

To the Standing Committee on Justice Policy:

Re: Bill 14, 2005

ACCESS TO JUSTICE ACT

Submitted on behalf of the ADR Institute of Ontario

**in consultation with the Ontario Association for Family
Mediation, the ADR Section of the
Ontario Bar Association, and St. Stephen's Community
Mediation Service**

Dr. Barbara Landau, Board of Directors, ADR Institute

August 21, 2006

SUBMISSION RE BILL 14

ACCESS TO JUSTICE ACT

To the Standing Committee on Justice Policy:

On behalf of the ADR Institute, I wish to indicate our serious concerns about Bill 14 2005, Access to Justice Act as it may impact mediators, parenting coordinators and arbitrators. The practice of mediation, parenting coordination and arbitration are NOT the practice of law and many of those offering such services, who are members in good standing of the ADR Institute, are not lawyers. What we are seeking is that mediators, parenting coordinators and arbitrators (who are members in good standing of a recognized organization, such as the ADR Institute or the Ontario Association for Family Mediation(OAFM) be exempted under the Regulations.

The Law Society of Upper Canada in its Task Force Report, May 2004 recommended that mediators/ADR practitioners be included in a class of persons exempted from this Act. This did not appear in its recommendations to government in September, 2004. **We urge mediators and other ADR practitioners who are members in good standing of recognized ADR organizations be exempted from this Act.**

We set out the following premises and concerns:

Premises:

1. It is our understanding that the Act anticipates that certain classes of practitioners (paralegals, law clerks, etc.) will be allowed, by bylaws of the Law Society, to seek licences from the Law Society to provide legal services; however mediation, med-arb, arbitration, parenting coordination, and other ADR services are NOT among those classes. The Law Society of Upper Canada Task Force Report in May 2004 recommended that mediators be exempted from the Act; however mediators/ADR practitioners were NOT included in those suggested for exclusion in the Law Society's recommendations in September 2004. While we believe that as mediators or other dispute resolution professionals we do not provide legal services, we feel it is essential for the Law Society to avoid any ambiguity as to whether this legislation is intended to affect us. Therefore, we request that all ADR practitioners be excluded from the Act (whether they are lawyers or not).

2. We understand that the objective of this Act, in part, is to protect the public from individuals or their agents who hold themselves out as practicing law to the detriment of the public, when these individuals are not in fact members of the Law Society of Upper Canada or are under suspension.
3. We assume that the intention is not to unduly restrict other professionals from responsibly offering assistance, advice, and conflict resolution services. In fact other professions, such as psychology and social work do regulate mediators as part of their profession and do not see these services as part of the practice of law.
4. We further assume that the objective is not to unduly restrict informed consumers from selecting professionals, other than members of the Law Society, for information and advice.
5. In addition we assume that the Act entitled "Access To Justice, is intended to make the provision of services in legal disputes more readily available to the general public and open up options of responsible dispute resolution that are non-adversarial, efficient, cost effective and that may be provided by a wide range of professionals or trained individuals who have expertise other than law.

Concerns:

1. Our primary concern is that this Bill unduly restricts the reasonable practices of many professionals. The Act as currently drafted would limit Access to Justice rather than improve services to the public. That is, Bill 14 appears to unduly restrict other professionals, in particular mediators, arbitrators and parenting coordinators from responsibly offering assistance, advice, and conflict resolution services.
2. This Bill affects many different professionals and trained mediators who assist informed and voluntary parties who are seeking cost effective, efficient and non-adversarial dispute resolution for a wide variety of issues. The effect of this Bill as currently drafted could be to greatly increase the number of unrepresented disputants who already clog our courtrooms.
3. This Bill would have a direct impact on my practice and that of my co-professionals. I am a lawyer, psychologist and mediator. I have attached a brief bio setting out my credentials and experience. I am concerned that in all three of my professions, I would be exposed to prosecution as Bill 14 is currently written. While my training as a lawyer may offer protection, in fact my practice as a mediator is NOT the practice of law.

4. When we are acting as mediators, we are not practicing law; however, our work may well *“involve the application of legal principles and legal judgment with regard to the circumstances or objectives of a person”* (*Provision of Legal Services*, s 1 (5)). This statement is too broad and ambiguous to provide reasonable guidance to me or my colleagues to avoid unduly restricting our activities in assisting clients to resolve their legal issues out of court.

