued)

External lawyer: I feel that the Woolf system has been imposed upon a framework which cannot cope with it. We have courts which are working until 7.30pm /8.00pm every night, and every Saturday and Sunday and they still cannot cope. I have had three cases recently in which orders were made requiring things to be done in a very short period of time. Now there is very little you can do about it. When it comes to fast-track trials which are now beginning to build up and have to be heard on a specific day, that day will be absolute chaos.

External lawyer: I can see this as a fantastic opportunity to actually recover the credibility of litigation.

External lawyer: Cases are coming to court a lot quicker, and far fewer cases are being issued in court. If that is because they are settling, it is a win-win situation and results in better access to justice.

External lawyer: Now things happen when they are supposed to happen. One party cannot delay, dally and take great amounts of time to do very simple things.

Internal lawyer: For companies, the CPR have produced change. They make it too difficult and too risky, especially with the Part 36 offer. If a company has a reasonable case that they would have run, they have to drop it because the cost penalties are so great.

External lawyer: There is not greater access to justice if they do away with legal aid. That is not the answer we are looking for.

External lawyer: Train your judges!

Internal lawyer: The biggest flaw is a wide range of inconsistency and implementation and I see more disregard of protocols than regard for them. I would prefer to see a single spirit type protocol rather than hundreds of detailed ones.

Internal lawyer: I had originally hoped that what we might get out of the CPR was one set of rules that all the county courts would apply, rather than having their different set of rules. Alas, that has proved not to be the case.

External lawyer: There does seem to be a complete disparity between different sectors of the judiciary.

Internal lawyer: Things were not properly thought out before they were implemented. One year on, pre-action protocols are still not in place. The court offices have still not got the computer system sorted out to back up the system.

External lawyer: There is tremendous difficulty with inconsistencies, particularly with regard to summary assessment of costs; it is totally arbitrary what we get.

Focus group statements/satisfaction with the CPR (continued)

Internal lawyer: The inconsistency between different circuits is a real difficulty, certainly with things like case management conferences. Some judges expect you to turn up with your client and others do not, but I do not think that they have any understanding of the real expense of getting everyone along to these meetings.

Internal lawyer: I have difficulty obtaining a signature to a Statement of Truth from my directors; they pass it round like a hot potato. They know that it has the weight of swearing an oath and will not sign it until they have every single fact in front of them, which is difficult to achieve. The larger companies will find that getting someone to sign a Statement of Truth who has overall knowledge of the case is very difficult.

External lawyer: I asked trainees in our firm "How many of you have ever been down to court on a time summons?" Virtually none of them ever had, because things are working on time, and that is one of the biggest impacts.

External lawyer: The largest loop hole in dealing with accountants and fraud actions, are the limits on disclosure, because you need to be able to follow a chain of correspondence, which you are now unable to do. There can be obvious fraud going on and it is very difficult to get the documents you require in order to demonstrate it.

External lawyer: I have recently been in correspondence with the Lord Chancellor's Department about who is supposed to sign a Statement of Truth. The specific problem is in the Practice Direction, Paragraph 11, and they have asked me to redraft it to overcome the problem. This will avoid the separation in large corporations between individuals who are senior enough to sign the Statement of Truth and those who actually know what is going on. As it is presently drafted, Paragraph 11 allows a large corporation to have the Statement signed by more junior management, according to a series of tests you can check against. However, in larger corporations, there is generally a separation of personnel and assets, and the Legal Director or employees with control of what is going on are not necessarily employed by the same company as is a party to proceedings. This automatically disqualifies them from signing it. A redraft will allow an individual within the same group of companies to sign a Statement on behalf of another member of the group. A fairly simple change.

External lawyer: The rules place a huge amount of discretionary power in the hands of the judges. One judge's view of a particular case could differ hugely from another judge's view and that makes it more difficult to advise clients and makes the process more difficult to predict.

External lawyer: I have a problem with discovery, I always get this awful feeling that there might be a "smoking gun" document.

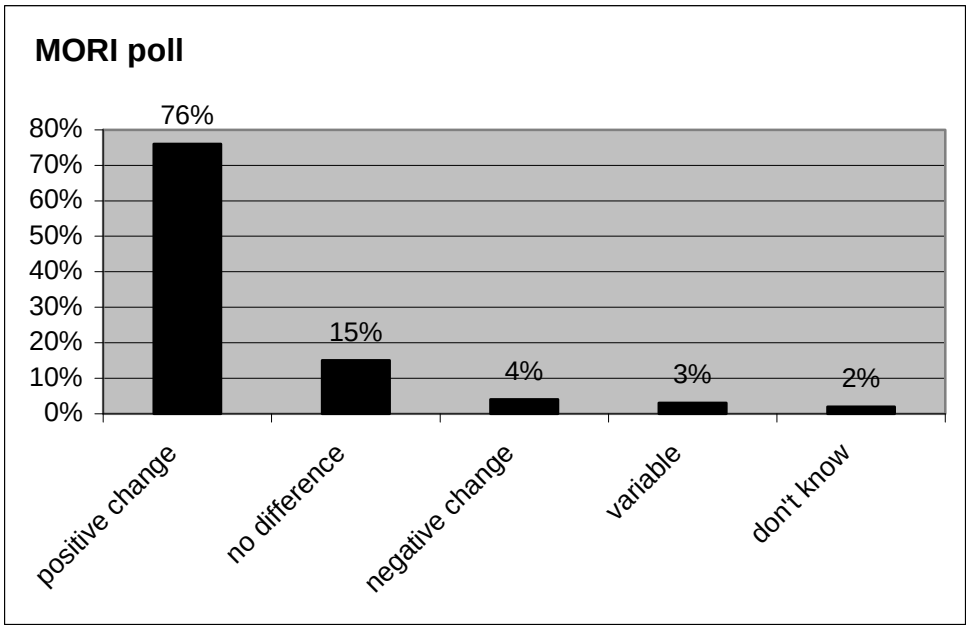
Focus group statements/satisfaction with the CPR (continued)

External lawyer: The use of a single expert for expert evidence has been developed in order to drive down costs. In my experience this does not happen because each side also has the opportunity to engage their own expert to second-guess the original expert, which takes extra time and expense.

External lawyer: My major concern is that we rely on case law to develop our common law system and if all these cases do not go to trial, how is our law going to develop?

Culture for settlement

Question: What change, if any, have the new CPR had on the culture for settlement?



Focus group statements

External lawyer: There are two factors that promote a culture of settlement which I do not think were there before. The first is the Part 36 offer, which focuses the client's mind on the benefits of settling now, compared to getting a result 'X' months or years down the road. The second is the summary assessment of costs on interlocutory hearings which, while not happening across the board, has become more frequent. Again, this means that the client is thinking about the ongoing cost of the litigation process. Not only their own legal fees, but the prospect of contributing to the other side's legal fees on an ongoing basis.

Internal lawyer: There is no doubt that the CPR have improved the climate for settlement and I think that letters are more co-operative.

External lawyer: The CPR have had a very big effect on the culture for settlement. Many of my cases are settling more quickly and people seem to be more conciliatory in their conduct towards one another, and that goes for lawyers as well.

Internal lawyer: You can change behaviour, but not necessarily the culture. We have had a fairly major mediation pilot scheme for the last 12 months in which we have carefully assessed the outcomes. One of the interesting things we noticed has been that the parties have tended to edge towards each other in a nervous sort of way - in the old fashion style of negotiating - rather than using an outside facilitator to help the parties reach a compromise.

Focus group statements/culture for settlement (continued)

External lawyer: Leopards cannot change their spots very easily. When you write and suggest, "would you like to go through the pre-action protocol that is designed to resolve the issue before litigation", it will be the same people who put two fingers up at you. Likewise, it will be the same people who will say: "we've done our investigation, and we are pleased to set out what our problem is, and so on". I do not think the CPR has changed the culture for settlement because the people who were doing it right before, are still doing it right.

Internal lawyer: Undoubtedly there are different attitudes towards settlement negotiations. The old idea that if you are the first person to talk settlement you are the weak party. While I won't go as far to say that it has gone, it is changing.

External lawyer: It is generally much easier to get the claimants to be sensible about settlement.

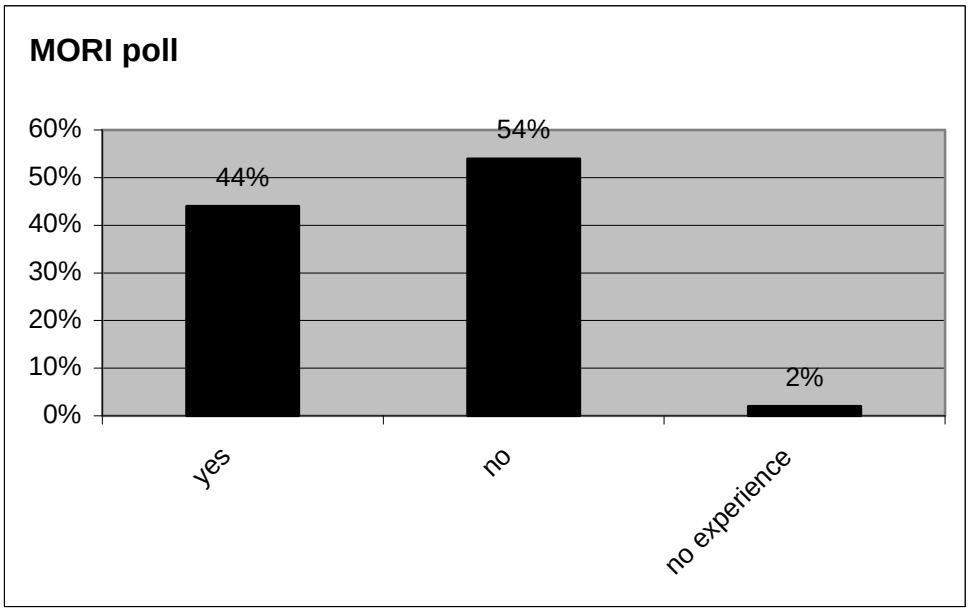
Internal lawyer: We are not doing things substantially differently, but the climate of litigation has changed. The plus side is early investigation and more open exchange. Before, you could be six months down the litigation path and no one was telling you anything. So that sort of thing has changed.

External lawyer: It is no longer seen as a sign of weakness to make the first step, and therefore, settlement is much easier to raise. Some of the change of culture is not necessarily for good reasons; part of it is out of fear.

External lawyer: I think the settlement culture will be client driven.

