

SOLUTIONS

A Periodical of Note from The Ontario Association for Family Mediation

May, 2005



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"Fostering a community in which family mediation is the first choice for resolving family conflict."



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SOLUTIONS

The News Journal for Members of
Ontario Association for Family Mediation



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Practice Standards

– A Refresher of the Basics

By Barbara Landau, Ph.D., LL.B., LL.M. and Susan Healey, LL.B., Chair, Standards and Ethics Committee

It is recommended that each of us review of our mediation standards from time to time to ensure that we are following best practices for our clients and to protect mediators from ethical complaints. All members of OAFM are governed by OAFM's Code of Ethics. Similarly, since all members of OAFM are also members of Family Mediation Canada under our current affiliation agreement, we are also governed by FMC's Code of Professional Conduct. The following is a helpful guide to practice standards that should be followed in each mediation that we conduct.

THE UNAUTHORIZED PRACTICE OF LAW

Both of the Codes prohibit a mediator who is not a lawyer from providing legal advice, which would specifically include giving an opinion of what a particular party's rights or obligations are under the Family Law Act, the Divorce Act, or the Children's Law Reform Act. (OAFM Code, para. 3(a), 8(a); FMC Code article 5.2, 5.3, 10.3, 11.1(f)).

MEDIATION RETAINER CONTRACT or AGREEMENT TO MEDIATE

The mediator must explain the mediation process clearly to their clients before agreeing to mediate the dispute. In particular, at the outset the mediator should review a written retainer contract or "agreement to mediate" with the clients, and explain its contents.

Although neither OAFM or FMC has produced a standard agreement to mediate, the content of such agreements should:

- a) explain mediation and distinguish it from other methods of dispute resolution and from therapy and marriage counseling;
- b) discuss and screen the clients individually to determine their appropriateness for mediation in light of their particular circumstances, such as domestic violence, drug or alcohol abuse or mental health concerns;
- c) discuss the differences between and implications of open and closed mediation, and require the parties to choose between the two;
- d) advise the participants of any conflict of interest and clarify any limitations on the mediator's role, such as, the mediator cannot act on behalf of one of the clients if there has been any significant prior involvement (without full disclosure and express consent of both clients) and cannot act on behalf of one client following the mediation;
- e) advise participants that either of them or the mediator has the right to suspend or terminate the process at any time;

continued on page 3...

- f) explain the cost of mediation and reach an agreement with the participants regarding payment. It is inappropriate for the mediator to base a fee on the outcome of the mediation process;
- g) advise the participants of the role of independent legal advice, and urge each participant to obtain independent legal advice prior to, during and at the conclusion of the mediation; and
- h) discuss with the clients the mediator's specific procedures and practices, such as when separate sessions may be held, including any rules relating to the confidentiality of such sessions. (OAFM Code, para. 6, FMC Code, article 11)

MEMORANDUM OF UNDERSTANDING or WRITTEN MEDIATION REPORT

The Law Society is clear that only lawyers can assist parties to create legally binding contracts. OAFM and FMC encourage members to emphasize that the Memorandum of Understanding (MOU) or written report produced by the non-lawyer mediator at the conclusion of the mediation is NOT a legally binding document. This is to avoid a complaint by the Law Society that the mediator is carrying out "the unauthorized practice of law". It should be made clear to the clients that the MOU is merely a guide to assist the lawyers of the clients in drawing up the final separation agreement or minutes of settlement. It has been suggested that using the title "Memorandum of Understanding" is preferable to "Memorandum of Agreement" in order to emphasize that it is not, and is not intended to be, a legal document. (FMC Code article 12.2).

"Following this advice is in the interest of our clients – and the mediation profession!!"

Clients are to be clearly told that the MOU or written report indicates that the parties have reached a tentative agreement, which can be changed as a result of obtaining legal advice. Any such MOU prepared by the mediator should contain, on the face of the document, words to the effect that "this document is not intended to be a legally binding contract, but merely a statement of intention by the parties".

In order to ensure that the parties fully appreciate that the MOU or written report is not a legal document, mediators are to avoid the use of legalistic phrases or paragraphs copied from separation agreements or legal documents.

The MOU should never be signed by the clients in the presence of a mediator or witnessed by the mediator, again, to emphasize that it is not a legally binding

document. Unlike non-lawyers, lawyer/mediators may draft a separation agreement as a MOU or mediation "report", but should recommend that the clients have it signed in their lawyer's office with their lawyer as witness. In this way the clients can obtain a certificate of independent legal advice. A lawyer/mediator should refrain from witnessing the separation agreement. (OAFM Code, para.9(c); FMC Code, article 12.1).