6. As mediators, we act as impartial facilitators with clients who choose to address parenting, property, support, business, estate, personal injury, construction, contract, workplace, human rights, harassment, and other issues in dispute. We similarly assist clients with If parties reach agreement. A Memorandum of Understanding is prepared setting out the agreement reached.

7. Family Mediators are instructed to include a notation that “This document represents a statement of intention by the parties and NOT a legally binding agreement”. Family Mediators strongly recommend that parties obtain independent legal advice, and do not witness or have parties sign the Memorandum without ILA. However, according to s. 2 of Bill 14, the mere act of drafting the parties’ intentions is the practice of law and could open mediators to prosecution. Specifically, s.2 of the proposed legislation states that a person who *“selects, drafts, completes or revises”* a document that affects a person’s interests in or rights to or in real or personal property, or a document that relates to the custody of or access to children is providing legal services and can be prosecuted and fined.

8. Similarly mental health professionals (non lawyers) are retained as assessors to prepare custody assessments or as parenting coordinators or family arbitrators to resolve issues related to parenting plans. The results may be incorporated into a Custody-Access Report with recommendations or a Memoranda of Understanding or an Arbitration Award. In each case “documents that relate to the custody of or access to children” (s(2) v.) are prepared which could contravene this Act.

9. Our concern is that the Act could have implications for mediation reports, draft memoranda of understanding, parenting plans, parenting co-ordination plans, arbitration awards, minutes of settlement or agreements, whether they are intended to be reviewed by lawyers or not. We are concerned that the proposed legislation may have a negative impact on the opportunity for parties to access mediation or other dispute resolution processes at a time

when access to the courts and legal services is financially out of the reach of many disputants. Also, a growing number of individuals are seeking non-adversarial approaches to resolving their issues and should be able to access these services.

Summary:

It is reasonable to prosecute unscrupulous individuals who deceive the public by misrepresenting their credentials and offering services fraudulently. However many eminent members of the Bar and judiciary have responded to the public's desire for more efficient, timely and cost effective "multi-door" approaches to legal disputes. They have encouraged the development of non-adversarial or alternative dispute resolution, such as is offered by mediators, arbitrators, med-arb practitioners, parenting coordinators, custody assessors and collaborative practitioners who have many different backgrounds, as selected by the parties.

Bill 14 should be referred to Committee where various groups, including mediators, can raise their concerns, and make constructive suggestions about reasonable distinctions between "legal" services and other professionals who assist informed and consensual parties to make their own decisions.

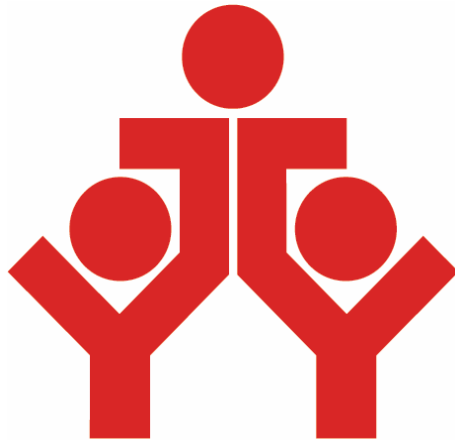
I look forward to an early response.

Yours sincerely,

Barbara Landau, Ph.D., LL.M.
ADR Institute, Board of Directors

NOTE: I have attached the following appendices:

1. Appendix "A" a copy of the Code of Conduct for Mediators of the ADR Institute.
2. Appendix "B" a copy of the Code of Ethics for Mediators of OAFM
3. Appendix "C" a copy of the updated Code of Conduct for Mediators of OAFM.
4. Appendix "D" a short bio setting out my experience and qualifications.



ADR Institute of Canada, Inc.

**Model Code of Conduct
For Mediators**

1. ADR INSTITUTE OF CANADA, INC.

MODEL CODE OF CONDUCT FOR MEDIATORS

The Model Code of Conduct for Mediators (“the Code”) applies in its entirety to every Mediator who is a member of the ADR Institute of Canada, Inc. (“the Institute”), or who accepts appointments from the Institute. While Mediators come from varied professional backgrounds and disciplines, every Mediator must adhere to the Code as a minimum. Being appointed as a Mediator confers no permanent rights to the individual, but is a conditional privilege that may be revoked for breaches of the Code.