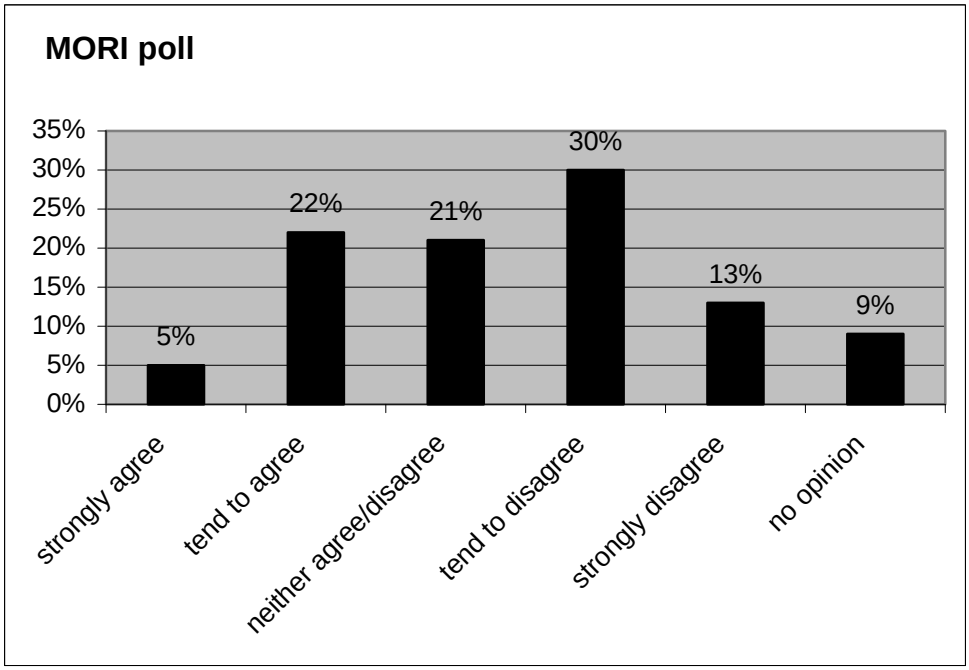
External lawyer: The front loading of costs and the concentration of issues is definitely working. People are looking at settlement a lot earlier than they used to.

Question: Has the prospect of Penal Interest Rates altered your advice to clients in favour of settlement? (To external lawyers only)



Judges training in case management

Question: Judges are adequately trained for case management under the new CPR. Do you agree?



Focus group statements

External lawyer: I think judges are managing cases a lot better but there is still a long way to go.

External lawyer: In my experience the courts and many judicial officers at all levels, be they District Judges or Masters, require a lot more education about what ADR and mediation is really about.

Internal lawyer: Yes, I think judges are managing cases better. The tension between low value claims and the issue of proportionality may be an area where access to justice has not improved and that might be to its detriment.

Internal lawyer: Just before the Rules were due to come in last April, we heard stories of bus loads of judges going to training courses so they were going to really attack these Rules. They were going to be quite draconian in their enforcement and quite stringent, but I really do not think that has happened. I think it ought to have happened but it is very much like a law firm in that you get good and bad lawyers, and in a court you get very very good judges and very very poor ones.

Focus group statements/judges training (continued)

Internal lawyer: I do not think it is a case that judges are not fully briefed on CPR. You would rarely get a summary judgement on a first application unless it was obvious and even in those cases, you might not. We were led to believe that if your claim or defence were no good when the judge looked at it, it would be struck out. However, I do not think that judges really want to do that. They will give defendants second or third opportunities.

Internal lawyer: In the early stages, judges were very, very switched on. That has been my personal experience, but whether they have had the time or the inclination to keep up to date with all the various amendments is another matter. I think they probably have not. The pressure of their work has just prevented them from keeping up with it, and there have been 12 amendments so far.

Internal lawyer: There was a feeling that the old summons for directions at that stage had fallen into a degree of disrepute. I am concerned as to whether the idea of the case management conference has gone too far the other way. Sometimes conferences have taken longer than they should and this has a consequent knock on to the question of costs.

External lawyer: I think there is a huge disparity across the board in terms of judges' abilities to manage cases and the extent to which they are proactive.

External lawyer: Judges are managing cases better. There are some slow learners and some were always going to be bad whatever they did, but judges are definitely managing cases better. However, I do not think that access to justice is any better or worse than before.

External lawyer: I think that things like case management conferences, while fine in theory, are not actually being used properly. More often than not, the hands on management of the case, which we are told to expect, are not occurring.

External lawyer: With regard to the stage and circumstances in which courts are fitting ADR into case management timetables, there seems to be a complete disparity between different sectors of the judiciary.

External lawyer: I think that some judges are managing cases better. One of the major problems with the law reforms was that the majority of district judges in this country were not even trained until Autumn 1999. For six months, unless they were very conscientious and found time to read the rules themselves, they did not actually know what the rules were saying and were trying to give directions in a total vacuum.

External lawyer: On the whole, judges' management of cases is better but there is scope for it to be worse. If you get a bad judge, they have got a lot more power and can really cock it up now.

Focus group statements/judges training (continued)

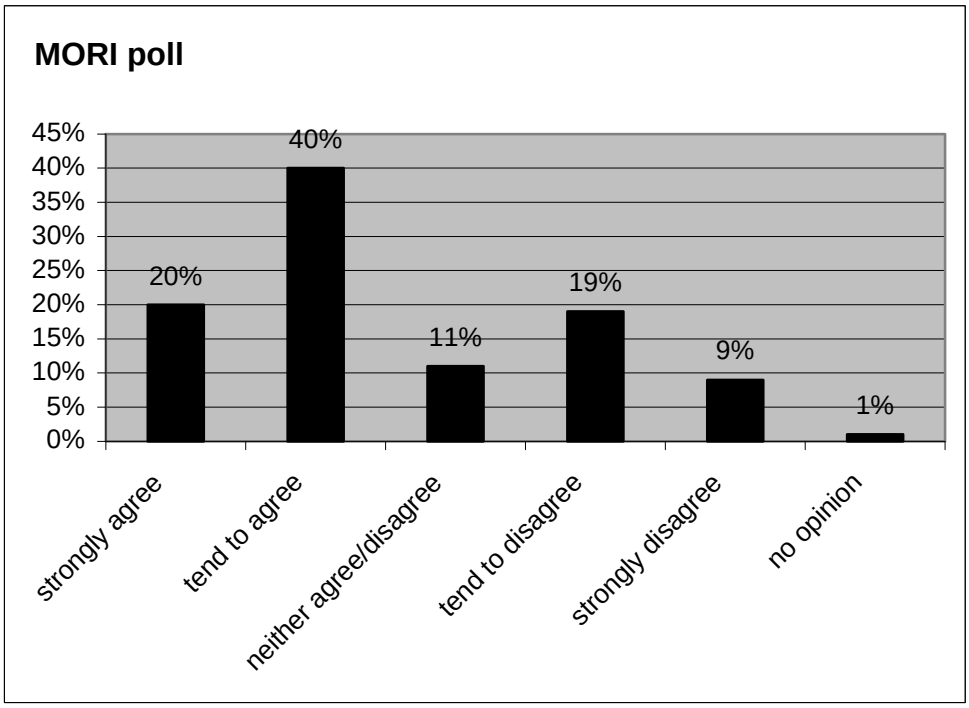
External lawyer: There seems to be a general view that there was not enough case management before CPR. My experience has been that there is too much of it and that it is not very good.

External lawyer: One effect of CPR has been to suddenly make everything completely discretionary with almost no guidance at all down to the district judges. You have no idea what you are going to get when you come to the case management stage.

External lawyer: We were already excited about the idea of having positive case management conferences, where judges took issues on board and either dealt them or discussed how disclosure would deal with them. So everyone could go forward and know exactly how the issues will be lined up and sorted. But it just didn't happen.

External lawyer: Judges are feeling overwhelmed a year on. They are still getting to grips with the new system. It has been disappointing.

Question: Judges should initiate settlement discussions. Do you agree?



Focus group statements

Internal lawyer: There is still a perception that ADR is very much related to the large scale commercial dispute, and in ordinary personal injury action the courts would not be asked or are not considering the possibility of ADR.

External lawyer: I have found some of the judges in London, in the Technology and Construction Courts, to be actually anti-ADR. Whether this is because they are used to dealing with construction cases and they are more used to adjudication and arbitration I do not know, but I have seen open hostility to it.

Internal lawyer: I expected that following the introduction of the CPR we would see fewer spurious small claims because the courts would just refuse to issue them. I think they have the power to actually look at the claims that are being pleaded, but that has not happened. I have not seen any intervention.

Internal lawyer: The closest I have got to is "I am not hearing this rubbish; parties go away and settle".

Internal lawyer: An allocation hearing could turn into a case management conference just like that if the judge decides it should be.

Focus group statements/settlement discussions (continued)

Internal lawyer: In the Technology and Construction Court, they have a very positive attitude for settlement. One judge in particular is very keen on it and will tell the parties, “go away and mediate”, whether you like it or not. He tends to use CPR as his guideline and authority to do that.

Internal lawyer: In my experience, I have not had a case management conference where mediation has been ordered at all. It has only been mentioned in passing. In those cases which I have booked, only rarely does the judge say this matter is going to be stayed.

Internal lawyer: With regard to the management of cases, I think that judges are beginning to flex their muscles more than they did in the early days. They are taking hold of things and driving them forward as was intended.

External lawyer: It is not so much courts fitting in ADR as courts allowing parties time to negotiate, to try and settle. We have had a number of occasions where the court is quite happy to let cases be stayed month after month on the basis that clients are negotiating.

External lawyer: My experience is that if you mention mediation, judges will bend over backwards to accommodate it. They realise that it is politically correct and have just got to go along with it.

External lawyer: Judges are not taking the initiative themselves. They are quite happy to rubber stamp and endorse the impetus towards ADR from the parties, but do not generally start things themselves.

External lawyer: I do not think there is a particular time or stage of the proceedings that judges seem to be focusing on. I would agree with the general sentiment that, outside the commercial court, the courts are generally not seeing or being proactive in recommending mediation.

External lawyer: I think there are occasions when the court would order mediation and the parties do not want it. Obviously there is the De Lorean case that was much against the will of all parties.

Internal lawyer: In quite a lot of cases, we have a litigant in person, acting as defendant or claimant. The district judges are far keener to help litigants in person, so CPR does balance the field better in that sense. It makes life difficult for us because they tend to ignore a lot of the new rules. The District Judge will take a more common sense approach, talk to people and decide issues there and then, rather than let it trundle on towards trial. That really helps.

External lawyer: If parties come to the judges and say “we are keen to mediate” then they will sanction a consent order that includes mediation. But the judges are not, in my experience, raising mediation as an option unless one of the parties suggests it.