FINANCIAL DISCLOSURE

Both Codes, as well as the Family Law Act, require the mediator to obtain an undertaking from the parties to make frank and full disclosure of their financial circumstances where financial issues such as support or division of assets are involved. The mediator is required to suspend or terminate mediation if a client refuses to make or demand adequate disclosure, at least until that person has had an opportunity to receive legal advice on the issue of financial disclosure. (OAFM Code, para. 8(b); FMC Code, article 9.5, 10.1, 10.2).

LEGAL ADVICE

There is a positive duty on mediators to actively encourage participants to obtain independent legal advice at every step in the mediation process. The mediator must be cognizant of the fact that the failure of a party in a given case to obtain legal advice may cause, or have the potential to cause, enough harm and prejudice to require the mediator to suspend or terminate mediation. (OAFM Code, para. 6(f), 8(a), 9; FMC Code, article 9.1, 9.3, 10.1, 10.3, 11.1(f)).

Both the mediation retainer contract (or agreement to mediate), and the MOU (or mediation report), should specifically caution and direct the parties to obtain legal advice.

Following this advice is in the interest of our clients – and the mediation profession!!!

Both OAFM's Code of Ethics and FMC's Code of Professional Conduct can be found on each organization's website. 

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Morning Session

Colm Brannigan

LL.B., LL.M., C.Med (ADR Inst.)

Privacy Act:

What You Need To Know About the Personal Information and Electronic Documents Act (PIPEDA) and your Mediation Practice

SESSION OVERVIEW:

What is PIPEDA? ■ Does PIPEDA apply to my business? ■ The 10 Privacy Principles ■ What is personal information?

Collection of personal information: ■ What is a purpose statement? ■ How much information should I collect from an individual? ■ How do I get consent to collect information? ■ How long do I have to retain information? ■ How do I "destroy" information?

Consequences of non-compliance.

Precedent clauses and simple policies you can use in your practice.

Afternoon Session

Hilary Linton

B.J., LL.B., LL.M. (ADR), Acc.FM (OAFM)

**Spousal Support Guidelines:
What They Mean And How To Use Them**

This half day session will cover the essentials of the new spousal support guidelines, including:

- Overview of guidelines
- How they are different from the child support guidelines
- How to apply the "without children" formula
- How to apply the "with children" formula
- Why you need to buy software
- Software demonstration

Bonus!

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- Sessions apply to Accreditation
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Bonus!

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About Your Presenters...

Hilary Linton

B.J., LL.B., LL.M. (ADR), Acc.F.M. (OAFM)



Hilary Linton, B.J., LL.B., LL.M. (ADR), Acc.F.M. (OAFM), ...principal of Riverdale Mediation, practiced family and civil litigation for 15 years before becoming a full time mediator/arbitrator of family and civil disputes. She specializes in mediation and med-arb of property and support disputes on marital breakdown. Ms. Linton is a former OAFM director, and is an executive member and program coordinator of the ADR section for the Ontario Bar Association. She teaches Negotiation and Mediation at the University of Western Ontario law school, family mediation skills training for Toronto Advanced Professional Education, and family law at Humber College. For more information, visit www.riverdalemediation.com.



Colm Brannigan

LL.B., LL.M., C.Med. (ADR Inst.)

Colm Brannigan received his LLB from Queen's University and an LLM in Alternative Dispute Resolution (ADR) from Osgoode Hall Law School of York University. He is a Chartered Mediator of the ADR Institute of Canada, Inc.

Colm is a mediator, arbitrator and facilitator based in Brampton, Ontario and can be contacted by e-mail at colm@mediate.ca or through his website www.mediate.ca.

June 24 2005

Mississauga

**ONTARIO
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Mediation in Action

Conference and Annual General Meeting

NOW!

REGISTER ONLINE:

www.oafm.on.ca/conference.html

Be sure to attend OAFM's...

AGM

and Member Luncheon

12-2 PM Friday June 24, 2005

Please see the next page for an important letter from OAFM President Susan Healey.

Conference Itinerary	
Friday, June 24, 2005	
7:30-9:30	Registration and Continental Breakfast
9:00-9:30	Plenary Session Welcome
9:30-12:00	Privacy Act and Your Practice (break at 10:30)
12:00-1:00	Buffet Luncheon – All Delegates
1:00-2:00	AGM – Members Only Please
2:00-4:30	Spousal Support Guidelines (break at 3:00)
4:30-5:30	Wine & Cheese Reception – All Delegates

A letter from OAFM President Susan Healey...