The Institute, or any of its Regional Affiliates, is empowered to investigate alleged breaches, including temporarily suspending any Mediator from any of its rosters or membership in the Institute, pending the outcome of an investigation. The Institute is empowered to cancel membership in the Institute or remove any Mediator from its rosters if the Mediator is determined by the Institute either on its own behalf or upon the recommendation of any of its Regional Affiliates to be in breach of the Code. It will be the objective to ensure that complaints are investigated fairly, and that no Mediator is arbitrarily suspended or removed.

I. OBJECTIVES FOR MODEL CODE OF CONDUCT FOR MEDIATORS

The main objectives of the Code for Mediators are as follows:

- (a) to provide guiding principles for the Mediator's conduct;
- (b) to provide a means of protection for the public; and
- (c) to promote confidence in Mediation as a process for resolving disputes.

II. DEFINITIONS

In the Code:

"Mediation" means the use of an impartial third Party to assist the parties to resolve a dispute, but does not include an arbitration.

"Mediator" means the impartial person or persons, engaged to assist the parties to resolve a dispute, but does not include an arbitrator unless the arbitrator is acting as a mediator by consent of the parties.

“impartial” means being and being seen as unbiased toward parties to a dispute, toward their interests and toward the options they present for settlement.

III. PRINCIPLE OF SELF-DETERMINATION

1. Self-determination is the right of parties in a Mediation to make their own voluntary and non-coerced decisions regarding the possible resolution of any issue in dispute. It is a fundamental principle of Mediation which every Mediator shall respect and encourage.
2. The Mediator shall provide information about his or her role in the Mediation before Mediation commences, including the fact that authority for decision-making rests with the parties, not the Mediator.
3. The Mediator shall not provide legal or professional advice to the parties.
4. The Mediator has the responsibility to advise unrepresented parties to obtain independent legal advice, where appropriate. The Mediator also has the responsibility where appropriate to advise parties of the need to consult other professionals to help parties make informed decisions.

IV. INDEPENDENCE AND IMPARTIALITY

1. Unless otherwise agreed by the parties, a Mediator shall be and remain, at all times, wholly independent.
2. The Mediator shall be and remain wholly impartial and shall not act as an advocate to any party to the Mediation.
3. The Mediator shall not establish a professional relationship with or act for any of the parties individually in relation to the particular dispute that is the subject matter of the Mediation in any capacity, unless all parties consent after full disclosure.
4. If the Mediator becomes aware of his or her lack of impartiality, he or she shall immediately disclose to the parties that he or she can no longer remain impartial and shall withdraw from the Mediation.

V. CONFLICT OF INTEREST

1. The Mediator has a responsibility to disclose as soon as possible to the parties in dispute any personal interest, conflict of interest, bias, or circumstances likely to give rise to a reasonable apprehension or presumption of bias that are known to the Mediator, or which becomes known after his or her appointment.

2. Any Mediator who has made a disclosure pursuant to V.1 shall withdraw as Mediator, unless the parties consent to retain the Mediator.
3. The Mediator's commitment is to the parties and the process and he or she shall not allow pressure or influence from third parties (including, without limitation, persons, service providers, Mediation facilities, organizations, or agencies) to compromise the independence of the Mediator.

VI. CONFIDENTIALITY

1. The Mediator shall inform the parties of the confidential nature of Mediation.
2. The Mediator shall not disclose to anyone who is not a party to the Mediation any information or documents that are exchanged for or during the Mediation process except:
 - (a) with the mediating parties' written consent;
 - (b) when ordered to do so by a court or otherwise required to do so by law;
 - (c) when the information/documentation discloses an actual or potential threat to human life;
 - (d) any report or summary that is required to be prepared by the Mediator; or
 - (e) where the data about the Mediation is for research and education purposes, and where the parties and the dispute are not, nor may reasonably be anticipated to be, identified by such disclosure.
3. If the Mediator holds private sessions (breakout meetings, caucuses) with a party, he or she shall discuss the nature of such sessions with all parties prior to commencing such sessions. In particular, the Mediator shall inform parties of any limits to confidentiality applicable to information disclosed during private sessions.
4. The Mediator shall maintain confidentiality in the storage and disposal of Mediation notes, records and files.