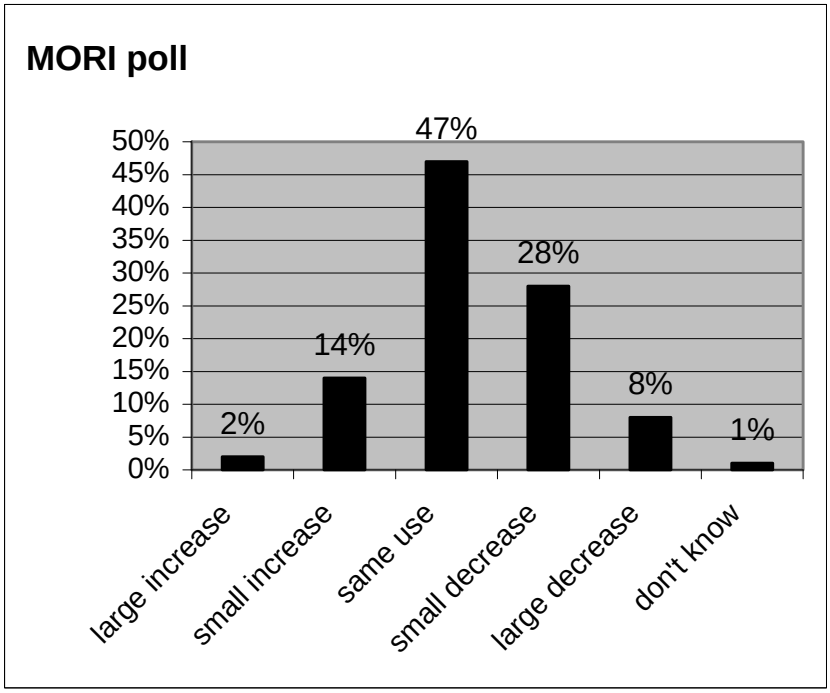
Focus group statements/settlement discussions (continued)

External lawyer: ADR/mediation is a consensual process. In my view the courts should never impose it. The court can grant a stay of a month to enable the parties to go off and think about mediation but, at the end of the day it is the constitutional right of every citizen to take his case off to court and trial. He may get penalised on costs but should not be forced to go to mediation/ADR against his will.

External lawyer: Actually, I have had charming instances of judges being quite frank in court and saying, “well of course I’ve never been to a mediation and would have to defer to solicitors here”. They think it is a solicitors’ thing and solicitors know about it.

Level of litigation

Question: Since the new CPR, has the amount of litigation you have been involved in altered?



Focus group statements

External lawyer: The net spend of a business on litigation has to go down because the great legal disaster has always been the ones where people drift along, incurring great cost, and drifting far too far down the track. The laser beam investigation and pre-action protocols of Woolf has are knocking out these cases that used to clog up the system.

External lawyer: There are an awful lot of very worried barristers out there. Trials are just collapsing, particularly at the senior end. The senior/junior counsel and the silks that rely on trial work for their bread and butter are finding that their diaries are a lot emptier than they ever were in the past.

Internal lawyer: We have noticed a marked reduction in litigation, a marked willingness to endorse open discussions and open negotiations earlier. Part 36 has been pretty great for that.

External lawyer: The days of a client ringing you up and saying "issue a writ tomorrow" are over. Those days will never come back again. You need two or three months to investigate a claim, and that is causing a reduction in the number of claims started. We have seen a 70% fall in litigation, I think, and this could continue for some time.

Focus group statements/level of litigation (continued)

Internal lawyer: It is exactly the same. How can it be any different? You can still bring a claim if you want to, and you can choose not to. No one was precluding you from walking away from the court door under the old system.

External lawyer: Everybody cites a 70% reduction in the number of claims issued. Yes they have gone down, but I think they will go back up. If they do not go up to the extent they were before it is because they are poorer quality claims that have fallen by the wayside.

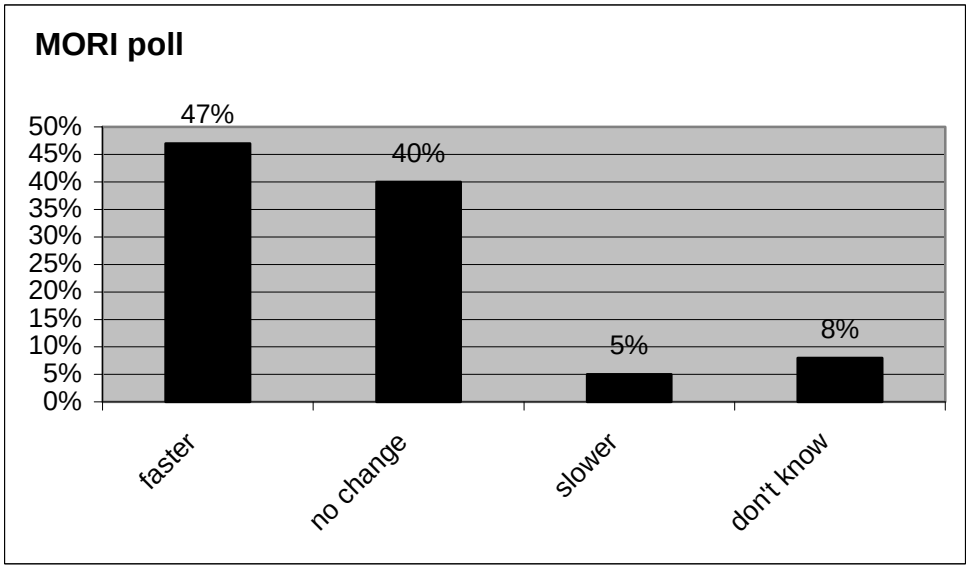
External lawyer: There are far fewer cases going to trial.

External lawyer: One of the things that is discouraging some from litigation is the cost involved. As you start hitting a commercial client in the pocket they are going to reassess whether it is something they want to run. So I am sure we have lost business.

External lawyer: We are making more money and it is more predictable.

Rate of settlement and fairness of outcome

Question: Of the cases that you have settled since April 1999, have these cases settled more quickly than before?



Focus groups statements

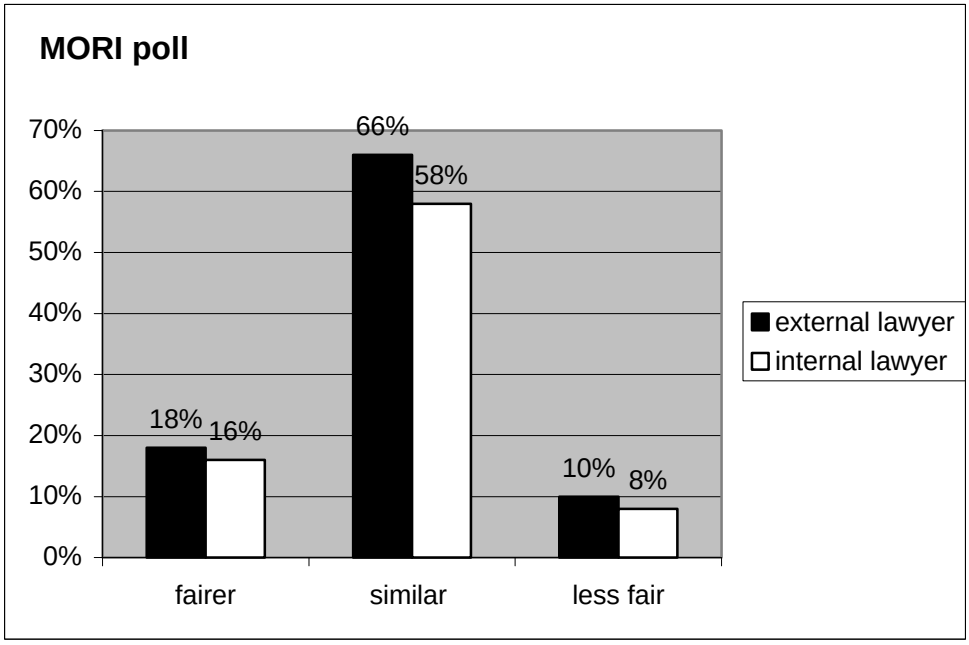
Internal lawyer: The investigation, pooling all the paperwork and documentation and getting statements from people about what happened. It increases the time and effort and people do not like that. However, in the long run the CPR are probably settling a lot of cases much more quickly.

Internal lawyer: There have always been plenty of opportunities for delaying tactics, if that is what you want, there are just some different ones now. Take the examples of the summary judgement, it might be a month before you get it back to court anyway.

External lawyer: My perception is that cases are getting resolved more quickly without proceedings being issued, in the personal injury field more than any other.

External lawyer: Now you can issue a claim, and you can actually have a trial well within a year, which is a fact against settlement, because you are sped in to court.

Question: Of the cases that have settled, have these cases been settled for a fairer outcome than before the CPR?



Focus group statements

External lawyer: The settlement negotiations are not necessarily a complete waste of time if they do not result in settlement, because you may settle certain issues. The other side's issues may suddenly become much clearer to you.

External lawyer: The summary assessment of costs where you have a hearing on costs in any event does focus minds, and that may encourage settlement of litigation.

External lawyer: I have always thought the real factor in any settlement is that

a) passions cool as litigation unfolds at its leisurely pace,
b) there is a sort of drip feed, and
c) they get bored and move onto other things.

External lawyer: Before April 26th last year it was very rare for a case to have gone to mediation before the exchange of witness statements. Since then cases are going to mediation an awful lot earlier, which suggests that mediation has come higher up the legal agenda.

Do the CPR benefit the claimant or the defendant?

Question: Do you feel the CPR have favoured claimants or defendants?

Focus Group Statements

Internal lawyer: We are usually the defendant. I think the CPR have leveled the playing field and it goes either way.

Internal lawyer: The lower thresholds for strike out at the summary judgement of defendants and the readiness of the courts to strike out unmeritorious claims, are a huge advantage to defendants.

Internal lawyer: Pre-action, claimants are in the driving seat and at commencement there are important tactical things that the defendants have which perhaps they did not have in the past.

External lawyer: The CPR definitely benefit the claimant more because of the faster timetable that is involved. The claimant can front load all the document preparation, have all its "ducks" in order and then press the button. The timetable is such that the defendant often only has a relatively short time to respond and gather evidence.

External lawyer: It is the conventional view that the CPR favour the claimant. Having said that, a shrewdly advised defendant can actually use the new rules to equalise the benefit.

Internal lawyer: Part 36 has redressed the balance. Prior to that, the defendant had the advantage and could make a payment into court.

Focus group statements/benefit to claimant or defendant (continued)

External lawyer: There is quite a significant advantage to the defendant because although it is not said expressly, there is undoubtedly more pressure on the claimant to settle.

