This Handbook was first published in October 2018. This version dated April 2020 . The law or procedure may have changed since that time and members should check the up-to-date position.

Covid-19 – Information for all Mediators

There is a supplement document to this Handbook covering on-line working for mediators, please read the supplement in conjunction with this handbook for the most up to date information about providing mediation services online

The Mediation Handbook

Welcome to Resolution's Mediation Handbook. The handbook sets out good practice guidance for mediator members of Resolution and for those members who work closely with the mediator community. It explains the principles of mediation, the requirements of the Family Mediation Council's (FMC) Code of Practice and sets a framework for the conduct of consistent and high-quality mediation practice.

Solicitor members should be aware that there is also guidance on good practice in relation to the responsibilities of solicitors in relation to mediation and good professional relationships between mediators and solicitors (see page 66).

The Family Mediation Council

Resolution is a Member Organisation (MO) of the Family Mediation Council (FMC). Resolution has adopted the Code of Practice for Family Mediators, which is published by the FMC. All mediator members must adhere to the Code of Practice (May 2018).

The FMC has also published a Manual of Professional Standards and Self-Regulatory Framework for all family mediators. This framework came into force on 1 January 2015 and all mediators should be aware of and adhere to the requirements. Guidance is also available for online video mediation.

This handbook follows the Code of Practice headings in setting out good practice guidance for all Resolution mediators and additionally includes sections relating to conduct of mediation, other professional practice considerations and in regard to variations and advances in practice.

Mediator members are reminded that support for appropriate self-regulation of practice, including assistance with matters of good practice, can also be provided by their

Professional Practice Consultant (PPC).

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Qualifications, training and ongoing professional support

All family mediators are required to work towards and maintain the standard of accreditation set out in the FMC Manual of Professional Standards and leading to the award of the title *FMC Accredited Family Mediator* (FMCA).

- Details of arrangements for mediators working towards their accreditation and in relation to maintaining accredited status are also set out in the manual. Resolution has produced Mediation Accreditation Guidance, which all unaccredited mediator members are advised to read. Mediators should also be in contact with their own professional practice consultant (PPC) in order to discuss how the standards may affect their practice and, if they are unaccredited, to plan towards submitting a portfolio for assessment.

The FMC Manual can be viewed or downloaded from www.familymediationcouncil.org.uk. Further information will be published by the FMC and member organisations as it becomes available.

Accreditation

All family mediators are required to attain FMCA (Family Mediation Council Accredited) status within three years of their foundation training, where possible. See the Family Mediation Standards Board (FMSB) Extension Policy and Procedure for exceptional circumstances and transitional arrangements for unaccredited mediators who trained before 1 January 2015. The FMC operates anan extensions policy for mediators who have not managed to attain their accreditation within three years of initial training.

It is important to understand that your foundation or initial training is only the beginning of your continuing development towards accreditation. Post-accreditation you are still required to maintain your learning and development to the standards set by the FMC.

Accreditation is for a period of three years so you will be required to re-accredit every three years.

Full details of the routes to accreditation via either The Law Society or the Family Mediation Council schemes are provided on the relevant websites. At the time of writing, the FMC has issued guidance regarding Accreditation deadlines, CPD and PPC requirements during the coranirus outbreak. Please ensure that you have read the guidance which may be accessed here

As of June 2019, the FMSB has issued information about changes to the Accreditation procedure as part of the review of Accreditation and Standards they are undertaking. These changes are designed to assist mediators who may have been struggling to reach a point where they can apply for Accreditation and include:

- being able to have the required observation of their practice carried out by another PPC or an FMCA mediator with three years post-qualifying experience (with the knowledge and agreement of their own PPC)
- being able to submit one case which has not completed or concluded but which provides evidence of skills used and provides an opportunity for the mediator to reflect on learning outcomes from it (you will still need to submit any actual or draft interim summaries) and
- the ability to submit one case where you have prepared client outcome documents that have not been provided to clients (because they either didn't want them or did not want to pay for them)

Full information about these new arrangements is provided in Resolution's Guide to Accreditation and on the Resolution and FMC websites.

Conduct of mediation information and assessment meetings (MIAMs)

From 1 January 2016 only accredited mediators (mediators holding FMCA status) may conduct statutory MIAMs. A statutory MIAM is required when a person has an immediate or settled intent to issue proceedings.

It is different from a prospective client who may be interested in finding out about mediation but who is not considering issuing proceedings in the immediate future.

This is an important distinction. The purpose of a MIAM is to assist people who are planning to issue proceedings in finding out whether mediation might be suitable for them in order to deflect them from an adversarial court route. The exception is where it is essential that individuals are protected by the court, for example, where abuse, violence or harm is suspected or where there are particular concerns for the children of the family.

Similarly, an initial meeting with someone who is interested in mediating or finding out about other forms of dispute resolution, aims to assist them to make the right decision for them and their family. It is not to raise the prospect of proceedings, unless it's appropriate and helpful to do so.

We recognise that it may be difficult to establish whether an individual may need a signed court form. You're advised to discuss this aspect of practice with your PPC as there is provision in the FMC arrangements for a PPC to sign court forms on behalf of their consultee.

Resolution has published a flowchart and explanatory note about the conduct of MIAMs and initial meetings.

The FMC issued guidance on the same subject which can be found on their website.

More information regarding the status of MIAMs is set out in the relevant later sections of the Handbook. The FMC Code of Practice also covers principles in relation to the conduct and status of the MIAM.

Professional practice consultancy

Professional practice consultancy ensures mediators have the guidance, support and help of a trained and experienced consultant or supervisor. Consultants are experienced mediators, trained and recognised to act as practice consultants and are required to hold and maintain FMCA status. All PPCs recognised by the FMC are subject to the FMC Code of Practice for PPCs

The Professional Practice Consultant's (PPC) role is to:

- assist new mediators as they begin their practice
- support mediators to develop their practice and accredit, including providing a statement confirming and endorsing their supervisee's application for accreditation.
- be available to support mediators with issues that may arise in their day-to-day practice. This includes providing support where there has been an allegation in respect of harm to a client or their children or there has been a client complaint.
- provide confirmation as and when required that the mediator has met the standards in relation to continuing development and practice consultancy.

Where mediators provide legally aided mediation, the PPC provides practice supervision to the terms required by the Legal Aid Agency in its family mediation contract, which includes review of mediation files.

Pre-Accreditation your PPC is required to see and approve any outcome documents (MOU/OFS) prior to them being sent to your clients. They may also want to consider with you how you are going to set up and manage your client files and what reviews of your client files or documents may be helpful for you as there are competencies to be met in doing so. PPCs will have useful experience themselves of what works in terms of the management and administration of mediation and most mediators find it helpful and useful to have the assistance of their PPC when thinking through how they might best manage client files and documentation and in any feedback they receive from their PPC in relation to

client outcome documentation. Please make sure that you and your PPC have talked through how best to manage sign off for client outcome documentation as your PPC will be anxious to avoid any delays being caused.

PPCs who undertake this role must be accredited and be registered with the FMC. They must otherwise meet the requirements set out in the contractual Quality Standards required by the Legal Aid Agency and the FMC Standards, including adherence to the FMC Code of practice and Guidance for PPCs.

Full details in relation to the PPC's role in your continuing development, practice consultancy and accreditation are set out in the FMC Standards Framework Manual and in the PPC Code of Practice and Guidance.

You are required to meet with your PPC on a one-to-one basis (minimum 2 hours per year) and may also accrue additional required hours by meeting with a PPC as a member of a peer group. If you're working towards accreditation, you're required to undertake more hours with your PPC than mediators who are post-accreditation: you must have 4 hours of PPC time each year (of which at least 2 hours much be one to one, face to face contact) plus an additional 10 hours of one to one time between completing initial foundation training and the point of submitting your accreditation portfolio. In summary:

Annual requirement for mediators working towards accreditation:

- 4 hours of time spent with a PPC of which:
    - 2 hours must be one to one, face to face
    - 2 hours can be as a member of a peer group led by a PPC, or as co-consultancy (with a mediator colleague)

Plus:

- 10 hours of one to one time between completion of initial training and submission of accreditation portfolio

This ensures continuing development toward accreditation and provides you with an enhanced level of professional support (see FMC Standards Framework Manual, 2.1 Post Training Requirements, p.6).

A level of consultancy can be provided via telephone or Skype/Zoom but be aware that this

should not be the greater part of your required PPC hours. Many PPCs lead peer groups or arrange with mediators to offer peer group meetings in local areas. You may attend groups led by a PPC other than your own for the purposes of your PPC hours but please ensure that you have agreed that to be the case with your own registered PPC first. The PPC network is still growing and there are shortages in some areas, so some PPCs travel to see mediators at some distance from their own home area.

There is a charge for time spent with a PPC. Rates vary, so ask what your individual PPC's rate is when you make contact. Many PPCs offer rates that are lower than their usual hourly rate (in any other professional role they have), to ensure they offer an affordable service to mediators. PPCs who travel to consultees generally charge for travel, so check this too if you choose a PPC who is at a distance.

Generally, it's your responsibility to choose and maintain contact with a PPC whom you think best meets your needs. It's important that the relationship is good, productive and comfortable, so you're encouraged to choose your PPC carefully.

PPCs should provide a written contract or agreement for the purposes of setting out arrangements for professional support, which should be signed by both you and your PPC. If you wish to change or move on, your PPC will expect you to let them know. Any new PPC will need to check that the former PPC has been informed of your decision to change and the reasons for it. They'll also familiarise themselves with any issues or concerns on the part of the previous PPC or for you.

You must meet the requirements for time spent annually with your PPC. PPCs generally expect to spread the time and support they provide to mediators over the year as a means to properly support you in practice. Make sure you discuss a schedule with your chosen PPC for your consultancy over the year.

PPCs are responsible for guiding and supporting their consultees towards accreditation, providing oversight and approval of their client outcome documents prior to them being sent to clients, observing some of their practice, providing constructive feedback, and preparing a statement in relation to the mediator's overall development. This all forms part of your accreditation portfolio. In order for your PPC to do this, they must have sufficient knowledge of your professional development and practice leading up to your application for accreditation.

Post-accreditation practice

Once accredited, you're required to spend four hours a year with your PPC. At least two hours should be an individual meeting in person or by telephone or Skype. Phone or Skype should not represent the majority of the time spent with your PPC, but if you have an at distance arrangement, this can ensure you keep the contact that you need over the year. You and your PPC will want to arrange your post accreditation PPC time to provide the most appropriate support for you. This may include case discussions, review of your practice and what goals you may wish to set for yourself and your practice, support if you have a complaint and reviewing documents and files as agreed between you.

The remaining two hours can be spent in a variety of ways. Many PPCs lead peer groups or arrange with mediators to offer peer group meetings in local areas, remember that if you're attending a group led by a PPC other than your own registered PPC, you must let your own PPC know that is the case.

You will need to reaccredit every three years, so it's important to maintain the PPC and continuing development requirements over the three years to ensure you're able to reaccredit. Further details about reaccreditation arrangements are available in the FMC Standards Framework Manual and on the FMC and Law Society's websites respectively.

Continuing development

You are required to record your continuing development. The FMC describes this as being able to '…demonstrate that adequate steps have been undertaken to keep up to date and maintain the ability to practise competently'. These arrangements replace the previous annual CPD requirement.

Continuing development can be achieved through a wide range of means, including accredited and non-accredited courses and conferences, practice-based activities (such as co-mediation, observation and action-based learning), online learning, research, reading and higher education programmes. There are no restrictions on the kind of activities that count, but it's important they're relevant to your practice, result in relevant learning and

benefits, and taken together, provide an adequate level of updating and development.

It's important to discuss your continuing development with your PPC, however the FMC framework makes clear that activities chosen and undertaken are your responsibility and do not need to be endorsed by your PPC. The framework further points out that mediators are strongly advised to record and evaluate activities as they take place, rather than waiting until the point of renewal of membership or accreditation/reaccreditation. It's important that you develop good habits in recording activities undertaken and reflecting on them (with or without the help and support of your PPC) and in considering your overall developmental pathway, both before and after accreditation. Resolution provides templates to record your learning and development on the mediators section of the website.

Publicly funded (legal aid) mediation practice

You must hold a family mediation contract if you want to offer legally aided family mediation. You must also be a member of an FMC member organisation and hold FMCA accreditation, either via the FMC or The Law Society. Be aware of the contractual quality standards of the Legal Aid Agency and also be aware that contracts also require that you meet the requirements of the FMC Standards. It will be important that you keep up to date with any changes to either the quality standards set by the LAA or the practice standards of the FMC.

You must also ensure that you meet the requirements set out by the Legal Aid Agency in relation to appropriate administration of your contract, including obtaining all documentary evidence from clients regarding their eligibility for legal aid.

Direct consultation with children (DCC) and Child Inclusive Mediation (CIM)

In 2018, the FMC issued a new section of the Standards Framework in relation to the move from Direct Consultation with Children in mediation to a new child inclusive model for practice. All mediators are affected by these changes and you are advised to read the new Part 6 of the Framework document to familiarise yourself with requirements.

All mediators are now required to complete a Child Inclusive Mediation (CIM) Awareness and Understanding Day and if you are working towards your accreditation and you are submitting or intend to submit your portfolio after 1st September 2019, you must have attended an Awareness and Understanding Day prior to submitting your portfolio for assessment.