Dear OAFM Member

Our annual general meeting will be held this year on June 24, 2005 at the Holiday Inn Select, Mississauga.

This is a particularly important AGM as the Board will be seeking the membership's approval of a new set of bylaws, which are included below for your review.

As well, we will be presenting our annual mini-conference, featuring excellent presentations about the new spousal support guidelines and how privacy legislation affects your mediation practice, among other topics. Last year's conference was so successful that we were over-capacity – please register early to avoid being disappointed.

We hope to see you there!

Sincerely

Susan Healey
President
OAFM



NOTICE OF ANNUAL GENERAL MEETING OF ALL MEMBERS IN GOOD STANDING

NOTICE is hereby given that the Annual Meeting of the Members of the Ontario Association of Family Mediators will be held at the Holiday Inn Select, Mississauga, Friday June 24, 2005 at the hour of 1:00 o'clock in the afternoon, to:

- a) receive and consider the annual report, the financial statements and the report of the auditors;
- b) elect directors;
- c) appoint auditors and authorize the directors to fix the remuneration; and
- d) transact such further business as may properly be brought before the meeting or any adjournment thereof.

By order of the Board of Directors.



NOTICE OF MOTION

The Board of Directors of the Ontario Association of Family Mediators hereby moves as follows:

That the Proposed By-Law Number 3, as approved by the Board, ("a bylaw relating generally to the transaction of the business and affairs of the corporation"), be approved by the membership.

That the Proposed By-Law Number 4, as approved by the Board, ("a bylaw relating generally to the transaction of the business and affairs of the corporation"), be approved by the membership.

Dated at Peterborough, Ontario January 15, 2005

**Please see the enclosed bylaws or visit:
www.oafm.on.ca/2005agm.htm**

Ontario Court of Appeal Will Rule on Mediation Confidentiality:


Rudd v. Trossacs Investments Inc.

by Susan Healey, LL.B, Acc.F.M. (OAFM)

In what will be a precedent-setting case, the Ontario Court of Appeal is scheduled to determine the issue of confidentiality in the mediation process. In the case of *Rudd v. Trossacs Investments Inc.* (2004) 72 O.R. (3d) 62, Superior Court Justice Lederman granted an order which compelled the mediator to give evidence about the parties' intentions in the mediation. In this case an agreement was reached during mediation and handwritten minutes of settlement, prepared by the mediator with the assistance of counsel, were signed at the conclusion of the mediation. One of the participants alleged that the minutes of settlement inadvertently omitted a party to the settlement, when it was the intention of all of the participants that he be made a party.

Leave to appeal was granted on March 7, 2005, along with an order allowing the Ontario Bar Association to intervene in the appeal.

All mediators know that confidentiality is a hallmark of mediation, for good reasons. Effective mediation requires that people feel free to frankly discuss the merits, drawbacks and potential resolution of their dispute. It is important that the public know that discussions occurring during mediation will not be misused. For example, an expression of remorse by one party can sometimes move the mediation to a productive plane, and yet outside of the mediation such an apologetic statement would likely be kept well hidden because of its potential use in litigation as an admission against that person's interest. In order for the magic of mediation to work, that person has to feel absolute confidence that what they say will not come back to prejudice them at a later date if the mediation is unsuccessful. However, there is currently no legislation or practice direction that protects confidentiality in mediation.

Rudd v. Trossacs Investments Inc. will hopefully assist in setting parameters around such confidentiality by determining under what circumstances, if any, the mediator should be compelled to testify about what transpired during the mediation. The appeal is expected to be heard in September 2005. 

Strategic Planning Committee Moves OAFM Forward...

by M. Colleen Currie Vice President,
OAFM Chair, Strategic Planning Committee

The Strategic Planning Committee is tasked with developing the long-term view for the Association. The Committee's mandate is to drive the creation of a strategic plan that ensures the continuing relevance of OAFM to both its members and to the public. Once the plan has been created - and approved by OAFM members - the Committee's work shifts to that of monitoring and auditing the performance of the Board in accordance with the plan goals and milestones.


At the last OAFM Board meeting (January 2005), a skilled facilitator worked with the Board members to develop a strategic plan. This draft plan looks forward five years and contains not only our vision and mission statements but concrete action items built around the vision. This plan will be presented at the upcoming AGM in June. In the interim, here are some highlights to give you an idea of the direction the Board adopted: Confirmation of our vision: ***"Fostering a community in which family mediation is the first choice for resolving conflict."***

Creation of our mission: *"Serving the Ontario public through being the driving force in professionalizing mediation capabilities focused on effective resolutions of family conflict situations."*

Definition of our goals: *fostering community, education, and professionalization.*

Articulation of our key activities: *member services, advocacy, and outreach.*

Establishment of milestones for each quarter of 2005.