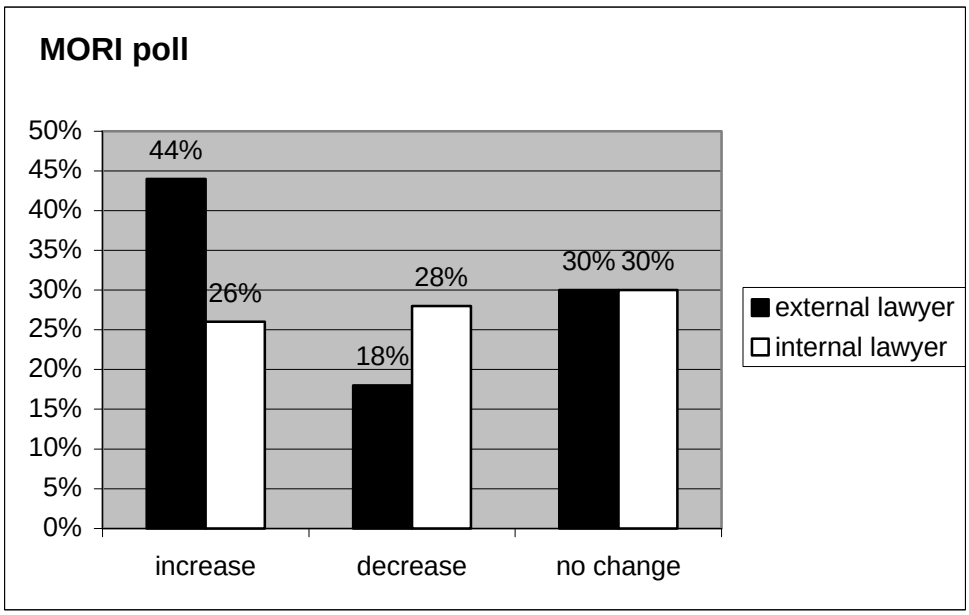
Internal lawyer: The advantage to a defendant who wishes to see off a claimant who has an unmeritorious claim, is that you have always got the 14 days to pay costs after a hearing. This makes someone stop and think very carefully before they start bringing any claim or prosecuting claims in the first place that have very little merit.

External lawyer: I think generally the CPR favour the claimant at the beginning, but there are tactical weapons for the defendant that have gone some way towards balancing things out. These include the summary of judgement application in reverse under Part 24.

External lawyer: The biggest problem for the claimant was endless delay. With the general quickening of the task on the whole I think the claimants are winning on CPR. Equally, a lot of very fair and clever rules have been put in. On the defendant's side it is better because the issue of interlocutory costs orders can bring a claimant to his senses very quickly. If he has got an exaggerated claim he thinks "I will win at trial but how long can I keep sustaining these huge figures along the way?"

Effect of CPR on legal costs

Question: What effect have the CPR had on the legal costs for the cases you have been involved in?



Focus group statements

External lawyer: We are having to tell our clients very carefully that costs are totally unpredictable at the moment.

External lawyer: Costs just do not get looked at in the detail that they sometimes deserve and that can penalise a party.

External lawyer: Good solicitors have always been aware of the need to keep clients informed of costs. The change in rules has made it necessary to ensure that clients are not only aware of cost estimates but are given much more specific advice at certain stages.

Internal lawyer: There is a lot more scope for imaginative fee proposals. To define success you may say, "if we get you out of this for less than such and such amount, we get this".

External lawyer: District judges are very good at assessing costs but the masters and more senior judges are absolutely hopeless because, frankly, they have no experience of taxation.

External lawyer: Guessing how costs are going to go has in some ways become harder. Since hearings of a day or less can be assessed summarily by the judge, there are some terrible injustices. Judges are allowing Bills of Costs, which, in a whole county court action would have been subject to detailed assessment and scrutiny.

Focus group statements/effect of CPR on legal costs (continued)

External lawyer: Clients are probably paying more in the first four months than they would have done under the old system, but their total bill is maybe half of what it would have been.

External lawyer: The idea of an open cheque book for litigation, no matter how large the entity, went out of the window literally years ago. In my experience there were virtually no companies that would come to you with a piece of litigation and say, “go away, charge as much as you like, we honestly do not care about it”. Uncertainty of costs is one of the biggest fears that businessmen have about litigation and that went out a long time ago, way before the CPR came in.

Internal lawyer: I am more conscious than I was as to which corporate solicitor I should use on a particular matter because of the front-loading. Whereas before I might have picked “horses for courses” I am now more conscious of how much A is going to cost me front-loaded as opposed to B or C. It is ridiculous that it should come into the equation but at the back of my mind is the question “how can I justify spending £20,000 to £30,000 upfront with A when I could be spending £15,000 to £20,000 with B”?.

Internal lawyer: Although you have to pay more up-front since the CPR, over time you are paying less because hopefully the dispute will have settled and gone away, whereas otherwise it might have gone on for years.

Internal lawyer: Front loading will make us look more carefully at getting solicitors to assess up front how much it is going to cost them to do the work. We are more aware at an early stage of how much it will cost us. That is difficult for solicitors to master because I do not think any of us are very good at working out how much something is going to cost on that basis.

Internal lawyer: It is an exponential curve on spending. You are just getting to the last bit at the flat end of the curve before it shoots up and that is the point of settlement. You get there quicker and have to pay to get there quicker but that is where it often settles.

Internal lawyer: All the parties to the litigation are thinking about costs much more than they were previously, and from an early stage.

Internal lawyer: I prefer to give fixed rather than conditional fees on most matters, because then you have got some certainty. You know you are going to get a quality service because the solicitors have worked out that they can afford to do it for that fee and are not just hanging on by a wing and a prayer in the hope that they will win.

Internal lawyer: The difficulty is that a lawyer will not want to take a 50/50 case because it is too much of a risk and the client will not want to give him an 80/20 case because they will think ‘why don’t you do it normally?’

Focus group statements/effect of CPR on legal costs (continued)

Internal lawyer: To answer the question “Is CPR encouraging the legal profession to use conditional fee arrangements”, I have not actually seen any sign of that.

External lawyer: Interlocutory costs orders are raising the stakes because clients are having to take the immediate consequences of a decision to try a big tactical application to upset the other side and concentrate them on a weak aspect of their case. You suddenly think about the tactical things very carefully because you have to do a cost schedule and deliver it on time before the hearing saying exactly what your costs are to that date. This is making our clients much more intelligent.

External lawyer: The CPR produce an immediate understanding of how much the whole process is costing. You find out what the other side’s costs are and that can be truly horrifying. There is nothing wrong with bringing people to their senses and it is not that their costs have gone up. It is just that people are realising and really understanding what they are.

External lawyer: One of the difficulties we have with both conditional fee arrangements and legal expenses funding is defining success and also the fact that because you are breaking things down into issues, you are not having one trial win / lose.

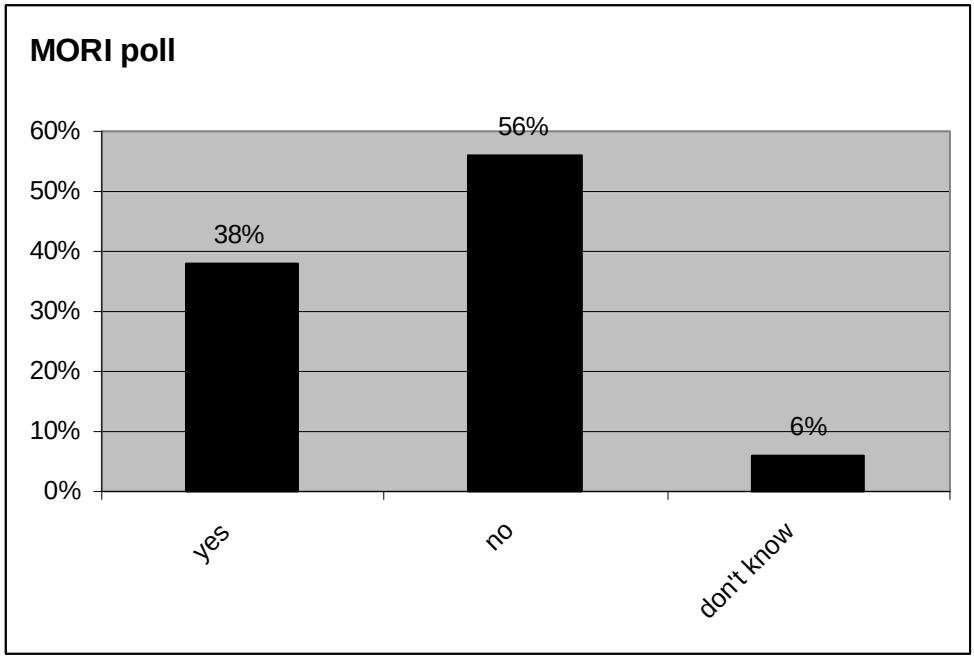
External lawyer: I have seen growth in demand for fixed fees for a mediation. The client is asking, “can you handle this mediation for a fixed fee?” I can see this taking off in a big way because there is cost certainty there for the client.

External lawyer: The claimant comes back with a letter saying their claim is now £2.7m. They have still got nowhere in explaining how they have lost all those customers and profits. As a defendant you know that you can skewer them before the court on costs if they do not answer those questions before they issue a writ. They have given no serious information about the nature of their claim. If they think they can issue a writ and get their costs back, in the light of the decision, which has just started to trickle through into the reports, a good Woolf judge is going to murder them on costs.

Internal lawyer: I have tried twice to force conditional fee arrangements from outside and they have not wanted it.

Front- loading of costs

Question: Has front-loading of litigation costs had any effect on your willingness to issue proceedings? (external lawyers only)



Focus group statements

External lawyer: I thought it was going to cost a fortune and the front-loading was going to be a nightmare, but in practice you are still taking business decisions on whether to initiate litigation on the basis of the usual traditional investigation into a case.

Internal lawyer: There is a need to educate senior employees that if a writ is served on a company they must deal with it immediately rather than sitting back, waiting a few months and hoping it goes away. Money well spent within the first two or three months is going to settle that case there and then and stop it in its tracks.

External lawyer: The effect of front-loading is not that costs have increased per se but just that things happen faster. People do not now look at liability in isolation, leaving all the investigation into causation and quantum until later. They do it all at the beginning.

Internal lawyer: There is a tension between the idea of front-loading and the issue of proportionality, particularly for the smaller scale fast track disputes. It is a tension felt most at the level of high street practitioner, in terms of the service he has to provide for his clients.