If you currently see children directly as part of a parental mediation process, you must have successfully completed recognised training and assessment, and your practice must be supervised by a PPC who is trained and qualified as a mediator and PPC for the purposes of direct consultation with children and in the future, child inclusive mediation. Additionally, you must hold an appropriate level of DBS (formerly CRB) check. You will need to attend a CIM Update Day to be recognised as a CIM mediator or PPC.

Resolution offers Child Inclusive Mediation Awareness and Understanding training for all mediators and in the coming months, update training for DCC qualified practitioners and for DCC PPCs and new initial training for mediators who wish to train to talk with children directly will be available. Those who wish to train for direct work with children and young people must be accredited and have the endorsement of their own PPC as a minimum entry qualification. The FMSB must approve initial training programmes so dates for training may be delayed whilst the approval process is completed. Resolution will publish details of training on the training and events section of the website.

Insurance

Appropriate professional indemnity cover is a requirement for mediators whether they are offering legally aided mediation or in private client practice and is a requirement set out in the FMC Code of Practice. Solicitor members can usually inform their insurer that they'll be offering mediation without incurring any loading or excess premium to their existing cover (but please ensure that you have read the requirements in relation to the SRA and complaints in this Guide). Barrister mediators should likewise check whether their existing insurance will also cover any work they do as a mediator. With the introduction of the new General Data Protection Regulation (GDPR), those mediators relying on their practice or firm's insurance are advised to check with their insurers as to arrangements for storing and destroying information. Mediation is not a legal activity and as such, retention of personal information is not governed by rules and regulations required of solicitors but which may

form part of insurance requirements.

If you're a Professional Practice Consultant or a mediator who sees children and young people directly as part of your practice, you should ensure you have informed your insurers in writing that that is the case.

If you are a mediator who prepares draft detailed terms or draft orders as part of your mediation practice and within the joint Resolution and Law Society guidance approved by the FMC, you must adhere to the guidance and only prepare such drafts within the 'without prejudice' Memorandum of Understanding or Outcome Summary using the wording recommended. If you prepare a draft order as an 'open' document, you should ensure that you have checked the terms and limits of your insurance. Full information is available at the scction related to enduring outcomes from mediation in this handbook.

It's important to ensure that you have a suitable level of insurance. It should cover, for example, working away from your office base, working with a co-mediator under the rules of that mediator's member organisation, in a hybrid process or where the client's asset base may exceed their level of indemnity. It's usually possible to negotiate single premiums where there is a need to increase cover for an individual case.

You must work within the FMC Code of Practice and the fundamental principles of family mediation for your insurance cover to remain valid on any claim.

Note for PPCs: If you agree to sign any court forms that might be required following a non-statutory MIAM conducted by your consultee, please check with your insurer that you're indemnified to do so.

Scope and principles of mediation

Family mediation is a process in which those involved in family breakdown, whether or not they're a couple or other family members, appoint an impartial third person to assist them to communicate better with one another and reach their own agreed and informed decisions concerning some, or all, of the issues relating to separation, divorce, children, finance or property by negotiation.

Family mediation may also be appropriate in other family transitions, such as family disputes, family businesses, inter-generational matters or inheritance planning.

Family mediation is a principled and structured process of family dispute resolution or solution seeking. In assessing for suitability and in conducting mediation, all mediators should ensure they fully explain the principles of mediation to clients (or prospective clients) and make sure they adhere to those principles in practice. You should also ensure that you only work within the limits of your competence as a practitioner.

Impartiality and conflicts of interest

The requirements in regard to impartiality and conflicts of interest are set out in the Family Mediation Council Code of Practice.

Generally, mediators must:

- act impartially in conducting any process of mediation and with integrity and fairness towards each participant.

- not have any personal interest in the outcome of the mediation

- not mediate in any case in which they have acquired or may acquire relevant information in any private or other professional capacity

- not act if they or a member of their firm has acted for any of the individuals in issues relating to the mediation

and

- where mediation services are offered as part of a practice/consortia offering other professional services or where an individual mediator carries out work for a practice on a **consultancy** basis, a mediator from that Practice or a consultant to that practice may not act as a mediator for any participant who has received other professional services from that practice unless the mediator is satisfied that:
- the information given to other professionals at the practice has no bearing on the issues to be addressed in the mediation; and
- the participants have been informed of the potential conflict of interest and have given consent in writing to the mediator conducting the mediation.

The consent of the participants does not lessen the mediator's duty to act impartially and with integrity and fairness towards each of the participants. Mediators must conduct mediation as an independent professional activity and must distinguish that activity from any other professional role in which the mediator may practise.

Conflicts of interest

You must ensure that you work within the FMC Code of Practice in regard to conflicts of interest. A number of mediators:

- Also work as family lawyers
- Work for more than one practice or service
- Work in a local area where the numbers of family lawyers and/or mediators are limited

This can result in referrals for mediation coming into practices where the mediator may

have had contact with a potential mediation participant either in the current, or another, service or practice in the past. Where this is the case, you must consider carefully the conflict of interest that does (or may) exist and whether it's possible for you to consider acting as a mediator within the parameters of the FMC Code of Practice. In any event, where you identify a conflict (or perceived conflict), you must raise it with each and both potential clients and explore with them the possibility of you acting as mediator. You must be satisfied that you are working within the Code of Practice.

It will be important for you to have considered fully with each potential participant their ability to accept that there's a potential or perceived conflict of interest. Although some people may present as being comfortable with the issue of previous contact, it may be difficult for them not to raise it as a challenge to you or your conduct of the mediation, especially if they're worried or anxious about the potential outcome. The previous contact could also be used as an attempt to align themselves with you inappropriately.

You must also ensure you're mindful of other aspects of assessment. This includes whether there is, may be, or may have been any intimidating or manipulative behaviour that could influence an individual's decision to agree to a mediation where there might be a potential conflict.

Therefore it will be important that you consider carefully with each person:

- The type and nature of any potential or perceived conflict
- Whether each of them is clear about it
- Whether they both have the ability to accept and cope with the fact that there's a potential or perceived conflict
- That they're each willing to provide written consent which has been given freely and without any form of undue influence

Please ensure the wording for any written consent also indicates that the nature of the conflict has been explained fully, that they've understood the nature of the conflict and that they agree to the mediation going ahead.

As a general guide, you should:

- Consider whether the perceived or potential conflict is too great to make the prospect of mediation possible within the terms of the Code of Practice
- Raise and explore the potential or perceived conflict with each participant

- Be careful to assess each person's ability to feel comfortable with the issue of conflict should they choose to mediate
- Make an appropriate assessment of whether there is, or has been, any intimidating or manipulative behaviour that might result in undue influence being exercised by one person on the other
- Be sure you're satisfied that both participants have understood the nature of the conflict and their consent in writing is given freely and in the full knowledge of the conflict which exists or may exist.

If you agree together that mediation can go ahead, you should remind potential clients that you'll be conducting any process of mediation impartially and have a responsibility to act in an even-handed and balanced way.

Please note: the review to the rules does not mean that direct referrals can be made within firms or practices. If a lawyer member of the practice that you provide services for is acting for an individual in relation to the same matter on which the client and their former partner wish to mediate, you may not act as mediator.

Impartiality in practice

Impartiality is a difficult word in that it may have different meanings to individuals. Generally, as a mediator, you may find it helpful to refer to your responsibility to act in an even-handed or balanced way, which can be clearer for individuals. You may also find it helpful to invite individuals to let you know if they feel that at any time, you are not being even-handed or balanced in order that you can deal with it. 'Giving permission' in this way may well avoid misunderstandings arising, which can disrupt or threaten your mediation process. You have a general responsibility to conduct any process of mediation in an impartial way rather than acting impartially as an individual.

You have a particular responsibility to prevent any manipulative, threatening or intimidating behaviour by either client. You should also seek to address, wherever possible, any imbalance of power that exists or arises during the mediation process.

Where it appears that any imbalance of power or behaviour between the clients is preventing mediation from being a fair or effective process, you may need to take

appropriate steps, including ending (or not starting) the mediation, if necessary.

In setting up or assessing for suitability, inform prospective clients as early as possible of your duty to conduct mediation in an even-handed and balanced manner. This can be done in a range of ways:

- Through the early provision of information to prospective clients
- In an early phone call or other discussion with prospective clients
- In any pre-mediation meeting or MIAM
- At the point of discussing and preparing to sign the agreement to mediate
- As is set out above, giving permission to clients to raise any concern they may have at any point as to your conduct of the mediation.

Voluntary participation

Mediation and the participation of mediators and clients is voluntary.

Section 10 of the Children and Families Act 2014 made attendance at a MIAM compulsory for any applicant in most family proceedings to consider mediation or another form of family dispute resolution. It also sets out that respondents are expected to attend a similar meeting. It is even more important that you ensure:

- prospective and current clients are reminded that mediation is a voluntary process and should be a positive choice for each and both of them
- prospective clients have the opportunity in individual meetings to explore whether mediation is the right choice for them and are provided with information about other ways of reaching a solution or resolution appropriate to their situation
- you consider whether mediation should commence or continue if there are concerns

in relation to voluntary participation, particularly where you consider that either or both clients are unable, unwilling or lack appropriate capacity to take part in the process fully or freely. This could be due to, for example, abuse or threat of abuse (in which case you must raise the issue and discuss your concerns with the clients and consider whether it is appropriate to start, suspend or end the mediation process)

- you do not give the reasons why people decided not to take part in mediation, or apportion blame of any kind to a decision not to enter or continue with mediation, when completing any required form

- where MIAM attendance is referred from the court, you take particular care to explain the voluntary nature of participation in a mediation.

Neutrality

You must remain neutral as to the outcome of any mediation. Monitor your practice at all times to ensure you're not imposing your own preferred outcome or influencing either or both clients towards any particular outcome.

Resolution mediators do have a responsibility, however, to inform clients if they think that the outcomes they are considering might (or would) fall outside that which a court might approve or order. You can provide legal and other information to help make informed decisions, but you must make it clear that you do not provide partial advice of any kind. Information should be provided as neutral and mutual, and not 'individualised' to either client. Be alert to points at which it would be helpful for either or both clients to have advice from their individual legal advisers or other specialised advice or support to assist them in reaching an outcome.

Information and Advice

As a mediator, you can provide information to clients but you cannot provide advice. Many mediators find that the differentiation between information and advice can be one of the most difficult aspects of their role especially when they begin their practice.

Advice may be regarded as something that is provided to an individual (but could involve more than one person), usually given with an element of (expert) opinion or judgement; it is personalised to them and to their particular situation. Information is a much more global proposition, it could be provided to an individual but equally, it may be pertinent to or for both people, it doesn't contain the same element of judgement or opinion, it is a statement of knowledge or of known factors.

In an age of advancing technology and the 'information economy', it is now much more possible for individuals to find information for themselves and they will also expect that you will be able to provide them with the information they need to understand e.g. how any legal process or procedures relating to separation or divorce work, what they need to do and how they can do it. It is important that as a mediator you develop your skills in being able to provide information confidently as one of the most disrupting and frustrating aspects for clients is having to consult a/their solicitors for answers to straightforward information questions. Even worse, if you have told them that you can't answer their question, they subsequently research it for themselves online and find the answer they need, they are likely to be confused, frustrated or even angry that you didn't either provide the information or tell them where they could find it. It can be useful to look at what is available online from reputable sources and how that information has been set out as a means of assisting your clients to find an accurate source of information if you do not feel confident to provide it yourself.

As a mediator, you work in a neutral and mutual way and you will have developed and will continue to be developing your skills in how to formulate questions and it will be important for you to also apply your thinking to formulating answers in the same mutual and neutral way.

Very often what might sound like a request for advice, is actually an opportunity to provide information to both e.g. 'What do I do about my pension?' is an opportunity to provide both clients with information about how pensions are regarded in law, (that is, they are a regarded as a major family asset), what's important (every scheme Is different and can be very complex, perhaps that although pensions can appear to have similar values, they might vary significantly in what is or might be available at the time of retirement), the ways in which they could deal with any pension either of them has and where they could get more information or individual advice, either as part of their mediation process or outside of it. This principle applies when dealing with most questions which might initially appear to be a

request for advice but are not necessarily so. Usually, you can re-frame the question into a neutral and mutual answer, so even a question such as 'but I get to stay in the house, don't I?' can prompt a neutral and mutual answer;

'I appreciate the concerns you probably both have about where you are going to be living, it's important to say that there isn't a hard and fast rule, because what the law regards as important is that you each have your needs met as far as it is possible to do, given your circumstances and that if you are parents, that the needs and welfare of your children are seen as a priority. There is a legal framework for this usually referred to as section 25 needs, which I'll talk you through and it would help me to understand if each of you could tell me what's important about where you live in the future' or

'I appreciate that where you might all live in the future is important and is going to be a worry for you at the moment, actually there isn't a hard and fast rule as it depends on a number of factors, which I can explain to you, just for now, can you tell me what's most important for each of you about where you might live?'

Often questions around e.g. who stays in the property and who is 'entitled' to what, come from the fear or anxiety an individual has about the future, or that they wish to make their 'position' clear or have it reinforced in some way. Providing a neutral and mutual answer, acknowledging anxiety and asking both to explain what is important for them is a good way of moving the conversation forward and defusing any conflict that may arise from one person regarding the other as having made a 'pre-emptive strike'.

