



## **Companion Guide Crossing the Cultural Divide:**

### **Practical Ways Lawyers and Mediators can Better Work Together for the Benefit of the Public**

#### **Introduction**

Ontario's Family Law Limited Scope Services Project ("the Project") launched in the fall of 2018 to facilitate the provision of limited scope services in family law disputes by family lawyers, within and outside of the court process. The Project's mandate is to improve access to family justice for middle-income Ontarians by establishing an online, province-wide directory of trained lawyers willing to provide unbundled legal services.

With limited scope services, the lawyer only does some of the work relating to the family law dispute, as agreed to in advance between the lawyer and the client.

One of the limited scope services most often requested by separating families is legal advice and/or drafting documents to formalize proposed settlements negotiated by individuals with little or no involvement by the lawyer. Such situations often occur in the context of the parties using mediation, either within or outside the court system, as a dispute resolution process.

There is evidence of an increased need by the public, for timely, affordable, and effective options for resolving family law matters. As the need grows, access to justice within family law matters is of increasing concern and importance. Family law services are critical for ensuring that Ontarians' family law matters can be addressed accurately and efficiently.

This collaboration between the Ontario Association of Family Mediators and Ontario's Family Law Limited Scope Services Project is intended to outline suggested practices for both mediators and lawyers to ensure both understand the roles and challenges of the other within such assignments.

#### **1. Module Learning**

##### **Module 1: Needs of Public in the Context of Separation**

Increasingly, individuals are turning to mediation as their preferred Consensual Dispute Resolution “CDR” process. Separating partners see the advantages of CDR in being able to work through their own solutions. These separating partners still need the responsible assistance of lawyers in order to ensure:

- they clearly understand all of the possible consequences of their choices;
- achieve a sustainable and durable agreement which will be respected by the judicial system; and
- minimize the risk of future conflict.

The purpose of these materials is to help the professionals involved in mediating and completing these agreements for separating partners to better meet the needs of their respective clients.

- Increased importance and concern today regarding issues of access to justice
- Public needs access to timely, affordable, and effective options for resolving their family law matters
- Increased focus on consensual dispute resolution (CDR) options in family law
- CDR provides value by allowing parties to design their own solutions, with as much professional assistance as they want/need, in a way that reduces conflict, reduces the resulting harm to children, and preserves relationships
- Client centered approach
- Individuals need:
  - help with communicating with former partner
  - help with understanding legal rights and obligations
  - help with imagining options to solve dispute or problem
  - help to make informed choices/decisions
  - help with documenting the specifics of their solution in a way which is:
    - understandable, unambiguous, enforceable; and
    - will minimize future conflict.

## Module 2: Mediators, Lawyers and other Professionals Working Together

- Family separations are complex
- They may contain a variety of issues – psychological, financial, legal
- Families may need assistance from different professionals in order to build a process and address the substance of their issues
- This would be a “client centered approach” and may necessitate a “multi-disciplinary approach”
- Certified family mediators may come from various disciplines

- Mediators' role is to help parties work through the dispute to reach their own solution
- Lawyers' role is to ensure parties understand their rights and obligations, and that the agreement/minutes of settlement are drafted clearly so they are durable and enforceable.
- Mediators' and lawyers' focus and views may be very different
  - mediators' focus is to empower the clients to have a conversation to achieve a consensus
  - lawyers' focus is to get the outcome "right" in accordance with the instructions from the client, and with the law
- If the roles and relationships of the mediator and lawyer are not "in sync", this can create an additional burden for the parties, an additional impediment to resolution and additional conflict
- Need understanding of the role of the other – teamwork and communication required
- Discuss the importance of legal advice
- The mediator should clearly outline the reasoning for the settlement model
- Option to have a client get legal advice without a certificate of legal advice and instead, each client confirms within the agreement that, i.e.,
  - a. each has had independent legal advice with "lawyer 1 or lawyer 2";
  - b. the Agreement is fair and reasonable;
  - c. they understand its nature and consequences;
  - d. they are not under any undue influence or duress;
  - e. they understand their respective rights and obligations under the Agreement;
  - f. they are signing this Agreement voluntarily.