Internal lawyer: Working in-house we are also front-loading cases and seeing a tension between the workloads of our internal clients, in terms of their business.

Focus group statements/front- loading of legal costs (continued)

Internal lawyer: We still have problems with our internal clients. They are not coming to the legal department soon enough for referral to external solicitors early enough for front-loading. We know what the weaknesses and strengths of our case are at that stage and it saves us getting down the line of litigation and having to abandon the case later on.

Internal lawyer: Front loading encourages us to look at things longer and harder internally before it goes outside. We know that the business area is going to be picking up the front-loaded costs much earlier on.

Internal lawyer: I do not have a major problem with front-loaded costs because if they force settlement and both parties have to sit down and think what the case is about, it just resolves quicker.

Internal lawyer: On a practical level, clients do not like front-loading. You are suddenly requiring them to do an awful lot of work and they are not too keen on that. I am always getting rung up by people who have got to sign a statement of truth; they do not like doing that at all.

External lawyer: The case management powers and the timetables being set are fairly tight. I find that you have to race on through your various steps. It means we are very busy with lots of things happening all at the same time and there is far less scope for timetabling things yourself.

Internal lawyer: CPR is a useful tool for emphasising to client managers that they need to own the problem and not just dump it on some lawyer, whether they be internal or external. The statement of truth and disclosure statements are particularly helpful here. In addition, because of the hype of Woolf, clients are more aware of litigation and some of the issues. They ask more questions and this heightens the commercial cost-benefit analysis issues.

Internal lawyer: It is not a bad thing that clients should be concerned about the front-loading of costs because it does concentrate minds at a very early stage. Now I find that we have to sit down and talk about the costs and this has made people think more carefully about the case. It has resulted in making payments or at least trying to enter without prejudice negotiations at an earlier stage.

Internal lawyer: Front-loading concentrates the mind because you have to make a fairly early judgement call. We are pretty sure that there is a major link between time and cost of litigation, so forming that crucial initial view with your external lawyers early on is critical. If you get it wrong you pay, and so although front-loading does mean spending more, we are happy to spend more at that early stage.

External lawyer: I think clients appreciate that lawyers now are being more proactive and are looking at the issues and advising them properly before they launch into litigation.

Focus group statements/front- loading of legal costs (continued)

Internal lawyer: What we are looking for from outside lawyers is (a) an analysis of the risks and probability that we are going to win; (b) how much it is going to cost us, and (c) a budget for handling the claim right through to the trial. We want that right at the start, and I think the firms that are able to provide that amount of detail are the ones who are going to get the work.

External lawyer: Timetabling is a bit like being on an express train. But in my experience doing all the work to start with, getting the documents in, getting your client in, going through exactly what happened, does make it easier to take all these steps within the timetable that the court imposes. Disclosure does not become the huge burden it used to be. Finding witnesses is not the issue it used to be because you actually talk to these people on all the fundamental points before you decide to proceed or before you make your decision about how you are going to deal with the dispute.

External lawyer: People are probably paying less in terms of a particular matter but more in the first four months than they would have done under an old system. Their total legal bill is maybe half of what it would have been.

External lawyer: I think the CPR makes it easier to keep clients because they realise at the beginning that you are getting down to the nitty-gritty and looking at the issues, strengths and weaknesses which is what everybody should have been doing anyway pre-CPR. I think clients actually appreciate that because most of them need to be asked to stand back and look at the issues early on.

External lawyer: It is difficult to talk generally about cost savings on legal services because it might vary from case to case. However, I would share the view that one consequence of front-loading is getting lawyers and clients to focus on the case at a much earlier stage. That will tend to result in cost savings in the long run.

External lawyer: In my opinion, we are not actually doing that much more work than we used to do anyway.

External lawyer: I would say, when looking at our practice and procedures, that they have changed remarkably little since 26 April. One exception is that with statements of truth and greater involvement from the clients, they have been forced to focus on things at an earlier stage than they did previously.

External lawyer: Front-loading had definitely resulted in more settlements pre-proceedings. People do not even bang off the claim form in the way they used to bang off a writ.

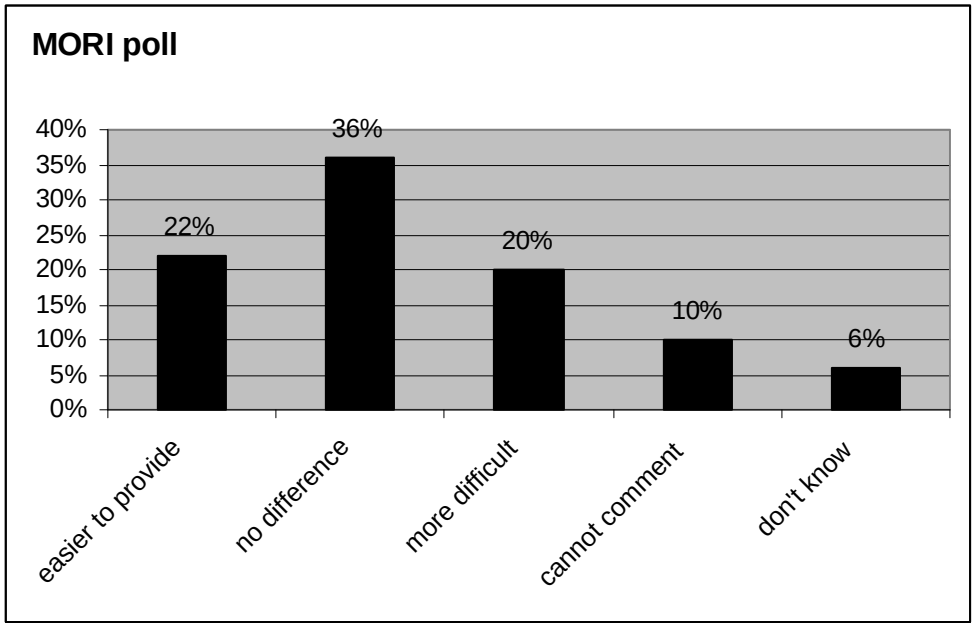
External lawyer: The litigation process could lock up management time for, say, two or three years. The beauty of front-loading is that you tackle the issue head on and early. You may have a lot of activity from the management in a short period at the outset but then you may get a settlement and, if not, you have got your witness statements already.

Focus group statements/front-loading of legal costs (continued)

External lawyer: Now we are doing a lot more pre-issue preparation and that is a good thing. But for the client it is quite frustrating. They think they have a good claim and frankly they just want to get it on the books. A lot of questions are asked and time is spent with the lawyers which they see as spending money without actually the writ or claim form in their hands.

Cost estimates

Question: Since the new CPR do you think your external lawyers have found cost estimates easier to provide?



Focus groups statements

Internal lawyer: The schedule of assessments that have to be prepared are very useful because they tend to concentrate my clients' minds on how much money has been incurred so far and how much is likely to be incurred in the future. On the allocation questionnaires one has to assess what the likely cost of the case is. Coupled with management time that people are going to have to spend in dealing with cases, it brings the mind to focus at an early stage on what the costs are going to be. I think that people are more receptive to settlements at an early stage now.

Internal lawyer: In recovery litigation at our bank, we purchase a lot of legal services. CPR has enabled us to focus on time and cost in such a way that we are now buying legal services as products rather than time, and using the structure provided by CPR.

Internal lawyer: As far as the external lawyer is concerned, we are able to set clearer objectives in terms of time, cost and what we expect to achieve by litigation much earlier.

External lawyer: You suddenly think about tactical things very carefully. The fact that you have to do a cost schedule before every hearing and deliver it on time, saying exactly what your costs are to that date, is making our clients much more intelligent.

Focus group statements/legal costs (continued)

External lawyer: It is more difficult now to predict and advise clients on costs and costs recovery. This linkage under the banner of proportionality of behaviour to costs recovery is a major problem.

External lawyer: I am not sure the CPR has done a whole lot for a client who wants to know exactly what the whole thing will cost him. We cannot really give any proper advice at the moment on what they can expect for costs orders.

Part 36 offers

Question: What effect, if any, does the new Part 36 claimant provision have on settling cases? (external lawyers only)

Focus group statements/Part 36 offers

External lawyer: Since Part 36 it now seems to be much easier to actually extract offers and sensible settlement discussions from claims than it used to be. Whether it is Part 36 or absolute fear of ending up in court under Woolf, I am not sure, but it does seem to be easier.

External lawyer: We exceeded a Part 36 offer and the trial judge had absolutely no hesitation in ordering indemnity costs.

External lawyer: As soon as the writ lands on the doorstep the defendant puts forward a Part 36. It is there or thereabouts, and it is that sort of "Shall we take it, shan't we?" Invariably the claimant is under some sort of pressure to take it.

Internal lawyer: As defendants' lawyers, Part 36 has probably been the biggest impact of the CPR. This is not necesarily a bad thing because it forces people to look at the issues, get the documents out and find out what the case is right at the start. However, if the claimant drops the claim after you have got experts in and instructed lawyers, you have wasted a lot of money.

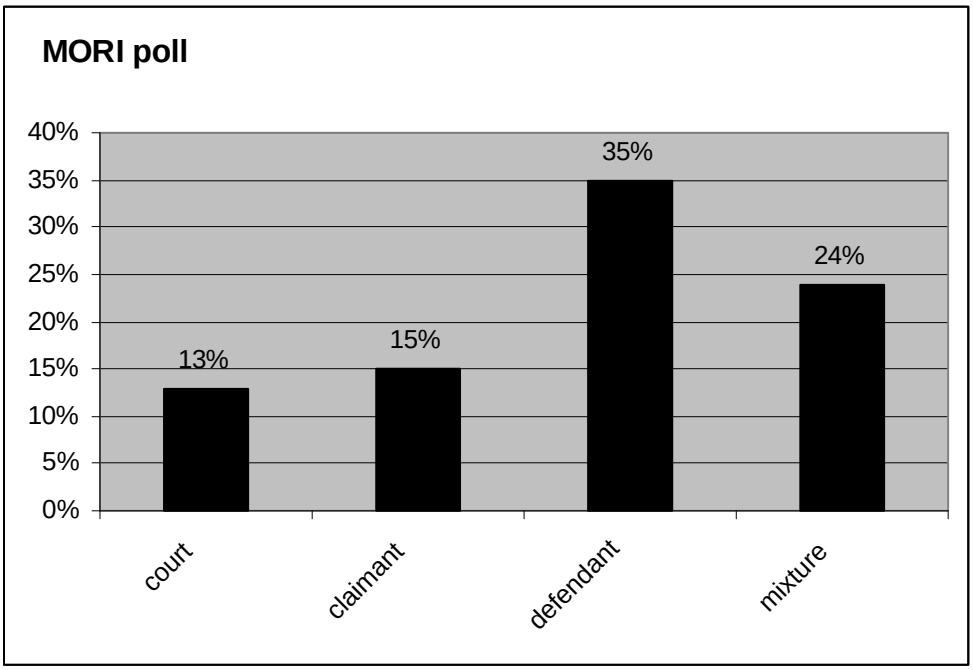
Focus group statements/Part 36 offers

Internal lawyer: The CPR have two benefits on that particular aspect [Part 36 offers] because the claimant has to identify far earlier whether he has a claim. It cannot be frivolous and it prevents defendants from dragging the process out until you either lose a head of steam, financially bankrupt yourself, or lose the will to live.