Generally, when dealing with questions which on first blush cause you concern that advice is being asked for, stop and consider what it is that they've actually asked, if you're not clear, ask them to say a bit more about what they need to know (it might not be as complex as you think), take the time to formulate a neutral and mutual answer, use your acknowledging skills and consider what open question/s might be useful to ask having provided an answer. If the answer you are about to give to any question starts with 'You', you should be careful that it isn't going to be construed as (or is) advice. If you're worried that individuals may construe your answer as advice, 'front load' by starting your answer by saying something like 'the information I can give (you both) about this …, 'what's helpful to know as information is …' or even, 'as you know, I can't provide advice to either of you but useful information to have is …'

The importance of individual legal and other advice

An increasing percentage of people are not seeking legal advice on family legal issues. This may be because they don't have the means to afford it or that they have made a choice not to do so. Whatever the case, you must:

- explain the importance of individual legal advice, especially in relation to any proposals or decisions they may reach in a mediation process. Nevertheless, you must respect the client's right to choose not to seek legal advice if that is the case
- clarify that although you can provide information on general principles of family law in a neutral and mutual way, you're not able to provide advice or information on how it may affect their individual circumstances
- ensure you are able to direct clients to details of local Resolution specialist family solicitors and explain some of the ways in which solicitors might offer advice services affordably
- signpost to other sources of legal information and advice, whether via the internet, telephone helpline services, local providers such as the CAB or local law centres. Information provided should relate to recognised and accredited providers of pro bono or other charitable or voluntary based services.

Whilst you may have considerable concerns for those who cannot afford legal advice, you must ensure you work within the requirements of the FMC Code of Practice and must not provide partial advice, as to do so would breach your neutrality and the impartiality of any mediation process and will breach the terms of your insurance.

Remember too that people should also be aware of other advice that might be important or useful for them to have. Financial advice, especially on matters such as mortgages, debt and pensions can be overlooked and it is your responsibility to ensure that people are aware of what help and advice they might need or should consider.

For some parents, it may be helpful and useful to ensure that you have signposted them to sources of help and assistance for separating parents and that might assist them in understanding what helps and what might be harmful for children and young people in managing their separation or divorce and in moving to new parenting arrangements.

Separated Parents Information Programmes (SPiPs) are another helpful and useful opportunity for separating and separated parents and you should be aware of their availability (and that of alternatives such as the Parenting After Parting workshops) in your local area.

Working with unrepresented individuals or Litigants in Person

As the numbers of individuals seeking legal advice or solicitor representation is falling, so the numbers of mediation clients where one or both clients is unrepresented is rising. When you are working with people who are unrepresented or who have not sought any individual legal advice, you should be aware that they may need a greater level of information from you about legal processes and procedures (see also section relating to online divorce procedures) and in relation to the general principles in family law matters. As a mediator, you cannot provide advice to either or both clients but you should provide a level of information sufficient to allow them to be able to make informed decisions. If and where it is the case that you are aware that they do need individual advice, you should ensure that you point this out to them, in a mutual and neutral way and explaining why this is the case. It is also useful to explore with clients what their concerns might be about seeing or appointing a solicitor, which is often about cost and may be about fears that solicitors could exacerbate tensions or conflicts between them. It is known that quite a high proportion of litigants in person at court have had some level of legal advice or representation in the past which might indicate a bad or unhelpful experience. It is helpful and useful therefore to provide them with information about finding a Resolution member solicitor in their area and particularly those who you are aware offer fixed fee or unbundled services. Helping clients to work out what it is they want or need from a solicitor and how they might ask for it can be very helpful to individuals who may be unsure about how they ask for what they need from a solicitor.

Many individuals now rely on what information and guidance they can find on the internet, from websites, apps and forums. You can help by guiding them to those resources which you know to be helpful, useful and accurate.

If having fully discussed all of the above, they prefer not to have individual legal advice, that is their choice. You must then weigh up whether you can continue the mediation and if so, what cautions will need to be recorded in any subsequent outcome documentation .

Remember, you can point out to clients when any proposal or decision they are considering

falls outside that which a Court would order.

Where it is the case that one person has taken advice or is represented and the other is not, you will need to be aware of the importance of keeping a balance between them. It can mean that one person has more power in the discussions than the other and where that is the case, you should discuss that aspect with them both and explore what might be a way of dealing with it. For those who are unrepresented, you will also need to discuss the verification of their financial disclosure as this is something that you cannot do.

You may find it helpful to refer to the Resolution Good Practice Guide on working with litigants in person as although this is written primarily for lawyer members, there are some useful hits and tips contained within it.

Confidentiality, privacy and privilege

Subject to the caveats in relation to the safeguarding of individuals (particularly of children), and in relation to money laundering legislation or criminal activity, mediation is offered as a confidential process. You must not disclose or share any information obtained in the course of mediation with anyone without the express consent of both clients, an order of the court or where the law imposes an overriding obligation of disclosure.

You must make it clear that confidentiality and legal privilege will not apply in relation to any allegation that any person, particularly a child, is suffering or is likely to suffer significant harm. See the separate detailed guidance at appendices 1 and 2 of this handbook.

The existing precedent that guides confidentiality in the mediation process is contained in **Re D (Minors) (Conciliation: Privilege) [1993] 1 FLR 932**, which is specific to mediation relating to children, arrangements for children or Children Act proceedings (see below in relation to finance and property).

You should also be aware of other more recent precedents in relation to civil or commercial cases that may impact upon family mediation, and of the Mediation Directive, Part 35 [Practice Direction 35A].

Any correspondence or discussion with either client's advisors can only take place where

the clients have given permission. Make sure that any information is provided in a balanced way to advisers.

Too often legal advisers feel concerned that they do not have information about the progress of their clients in mediation and are asked to give advice without understanding the context. So you should consider the usefulness of keeping in touch with legal advisers and of forwarding mediation documents to them (with the permission of their clients) as part of good client service.

Bear in mind the importance of good legal advice and that mediators and advisers should work as a team to provide the best, most efficient and economical client service. However, you must also ensure that you've explained the principles of confidentiality to your clients and obtain their permission to be in contact with their advisers. You should also explain that there may be additional costs in relation to their respective solicitors receiving documents and for reading them ahead of providing any advice.

Confidentiality and safeguarding

All mediators must be aware of the statutory guidelines set out in 'Working together to safeguard children: a guide to inter-agency working to safeguard and promote the welfare of children' (UK Government July 2018)).

Government has also published a guide to information sharing in relation to safeguarding to accompany *Working Together,* which provides valuable information and advice.

These two documents provide a great deal of information about the safeguarding partners' responsibilities in relation to safeguarding, including setting out in useful flowcharts what happens following a referral and when an assessment is deemed appropriate.

You should also be aware of the arrangements set out by the local children's safeguarding board/Multi-Agency Safeguarding Hub that are available via the internet (enter the name of the nearest town or city followed by 'children's safeguarding board'). You will find that most of these local websites will include the information to help you as a practitioner, including referral forms and information about useful contacts and training and learning opportunities. Please also see the appendices to this handbook, which set out applicable

information for you as a mediator and Resolution's Guidance Note in regard to safeguarding (published November 2018).

Where there i is a specific allegation that a child has suffered significant harm or is at risk of significant harm, you must stop the mediation process and discuss limits of confidentiality with your clients, their responsibility regarding protecting their children from harm and the allegation that has been made. You must then decide what action to take, including referring to the local children's services duty team (or as is set out in your local Children Safeguarding Board arrangements).

If you're concerned that a child is at risk of immediate significant harm you must, having discussed and agreed a course of action with your clients, report immediately. If you're concerned that discussing an allegation with your clients would place the child in immediate or increased risk of significant harm, you should make an immediate referral to children's services.

Mediators also have a duty of care in relation to adults at risk of (or subject to) harm due to an abusive relationship or because of lack of capacity. Consider the potential for so-called 'honour-based' (now more appropriately referred to as 'harmful practice') or other violence and where this is the case, take the steps to discuss an appropriate course of action with your clients. This may include reporting or referring clients to an appropriate agency. You should also be aware of local arrangements which will be set out in your local Safeguarding Adults Board website. More information can be found in the appendices to this handbook.

You should not make judgements about either client in regard to what has been reported or disclosed but seek to provide information and assistance to each and both clients in an even-handed way. Take care that in all cases of safeguarding concerns, 'next steps' are discussed with clients and an appropriate onward destination is agreed. Great care must be taken to ensure safe exits for clients in these circumstances.

A brief record of what happened and your actions should be made as soon as possible. In all cases relating to safeguarding concerns, you should be in contact with your PPC for support, advice and guidance as soon as is possible and practicable.

Full information and details about how to deal with such situations are set out in appendices 1 and 2 of this handbook.

Confidentiality, privilege and legal proceedings

Discussions, client negotiation and proposals made within mediation must be conducted on a legally privileged, without prejudice basis.

You have a responsibility to ensure your clients understand the nature of confidentiality and legal privilege. They must be willing to sign the agreement to mediate, which states that discussions and negotiations in the mediation process are not to be referred to in any legal proceedings. It should also say that you cannot give evidence or produce any notes or records made in the course of the mediation, unless all participants agree to waive the privilege or the law imposes an overriding obligation of disclosure upon the mediator (see also sections in relation to GDPR and Subject Access Requests).

You should be familiar with the judgment of Ramsey J in Farm Assist v DEFRA [2009] EWHC 1102 (TCC) where, having reviewed all available mediation precedents, Ramsey J defines confidentiality and privilege as:

Confidentiality: the proceedings are confidential both as between the parties and as between the parties and the mediator. As a result, even if the parties agree that matters can be referred to outside the mediation, the mediator can enforce the confidentiality provision. The court will generally uphold that confidentiality, but where it's necessary in the interests of justice for evidence to be given of confidential matters, the courts will order or permit that evidence to be given or produced.

Without prejudice privilege: the proceedings are covered by without prejudice privilege. This is a privilege which exists as between the parties and is not a privilege of the mediator. The parties can waive that privilege.

Other privileges: if another privilege attaches to documents that are produced by a party and shown to a mediator, that party retains that privilege and it is not waived by disclosure to the mediator or by waiver of the without prejudice privilege.

Although Farm Assist v DEFRA concerns a civil case, the principles set out by Ramsey J in his judgment provide a useful framework for family mediators, particularly in relation to

matters involving financial or property discussions.

More recently, attempts to utilise other civil judgments have started to emerge, whether to establish that an 'agreement' was reached in a mediation (Brown v Rice & Patel [2007] EWHC 625 (ChD)), because of third-party interest (Cattley v Pollard [2007] 3 WLR 317), because of alleged misrepresentation, fraud or undue influence (Unilever v Proctor and Gamble [2000]), or on interests of justice principles (Farm Assist v DEFRA [2009] EWHC 1102). There has also been recent judgement in a Hague matter, Power imbalance

Clients must understand that all factual information regarding financial issues is provided on an open basis, so that it can be referred to in any legal proceedings. All prospective clients should also understand that all information or correspondence in a mediation process will be shared openly with each and both clients and not withheld, excepting any address or telephone number, or as the clients may agree otherwise.

The decision in Imerman v Tchenguiz [2010] EWCA Civ 908 is likely to mean that any documents relating to a client's financial situation, which were obtained in mediation without their knowledge, should not be accepted (or in the case of emailed attachments, opened) until the mediator has clarified what the document is and how it came into the client's possession.

If it's clear that one client was not aware that any document is now in the possession of the other, you should stop the mediation and encourage both clients to seek legal advice before continuing.

Where a document is produced that could indicate full disclosure has not been made (or there's been an attempt to hide information), you must also consider whether the mediation should - or can - continue.

The welfare of children

Confidentiality and legal privilege will not apply where there is an allegation that any person, particularly a child, is suffering or is likely to suffer significant harm.

Mediators have a special responsibility for the welfare of any child of the family. You should

encourage and assist clients to focus on the needs and interests of their children and their future parenting.

Mediators must consider how any decision being discussed by parents may affect their children. You should also encourage parents to think about the ways in which they may consider their children's views or perspective in any decisions they may reach about their future. The revised Code of Practice now contains a requirement that 'All children and young people aged 10 and above should be offered the opportunity to have their voices heard directly during the mediation, if they wish' (Rule 5.7.2. FMC Code of Practice Sept. 2016). This amendment to the Code is in line with the move to a child inclusive model for practice following the government response to the recommendations of the Voice of the Child Dispute Resolution Advisory Group Report that states:

'the principle of child inclusive practice and the adoption of a non-legal presumption that all children and young people aged 10 and above should be offered the opportunity to have their voices heard during dispute resolution processes, including mediation, if they wish.'

All mediators do, of course, discuss matters relating to children with parents where this is part of the mediation process. We would suggest that all members should, as now, talk to client parents about the importance of helping their children by talking with them about what's happening in their family and, wherever possible, encouraging children to share their views. On a separate note, mediators may also wish to raise with parents the possibility that their child may wish to talk to a mediator directly, and this opportunity can be provided for children if they so wish. Please ensure that if you are not trained and qualified to talk with a child or young person directly, or you intend to co-work any case where there is prospect of a child or young person being offered the opportunity to speak to someone independently, that you are in touch with local colleagues who can assist. You should also discuss with them how you will work together and the appropriate ways to contact them or to refer to them where parents are interested in their child being offered an opportunity to speak directly with a mediator (see also Arrangements for Children section of this handbook).