### Module 3: Professional Responsibilities and Risk Management for Mediators and Lawyers

- Purpose is to learn about each other's:
  - roles;
  - professional and ethical responsibilities;
  - potential liability of the professional, especially lawyer liability which tends to be higher.
- Mediators should address the follow up steps in the mediation report:
- After care for lawyers – identify the follow up items that are part of the Agreement, and clearly delineate who is responsible for each step, i.e., insurance, RRSP rollovers, pension forms, filing for divorce, etc.
- Ensure the draft stipulates in writing the "who what when, how and why" of steps.

- Ensure all Schedules are attached for both the lawyer and the mediator.
- Responsible drafting with consistent terms and avoid error by paying special attention to dates.
- Examples of difficult situations for the lawyer and the mediator and suggested possible solutions - i.e., when clients do not want to follow particular step in process, discuss when to try to work with them and when to say “no”.
- Potential of running both a “legal model” and a “settlement model” that compares intangible benefits, i.e., speedy resolution, preserving relationships, “the price of peace” etc., set out specifically what the intangible benefits are to the parties that caused them to choose the settlement model?
- Mediators need to understand what circumstances make it challenging for lawyers to give Independent Legal Advice “ILA”.
- Mediators need to appreciate the associated risks and responsibility of lawyers giving ILA and have mutual respect for each other’s role.
- Address the differences and connotations between Independent Legal Advice and Independent Legal Representation.
- Address negative connotation around “ILA” – short, cheap and of little value
- Outline the additional value that *representation* over simple *advice* can provide to individuals – and how mediators can communicate this to individuals along with reasonable costs.
- Explain role that a certificate of ILA may or may NOT play in a determination by the court about enforceability of agreement.
- Understand biases of mediator’s and lawyers’ respective roles.
- ILA is a serious endeavor with great risk for lawyer and affects clients forever -not to be taken lightly.

Define who is responsible for, and identify joint responsibility for:

- compiling all relevant information
- comprehensive financial disclosure and decide on format
- creating Financial Statements (13.1) and Net Family Property Statements (13B)
- running support calculations
- customization of support calculations of financial disclosure is needed, discuss who is responsible for what and when and how the calculations will be made
- identifying if additional resources are required (experts), for example in complex financial issues, i.e., business valuations, real estate valuations, tax accountants, etc.
- providing information re: how the law (legal model) would apply to the circumstances of the file
- providing explanation of settlement options and potential compromises
- process Management of the file and any settlement steps for implementation

- ensuring the agreement clearly communicates what the parties intended
- ensuring the individuals clearly understand what steps they are responsible for and how to accomplish required steps.

#### Communication Best Practices:

- Listen to the client: words, tone, and body language.
- Be alert to signs of duress, time, and other pressures.
- Ensure the client understands key terms, consequences, and finality of the agreement.
- If client is not ready to commit, is a cooling off period advisable?

### Module 4: Sustainable Mediation Report's, Durable Agreements and Enforceable Minutes of Settlement

#### **Sustainable Mediation Report**

A document where there is sufficient clarity and detail:

- to provide a road map for the parties moving forward in a manner designed to reduce future conflict,
- that legal professionals and parties can understand the consensus reached and allow for the preparation of a Separation Agreement or Minutes of Settlement, and
- results in a final product that clearly identifies when clients have reached a settlement that differs from the legal model and provides an explanation for the compromise.

#### **Four Key Components**

1. Progress Notes to set out reasons for settlement
2. Financial Documents disclosed during mediation
3. Calculations relied on by parties when resolving property or support issues
4. Sufficient detail in Mediation Report regarding consensus reached

#### **What is a Durable Agreement?**

A document that stands the test of time and is:

- likely to be respected by the courts in the event the agreement is challenged, and the court is called upon to either interpret, vary, enforce, or set it aside;
- able to anticipate future needs of the family, provides structure to minimize future conflict and includes a process for resolving future potential disputes; and
- able to demonstrate integrity in the process and provide confirmation that parties were able to make informed choices when reaching settlement.