Internal lawyer: As in-house counsel, I think the biggest benefit to us has been the Part 36 offers, without question. We like to take a commercial view and often when you are litigating – almost exclusively in our case against insurers and the Solicitors' Indemnity Fund – previously they had not been too forthcoming with a settlement. The new rules do not allow that and also we have put in some Part 36 offers pretty early and pitched it just right, so it is really hard to refuse.

The role of mediation

Question: In the majority of cases, who initiates mediation?



Focus group statements

External lawyer: Undoubtedly clients are coming to us now and pushing the settlement culture. I think that will have more effect than the potential threat of a comment from the Bench personally.

External lawyer: I am seeing a lot of court ordered mediations as mediator.

Internal lawyer: There is the Sword of Damocles of costs hanging over both sides and that is why they are thinking of mediation earlier. The courts are not forcing them but they are forcing themselves because they know the courts will force them. They have to consider mediation otherwise it is going to come to the first hearing and the courts will say it.

External lawyer: My mediations have been by consent and mostly before the court intervenes. However, I think in a lot of those cases mediations take place in anticipation of what's going to happen.

External lawyer: I have had a lot of cases go to mediation but I haven't had one where the court has ordered it.

External lawyer: You are having cases that are going to mediation at the close of pleadings before you have even got to the point of disclosure. In most of these cases, it is the lawyers who are actually taking the initiative with regard to ADR and mediation. There are very few courts that actually take the bull by the horns themselves. The Commercial Court in London is an exception.

Focus group statements/role of mediation (continued)

External lawyer: “Who initiates mediation?” I would say it is about two thirds defendants. However, on quite a few occasions, I have had claimants say, “here are the proceedings, this is what we have got but we still want to mediate”. That is not seen as a sign of weakness necessarily.

External lawyer: Very few mediations have been court referred. Most have been pushed along by the parties.

External lawyer: I do not think that mediation is a judge thing on the whole.

External lawyer: It is not much of a barrister thing either.

External lawyer: It is the lawyers, in-house lawyers and clients who are actually driving the impetus towards mediation and towards ADR generally.

Internal lawyer: Instinctively as lawyers we have the horror of the idea of a mediation being in some way made public.

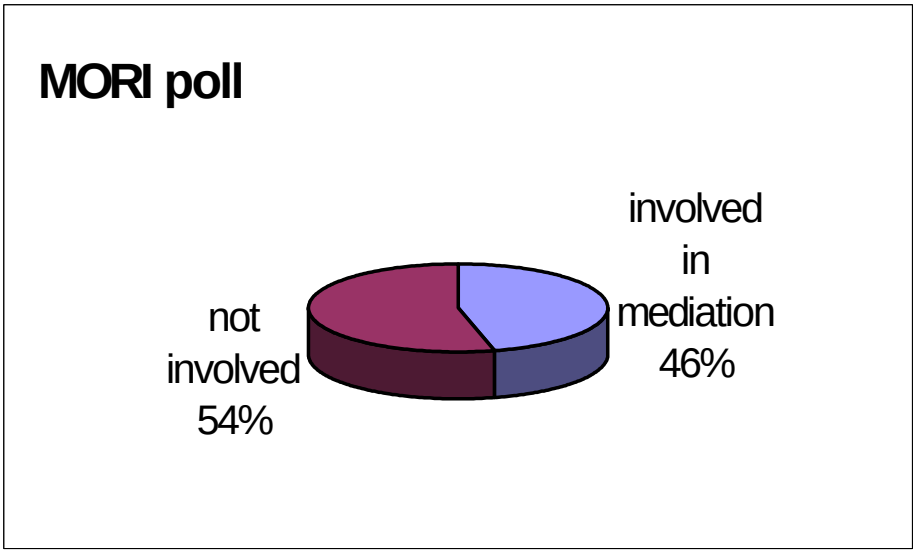
External lawyer: I had one case when a master, in the teeth of opposition from us, in effect required the parties to go off to mediation. I maintain that the master had no right to direct the two sides to go to mediation at all, owing to the fact that mediation and ADR are consensual processes. The court can, if necessary grant a stay for a month for the parties to consider ADR, but bearing in mind the Human Rights Act due later this year, an individual should not be forced into mediation against his or her will.

External lawyer: I think that we shall see two challenges reach the High Court. Firstly, there will be challenges against orders for parties to go to mediation as a mandatory requirement, because the rules do not say that a judge is entitled to do that. Secondly, the extent to which a judge can enquire into the events in a mediation, and find out why the parties did not settle. This would destroy the fundamental basis upon which mediation is based.

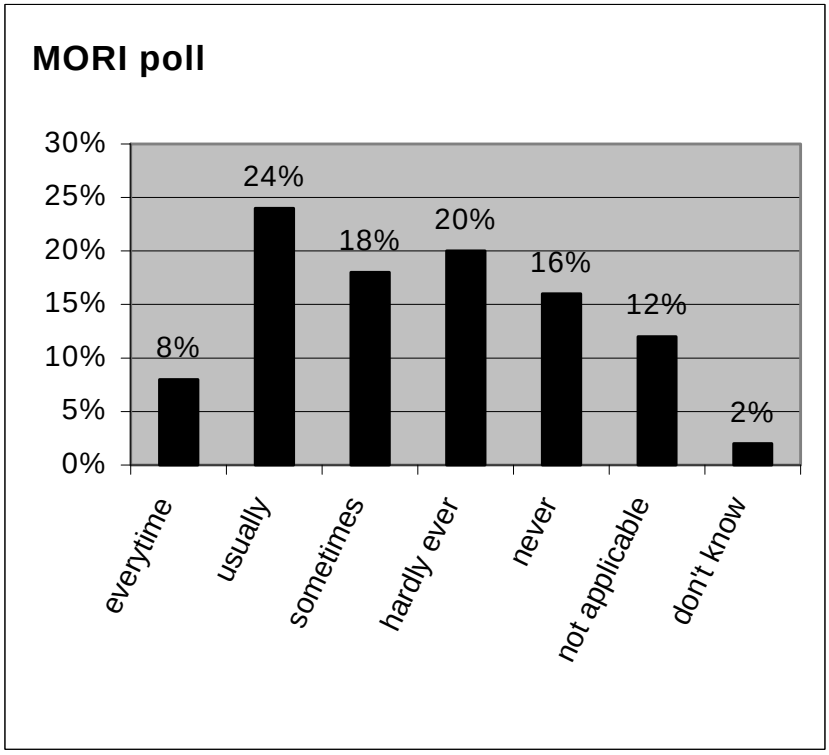
External lawyer: By and large, judges do not feel comfortable with the process of mediation. The overwhelming majority of references to mediation occur at the instance of either one or other of the parties.

External lawyer: I have a bee in my bonnet that the judges know very little about mediation. Most of them have never participated or had any experience of how it works, but they do not hesitate to preach the gospel. I am very keen on mediation indeed but I have come across cases where judges have pushed it where I think it wholly unsuitable. I think that judges could learn more about mediation.

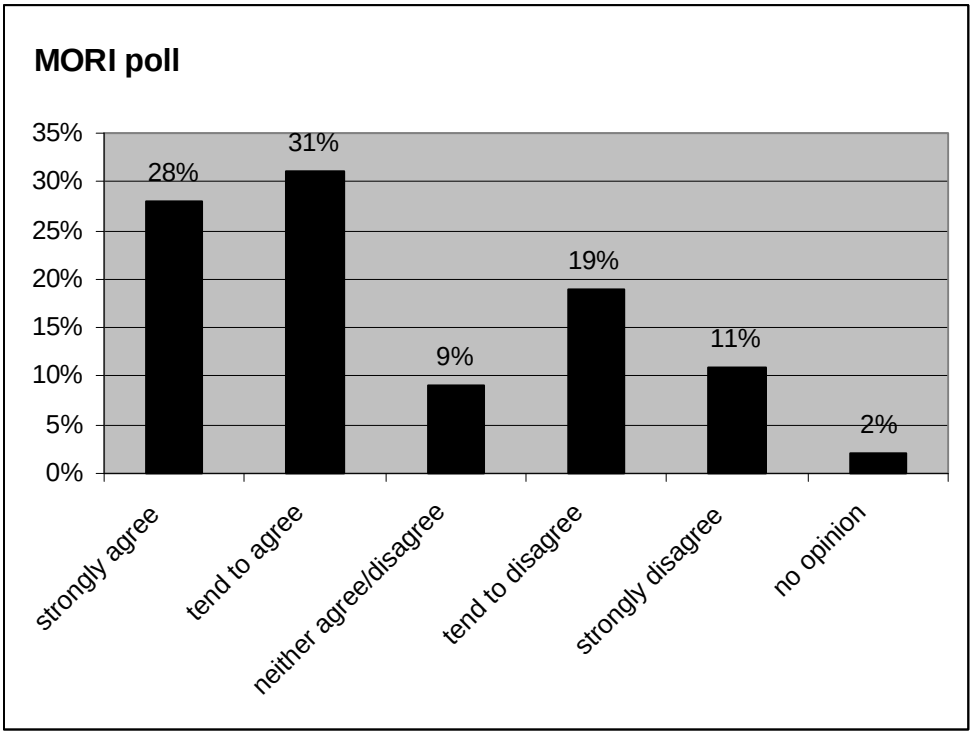
Question: Since the new CPR took effect, have you been involved in mediation?