It is important to point out that the infrastructure and resources to make it possible for all children and young people over the age of 10 to be offered an opportunity to speak with someone independently is not in place. Mediators will therefore need to work carefully in their local area to consider ways in which they can nonetheless help parents to think about the ways in which they might understand their child's perspective and what is important to them. There are a number of ways in which you can help. You might assist parents to consider how they will talk with their children or whether there is a 'neutral' family member

or friend who may be able to assist. Where parents may be concerned about their child's emotional health, a school counsellor may be able to provide help.

It is appreciated that mediator members who haven't trained in the current model of Direct Consultation with Children or who have yet to attend Child Inclusive Mediation Awareness and Understanding training will need additional information about arrangements for talking with a child directly and the important aspects to share with parents. Resolution will publish further guidance as soon as possible to assist mediator members and Awareness and Understanding training days are being offered at regular intervals by Resolution and other member organisations of the FMC. You may wish to discuss with your PPC how you might introduce children being seen separately with parents and how you might make appropriate links with mediators who can see children directly.

Mediators who are recognised to offer the current model for Direct Consultation with Children are listed on the FMC website. As mediators (and PPCs) either update their training to offer child inclusive mediation or train as child inclusive mediators, their recognition will be listed as part of their FMC registration.

If you're workingdirectly with children, you must be trained to do so and hold an appropriate DBS check. You must also provide appropriate facilities for children and young people who you invite to meet with you.

You must also ensure that if you are qualified to talk with children as part of mediation, you have explained to children that conversations are kept confidential, unless the child discloses an issue of significant harm. You must do this in a way that's appropriate for their age and understanding. Take care also to explain that if their parents ask a judge to assist in decision making, the judge may wish to know what the children said, talk with them about their views or arrange for someone else to do so. You must also explain in a way that is appropriate to the age and understanding of the child or young person that if you suspect a child is suffering or is likely to suffer significant harm, you have to tell another person who's responsible for the safety of children, and, unless it would place the child at further or immediate risk of significant harm, you will also have to speak to their parents. In all cases regarding information and explanations to children and young people, mediators should check that the child or young person has understood and has been encouraged and has been able to ask any questions they may have.

Note: Where there are discussions with parents about their child talking with a mediator, you must inform parents that you and/or any mediator who is going to talk with their

child/ren has a responsibility to refer any safeguarding matter to an appropriate agency. You should ensure that you have discussed and clarified this to parents ahead of any meeting with a child or young person and it should form part of the written agreement you have with the parents regarding seeing their child or children separately. Further guidance on issues of safeguarding and disclosure can be found in the Working together to safeguard children document. See appendices 1 and 2 for further information.

For all mediators: If you believe the parents are acting in a manner likely to be seriously detrimental to the welfare of a child, consider ending the mediation. Discuss your reasons for doing so and ensure that this is outlined in any closing or future communication.

Abuse and power imbalances within the family

There is a likelihood of power imbalances existing or emerging between clients in mediation. Power very often shifts back and forth between individuals and your responsibility is to address those imbalances to create and maintain a balanced environment for negotiation.

However, all clients must take part in mediation willingly and without fear or threat of violence or harm. You must undertake appropriate screening and assessment procedures before and during any mediation process.

It is important that assessment in relation to abusive behaviour and/or client capacity is undertaken in individual meetings with each of the clients. You must remain alert to concerns of abuse or lack of capacity during any subsequent process of mediation. If you have concerns that there are, may be or have been issues of abuse, harm or violence, or imbalance of power that you cannot address, discuss whether taking part in mediation is appropriate with each of the clients and provide information about available support services.

Where mediation does take place, ensure that principles of voluntary participation, fairness and safety are adhered to and that the clients are safe, especially on arrival and departure.

You must endeavour to prevent manipulative, threatening, controlling or intimidating behaviour by either client during the mediation. Further information is provided in the

appendices to this handbook.

Mediation Information and Assessment Meetings (MIAMs)

The statutory requirement for individuals to attend a MIAM was introduced as part of the Children and Families Act 2014 (s.10). The compulsory requirement to attend applies to individuals who wish to issue proceedings for a relevant family application. Section 10 sets out that a MIAM should provide information about mediation of disputes, the ways in which disputes can be resolved other than by the Court and the suitability of mediation in the particular case. The Family Practice Direction (3A) which refers to MIAMs further sets out that prospective respondents are expected to attend a MIAM. It also makes clear that the prospective applicant should provide contact details for the prospective respondent to the mediator for the purposes of the mediator contacting them to discuss attending a MIAM.

Resolution believes that it is good practice for member mediators who conduct MIAMs to ensure that individuals are given sufficient time and attention in any MIAM to discuss their situation, understand what mediation is and how it works, for a proper assessment to be undertaken as to suitability. Where mediation is not likely to be suitable or appropriate, to have information about other alternatives such as collaborative practice, solicitor negotiation and arbitration and have other signposting information about issues of concern to them e.g. separated parenting, getting legal advice or information about legal procedures etc.

Status of initial meetings and MIAMS

When either person attends any kind of first individual meeting, they're coming to explore whether mediation (or another form of family dispute resolution or solution seeking) may be suitable for them. This is an information giving meeting, not a mediation meeting (although it may form part of preparing to come into a mediation process). At this point,

neither individual is a ‘client’.

Generally, neither person would become a client until an Agreement to Mediate is signed by both participants and by you as the mediator.

You should inform people that the meeting’s purpose is purely for giving information on options for resolving issues away from court. This includes discussing whether mediation may be suitable for them.

Coming to an initial meeting or MIAM does not commit either person (or you as mediator) to mediation in any way. It’s only when you all agree that mediation might be entered into that arrangements can be made to start the mediation process.

The conduct of MIAMs is now inclusive to the general principles set out in the FMC Code of Practice and all mediators should be aware of their responsibilities when setting up or conducting MIAMs.

Unaccredited mediators and MIAMs

It is not always possible to define with individuals whether they need to attend a ‘statutory’ MIAM or whether they simply need information about the mediation process. Ask people whether they intend to issue proceedings straightaway. If so, unaccredited mediators should refer those individuals to an FMCA mediator.

It is possible for unaccredited mediators to co-conduct MIAMs with an FMCA mediator or with their PPC in order that their FMCA colleague or PPC can sign any court forms. In some cases, PPCs may be willing to sign court forms for unaccredited mediators. Please remember that PPCs are under no obligation to do so. All mediators working towards their accreditation should discuss with their PPC if they will sign court forms as a proxy. The various possible ‘pathways’ are set out in the flowchart on the Resolution website.

The FMC has issued guidance in relation to the conduct of MIAMs. All mediators (whether accredited or not) should familiarise themselves with this guidance and regularly check the guidance for any changes.

Conducting MIAMs

Information and assessment meetings offer a great opportunity to engage with clients and provide a valuable client service in relation to separation or transitions, akin to the options meeting already offered by many members.

Information and assessment meetings should not, therefore, be viewed as a 'bureaucratic hurdle' or of little significance.

These meetings should last between 45 minutes to an hour and should be charged for accordingly. The FMC guideline suggests mediators should not charge less than the current legal aid rate.

Individuals may not be clear about what their options are for resolving matters and may have settled on an intent to issue because they've been unable to find another route.

Wherever possible, you should offer a MIAM to both the applicant and respondent, even where the prospect of mediation might seem slight. Even if the applicant has confirmed that they do not wish to mediate or where you, having seen the applicant, do not think mediation is appropriate, you should still, as a courtesy contact the respondent and offer a meeting to them. It's important that individuals have an opportunity to consider the other options available to them and to discuss any other information needs they may have.

Consider carefully how you can best provide information to referrers and to prospective attendees about the purpose and status of MIAMs. Consider how you will gather information ahead of the meeting in order to use the time spent with the attendee to best advantage. This may include:

- information provided on your website (in the case of unaccredited mediators, a note to make clear that you do not provide statutory MIAMs)

- signposts to local MIAMs providers or where to access information about local providers, such as the Family Mediation Council register

- leaflets for client use

- a short, preliminary information form to be completed and returned to you by prospective clients (bearing in mind that attendees may not wish to provide a great deal of personal or sensitive information prior to a MIAM and that you should be aware of your responsibilities in respect of GDPR).

Provide information about the purpose of the MIAM or initial meeting, ensuring that prospective attendees understand that it will provide an opportunity to consider:

- what other processes of dispute resolution might be available and suitable for them. You should be familiar with information about other forms of family dispute resolution and solution seeking. As a minimum, this should include collaborative practice, solicitor negotiation and arbitration. You should be able to discuss these options accurately with any potential client.
- any information they might need in relation to their circumstances, for example, the effect of separation for children, parenting apart and the legal process. Also, signposting information pertinent to their circumstances, for example, in relation to debts, housing or accommodation, benefits, personal and professional support services.

Information should be provided in a neutral and mutual way, bearing in mind you might subsequently be acting as mediator with the two people whom you have met separately. You should ensure that you make clear to individuals the status of the meeting, that is, it is a confidential meeting, subject to exemptions in respect of abuse or harm and unlawful activity. You should also make clear that you will not share any information shared with you in an individual meeting with their ex-partner unless and until you either have their permission to do so or should mediation go ahead, you have agreed together what will need to be shared in any mediation process. You should also make clear that you will not be sharing any information about a decision not to mediate made by either of them or by you.

Safeguarding/screening and assessment in the MIAM

It is essential you carry out a process of assessment for harm or potential harm as part of

the invitation to the MIAM, and at the MIAM itself. It's likely that people who have been, or are currently in, an unreported abusive relationship will be among those who will be required to come to a MIAM. Where there are issues of harm, you must ensure you adhere to your duties and responsibilities in relation to safeguarding, ensure appropriate referral is made where necessary and that information is provided to clients as to next steps.

As is set out earlier, you can conduct MIAMs confidentially, subject to the usual caveats, and this should be made clear to individuals prior to any meeting. However, and with a view to the potential for mediation, you should also explain that in a mediation all information is shared so any information disclosed in an individual meeting that may be pertinent to subsequent mediation meetings would need to be shared should the mediation go ahead and you will discuss and agree with them what needs to be shared and how they wish to do so.

Where information is shared in an individual meeting relating to issues of abuse or harm, you must (in the case of safeguarding of children) consider appropriate referral to children's services. If what is reported raises issues of immediate, serious or significant harm, then you should refer immediately.

In the case of vulnerable adults, provide information in respect of ensuring protection from abuse, harm or violence and about sources of local help and support.

Where this is the case, you are under no obligation to share what has been said with the other person, excepting where the individual remains hopeful of taking part in a mediation process despite the abuse they've reported or disclosed. Firstly, if on assessment, you do not believe the case is suitable for mediation, you should not continue. Secondly, if you believe it might be possible to mediate despite the concerns that have been raised, the information would have to be shared in any subsequent mediation process. If you decide that a mediation process is appropriate despite any disclosed abusive behaviour between adults, you must consider how best to ensure protection from any further harm and that you have discussed with each and both individuals' appropriate protection and/or support.

If the abuse reported, disclosed or alleged is in relation to any child or young person, you must consider your responsibilities in relation to safeguarding. If what has been reported or disclosed relates to past allegations of abuse or harm involving a child which has been assessed and/or investigated, you must ask to see whatever documentary evidence the parent/s have that indicates that the assessment or investigation has been carried out and

closed and the current status of any arrangements for protecting the child.

Bear in mind that your role does not require you to make judgements about whether there is or has been abuse in a relationship, but to act appropriately to ensure information about protection from harm or abuse is provided to the person who has reported or alleged it.

Conducting MIAMs via other media

Resolution mediators are committed to providing the best client service. Today, people expect to be able to have an online alternative for a range of services. However, it is important to consider whether agreeing (or offering) to conduct meetings via other technology is appropriate. Remote contact can severely affect your ability to properly assess any aspects of abusive behaviour or client capacity. Plus, the ability to properly explore the issues and how they might resolve them and provide information or signposting to other services of support and assistance may be lost or curtailed.

You may need to consider whether conducting a MIAM via Skype may be appropriate, for example, because of the potential client's disability or location, or because you're operating an online service for clients. All mediators should be aware of the new arrangements set out in the revised Code of Practice and the Guidance to Online Video Mediation. Using an online video connection to conduct a MIAM or mediation is allowable and acceptable: the new Code and Guidance reflects that in a changing world, more people may expect to choose an online means of accessing mediation or MIAMs. Please be aware that you must adhere to the requirements of the Code and the Guidance.

In respect of conducting MIAMs via a telephone-only connection, the Code is clear that MIAMs should not be conducted via such a connection, except where there are specific problems about access to an online video link. If so, the mediator must record in writing what those specific problems are. If this is the case, you should also consider whether one of the exemptions from attending a MIAM may apply; whether it would be more appropriate for a MIAM to be offered nearer to the client's home area (and information provided in respect of mediators local to that prospective client); and, generally, whether there is the prospect of a mediation (or other form of family dispute resolution), if either prospective client is e.g. out of the jurisdiction.