VII. QUALITY OF THE PROCESS

1. The Mediator shall make reasonable efforts to ensure the parties understand the Mediation process before Mediation commences.
2. The Mediator has a duty to ensure that he or she conducts a process which provides parties with the opportunity to participate in the Mediation and which encourages respect among the parties.
3. All Mediators have an obligation to acquire and maintain professional skills and abilities required to uphold the quality of the Mediation process.
4. The Mediator shall conduct himself or herself professionally at all times, and shall not engage in behaviour that will bring disrepute on the Mediator or the Institute.

VIII. ADVERTISING

In advertising or offering services to clients or potential clients:

1. The Mediator shall refrain from guaranteeing settlement or promising specific results.
2. The Mediator shall provide accurate information about his or her education, background, Mediation training and experience, in any representation, biographical or promotional material and in any oral explanation of same.

IX. FEES

1. The Mediator shall provide parties with the fee structure, likely expenses and any payment retainer requirements before Mediation commences.
2. The Mediator shall not base his or her fees on the outcome of Mediation, whether there is a settlement, what the settlement is, or the amount of the settlement.
3. The Mediator may charge a cancellation or a late/delay fee within the Mediator's discretion, provided the Mediator advises the parties in advance of this practice and the amount of the fee.

X. AGREEMENT TO MEDIATE

The Mediator, together with the parties, shall prepare and execute a Mediation Agreement setting out:

- (a) the terms and conditions under which the parties are engaging the Mediator;
- (b) any of the National Mediation Rules of the Institute which the parties agree shall not apply to the Mediation; and
- (c) any additional rules which the parties agree shall apply to the Mediation.

Should the parties be unable to agree on a Mediation Agreement, the Institute's Standard Form Agreement to Mediate shall be used.

XI. TERMINATION OR SUSPENSION OF MEDIATION

1. The Mediator shall withdraw from the Mediation for the reason referred to in paragraph IV.3.
2. The Mediator may suspend or terminate the Mediation if requested, in writing, by one or more of the parties.
3. The Mediator may suspend or terminate the Mediation with a written declaration by the Mediator that further efforts at mediation would not be useful.

XII. OTHER CONDUCT OBLIGATIONS

Nothing in the Code replaces or supersedes ethical standards and codes which may be additionally imposed upon any Mediator by virtue of the Mediator's professional calling. Where there are conflicting codes of conduct, the Mediator shall be bound by the stricter of the codes.

2.

Code of Ethics Ontario Association for Family Mediation Code of Professional Conduct

Reproduced with the permission of the Ontario Association for Family Mediation.

1. Foreword

The following rules are intended to govern the relations of family mediators with their clients, their professional colleagues, and the general public so that all will benefit from high standards of practice in family mediation. The rules are to be observed in spirit as well as in practice.

2. Definition of Terms

For the purposes of this Code, family mediation is defined as a non-adversarial process in which a qualified and impartial third party (the mediator) helps family members resolve their disputes. The resolution is voluntary and is based on sufficient information and advice for each participant.

In open mediation, if the parties fail to agree voluntarily on one or more issues, the mediator may prepare a report on the mediation and/or make recommendations. In open mediation, such a report may be used in subsequent court proceedings.

In closed mediation, there is no such report or recommendations and the process is entirely confidential.

3. Competence

It is the obligation of anyone acting as a family mediator to ensure that he or she is fully qualified to deal with the specific issues involved.

- (a) It is acknowledged that family mediators will have a diversity of education and training, but the obligation to refrain from rendering services outside the limits of the family mediator's qualifications and capabilities remains.
- (b) Family mediators shall co-operate with and endeavor to involve other competent professionals where the situation requires it.
- (c) Family mediators shall engage in continuing education to ensure that their mediation skills are current and effective.
- (d) Family mediators shall perform their service in a conscientious, diligent, and efficient manner in accordance with this Code of Conduct.

4. Duty of Confidentiality

The mediator shall not voluntarily disclose to anyone not a party to the mediation any information obtained through the mediation process except:

- (a) non-identifying information for research or educational purposes; or
- (b) with the written consent of the parties to the mediation contract; or
- (c) where ordered to do so by an appropriate judicial authority or required to do so by law; or
- (d) where the information discloses an actual or potential threat to human life or safety or a proposed breach of the Criminal Code of Canada.

If mediation is open, communications made in the course of the mediation and the mediator's report and recommendations may be disclosed to a third party only for the purposes of resolving the dispute whether by litigation or otherwise.