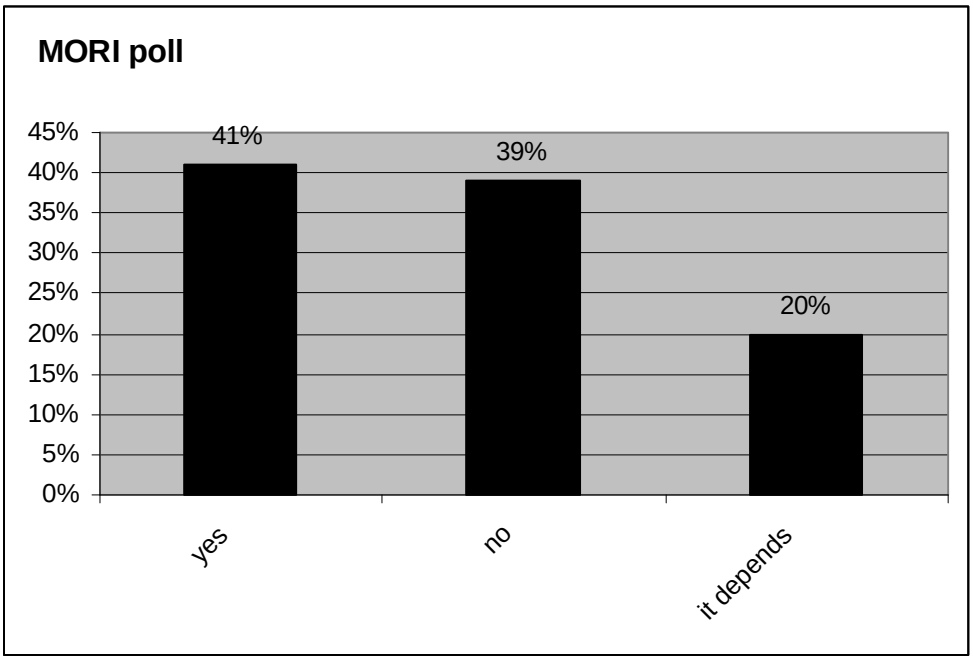
Question: To what extent has your external lawyer advised you to use mediation as an alternative to litigation?



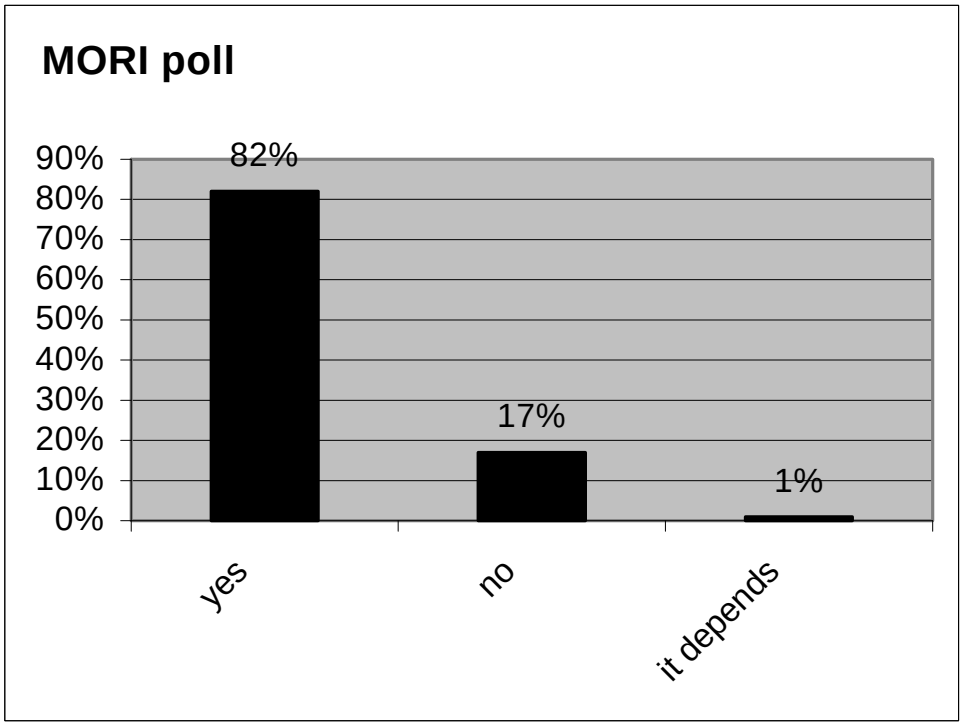
Question: Mediation is required at some point if a business dispute goes to court. Do you agree?



Question: Should the court award costs against parties who refuse to take part in ADR?



Should the courts award costs against parties who are considered to have behaved "unreasonably" (e.g. are un co-operative) in an ADR procedure?



Focus group statements/parties refusing to take part in ADR (continued)

Internal lawyer: I think the court should take into account the parties' behaviour in the conduct of litigation. If you can go to the judge with open correspondence and say, "look, it is clear that the other side has been behaving unreasonably" then I think the court should have discretion over costs and what it does, and should exercise that discretion. On the other hand, if you have a situation where the judge is asking about what happened during the mediation, this is totally wrong and ought to result in the process going out of style pretty quickly. The whole point of mediation is confidentiality and knowing that what you say will not be used against you at a later date.

External lawyer: I have a colleague who fears that if people are forced into mediation when they do not want to it is going to become less effective.

External lawyer: In one of the cases I know, a client said, "This isn't going to settle, this isn't going to mediate. The people involved hate each other so much sitting in a room all day is not going to work." The lawyers between them decided that they really had to try mediation because it was now expected of them. They spent an entire day sitting in a room and got absolutely nowhere.

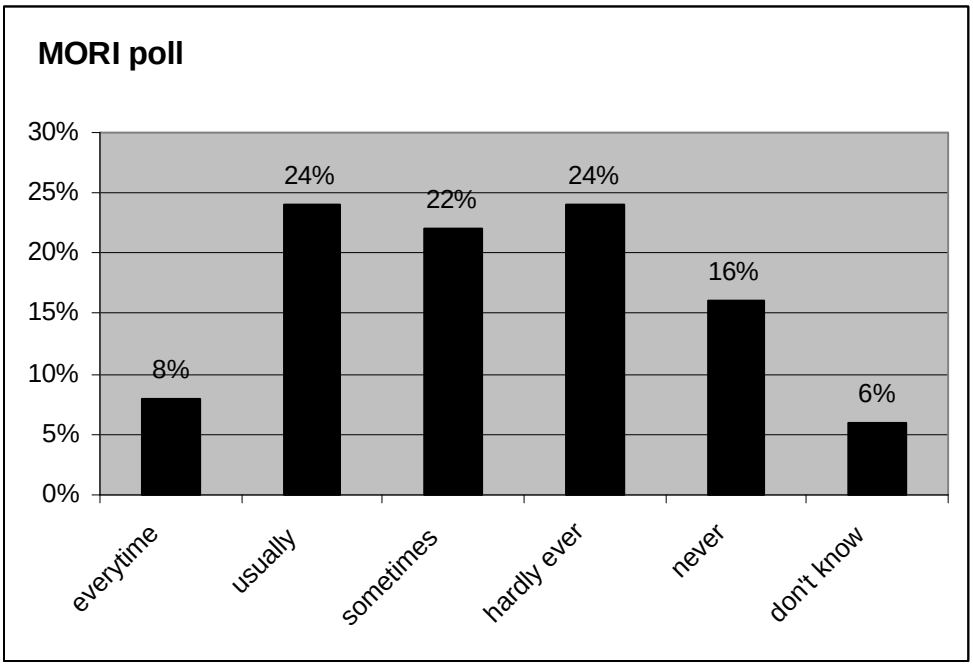
Question: Cases should not be stayed whilst settlement discussions are underway. Do you agree?

Focus group statements

External lawyer: If a direction is made that a case should go to mediation, it is plainly a waste of time, money and effort for the litigation timetable to be continuing.

External lawyer: There was a case in London where both parties had agreed to go off to mediation. At the case management conference the judge required a great deal of convincing that she should grant a stay for a number of months to enable the mediation to take place, notwithstanding the fact that both parties agreed that this should happen.

Question: To what extent does your company use clauses in contracts, which require mediation to be an initial course of action?



Use of experts

Focus group statements

External lawyer: My most immediate experience of the impact of CPR on litigation practice is in relation to experts. In our practice we use experts a lot and the duties of the expert now are to the court rather than to the parties who are actually paying him.

External lawyer: The experts' reports are prepared in a different way.

External lawyer: I think the experts' reports are prepared in a different way to that in which they were previously, and the opportunity to change them after they have been seen by the instructing party is reduced.

Judges' comments:

The parties are getting more use to the concept. Experts are getting to understand the importance of narrowing or agreeing the issues.

The employment of a single expert often leads to a prompt settlement.

Single experts are now more common. I have not been made aware of any specific problems arising from this.

Great potential for unfairness here. Risk of trial by experts. Fine for peripheral expert evidence.

Very efficient system. Difficult to enforce in transitional cases where the other party, or both has already instructed an expert, but that will soon be a thing of the past.

Readily accepted where expertise is required for non-central issues, e.g. accounting, valuation, care, employment, psychological, etc.

Appendices

Civil Justice Survey
Marked-Up Questionnaire

Explanatory Notes

- MORI interviewed 50 External Lawyers (practices) and 50 Internal Lawyers (corporates).
- The toplines relate to the 100 completed interviews, so the base is 100 unless specified otherwise.
- CEDR supplied the sample which included practices listed on the Top London 200 and also included other lawyers. They also supplied the sample for corporates which was supplemented by sample from Dun & Bradstreet.
- CEDR supplied named contacts for the majority of the sample but MORI ensured that the person interviewed was actively involved in litigation and had either 'a great deal' or 'a fair amount' of knowledge of the new CPR.
- The study was conducted across England (excluding Northern Ireland, Scotland and Wales – as we understand that the new CPR is not relevant in these areas).
- All interviews were conducted by telephone between 1 and 9 March 2000. Calls were made between the hours of 9am and 5pm on weekdays.
- Figures quoted are percentages unless otherwise stated.
- Where percentages do not sum to 100% this is due to computer rounding or questions where more than one answer is allowed.
- The data is unedited, and therefore may change in the final tables. Data only relates to pre-coded questions.
- Other responses and open-ended answers require a different analysis process and are being coded and analysed separately. Main groupings of answers will be tabulated for each open-ended question and a selection of comments supplied for reference.

Good morning/afternoon/evening. My name is ..... and I'm calling on behalf of MORI, the Market Research company. We are currently conducting a study on behalf of CEDR, The Centre for Dispute Resolution. The study is being conducted across England and looks at the impact of the <u>new</u> Civil Procedure Rules introduced on the 26th April 1999. You may also know these as the Woolf Reforms.

I would appreciate it if you could spare a few minutes to help us with this study; the interview should take no longer than ten minutes to complete. The findings of this survey will be presented at a conference on the 7 April, entitled 'The CEDR Civil Justice Audit' at which Lord Woolf will preside.

Please be assured that, as with all of our surveys, this study is being conducted under the Market Research Society's Code of Conduct. This ensures that all answers and comments you might give will be treated as strictly private and confidential.