If the case involves child abduction or international aspects, mediators should also be aware of the specialist mediation service offered by Reunite International and provide information to the prospective client. (See also the section on international parenting below).

Generally, you can (and should) discuss any request or consideration of conducting a MIAM via telephone with your PPC.

Charging for the MIAM

As is mentioned earlier, the FMC has issued guidance regarding charging for the MIAM. You should think carefully about how and what level of charge you make for conducting a MIAM. You should ensure that you are clear about charges in any advance information you provide, on your website or in any letter or leaflet that you provide to potential attendees and at the time of the meeting.

Mediators charge for MIAMs in a range of ways but it's important that you consider two things:

- How your MIAM service appears to the client. Remember that for many, this will be their first introduction to mediation and that some - especially potential applicants to court and respondents (in particular) - may already feel aggrieved at having to attend and pay for a meeting that is not of their choosing.

- How you ensure that you balance out the income to your practice and time spent with attendees.

Offering the MIAM as a free service

Some mediators offer their MIAMs free of charge (with the view that if people go on to mediate, they are likely to make up the income overall). If this is what you choose to do, make sure you have factored in the cost of the MIAM to your hourly or overall charging rate. Some mediators offer the MIAM free of charge but make a charge for signing any court

form that is required. In both instances, it's important to consider whether you can still offer a MIAM that covers all that it should, in the time you can allocate, given that it's a free service. If you're forced into rushing what you have to cover or shortening the amount of time you spend, there's a danger that it doesn't provide the introduction to mediation that it should, or that would attract individuals to mediate. Very importantly, it might not provide you with sufficient time to properly assess with each individual whether mediation is appropriate and/or for there to be any level of engagement with the individual.

People tend to value what they pay for which means they may not value a free meeting and/or may be suspicious of it. It can also mean a higher rate of non-attendances or cancellations.

Lastly, you may struggle to properly cover all that you should including other options and signposting. Please don't forget that the MIAM should be a significant meeting; a real opportunity to engage with potential clients and to provide a valuable service in relation to separation or transitions, akin to the options meeting already offered by many members.

If you offer your MIAM as a free service but charge for signing the court form, or charge for the court form and the MIAM as separate items, please think carefully about how that might be perceived by consumers or attendees. It's easy to see that, of course, there is an element of administrative time to be spent in completing and signing the form and arranging for it to be posted out to the individual (if it needs to be), but to a consumer, it could simply look like extra charging. If you have offered the MIAM free, that might not be such an issue but you still need to think carefully about what it says to the consumer about your service overall.

Often it is the case that you can't supply a signed form on the same day you see the applicant. This might be because you haven't met with the other person and/or you need time to consider the circumstances if they both wish to mediate but you believe it may be inappropriate. It may simply have been a gap in time between the MIAM and the individual/s deciding they will proceed with an application to court. Whatever the reason, it's very important to ensure that attendees are clear about how you charge.

Please bear in mind that those who find they are required to attend a MIAM may feel very confused or angry and may not feel well disposed towards paying for a meeting that they can't see the point of and did not want. In recent months, there have been a growing

number of complaints regarding MIAMs and charging can often form part of the complaint.

Legal aid eligibility

You must be able to assess whether prospective attendees are eligible for public funding for mediation. Give prospective attendees the eligibility limits or refer them to the eligibility calculator. Other information for prospective clients is available on the gov.uk website which also provides a link to the online eligibility calculator.

If you don't hold a contract for the delivery of legally aided mediation, you should make it clear to individuals that legal aid is available for mediation for eligible people. If they're eligible, refer them to those practices that can offer legal aid. If prospective attendees would prefer to proceed without legal aid funding and wish to pay privately, they should confirm this in writing.

Conduct of mediation

First contact: assessing suitability and appropriateness

Always give prospective clients information about the principles and process of family mediation so they can decide whether it's the right choice for them. This should include the likely cost and remembering to remind them that legal aid may be available for mediation, whether you offer legally aided mediation or otherwise. Having information on your firm's or service's website that sets out these basic points is a good way of ensuring that people have access to information even before they have made a first contact with you.

If the first contact is a call from a prospective client, it is best to keep the call reasonably short (much harder for individuals to recall everything that is said in a long phone call) and to offer an individual meeting (for which you make a charge) so that you can spend time with the individual making an appropriate assessment, starting to engage with them, preparing them if they are to mediate or discussing alternatives if mediation is not appropriate.

It is possible in a reasonably short phone call to check the individual's understanding of mediation and to outline principles, including that mediation works because:

- it is a choice: people come voluntarily to sort things out
- it is confidential (subject to the usual caveats regarding safeguarding and abuse) and it provides a private space where they can think about how they can resolve things
- they can make their own decisions based on what will work for them (and for their children if they are parents)
- you will help them to reach decisions by acting to keep a balance between them so that they can discuss things calmly

Provide a brief explanation of how mediation is usually conducted. This includes explaining that mediation usually takes between three and five meetings of 90 minutes each but that it can be flexible to their needs depending on what they have to deal with, and usually starting with an individual meeting of about an hour. Give an indication of cost, your hourly or sessional rate.

Start the process of screening and assessment by explaining that after an initial individual meeting, meetings usually take place with both people in the room and asking if that is or might be a concern to them, paying attention to their response.

At this stage it may be difficult to fully understand the individual's situation without spending a great deal of time on the telephone; always suggest that the best and immediate way forward is to meet with you.

Provide prospective clients with the following ahead of any first individual meeting:

- a preliminary information form (which should be completed and returned to you ahead of any first meeting (and be aware that for MIAM attendees, they may not wish to complete a full information form, so use a shortened form to provide you with sufficient information)

- Information about mediation that reiterates what you have explained or refer them to the information on your website

- a blank agreement to mediate (or you may prefer to discuss the Agreement with a prospective client at their individual meeting)

- information about you (or refer them to your mediator profile on your website)

- details of fees and charges.

Resolution mediation templates may be downloaded from the Resolution website.

Generally, where a first phone contact is made by one prospective client, ask them to ask their former partner to contact you (except where a prospective client is referred for a MIAM). This avoids you having to make a 'cold' contact with a prospective client who may

be unaware that their partner (or former partner) is considering mediation. Great care should always be taken in handling the sensitivities of first contacts

Properly engaging with prospective clients and ensuring that you have covered all that needs to be explained is always best carried out in a first individual meeting. Always explain that it is your usual practice to meet with people individually so that you can help them to think about what will work best for them. You can also explain that if they are going to mediate you can then spend some time planning with them what is going to help them most to be comfortable in their mediation, providing an explanation and a reassurance to individuals who may well be worried about how they are going to sort things out and uncertain about what mediation actually involves and/or worried about meeting with their former partner.

The importance of screening and assessment processes

Be aware that domestic abuse is not limited to forms of violence. Some forms of abuse are subtle. They may include, but are not limited to:

- coercive or controlling behaviour, which results in one person's inability to be self-determined or act independently of the other
- emotional abuse or bullying that leads to a serious loss of self-esteem in an individual, reducing their capacity to take part in discussions on an equal footing
- financial abuse, where the individual gets trapped in a cycle of poverty, causing physical and mental ill-health, a lack of confidence and feelings of isolation.

It is essential you have a clear process for screening and assessment for all aspects of harm or abusive behaviour.

Whether abuse is in the past or ongoing, proven or alleged, you should assess the person's capacity to take part. It's critical to remain alert to factors in the client's past or continuing relationship that may put either client (or their child) at risk or affect either client's capacity to take part equally in a mediation process.

Prior to starting joint meetings, a confidential first individual preparatory meeting allows you to discuss with each individual any concerns about power imbalance, abusive behaviour

or safeguarding concerns they each might have. Discuss any concerns they may have indicated in conversation or in their preliminary information form. This will clarify whether mediation is right for them and ensure they can take part in any process of mediation comfortably, openly and without fear or anxiety.

If mediation is not an appropriate or suitable choice, you should discuss next steps with that prospective client to ensure their individual safety or that of any child or children (including any referral to the appropriate authorities where it's appropriate to do so).

You are not under any obligation to share or disclose information relating to abusive behaviour discussed in individual meetings prior to the mediation to the other prospective client. This is because the meeting is pre-mediation and you and each prospective client are therefore not bound by the same provisions that apply once they have signed the Agreement to Mediate. Note, however, that you should make clear that confidentiality offered in an individual meeting is subject to the usual caveats set out above. You should also make clear that information shared in an individual meeting that is likely to be pertinent to any subsequent mediation discussions would need to be disclosed by the client as part of any following mediation process.

Your role is not to make judgements about either client and their situation, but to assess with each the suitability of a mediation process given all the circumstances. See appendices 1 and 2 for further information.

Remember that the capacity any individual has is not limited to the effects of abusive behaviour. It will be important for you to consider in any event whether each individual is able to speak on their own behalf and in their own interests. Capacity can be affected by high or raw emotion, illness (including mental or emotional health issues) or by substance or drug misuse. It is also important to be aware that in some cultures and communities there may be certain 'norms', rules or expectations which may affect individual capacity to speak freely or that might affect overall expectation of what might be achievable (see also the handbook section relating to diversity). If you have concerns of any kind about individual capacity, you should ensure that you have raised it sensitively, explored any concerns and can be confident that each individual is able to take part in a mediation process. Remember that your PPC may be able to help you in teasing out any concerns you may have.

First individual meetings

Good practice dictates that you conduct an individual meeting with each prospective client, even where the clients' stated preference is to meet together.

It is up to you to decide how to conduct individual meetings and what you'll cover. Individual meetings can serve a number of purposes and should be seen as an integral part of assessing for the suitability of any mediation process. They allow you to screen and assess clients individually, check the information provided on the preliminary information form and discuss any special needs, additional support or arrangements that would help clients engage in the process comfortably and confidently.

Individual meetings give your clients an opportunity to prepare for any subsequent mediation. They can ask questions that they might feel inhibited to ask in front of their former partner and it allows them to get a sense of you as a mediator and the environment for mediation. It also enables them to receive information about other services of help and support that might assist in either preparing for or supporting them through the mediation process itself.

For you it provides an opportunity to start a process of engagement with each client, manage client expectations, clarify priorities and aspirations and gather information about the nature of any dispute or simply what it is that they each hope to sort out and to achieve. It also provides an opportunity to consider with them anything that might be useful to do prior to starting their mediation process, e.g. whether they need to have some emotional support in place, if there are debts, seeking information and support from an agency such as StepChange ahead of beginning their mediation etc. and/or considering with them whether it would be helpful to work with a co-mediator or to involve other professionals during the mediation process itself, such as a financial neutral, their respective solicitors etc. It also allows you to consider the areas where there may be a level of agreement and an opportunity to de-escalate conflict or, at least, to establish what is likely to cause conflict between them in any subsequent joint meeting.

Ask questions that assist people to consider what's important to them to sort out and what they hope to achieve if they decide to mediate. Make it clear that mediation isn't about what has happened, rather what they would like to happen for the future. Remember that it is important to remain balanced in your approach, keep the other person in mind and ask

questions that keep a focus on both people, e.g. 'do you think that is important to X (former partner) too?', or do you think that might be how X sees things too?'

Remember too that generally, any individual meeting you have should cover similar content to a MIAM.

The first joint mediation meeting

Prior to any first meeting, whether an individual or joint meeting, you should establish an appropriate, safe and welcoming environment. Remember that the first joint meeting may be the first time clients have sat together in the same room for some time and it may feel awkward or uncomfortable. Consider:

- appropriate arrangements for waiting – especially where either client has voiced concerns about seeing or meeting with their former partner. Reception staff should be briefed to be able to welcome and arrange waiting for each client

- mediation rooms should be comfortable and all required documentation and resources should be available within the room

- checking that there's easy exit from the room for both clients and for yourself (and brief support staff and have a strategy in place should any issue of abuse arise during the mediation)

- wherever possible, mediators should have an appropriate and private space available should either client need to take a break during the mediation meeting.

Ensure both clients are clear about the principles and conduct of the mediation and are willing to sign the agreement to mediate, which must be signed before starting the process. Care should also be taken to ensure that arrangements for payment are discussed and agreed before commencing the first mediation meeting.

You should then:

- establish the issues to be discussed and resolved, taking particular account of the needs of any children

- create an agenda with the clients

- begin to discuss the priority issues, establishing whether there are short-term matters to be dealt with and planning with the clients the medium- and longer-term issues and priorities to be considered.

Financial disclosure – use of forms

If the clients want to deal with their finances in the mediation, time should be set aside towards the end of the meeting to go through the Form E. You will need to explain to clients the pertinent sections to their disclosure and provide any information to assist them in assembling the information and documentation required to provide an appropriate level of disclosure.

Provide clients with information about the necessity and requirements of financial disclosure and emphasise that, whichever route they choose to settle financial issues, an open disclosure of finances is required.

A growing number of clients now download Form E for themselves or may have discussed financial disclosure with a solicitor. Because the HMCTS Form E is primarily for those applying for a financial order following a separation or divorce, it's not particularly mediation-friendly.