We look forward to seeing you in June in Mississauga and to provide you a formal presentation of the strategic plan. 

Become Accredited!

Accreditation Criteria for Ontario Family Mediators

A. STANDARDS OF PRACTICE

1. The development of Standards, the operational context within which the Code of Professional Conduct (Ethics) should function in practice, is a complex and difficult matter.
2. The OAFM is acutely aware of the ultimate need to certify competence in mediation practice in order to maintain the integrity of the process. However, due to the variety and divergent backgrounds of its practitioners, the unevenness in quality and availability of training, and the very recent emergence of mediation as a distinct profession, we believe that it would be premature to attempt to evaluate the competence of Accredited Family Mediators at this time.
3. Experience and outcome research will eventually provide the best information as to what constitutes high quality in mediation practice. At that point a certification process will be more appropriate.
4. OAFM does, however, have minimum standards of practice including education, training, supervision and experience.

B. AREAS OF COMPETENCE

In order to qualify for and maintain membership in the OAFM as an "Accredited Family Mediator" an applicant member must satisfy the Association that he or she possesses the qualifications set out below, and provide proof of:

1. PROFESSIONAL EDUCATION:

Applicants must provide proof of a university degree or proof of having attained FMC certification.

2. KNOWLEDGE OF FAMILY MEDIATION THEORY AND SKILLS:

A basic knowledge of family mediation theory and skills is essential. For the purpose of application for membership, or continuing membership, an applicant/member must have completed:

A) Sixty (60) hours of family mediation education including a 40-hour family mediation training course and 20 hours of family mediation skills training. The 40-hour family mediation training course must be taught by an OAFM accredited mediator or approved by the OAFM, FMC or equivalent. The family mediation training course must include a minimum of five hours in each of the following categories:

- (i) Conflict resolution theories;
 - (ii) Psychological issues in separation, divorce, family dynamics, and power imbalances;
 - (iii) Issues and needs of children in separation and divorce;
 - (iv) Mediation process and techniques including role play;
 - (v) Family Law including custody, support, asset evaluation and distribution, taxation as it relates to separation and divorce; and
 - (vi) Family economics (not required if the basic training is limited to custody mediation).
- The additional 20 hours can be achieved by attendance at one or more advanced trainings, relevant workshops and conferences.

AND,

(B) A minimum of 14 hours on domestic violence education OR

C) Taught such courses him/herself, and

D) Had an exceptional amount of applicable personal experience and in-service training.

NOTE: If the applicant lacks the minimum qualifications outlined in 1 and 2 above, he/she shall submit a resume and contact the Accreditation Committee to discuss his/her acceptability for membership on an individual basis.

3. EXPERIENCE AND CONSULTATION/SUPERVISION IN THE ACTUAL PRACTICE OF MEDIATION:

An OAFM Accredited Family Mediator must:

A) Applicants who possess a law degree or a graduate degree must provide proof (i.e. letter from supervisor, peer references) of a minimum two years of relevant experience in human service. Applicants who do not have a law degree or a graduate degree must provide proof of a minimum of six years of relevant work experience in human service;

B) SUBMIT a minimum of five family related cases mediated to the point of agreement. The mediator should consult with or be supervised by an OAFM Accredited Family Mediator for a minimum of one hundred hours including five cases mediated to point of agreement. The consultation could include: co-mediation; supervision; and peer consultation. The applicant must submit letter(s) from Acc.F.M. (O.A.F.M.) mediator(s) confirming co-mediation, supervision, and/or peer consultation of required one hundred (100) hours including five (5) cases mediated to point of agreement; and,

C) SUBMIT the 5 contracts to mediate which indicate the working relationship with the clients for the cases in (B) above.

4. STANDARDS OF PRACTICE:


A) Code of Professional Conduct (Ethics)

An Accredited Family Mediator must commit himself/herself and adhere strictly to the OAFM Code of Professional Conduct as a Standard of Practice. No mediator shall venture into an area of practice beyond his/her own area of expertise.

B) Continuing Education

An OAFM Accredited Family Mediator must continue and submit proof of his/her mediation education through attending courses and workshops and reading about new developments in the field. Continuing education must be a minimum of 10 hours of course-work relating to the practice of family mediation every year,

C) Liability Insurance

All candidates at the time of application for the status of Accredited Family Mediator, as well as Accredited Family Mediators at the time of annual renewal, must provide proof of current liability insurance covering the practice of mediation in an amount not less than \$1,000,000. 

Please visit www.oafm.on.ca for more information.