SCREENER

QA **As part of your current role, are you actively involved in litigation for your organisation?**

	External %	Internal %	All %	
Yes	100	100	100	CONTINUE
No	0	0	0	ASK FOR REFERRAL TO
Don't know	0	0	0	RELEVANT PERSON ( )

QB **And how much do you feel you know about the new Civil Procedure Rules? For the rest of this interview these rules will be referred to as the new CPR. Do you feel you know …?**

	External %	Internal %	All %	
A great deal	62	24	43	CONTINUE
A fair amount	38	76	57	CONTINUE
Just a little	0	0	0	CLOSE
Heard of but know nothing about	0	0	0	CLOSE
Don't know	0	0	0	CLOSE

GENERAL

Q1. **Which parts, if any, of the new CPR have had the most impact on litigation practice? e.g. Fast track, use of mediation, Part 36 offers etc?** PLEASE COMMENT. ( )

ANY ANSWER (WRITE IN AND CODE '1) 1

ANSWERS SHOWN IN COMPUTER TABULATIONS

None/no answer X

Don't know Y (-)

Q2. **Overall, do you feel that the new CPR has favoured …?** READ OUT. Single Code only

	External %	Internal %	All %
Claimants	34	40	37
Defendants	12	6	9
Neither/treated them both equally	50	46	48
Don't know	4	8	6

(

Q3. **How strongly do you agree or disagree with each of the following statements?**

		Agree	Neither agree nor disagree	Disagree	No opinion	
		%	%	%	%	
a)	**Judges should initiate settlement discussions**					( )
	External	58	16	24	2	
	Internal	62	6	32	0	
	All	60	11	28	1	
b)	**Mediation should be required at some point if a business dispute goes to court**					( )
	External	40	10	50	0	
	Internal	78	8	10	4	
	All	59	9	30	2	
c)	**Cases should not be "stayed" while settlement discussions are underway**					()
	External	28	6	66	0	
	Internal	46	4	50	0	
	All	37	5	58	0	
d)	**Judges are adequately trained for case management under the new CPR**					()
	External	28	18	54	0	
	Internal	26	24	32	18	
	All	27	21	43	9	

Q4. **Since the new CPR took effect, have you been involved in mediation?** Single Code only

	External %	Internal %	All %	
Yes	54	38	46	CONTINUE
No	46	62	54	GO TO Q6
Don't know	0	0	0	GO TO Q6

Q5. **And, in the majority of cases, who initiated these mediations?** Single Code only

Base: 46	External %	Internal %	All %
The Court	7	11	9
The Claimant	11	21	15
The Defendant	33	37	35
A mixture	30	26	28
Between the Court and Claimant	11	0	7
Other (Write in)	0	0	0
DON'T READ OUT: It depends	4	5	4
Don't know	4	0	2

( )

Q6. **Since the new CPR, has the amount of litigation you have been involved with … ?** READ OUT EACH IN TURN. Single Code Only

		External %	Internal %	All %
	Increased a lot	4	0	2
	Increased a little	14	14	14
	Stayed the same	44	50	47
	Decreased a little	30	26	28
	Decreased a lot	8	8	8
	Don't know	0	2	1

Q7. **Thinking of the cases that you have settled since 26 April 1999, have these cases been settled …?** READ OUT EACH IN TURN. Single Code Only

	External %	Internal %	All %
Faster than before	44	50	47
In about the same time	48	32	40
Slower than before	4	6	5
Don't know	4	12	8

Q8. **And of these (settled since 26 April 1999), have these cases been settled for…?** READ OUT EACH IN TURN. Single Code only in each case

	External %	Internal %	All %
A fairer outcome	18	16	17
A similar outcome	66	58	62
A less fair outcome	10	8	9
DON'T READ OUT: It varies	4	4	4
DON'T READ OUT: Don't know	2	14	8

Q9. **And, what effect if any have the new CPR had on legal costs for these cases. Are legal costs …?** READ OUT EACH IN TURN. Single Code only in each case

	External %	Internal %	All %
Higher than before	44	26	35
About the same	30	30	30
Lower than before	18	28	23
DON'T READ OUT: It varies	6	6	6
DON'T READ OUT: Don't know	2	10	6

Q10. **Should the court award costs against parties who refuse to take part in Alternative Dispute Resolution (ADR)?** Single Code Only

	External %	Internal %	All %
Yes	26	56	41
No	50	28	39
DON'T READ OUT: It depends	24	14	19
DON'T READ OUT: Don't know	0	2	1

Q11. **Should the court award costs against parties who are considered to have behaved "unreasonably" (e.g. are unco-operative) in an ADR procedure?** Single Code Only

	External %	Internal %	All %
Yes	76	88	82
No	22	12	17
DON'T READ OUT: It depends	2	0	1
DON'T READ OUT: Don't know	0	0	0

Q12. **What change, if any, has the new CPR had on the culture for settlement?** READ OUT. Single Code Only

	External %	Internal %	All %
A positive change	84	68	76
No difference	14	16	15
A negative change	2	6	4
DON'T READ OUT: It varies	0	6	3
DON'T READ OUT: Don't know	0	4	2

Q13. **Overall, how satisfied are you with the new CPR?** READ OUT. Single Code Only

	External %	Internal %	All %
Very satisfied	10	4	7
Fairly satisfied	68	78	73
Fairly dissatisfied	14	12	13
Very dissatisfied	8	2	5
Don't know	0	4	2

INTERNAL LAWYERS – COMPANIES

Q14. **Since the new CPR do you think your external lawyers have found cost estimates and risk estimates to be …?** READ OUT. Single Code Only

Base: 50	%	
Easier to provide	22	
About the same/no difference	36	( )
More difficult to provide	20	
Don't know	6	
Cannot comment	10	
Not applicable, no external lawyers	6	

Q15. **To what extent does your company use clauses in contracts, which require mediation to be an <u>initial</u> course of action when resolving disputes?** READ OUT. Single Code Only

Base: 50	%	
Everytime	8	
Usually	24	
Sometimes	22	
Hardly ever	24	
Never	16	( )
Don't know	6	

Q16. **And to what extent has your external lawyer advised you to use mediation as an alternative to litigation?** READ OUT. Single Code Only

Base: 50	%	
Everytime	8	
Usually	24	
Sometimes	18	
Hardly ever	20	
Never	16	( )
Not applicable, no external lawyer	12	
Don't know	2	

EXTERNAL LAWYERS – LAW FIRMS

Q17. **What effect, if any, does the new Part 36 claimant offer provision have on settling cases?** READ OUT. Single Code Only

Base: 50	%	
Makes it easier	74	
No difference	22	( )
Makes it more difficult	4	
Don't know	0	

Q18. **In general, has the prospect of Penal Interest Rates altered your advice to clients in favour of settlement?** Single Code Only

Base: 50	%
Yes	44
No	54
No Penal Interest Rates ordered in a case	2
Don't know	0

Q19. **Overall, has front-loading of litigation costs had any effect on your willingness to issue proceedings?** Single Code Only

Base: 50	%
Yes	38
No	56
Don't know	6

( )

ASK ALL RESPONDENTS Q20 ONWARDS

Q20. **Which areas of the new CPR, if any, do you feel could be improved?** PROBE FULLY AND WRITE IN. ( )

ANY ANSWER (WRITE IN AND CODE '1') 1

ANSWERS SHOWN IN COMPUTER TABULATIONS

None/no answer X

Don't know Y (-)

AWARENESS OF CEDR

And now looking at the wider picture of dispute resolution, can I ask:

Q21. **What aspects, if any, of CEDR's role are you most familiar with?** DO NOT PROMPT. MULTICODE OK.

	External %	Internal %	All %	
Training	24	18	21	
Mediation provider	78	54	66	
Promotion of ADR (Alternative Dispute Resolution) to industry	24	28	26	
Guidance to the legal profession on ADR	8	6	7	
Other (WRITE IN)	0	8	4	LISTINGS SUPPLIED
Know all aspects	2	2	2	
Aware of CEDR but don't know their role	8	14	11	
Not heard of CEDR before this survey	0	2	2	
Don't know	6	4	5	

ORGANISATION & PERSONAL INFORMATION

Finally, I would like to ask you two background questions about you and your organisation. These will be used for analysis purposes only and will not be attributed to you as an individual.

Q22. **How many years have you been involved in litigation?** Single Code Only

	External %	Internal %	All %
Less than 1 year	0	2	1
1 to 5 years	10	22	16
6 - 10 years	14	34	24
11 - 15 years	24	20	22
Over 15 years	52	22	37
Refused	0	0	0

Q23. **And can I just check where <u>your</u> office is based?** READ OUT. Single Code Only

	External %	Internal %	All %
North	10	2	6
Midlands	14	8	11
South	76	90	83

CIVIL JUSTICE AUDIT QUESTIONNAIRE

Please comment in relation to civil, not family cases.

1. Have solicitors embraced the new CPR?

2. Have barristers embraced the new CPR?

3. What loopholes have Judges discovered in the new CPR?

4. What actions have Judges taken in response to a failure to comply with the new CPR?

5. How have Judges reacted in cases where the costs are likely to be disproportionate to the claim?

6. Please outline briefly the experience of the Judges with summary costs assessments.

7. Have Judges used the power in Part 32 to control evidence and, if so, how?

8. Have single experts been used and, if so what has been the experience to date?

9. What kind of orders for costs have been made in relation to Part 36 offers?

10. In terms of ADR:

    (a) Should ADR be mandatory?

    (b) In what circumstances have orders been made for a stay under CPR 26.4?

(c) Have adverse cost orders been made when a party has refused to attempt ADR?

(d) Should mediation be provided by a local designated panel of mediators or local ADR providers or court personnel?

(e) Following an attempt of ADR, has a Judge examined the conduct of the parties before or during ADR and if so, why?

Thank you for taking the time to complete this questionnaire.
Please return it in the stamped addressed envelope provided, to:
Civil Justice Audit, CEDR, Princes House, 95 Gresham Street, London EC2V 7NA

Focus Group Questions

- What parts of the CPR have had the most impact on litigation practice?
- Have the CPR altered your relationship with your clients or your external lawyers? If so how?
- Do you think the CPR give an advantage to either a claimant or a defendant? If so, how?
- Where the outcome of a case is better than the Part 36 offer/payment, how is the court exercising its discretion in relation to costs and/or interest?
- Are client's concerns about front-loaded costs well founded?
- What effect, if any, have the new CPR had on the culture for settlement?
- To what extent are the courts making ADR "compulsory"?
- How has the CPR affected your cost and risk analysis of cases?
- What loopholes or flaws have you discovered with the new CPR?
- A year into the new system, are you finding that judges are managing cases better, and that there is, as Lord Woolf intended, greater access to justice?