While closed mediation imposes the intention and the duty of confidentiality on the mediator, it cannot confer privilege, and the mediator should advise the parties that the intended confidentiality cannot be guaranteed.

5. Impartiality

The mediator has a duty to be impartial in relation to the participants. Impartiality requires that the mediator shall not have preconceived opinions in favour of or against one person or the other.

- (a) The mediator shall disclose to the participants any biases he or she may have relating to the issues to be mediated.
- (b) The mediator will refrain from mediating in cases where the mediator knows there has been any significant prior involvement by the mediator or any partner or associate of the mediator with one of the participants except after full disclosure of the involvement to, and express consent by, the other participant(s). The role of the mediator should be distinguished from the earlier relationship.
- (c) A lawyer-mediator, or any partner or associate of such lawyer-mediator, should decline to represent either or both spouses in any subsequent legal matter related to the issues mediated. Rather, the mediator should keep him or herself available as a neutral to assist the parties in future in the event that any modifications are required to the mediated settlement.
- (d) The perception of partiality on the part of the mediator by one or both participants does not in itself require the mediator to withdraw. In these circumstances, it is only the duty of the mediator to advise the participants of their right to terminate the mediation.

6. Agreement to Mediate

The mediator has a duty to explain the mediation process clearly to the participants before reaching an agreement to mediate. In particular, the mediator shall do the following:

- (a) define mediation, distinguishing it from other methods of dispute resolution and from therapy and marriage counselling;
- (b) determine the appropriateness of mediation for the participants in light of their particular circumstances;
- (c) discuss the differences between closed mediation, open mediation and assessment, and the implications of each, and require the parties to choose open or closed mediation;
- (d) advise participants that either of them or the mediator has the right to suspend or terminate the process at any time;
- (e) explain the cost of mediation and reach an agreement with the participants regarding payment. It is inappropriate for the mediator to charge a contingency fee or to base the fee on the outcome of the mediation process;
- (f) advise the participants of the role of independent legal advice in accordance with paragraph 9 of this Code. In the event the mediator is a lawyer, the lawyer-mediator shall inform the participants that he or she cannot represent either or both of them in any subsequent legal matter related to the issues mediated;
- (g) discuss with the participants the mediator's specific procedures and practices;
- (h) recommend that the agreement to mediate be written and signed by the parties and the mediator.

7. Potential Problems in Mediation

It is the duty of the mediator to advise the participants of potential problems that may arise during mediation. Some of these problems include:

- (a) the possibility that one or both spouses may use the time during the mediation to dissipate or conceal assets;

- (b) the fact that a status quo may be developing with respect to the custody of the children so that the non-custodial parent may be prejudiced in any future custody claim in the courts, notwithstanding any agreement to the contrary;
- (c) the fact that information disclosed during the mediation may be used against a participant in the event of subsequent legal proceedings.
 - i) Even if the information disclosed directly in the mediation is confidential, it may open up lines of inquiry and/or reveal other information which might not otherwise have come to light in any subsequent litigation.
 - ii) A judicial authority may require disclosure of information revealed during mediation.

8. Information, Disclosure and Advice

It is the duty of a mediator to actively encourage the participants to make decisions based upon sufficient information, knowledge and advice:

- (a) Every family mediator has an ongoing obligation to advise participants of the desirability and availability of independent legal advice. While neutral legal information may be made available to the parties, each should be encouraged to obtain legal advice.
- (b) Where financial or property issues are involved, the mediator shall obtain an undertaking from the parties to make frank and full disclosure of their financial and related circumstances at the appropriate time in the mediation process. The mediator will assist the parties and their advisors to achieve such disclosure. A mediator has an ongoing obligation to advise both parties to obtain legal and other professional advice and assistance in this respect.

9. Independent Legal Advice

It is the obligation of every family mediator to advise clients:

- (a) of the availability of independent legal advice for each spouse;
- (b) of the advisability of obtaining it from the outset of the mediation;
- (c) to obtain independent legal advice prior to signing the mediated agreement.

10. Duty to Minimize Harm or Prejudice to Participants

It is the duty of the mediator to suspend or terminate mediation whenever continuation of the process would harm or prejudice one or more of the participants.