Be aware that it might prompt further conflict or misunderstanding between the clients, or an expectation or fear that they'll be going to court. Explain carefully to the clients the purpose of the form, and that the questions set out at Part 1 (factual details they will already have provided), Part 4 (relating to conduct or behaviour, standard of living) and Part 5 (order sought) do not need to be completed for the purposes of their immediate discussions in the mediation.

You can remove these parts before giving the clients the form to complete. Simply ask them

to note their name at the top of Section 2, where details of financial disclosure start.

It can be useful to spend some time with the clients agreeing what sections of the information required will apply in their circumstances (not all clients will have other properties, business assets or directorships). This can:

- reduce the worry that clients may have about the enormity of the information asked for
- help to clarify exactly what applies to their circumstances
- make the disclosure process feel more manageable for clients by reducing the amount of information required.
- help you to gather an understanding of how much each understands of their financial situation and who holds information or required documentation
- provide an opportunity to discuss with clients what documents they will need to assemble (it is helpful to suggest that they make a note of these, who holds them or knows where they are or how they can be accessed)

It can also help identify which assets or liabilities clients are not sure about or are concerned are being 'hidden' by the other. In this case, reiterate the importance of appropriate disclosure and note what the concerns are for discussion in any meeting to record financial disclosure.

It is useful to note that mediator practice in regard to financial disclosure varies. It can be tempting to think that providing the Form E ahead of any joint first meeting can help to speed up the process of mediation. Remember that Form E (or a more mediation-friendly version of it) to most individuals can be an alarming and off-putting document and might result in people deciding that mediation is not for them. Equally, it is also tempting to think that sending a copy of the other's completed Form E to each (or suggesting that the clients do so ahead of your next meeting) might also aid speed of progress, however, this might well prompt further anger, unhappiness or disputes between them which might prompt them to abandon mediation or to come to their next meeting unable to focus on getting a sense of their financial situation as a whole. Getting completed Forms E returned from clients and turning the information into a schedule ahead of meeting with them to discuss their finances might also seem helpful, but remember that they have chosen mediation to

make their own informed decisions about their future. They really need to know, understand and 'own' their individual financial information and that can be much harder to do if they haven't had the chance to work through their finances and to identify areas where they have questions or lack understanding. If clients are represented and exchange of Form E has happened before coming to mediation, it is still important to check that they each have a clear understanding of their finances.

If or where you have concerns about an individual's understanding or knowledge of their financial situation, it can be useful in a first individual meeting to discuss with that prospective client whether they have a financial adviser or the role a financial neutral can play in assisting them to get a clear sense of financial matters.

A number of mediators now involve financial neutrals/advisers within their mediation process and have found it helpful and useful to do so. Remember that if you are going to work in this way, you must ensure that you discuss with prospective clients that is your preferred way to work and why and be prepared to accept that for some clients involving other professionals is not affordable for them.

Remember however that financial abuse as part of a coercive or controlling relationship can have serious and detrimental effects on an individual and their ability to negotiate fully and freely on their own behalf and may result in a critical power imbalance.

Before any meeting to record financial information

Tell clients that you need them to return completed financial forms to you ahead of the meeting (usually three to four days before). Make clear that if the completed forms are not received, then it is unlikely to be possible to proceed with the meeting.

Provide an explanation of the importance of supporting documentation to your clients, along with the fact that, although you are not responsible for verifying the documentation, you can assist clients in ensuring this happens appropriately and to an acceptable standard.

The issue of pension valuations remains a difficult one for the purposes of recording financial disclosure, as it can take considerable time for documents to be produced. Suggest

the clients contact the pension provider as soon as possible and enquire as to the expected length of time it may take to get a pension valuation. Remember that they should also get a statement of their state pension.

Generally, a gap of not less than four weeks should be sufficient to gather most of the information and documentation they'll need in the absence of a pension valuation. Ask clients to use their most recent annual pension statement until they receive a valuation. Clearly, this will vary between individual clients so plan with clients according to their situation.

Establishing financial disclosure

If completed forms aren't received by the date agreed, you'll need to contact clients and check whether there are any problems returning them and whether they can get them to you in good time for the meeting.

On receipt of the completed forms, you should:

- check through each one, noting any areas of discrepancy between each client's recorded figures, missing information and any other features of note
- copy both forms so that you and each client have a set of both forms (and, if provided, any supporting documentation)
- prepare an outline for scheduling client information on the flipchart
- (as an option) draft a pencil schedule of major figures as an 'aide memoire' for the meeting with the clients, or a more detailed summary if a case is particularly complex.

At the meeting, as in all meetings, check first with both clients whether any matter has arisen since the last meeting that may need to be dealt with.

Having dealt with anything that might have arisen between meetings and/or having checked that they are ready to go ahead, you should:

- reiterate the purpose of the meeting

- explain the use of the flipchart and check that each and both clients are comfortable with the recording of their finances on it

- explain that all the information noted on the flipchart will be transcribed into a draft open financial summary or statement. This statement will be sent to each client as a working document for the remainder of the mediation process and until financial disclosure is complete

- give each person a copy of the other's completed form E . Tell the clients that you will all work through them together on a page-by-page basis to record their joint financial situation. This prevents clients from immediately getting engrossed in their partner's completed form.

The financial information provided by both clients should be recorded on the flipchart to set out:

- assets

- liabilities and debts

- an outline family budget of income and significant outgoings (significant outgoings relates to the 'here and now'. Discussions on future income/outgoings/budgets should be reserved for future conversations as part of reality testing any proposals the clients are considering)

Practice varies in relation to income and outgoings schedules. It can be a long and laborious task to record a complete schedule on the flipchart and it might be more appropriate that detailed scheduling is a task that individuals undertake for themselves and which can be exchanged and discussed in a managed way in the mediation meetings. Some couples can prepare a joint schedule of their current outgoings and they will need to think carefully once they have dealt with their 'here and now' disclosure about what their respective needs might be in terms of outgoings for the future.

It is always useful and helpful and will be important for clients to consider what their future budgets might look like. This can be difficult to do until they are reaching a stage where they have a or some proposals that they are considering seriously. Generally, you should

remain aware that any decisions people reach should be 'reality' and 'stress' tested. There is no point in people reaching a decision that they subsequently cannot fund.

Some clients ask to photograph the information on the flipchart pending receiving the written draft. If this is the case, ensure the flipchart sheets are marked as 'without prejudice' to avoid any confusion about the status of the recorded information.

You should have a clear understanding of what needs to be included in any financial disclosure and how to check areas of discrepancy, uncertainty or missing information. Ensure both clients also have a clear understanding of the information recorded and why it is required. An important part of recording financial disclosure is for clients to be properly informed about their own finances and confident in their ability to negotiate together. It is usually helpful to emphasise the two-stage process as follows:

- provision of financial information and charting what is in the family 'pot' (which should not create any expectation of division or financial provision)
- discussing options for division and/or financial provision.

You have a responsibility to assist clients in making an appropriate disclosure of their finances. However, it is not your role to interrogate.

Where it appears that financial information is being deliberately withheld or where either or both clients are unwilling to disclose financial information, then consider whether it is appropriate to continue the mediation and whether you should discuss an alternative means of resolving financial issues between them. Otherwise, financial disclosure should be at a standard equivalent to what would be required by a legal process or court-scrutinised route, unless otherwise agreed and recorded by both clients.

Arrangements for children

Where separating or separated parents are considering future arrangements for their children, ensure you:

- gather information about each individual child to assist parents in planning to best meet their needs

- provide information to parents about what is most helpful to children and young

people when parents part (whilst recognising professional boundaries)

- set out the factors that can most help children when their parents separate and those that can cause emotional harm to children and young people

- provide information about services or support and assistance for separated parents, children and young people – bearing in mind that it's often the case that reactions to parental separation are generally within a normative range. Children benefit most from the support of their parents during a family transition, and/or from the support of other significant members of their family or supporters who can be briefed by parents to provide support in a neutral way

- Consider with parents how they can best seek and understand any views their children may have about what is happening in their family and provide information about Child Inclusive Mediation (CIM), remembering that it will be important to consider carefully with parents how appropriate it is or might be given all the family circumstances.

Be alertto parental concerns about their child's behaviour that is clearly outside that which might be considered normal, for example, self-harming, eating disorder, risk-taking behaviour, substance, drugs or alcohol abuse. Provide parents with information and links to specialised services of assistance where relevant.

Discussions in mediation about the upbringing of children when parents separate should take account of the day-to-day care in the unique context of their own family.

Assist parents to consider:

- what they think their children know about what is happening

- what and how to tell their children about their separation and future living arrangements

- how they might talk with their children about what is important to them and any views that they have about what will work best

- whether it might be helpful for their child or children to be offered the opportunity to talk with someone independently (a 'neutral' family member or friend, a mediator, if possible or school counsellor if there are concerns about their child's emotional state)

- whether it might be helpful to ask a neutral family member or friend to act as the child's supporter during the separation, someone who keeps in touch with them and can be available to them

- how to balance their parenting and the importance of their children growing up in a close and loving relationship with each and both of their parents

- how to manage parental communication in a way that best meets the needs of their children; especially in relation to providing boundaries

- sharing information such as addresses as to where their children will be when they are with each parent, and the means for contacting each other

- significant family relationships – grandparents and other family members

- how parents' new relationships might best be managed as far as children are concerned

- arrangements that have significance for children and young people, for example, family pets

- significant issues and events – birthdays, Christmas, school holidays etc.

- future education, health-care issues and any special needs relating to their children

- reality testing arrangements they are considering in the context of their growing children's needs

- the importance of taking account of young people's needs as they grow towards independence – having time to spend with their friends and peers etc.

- contingencies for when things go wrong.

Where appropriate, you should help parents set out their aspirations as separated and co-operative parents in a memorandum of understanding or annexed to it as a parenting plan.

Parenting plans

Parenting plans should not be a means of simply setting the ration of time children will spend with each parent. It is a statement of how parents hope to raise their children together, though apart. The Resolution Parenting Plan template and guidance note is downloadable from the website. Other templates are available, including the Parenting Plan which can be accessed from the Cafcass website. Parents can use it as a guide to think through arrangements for their future parenting.

Rather like a Form E, a parenting plan needs to encompass everything to be considered by parents. It's therefore a very comprehensive document. It's helpful to point this out to parents and suggest they take some time between mediation meetings to consider what's important for their individual children and the family. You can then use the next mediation meeting to assist them in reaching decisions together that can be recorded in a parenting plan or within the Memorandum of Understanding. There is particular policy emphasis being placed on the use of parenting plans as part of the overall reform of family justice. It's intended that, wherever possible, parents should consider the drafting of a parenting plan as a framework to help them parent their children to adulthood, even though they no longer live together.

Parenting plans will not carry any evidential weight in court proceedings, but parents may attach a copy of any existing plan to their C100 application if they make such an application. More information is available in the downloadable Plan and guidance note on the website.

Hearing the voices of children and young people

The revised FMC Code of Practice now also contains a requirement that 'All children and

young people aged 10 and above should be offered the opportunity to have their voices heard directly during the mediation, if they wish' (Rule 5.7.2. FMC Code of Practice). This amendment to the Code is in line with the government response to the recommendations of the Voice of the Child Dispute Resolution Advisory Group Report that states:

'the principle of child inclusive practice and the adoption of a non-legal presumption that all children and young people aged 10 and above should be offered the opportunity to have their voices heard during dispute resolution processes, including mediation, if they wish.'

All mediators do, of course, discuss matters relating to children with parents where this is part of the mediation process. We'd suggest that all members should, as now, talk to client parents about the importance of helping their children by talking with them about what's happening in their family and, wherever possible, encouraging children to share their views. On a separate note, mediators may also wish to raise with parents the possibility that their child may wish to talk to a mediator directly and this opportunity can be provided for children if they so wish.

It is appreciated that mediator members who have not trained in the current model of Direct Consultation with Children or who have yet to attend Child Inclusive Mediation Awareness and Understanding training will need additional information about arrangements for talking with a child directly and the important aspects to share with parents. Resolution will publish further guidance as soon as possible to assist mediator members and Awareness and Understanding training days are being offered at regular intervals by Resolution and other member organisations of the FMC. You may wish to discuss with your PPC how you might introduce children being seen separately with parents and how you might make appropriate links with mediators who can see children directly.

You should also be aware that the new arrangements in relation to CIM practice mean that if you are submitting your portfolio for accreditation after 1st September 2019, you will need to have attended a CIM Awareness and Understanding Day before you submit your portfolio.

Mediators who are recognised to offer the current model for Direct Consultation with Children are listed on the FMC website. As mediators either update their training to offer child inclusive mediation or train as child inclusive mediators, their recognition will be listed as part of their FMC registration.

Developing options

Once all the information is gathered, clients can consider all the options available. Encourage clients to consider the whole range of options that they think might be open to them. If you are suggesting options, take care not to provide clients only with options that you believe might be an appropriate outcome. Provide options the clients may not have thought of or put forward but avoid any indication that the option you have suggested is a preferred or 'better' potential outcome. As clients work towards achieving an outcome, their preferred option should be carefully reality-checked and information given where an option being considered may fall outside that which a court would approve. Alert clients to where and when it would be helpful to seek individual advice (legal or other).