### **Workable documents that can form enforceable Minutes of Settlement/Consent Order**

- Enforceable Minutes of Settlement are documents which are:
  - written in a way that can be easily converted into a court order;
  - recognizes what terms can be ordered by a judge; and
  - includes sufficient detail to satisfy legislative requirements (i.e., including payor's income in term re payment of child support).
- Can be incorporated into a court order and must be worded in specific ways.
- Drafting of terms to be easily convertible, and in consideration of what a court can order.
- May be a check the boxes model.
- Consider regional differences in practice/judicial expectations.
- Workable consents:
  - clarity
  - consistency
- Examples provided within *MINUTES OF SETTLEMENT: TEN PRACTICE TIPS – power point presentation found at the end of this Guide.*

## **2. Best Practices Guide**

### **Best Practices for Mediators to Facilitate Independent Legal Advice Process:**

By fostering better understanding and greater cooperation, families can better receive appropriate, settlement-minded, cost-effective, and timely assistance and advice from such professionals when resolving their disputes.

1. Obtain general and specific direction from all parties to communicate with other professionals.
2. Provide explanation to parties about what good ILA is and why it is important to obtain such advice, distinguishing between legal information, legal advice and legal representation.

3. Understand what information the advising lawyer will need in order to be able to provide efficient and effective legal advice.
4. Consider information beyond legal concepts such as the interests and underlying values of the client.
5. Gather sufficient financial information to be able to appropriately address the financial issues in dispute.
6. Prepare progress notes/documentation, consistent with the mediation process (closed or open) agreed on by the parties, after every mediation with sufficient detail to understand rationale for decisions and/or compromises made by parties during mediation.
7. Ensure that the retainer agreement allows for ongoing exchange with the legal team.
8. Be conscious of the need to manage the process and identify next steps, subject to process design and needs of the parties.
9. Develop protocols for sharing financial information received from parties as part of the mediation, and the lawyers or other financial professionals working with them in order to avoid deficiencies in information or duplication of collection efforts.
10. Provide copies of any calculations relied on during mediation to reach settlement of financial issues to the lawyer providing advice.
11. Ensure that the parties understand that production of any documents are only generated for legal information in draft form pending ILA.
12. Draft sustainable mediation reports.
13. Clearly outline in the mediation reports where parties have agreed to compromises and their reasons for doing so.
14. Develop good working relationships with the family lawyers in your community.

**Overview of Best Practices for Lawyers Providing Independent Legal Advice:**

Because a lawyer-client relationship is formed in a limited scope legal services retainer, many if not all of the best practices that family lawyers have developed in full representation retainers

and limited scope services also apply in the context of independent legal advice. As such, the following best practices are intended to be a specific sub-set of these overall best practices.

It should be noted that these Best Practices are not intended to either limit or in any way relieve the lawyer from his or her professional responsibilities under the *Rules of Professional Conduct*. While the best practices outlined in this guide may, in some circumstances, assist lawyers in establishing that they have met the necessary standard of practice, lawyers who provide legal services pursuant to a limited scope retainer should ensure that they meet their professional responsibilities at all times.

Family lawyers, who provide independent legal advice on settlements or legal coaching to clients who are mediating on their own, should be guided by the following principles:

1. Assess the client's capacity throughout your involvement and be aware of power imbalances and domestic violence that may impact the appropriateness of the settlement in the circumstances.
2. Review and revise your client intake form and process to ensure that you receive adequate information to help you:
  - a. understand the dispute resolution process(es) involved;
  - b. determine the context in which the settlement was negotiated.
3. Conduct a thorough intake with the client after reviewing their intake form(s). Determine what information was relied on in the negotiations and if available, arrange to obtain the supporting documentation.
4. Ensure good communication with the client throughout your relationship.
5. Document all advice and decisions.
6. Remember parties want to resolve their matter. If you find an issue that is problematic, provide proactive options for solving it.
7. Once advice has been provided, if needed and appropriate, ask/encourage clients to go back to mediator for further assistance to negotiate identified issues.
8. Despite the limited scope of your retainer, identify for the client, in writing, any collateral issues that come to your attention during the course of your retainer.