- (a) The mediator shall suspend or terminate mediation where the ability or the willingness of either of the participants to effectively participate in the process is lacking
- (b) The mediator shall suspend or terminate mediation when its usefulness is exhausted so that there is no unnecessary expense to the participants from unproductive mediation.
- (c) If the mediator has suspended or terminated the process, he or she may suggest that the participants obtain appropriate professional services.
- (d) When the mediator believes the agreement being reached is unreasonable, he or she shall so advise the participants.
- (e) Notwithstanding impartiality, the mediator has the duty to promote the best interests of the children and to assist the parents to examine the separate and individual needs of each child.
- (f) While the mediator has an obligation to minimize the harm or prejudice to participants in the process, it is a fundamental principle of mediation that competent and informed participants can reach an agreement which may not correspond to legal guidelines contained in the relevant statutes or case law or that does not correspond to general community expectations and standards.
- (g) The mediator shall see that the participants are reaching agreement freely, voluntarily and without undue influence.

11. Public Communications

- (a) The purpose of public statements concerning family mediation should be:
 - i) to educate the public generally about the process; and
 - ii) to present the process of mediation objectively as one of several methods of dispute resolution in order to help the public make informed judgments and choices.
- (b) When advertising professional services, mediators should restrict themselves to matters which educate and inform the public. These could include the following to describe the mediator and the services offered: name, address, telephone number, office hours of the particular mediation service, highest relevant academic degree, relevant training and experience in mediation, appropriate professional affiliations and membership status, and any additional relevant or important consumer information.
- (c) Public Communications should not imply that membership in the Ontario Association for Family Mediation constitutes certification as a mediator.

12. Duty to Encourage Reporting of Breaches of Code

It is the obligation of family mediators to encourage clients to report in writing real or apparent breaches of this Code forthwith to the Chairman of the Standards and Ethics Committee and/or to the President of the Ontario Association for Family Mediation.

Note: In 1994 OAFM added the Abuse Policy to the Code of Conduct.

3.

OAFM Practice Standards

Barbara Landau, Ph.D., LL.B., LL.M. &

Susan Healey, LL.B., Chair, Standards and Ethics Committee

April 28, 2005

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;
- (e) 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;
- (f) advise participants that either of them or the mediator has the right to suspend or terminate the process at any time;
- (g) 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;
- (h) 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
- (i) 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*).

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!!!

4.

Dr. Barbara Landau, President of Cooperative Solutions, is a Psychologist, Lawyer, Mediator & Trainer. In 2004, Dr. Landau received the Long Term Achievement Award (FAMMA) from Family Mediation Canada. In 2003, she received the “Distinguished Mediator Award” from the Association for Conflict Resolution (ACR). In 2002, The “Award For Excellence in Dispute Resolution” was given to her by the Ontario Bar Association (OBA). The lifetime title of “Fellow of the Canadian Psychological Association”, was awarded for outstanding contribution to clinical psychology.



Barbara is a Chartered Mediator, a Certified Comprehensive Family Mediator, who restricts her family practice to Collaborative cases. She has successfully resolved family law disputes, including parenting plans, financial issues, family businesses, estate issues, as well as workplace, commercial and personal injury matters.

Barbara is a former:

- executive member of the ADR Section of the Ontario Bar Association
- Vice President of the ADR Institute of Ontario and current Board member
- President of the Ontario Association for Family Mediation
- executive Board member of the Academy of Family Mediators (now ACR)
- executive member of the Ontario Advisory Council on the Status of Women.
- Director of the Psychology Foundation of Canada, chairing the “In Place of Violence” Committee.

She has offered conflict resolution, and mediation workshops in several countries, as well as collaborative practice courses, to lawyers, mental health professionals, teachers, students, human resources specialists, and others. Several courses are offered through Conrad Grebel University College, University of Waterloo. Also, Barbara has considerable management experience in several health care organizations.

Barbara has co-authored two books, edited another, and published numerous articles on mediation and collaborative law, including “***The Family Mediation & Collaborative Practice Handbook***” (4th ed), 2005, Barbara Landau, Lorne Wolfson, Niki Landau; and “***From Conflict to Creativity***”, 2001, Sy Landau, Barbara Landau & Daryl Landau.

In 1999, Barbara participated in a “citizen diplomacy” mission to Israel, the West Bank and Gaza to compassionately listen to Israelis and Palestinians as a step toward peace and reconciliation. As the Co-Chair of the Canadian Association of Jews and Muslims, she co-leads Dialogue Groups to build understanding and respect between Jews, Muslims and Palestinians living in Toronto.