Practicalities

It is important to reality-check the options being considered. This must include affordability and workability in relation to any future financial plans or proposals. If the clients are considering new or re-mortgages, or releasing one partner from the mortgage, encourage them to seek relevant information and advice. New arrangements, particularly in relation to mortgages, the amount of loan available and obtaining a mortgage offer may take time and may not be at a level that either client expects or hopes for. Future financial outgoings should also be tested to ensure affordability. If gaps or shortfalls are evident and clients still wish to proceed, record, as a caution in the memorandum or outcome documentation, that it was discussed and will need to be addressed by the clients.

Preparing to draft documentation

Resolution provides model document outlines for open financial summaries or statements, the memorandum of understanding and a Parenting Plan. You'll need to be familiar with the headings in these documents so that when the mediation is coming to a conclusion, you can check that clients have covered all pertinent areas. This should include, for example, the drafting of wills, signing of notices of severance, any prospect of inheritance, tax (including any tax credits in payment or to be applied for) and benefits.

Drafting and presentation of mediation documents

Mediation documents are of great significance to clients, as they record the commitment and the work they have undertaken in the mediation, often in difficult and emotional circumstances. Documents should always be of a high-quality standard that reflects the significance.

The language used in mediation documents should be carefully considered. If you are using legal terminology it should be explained, as the documents are primarily for the clients and should be clear for them. Mediation documentation is the 'shop window' of mediation – the part of a mediation that is seen externally – so you should ensure that documents are carefully prepared, well presented, and accurate. If you're working towards your accreditation, in line with FMC Standards, your PPC will expect to see your drafted documentation before you send it to clients.

If you intend or are thinking about drafting more detailed terms for clients as part of their outcome documentation, please make sure that you have read the section relating to realising enduring outcomes from mediation in this handbook. You should also ensure that you have discussed drafting more detailed terms in your documentation with your PPC.

Recording Interim decisions

An interim document may be useful to record e.g. a one-off payment for something necessary to day to day living arrangements, a deposit for a flat for example, or to purchase an item such as a washing machine or other white goods. They can also be useful to record a decision to go ahead with a property sale etc. if and when it is useful for the clients to have recorded their decision. Mediators should use their common sense and their knowledge and experience when preparing these documents, the importance is to ensure that individuals understand the effect of any decision/s, are encouraged to take advice where necessary (please also record in the template if you have recommended advice and the clients have decided not to seek/take it) and that you do not prepare an interim document where it is clear that in doing so, there may be a substantial or detrimental effect on any final outcome proposals. This needs careful consideration where appropriate financial disclosure is not yet complete as it may be difficult for you to assess whether a

decision reached may or may not have a substantive effect on final proposals.

Template wording is available for these documents on the Resolutions website. Please note that interim documentation should only be used to record decisions made as part of a continuing mediation process or where a decision has been made that all that can be decided or proposed from a mediation process has been reached and that there are outstanding issues to be resolved. [An interim document in this case will act as an aide-memoire for the individuals to take on to their next step (which you should have discussed with them) and will help any receiving professional readily identify what remains unresolved]. It must be made clear to clients where the decisions would still benefit from individual legal advice before implementation and you must have explained to clients that a. any decisions taken to utilise monies from the joint or individual finances will still need to be taken into account as they work towards their final proposals and b. any decisions they make should be those that are unlikely to result in any substantive or material effect on any final settlement proposals they reach (e.g. an interim decisions should not be made regarding the division or sharing of pensions where financial disclosure is not complete).

Interim decisions regarding parenting arrangements

Sometimes it can be helpful for parents who are struggling to establish a co-operative parenting relationship to have an interim document setting out how they wish to manage arrangements for their children on an interim basis or to record arrangements they wish to try out. Please be aware that if parents are very conflictual, there is a danger that an interim document that details e.g. quantum of time (especially) or pick up and return times can be used by one parent against the other and can escalate rather than diffuse conflict. Where possible, any interim children arrangements should also include contingency arrangements designed to manage any conflict should it arise.

Records

Clients are entitled to see and question any written record you make and keep on file as part of the mediation process (see information in the handbook section relating to data protection and GDPR). Clients should be made aware of this so, if note-taking, you should

keep notes to the bare minimum of facts, tasks yet to be undertaken and any other information that assists both clients and you to progress the mediation.

You may wish to consider sending clients a brief and balanced summary of discussions, and tasks to be undertaken between meetings, as part of client service. Any summary provided should be one document sent to both clients, separate copies if they prefer. If you choose to do this, you should make sure that your fee information reflects this and/or that any such correspondence is costed into their overall fee.

You should ensure clarity around the confidentiality of any individual discussions. Individual discussions as part of the mediation process can be helpful but should be managed with care to preserve even-handedness and balance. Individual meetings are especially important for assessment or screening, in first preparation meetings or as part of a 'shuttle mediation', but can also be useful to 'check in' with individual clients as to e.g. how they think the mediation is progressing, to check if there are particular concerns or issues they are finding difficult to raise in a joint meeting and/or whether they lack some element of information. Any notes of these discussions should be clear about this, as should the agreement with the client about the nature and disclosability or otherwise of such notes. Generally, family mediators may not keep 'mediator secrets' or individual confidentiality (see also handbook section on hybrid models of practice).

It may be helpful to provide between-meeting summaries to the clients' solicitors (if the clients consent), so they are kept informed about progress and are better able to support their clients through the process. The fact that their solicitors may charge for reading the summary should be made clear and taken into account. The basis on which the information is disclosed should also be considered carefully in the context of confidentiality and privilege and documented appropriately.

For professional practice purposes, particularly when working towards accreditation, you should also keep a brief professional practice note. This should record:

- a brief overview of the situation and the issues brought to the mediation
- what skills and techniques you used in the mediation
- what went well and what on reflection you might have done differently

- what areas of professional practice you would like more information or guidance about.

Professional practice notes are kept separately from client files as they provide an aide memoire on practice issues for discussion between you and your PPC, and as a means of preparing your accreditation portfolio. If they're for your benefit and they belong to you rather than your clients, they need to be suitably anonymised and may not be charged for.

If you're working towards accreditation, Resolution has a number of template documents for the purposes of keeping a record of your professional practice in each case, logging time with your PPC and recording your learning and development. The templates can be accessed from our website.

If you are a new mediator, you should discuss with your PPC keeping records towards preparing for your accreditation, how best to set up and manage mediation client files and what arrangements your PPC might expect in terms of reviewing client files and file management with you. If you are working within a regulated practice, remember that although mediation is not a legal process and therefore mediation files are technically, separate from the arrangements for legal client file management, you and your COLP and/or COFA should discuss what expectations they have for your mediation file management. You should also be aware that Lexcel may expect to include mediation client files in their assessments.

Responsibilities in relation to data protection

This guide can only provide mediators with broad guidance in relation to data protection principles and requirements. It is essential that you ensure that you are conversant with the principles and requirements of data protection and that you are sure that you are compliant with regulations within your practice. Whilst every care has been taken in drafting this broad guidance, Resolution cannot take any responsibility for subsequent changes or precedents established as a result of the implementation of the GDPR.

General Data Protection Regulation

The General Data Protection Regulation (GDPR) was implemented from 25 May 2018. All mediator members should be aware of and compliant with the requirements of this regulation. The GDPR will strengthen the Data Protection Act provisions.

If you work within a regulated practice, please ensure that you have spoken with whoever within the practice has overall responsibility for compliance with GDPR (probably your COLP or DPO or DP lead) so that they can ensure that your mediation practice is compliant. For members who work in other services or as a sole practitioner, you should check the information on the website of the Information Commissioner's Office (ICO) so that you have checked and reassured yourself that you are compliant with the regulation.

Please also remember that the GDPR is a 'living document' and is likely to be expanded upon and amended over time so you should ensure that you are checking for amendments or changes on a regular basis (e.g. it is possible to subscribe to the ICO e-newsletter). Please also note that Brexit arrangements will not affect the GDPR. It is also important to remember that although the GDPR in effects strengthens existing legislation, aspects of it are new and untested so you should always consider any actions you decide to take carefully and should ensure that you discuss any concerns you have with your PPC (and with your COLP if you work within a regulated practice).

The Data Protection Act 1998 and the new GDPR protects the rights and privacy of individuals. It requires anyone who handles personal data to comply with a number of important principles and legal obligations. As the legislation and new regulation is settled on a number of principles, it requires that you reflect carefully and consider how data protection principles apply on a case-by-case basis, as well as ensuring that you comply with requirements in relation to being clear as to your policy for any client/s. All family dispute resolution practitioners, including mediators, should be aware of their responsibilities in relation to the provisions of the Act.

This has application in family dispute resolution processes where there is, may be or has been, data or information that has been collected by you, that you hold or store and/or may or could be shared with other professionals or in any other way outside of the mediation process. This might include lawyers, IFAs, financial neutrals or family consultants who may be involved in working with, advising or representing clients as part of, or outside of, any family dispute resolution process. Care should be taken to ensure that any information shared outside of the immediate mediation process should only be shared with the

knowledge and consent of those involved. If you work in an inter- or multi-disciplinary way with mediation clients, you must ensure that you have arrangements in place that make it clear to them how their data protection rights are protected and managed between you and by each of you.

Schedules 2 and 3 of the Act set out the circumstances under which the processing of personal data may be considered fair and lawful ('the principles'). The main principles are that you must:

- have legitimate grounds for collecting and using the personal data
- not use the data in ways that have unjustified adverse effects on the individuals concerned
- be transparent about how you intend to use the data, and give individuals appropriate privacy notices when collecting their personal data
- handle people's personal data only in ways they would reasonably expect
- make sure you do not do anything unlawful with the data.

Personal data

The ICO defines 'personal data' in relation to the GDPR as:

'The GDPR applies to 'personal data' meaning any information relating to an identifiable person who can be directly or indirectly identified in particular by reference to an identifier'.

'Sensitive personal data' includes any genetic or biometric data where processed to uniquely identify an individual'.

You should be aware that 'personal data' may therefore apply to a range of data or information held by you as part of client's records or any record of the mediation.

Security of information held

You must ensure that any personal data or information you hold is stored securely. If data is held electronically, you have a responsibility to ensure that your systems are secure and that you can securely and fully delete any data or information. Similarly, any paper information or data must also be stored and destroyed securely.

Retention of information

The Data Protection legislation does not set out any specific minimum or maximum periods for retaining personal data. It sets out that:

'Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.'

Mediators should therefore think carefully about their current arrangements and ensure that they are not retaining personal data any longer than is necessary for the purposes of providing a mediation service. This will include thinking carefully about retaining information regarding e.g. credit/debit cards used in relation to payments, financial information/documents, documents copied for identification purposes etc. You must also take into account any legal or regulatory requirements and if working as part of a regulated legal practice, you should discuss this aspect with your COLP. If you offer Legally Aided mediation, please ensure that you comply with the terms of your contract in respect of retention of records, you may find it useful to discuss this with your PPC and/or with your local contract manager.

Please remember that mediation is not a 'legal activity' (defined in the Legal Services Act 2007, S. 12 (4)) and so the requirements for retention of legal documents will not apply in the same way to the retention of mediation documents. Many mediators currently apply the same rules for retention as they might in a legal practice but under the new data protection regulation, you must re-think what is appropriate to retain and for how long and what should be destroyed in line with data protection regulation. You will need to balance this with considering how long it would be considered reasonable to hold on to documents and files, especially as the client outcome documents might be important in terms of clients needing to re-visit proposals at a later date or in respect of e.g. any investigation in relation to a complaint or an alleged crime or unlawful act where you may be required to produce any information pertinent to an investigation. You should also check with your insurer (especially if you work in a regulated practice or as a barrister who mediates) that any arrangements you make with regard to retaining, storing and destroying personal information is compliant with insurance requirements).

Generally, it is good practice and will be required as part of GDPR responsibilities to set out your arrangements for collection, sharing, retaining and destroying personal data and

information so that clients are clear as to arrangements. The ICO suggest that this might best be accomplished by having a 'Privacy Notice' or Policy in which this information is set out.

What you should consider when drafting a Privacy Notice or Policy

As a mediator, you collect, handle and store a broad range of personal information about individual clients. In addition, you have certain responsibilities in relation to discussing and explaining what information might or will be shared (for example, between clients or with individual solicitors), who else might have sight of it, how long it will be kept and how it will be destroyed.

A Privacy Notice or Policy should set out in clear, understandable and unambiguous language how you and your practice handle and manage personal data.

The ICO provides a useful checklist for creating a Privacy Notice or Policy, which can be accessed here.

Your Privacy Notice or Policy should support any information you provide in other client documents e.g. any Preliminary Information Form, the Agreement to Mediate etc.

You should also and therefore check your mediation documents to ensure that they too are compliant with requirements. There are templates and guidance on the Resolution website. (If you prefer to use your own version of mediation documents, please also see the Guidance available to members with the template documents on the website).

Consent

The GDPR provides information in respect of consent on its website. It suggests that consent should be set out separately from other terms and conditions and that individuals should be aware that they may withdraw any consent given if they so wish. It is therefore important that individual clients know and understand that they are being asked to consent to any information sharing or any other specific detail about their information and have a choice about giving that consent. Therefore, you should be clear about when information might, could or will be shared and always ask for and obtain the clients' express permission for that to happen.