9. Always provide a detailed Reporting Letter at the conclusion of your retainer. Explain what was done, including what forms were completed and clearly identify what remaining tasks are to be completed by the client.
10. For a sample independent legal advice checklist, please refer to the following resource: <https://www.practicepro.ca/wp-content/uploads/2017/07/Domestic-ILA-Checklist.pdf>

### **Practical Recommendations for Lawyers:**

#### Family Violence Assessment

Risk assessment is a predominantly objective examination of both static and dynamics factors existing in a family violence situation. Screening is the process by which family law professionals identify possible risks and its impact on each client's ability to proceed fairly and safety in the proposed dispute resolution process.

- Know how to properly screen for domestic violence.
- Assess your own comfort in working with a client at risk of violence and your ability to competently handle the complexities of such a file.
- Understand your obligations when the client is an alleged abuser.
- Be armed with referrals (legal and otherwise) of professionals with expertise in this area. Refer to the domestic violence information in the resource toolkit.
- Always be prepared to assist the client with safety planning when a safety concern arises.

If you wish to learn more about family and domestic violence assessment and services, we recommend the following resources (not an exhaustive list):

- [Divorce and Family Violence](#)
- [What You Don't Know Can Hurt You: The importance of family violence screening tools for family law practitioners.](#)
- [Responding to Domestic Violence in Family Law, Civil Protection & Child Protection Cases | CanLII](#)
- [Policy on Intimate Partner Violence and Power Imbalances](#)

#### *Tools/Checklists*

- Develop handouts/worksheets to help your client(s):
  - understand the law, within the scope of your profession, the process in which they are engaged (whether in court proceedings or outside of court) and specific stages of litigation (where applicable).

- better understand the issues/tasks that they will remain responsible for and what is expected of them in terms of addressing those issues/tasks within prescribed timelines.
- provide you with the information that you need to complete your tasks.
- Tailor your client(s) intake forms to obtain information regarding the specific help that the client is seeking.
  - Ensure you and the client(s) are clear on the goals of each meeting/step/event.
- Prepare post-meeting and/or step/event checklists that can be provided to a client to help them follow up with any required tasks.

#### *Work Within Your Expertise*

- Work within the areas of family law where you have the necessary legal knowledge and skills (e.g., parenting cases, support & property division).

#### *Your Intake and Ongoing Process*

- Set up your office systems to minimize the time needed for you to get up to speed when your assistance is requested.
- Have client's complete intake forms before your initial meeting so that you can retrieve the key information quickly at the outset.
- Perform a comprehensive interview to discover the critical issues in the case.
- Understand that fact gathering must be an ongoing process.
- Obtain informed consent.

#### **For Lawyers:**

##### *Assess the Client and Matter Suitability for Independent Legal Advice*

- The ideal client for ILA on an agreement they have negotiated without your involvement or legal coaching likely has high literacy skills and emotional capacity, realistic expectations regarding the likely outcome, time and ability to work independently, the ability to listen and is open to taking direction. They are also attentive to details and learn relatively quickly. The ideal client is confident, open to persuasion and genuinely interested in resolution.
- Clients who may require additional support:
  - a person who acts on principle regardless of advice to the contrary
  - a person with unreasonable expectations re: success
  - a person who is always in crisis (whether indicated or not)
  - a person who cannot let go of tasks or delegate and micromanages the lawyers' tasks

- a person with cognitive or literacy issues and/or significant addiction or mental health issues
- a person who makes requests for extra help, thereby not respecting either the boundaries in the professional relationship or the retainer
- a person who has already consulted successive lawyers without good explanation.
- Assess the complexity of the matter. Do not agree to provide advice or legal coaching on matters where the client seeks to limit the extent of your assistance beyond what is reasonably necessary in relation to the complexity of the matter.
- When a client requires more information, make sure to pause, assess the situation, and then provide them with the necessary information.
- We recommend starting with ensuring the client knows and understands ILA.
- A few clients may require additional cautions, but this decision should be carefully made considering personal risk, clients' needs, and access to justice issues. It is recommended to include a referral to another professional.
- The following resource may help explain a legal process to a client [Steps in a Family Law Case: Applicant | Family Law Flowcharts](#)

#### *Your Retainer Agreement to Provide ILA*

- It is essential that your retainer agreement be in writing and that it clearly reflects what parts of the matter you will handle and that your client will be responsible for the other parts.
- Review the retainer with the client to ensure the client understands and agrees with the limits of your role/responsibilities and the services that you will be providing.
- Obtain specific instructions from the client within the written retainer agreement allowing you to communicate with the Mediator who assisted with reaching the proposed settlement.

#### *Communications with the Client*

- Ensure that the client understands the limits of your role and of the services that you will be providing throughout the retainer.
- Maintain good communication with the client at all relevant stages in the relationship. Limited scope services typically require more detailed written communication with clients, not less.
- Take comprehensive notes during calls and meetings.
- Avoid miscommunication with the client by documenting rigorously. Keep a written record and copies of all of the information the client has provided.

#### *Document Advice and Decisions*

- Confirm, in writing, the advice you have given and where appropriate, the decision the client has made and your understanding of the reasons for the decision.
- Document your advice to the client to follow up on any legal matters or tasks beyond the scope of the retainer. Have the client acknowledge having received that advice.
- If you identify additional problems or issues, even if they are outside of the scope of the unbundled retainer, you should identify those issues to your client. Clarify what the issues are and whether or not you will be dealing with them. If not, consider referring your client to other professionals for assistance.
- Save any documents you provided advice on or that you helped to draft or edit.

#### *Communications with the Other Side or the Mediator*

- Have clear discussions with your client about who will communicate with the other side or the Mediator and about which issues. Make sure that your client understands that opposing counsel may communicate with them directly about matters outside the scope of your retainer.
- Ensure the retainer agreement is clear with respect to the issues you have authority to communicate with the other side about.
- Have a system in place to deal with situations where the client has also communicated with the other side about an issue which you are tasked with managing.
- Consider having the client review correspondence before sending to the other side (where possible).
- Ensure that your client receives a copy of all correspondence to or from the other side in a timely manner.
- Where responsibility has been divided based on subject matter:
  - co-ordinate communications with your client to avoid duplication and inconsistent messages; and,
  - clearly communicate to the other side to whom the response should be directed – you, the client or both.
- Be cautious of a client who is maintaining responsibility for certain issues in order to manipulate the other party or use up his or her resources.

#### *Collateral Issues*

- Flag any important issues for the client that you become aware of, regardless of whether or not they are covered in your retainer. This includes any limitation periods that may apply.
- Provide sufficient information to the client about the issue and likely consequences so he or she can make an informed decision about how to address the issue.

#### *Avoid Scope Creep*

- Do not provide additional services outside of the scope of the retainer.
- Advise clients of their right/obligation to seek advice on issues outside of the scope of the *limited* retainer.
- Ensure an amended/new retainer is properly executed for new or changed responsibilities.

#### *End of the Retainer*

- Confirm with the client in writing when the retainer has been completed.
- Consider whether you should provide notice to the other side the fact that your representation is complete.

#### *Legal Coaching – Additional Considerations*

- Establish parameters and set boundaries for clients, both as part of the retainer and in the relationship.
- Ask questions to determine the client’s values (as values drive decision-making).
- Remember that this relationship is somewhat unique and that you are teaching, mentoring, and wearing many hats; you are not simply advising.
- Remain non-judgmental.
- Use your emotional intelligence.
- Manage the client’s expectations of what both you and they can achieve, given the law, the facts and their budget.
- Create an action plan for each file.
- Use checklists to identify tasks and next steps and ensure the client understands those steps.
- Do not take steps without asking the client’s permission – the client is in the driver seat of the coaching relationship in terms of how much and how often they seek your assistance.
- Work with your client to set goals, assign manageable and goal-oriented deliverables (“homework”).
- Review deliverables and provide timely feedback.
- Follow up consistently and at key intervals.
- Work to establish trust at each stage.
- Let the client know in writing when the relationship has ended.
- Create a support group of experienced colleagues.

### **3. Sample Drafting Examples**

*MINUTES OF SETTLEMENT: TEN PRACTICE TIPS, courtesy of, Michael B. Kleinman, LL.B., Kleinman Family Law and Janet M. Whitehead, LL.B. AccFM, Whitehead Law & Mediation.*