Mediators working towards accreditation

If you are working towards your accreditation, you will be keeping professional practice notes (that are not part of the client file, templates are available on the Resolution website) to aid in building your accreditation portfolio. You will also need to keep client outcome documents as required evidence of your practice. In any event, you are required to anonymise any documentation that you submit for your accreditation. You will need to consider carefully how you keep notes and documents so that you remain compliant with the GDPR. You may wish to discuss this aspect with your PPC.

Complaints

Please also remember that if a client makes a complaint that cannot be resolved by you or within the practice that if the complaint is latterly referred to Resolution (or to another regulator e.g. LeO or the SRA) it is likely that information from the client file or the file itself will need to be released for the purposes of investigating/resolving the complaint. You should therefore ensure that clients are aware of this aspect, which is referred to in the template Agreement to Mediate and in the accompanying Guidance.

Subject Access Requests (SARs)

From time to time you may receive a request from clients, prospective clients or former clients to provide information you hold about them. This is known as a 'subject access request'. Generally, people are entitled to be told what personal information is held about them and to be provided with it, including how the information was obtained. If you receive such a request, now that the GDPR is implemented, **you may not make a charge** for responding to a subject access request.

If the individual's information contains information about another person, usually it cannot be provided without that other person's consent. However, if the client hasn't specified what particular information they're seeking, it can be useful to clarify what it is they want as it may be that they are only seeking information pertinent to themselves. The data protection regulation and principles requires that you consider each request you receive on a case-by-case basis and you must ensure that you have followed and carefully balanced regulations and principles.

Further information in respect of professional duties in relation to Subject Access Requests

is available from the website of the Information Commissioner's Office. The ICO also produce a very helpful Code of Practice and Checklist relating to Subject Access Requests

Exemptions

All practitioners should note, however, the provision for permitted disclosure of data (exemptions from non-disclosure):

- by or under any UK enactment
- by any rule of common law
- by order of a court or tribunal in any jurisdiction.

In these circumstances, the legal obligation overrides any objection the individual may have.

Disclosure is also permitted if it's likely to assist in the prevention, detection or prosecution of a crime and a failure to disclose would be prejudicial to those purposes.

Negotiation exemption

Part 4 of and Schedule 7 to the Data Protection Act set out several specific exemptions. Included within these is an exemption in relation to negotiation. This part of the legislation allows for exemption to disclosure in relation to negotiations where it would be likely to prejudice the negotiations and it may therefore have application in relation to any SAR made by a mediation client. However, as with the consideration you should give to any decision-making about releasing information without the other person's expressed consent, you should consider carefully whether this exemption is justified in any decision to withhold information. (Further information is available from the ICO website).

Police requests

Occasionally, you may also be contacted by the police who are investigating an allegation of domestic abuse or other crime. They'll generally inform you that a client (past or present), or a past prospective client, has given their permission for the release of any records from you that are directly related to that person having told you about the abuse which is now being investigated by the police as a crime. Generally, any request will be accompanied by a Personal Data Request Form. This form clarifies under what legislation the request is being made and confirms that it is because of an investigation into allegations of a crime.

Requests of this nature fall into exemptions from non-disclosure permitted under Data Protection legislation (and may also be under other legislative provisions) If any request is made without a Personal Data Request Form, you should ask that you are provided with one and also ask whether the person named has given their permission for information to be released. Make sure that you keep copies of the Personal Data Request Form and any written permission provided by the person on their file. Requests of this nature vary, but generally you should confirm the date of any meeting with the person and what they said to you about the allegation now being investigated.

Very occasionally, the police may insist on having copies of notes from your file and/or the file in its entirety and you should provide them. Whilst it is generally good practice to check with and/or have the written permission of any individual if you are to release their information to a third party, in the case of the investigation of a crime, there are may be very good (and lawful) reasons why you should not contact the other person. If you are in any doubts about this you should check with the police officer requesting the information, explaining your normal practice and/or speak with your PPC if you have any concerns about the request. If you work within a regulated practice, please also ensure that you speak to your COLP. They may be assisted by having sight of this section of the Good Practice Guide.

Mediation Information and Assessment Meetings

Please remember that appropriate arrangements in relation to data protection will also apply in respect of any MIAM. The 'legitimate grounds' for collecting information in respect of both applicant and respondent (and also for initial contact) is primarily s.10, Children and Families Act 2014 and specifically, the Family Procedure Rules, Part 3A Mediation Information and Assessment Meetings, where at 32. and 33. it states:

'Prospective respondents are expected to attend a MIAM, either with the prospective applicant or separately. A respondent may choose to attend a MIAM separately but this should be with the same authorised family mediator.

33. The prospective applicant should provide contact details for the prospective respondent to an authorised family mediator for the purpose of the mediator contacting them to discuss their willingness to attend a MIAM and, if appropriate, to schedule their attendance at a MIAM'.

You may wish to consider setting this out in any Privacy Notice or Policy that you create for

clients and/or any letter sent to a prospective respondent.

You should consider whether it is appropriate to use a/the template Preliminary Information Form ahead of a MIAM simply because it asks for a great deal of personal information (and therefore may not be compliant Principle 3 'shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed'). It may also be the case that the individual may not go on to mediate and may already be unhappy that they have to attend a meeting when they had hoped to issue proceedings or conversely, may not have been aware that their former partner intended to do so. In data protection terms, you should only collect data and information that you really need, you must store it securely and you should ensure that it is destroyed securely as soon as it is no longer required or relevant. For all these reasons, it may be more appropriate to use a shorter form to collect basic data.

Please note that MIAMs should be treated as confidential in similar terms to the mediation process itself (see FMC Code of Practice).

The memorandum of understanding/outcome statement or summary

In July 2019 The FMC approved a guidance note prepared jointly by Resolution and The Law Society in relation to the drafting of more detailed terms and/or the drafting of standard draft orders by mediators. This is a significant change in mediation practice and all mediators should be aware of this guidance which is set out in this Handbook at 'Helping Participants realise an enduring outcome to family mediation'.

It is important to point out that the guidance does not represent an overall change to the preparation of all outcome documents to provide draft detailed terms. It is provided to assist those mediators who wish to provide such drafts if and when it is appropriate to do so.

Generally, mediators should work on the basis of 'just because you can, it doesn't mean you should' as there are a number of considerations for you and for your clients as to what might be most appropriate and helpful in an individual case.

Any Memorandum of Understanding should be clearly marked as 'confidential' and 'without

prejudice' and the precedent paragraphs from the Resolution model document/s must be used at the opening of the document, adapted as required for the particular clients or the model for practice being used. (see also section on enduring outcomes in this handbook).

All headings in the model document should be addressed. If a particular issue has not been discussed in the mediation, indicate that this is the case. Where there are outstanding matters to be resolved, these should also be noted in the document. If you have a concern about any part of the outcome but having discussed this concern with the clients they wish nonetheless to proceed with a proposal or decision, then you should record this as a caution within the document.

Language used in mediation documents should be clear, neutral and balanced. Formal legal terminology should be avoided (unless an explanation as to the term used is also provided). Language in relation to decisions reached about the formal ending of the couple's relationship, and especially in relation to arrangements for the children of the family, should be sensitive to the client's situation and circumstances. Use of the words 'agreed' and 'agreement' should be avoided in the memorandum of understanding to ensure there is no confusion as to the status of the proposals made in mediation. (see also section on enduring outcomes in this handbook).

Draft a bullet point summary of the proposals, clearly setting out the proposals reached, with a timetable wherever possible and practicable.

The memorandum or outcome statement or summary is your record of the mediation outcomes and is signed by you and not by the clients. This also ensures there can be no misunderstanding about the non-binding nature of the document. (This is particularly important if the MOU contains draft detailed terms and you should use the appropriate template).

Open financial statement

This document should be clearly titled as an open summary or statement and the opening paragraphs from the Resolution model document must be used (adapted as necessary). Give an indication in the opening paragraphs as to whether the document provides full disclosure or whether disclosure is not yet complete, and the date that the clients have agreed applies to their disclosure.

Usually, you would prepare a working draft of this document following the joint recording of the financial information provided by the clients. This should be marked as a 'draft'. Once all financial information has been finalised as far as possible, prepare a final version that can be signed by the clients at the last meeting.

Background information should be factual and take care to record any such information to ensure that nothing of a particularly sensitive nature is included, as this document may be seen by a number of other professionals.

The financial schedule should clearly set out the client's finances (including details of account/policy numbers/references) and any significant points flagged up – including where information is still needed. The schedule should include all assets and liabilities, income and outgoings, details and copies of the documents seen, and the clients' individual Form Es or other financial form attached if required.

This document is signed by the clients (rather than you) as an indication that it is their agreed financial disclosure, although you may sign it as a 'witness' to their signatures if you wish.

Variations – disclosure

Obtaining financial information, particularly in relation to the cash equivalent value (CEV) or pension valuations, can cause considerable difficulties in mediations.

Clients may decide to proceed without a valuation and/or state that they do not wish to deal with any pensions. If so, you must be clear that pensions can represent a significant family asset. They should be aware that there is a danger that any proposals reached in regard to their finances may be set aside once a valuation of any pension/s is made.

A caution should also be placed in any documentation that pension information is not available or that clients, having been informed about the importance of pensions, wished not to discuss or deal with any pensions.

Occasionally, clients may decide to proceed in their negotiations even though they're

waiting on a pension valuation – especially if they're told that information may take months - rather than weeks - to be available. Consider carefully with the clients whether they should continue their negotiations on that basis, or whether they should re-schedule the mediation process to a time when the information is going to be available.

You do have a duty to ensure that clients are provided with the best possible service; one that does not result in unfair proposals or cannot be taken to a binding conclusion as a result of missing financial information. It may be possible to discuss pension options in principle without specific values, with the details to be finalised when CEVs are available. This will depend on the circumstances of the individual case.

If you agree to end the mediation as a result of withholding financial information, you should provide written confirmation to the clients noting any proposals outside of the financial matters that were reached in mediation. If this is provided as a memorandum of understanding, you should record that mediation ended as it was not possible to obtain full financial disclosure and record only those proposals made in relation to non-financial matters.

Pensions

As is recorded above, pensions represent a major family asset where they are available as part of the family asset base. With recent changes to pensions legislation, it is extremely important that mediators are careful to inform clients of the importance of having specialist advice in relation to their pensions. As a mediator, you are unlikely to have the expertise required and it is therefore important that you discuss with clients what sources of help, information and advice might be available to them. It will be important that you remain alert to those situations where it may be essential to have a valuation report and to help guide clients in thinking about how that can be obtained, from whom and how any instruction can be formulated.

This is an area where increasingly, mediators are working with financial and pensions advisers and lawyers to ensure that clients can make fully informed choices about any division or allocation of pension funds.

It is always useful to remind clients that they should also seek information about their entitlement to State pension as this can have a significant effect on their future planning. It is possible to obtain a State Pension forecast (other than those in payment) at https://www.gov.uk/check-state-pension . There is also information on the gov.uk website about contacting the Future Pension Centre and downloading Form BR19.

Money laundering, fraud etc.

You need to inform your clients of your duty to disclose suspected or actual fraudulent or criminal intent. It will be detailed in the agreement to mediate, so draw your client's attention to it. If you have any concern that the client may make an allegation or disclosure, you may need to remind your client of your duty.

Where you have any concern in relation to allegations of fraud, criminal offences, or a money laundering offence, you must manage the situation in accordance with legal and regulatory duties.

Money laundering refers to concealing the source of illegally and grey area-obtained money. The Proceeds of Crime Act 2002 (as amended) sets out legislation relating to money laundering offences and includes provisions requiring businesses within the regulated sector (banking, investment, money transmission, certain professions etc.) to report suspicions of money laundering to the authorities.

One consequence of the Act is that solicitors, accountants, and insolvency practitioners (and some businesses, for example, banks), who suspect that someone has engaged in tax evasion or other criminal conduct from which a benefit has been obtained, must report their suspicions to the authorities.

The effect of Bowman v Fels on mediation

In most circumstances it would be an offence (tipping off), for the reporter to inform the subject of their report that a report has been made. These provisions do not, however, require disclosure to the authorities of information received by certain professionals in privileged circumstances or where the information is subject to legal professional privilege.

The Court of Appeal considered these issues in Bowman v Fels [2005] EWCA Civ 226 and recorded at para 100:

'The need to encourage co-operation and the value of consensual settlement have been underlined both nationally, by the Woolf Reforms in particular, and internationally, e.g. in the acquis of the Council of Europe and the developed practices of courts in countries such as the United States and Canada. Consensual settlement gives effect to the parties' perception of the strengths and weaknesses of their respective positions, which would otherwise have to be determined by litigation to judgment. Any consensual agreement can in abstract dictionary terms be called an arrangement. But we do not consider that it can have been contemplated that taking such a step in the context of civil litigation would amount to "becoming concerned in an arrangement which…. facilitates the acquisition, retention, use or control of criminal property" within the meaning of s328. Rather it is another ordinary feature of the conduct of civil litigation, facilitating the resolution of a legal dispute and of the parties' legal rights and duties according to law in a manner which is a valuable alternative to the court-imposed solution of litigation to judgment.

101. We appreciate that this means that there is a distinction between consensual steps (including a settlement) taken in an ordinary litigious context and consensual arrangements independent of litigation. But this is a distinction that is inherent in recitals (17) and (18) and in the second paragraph of article 6(3) of the 2001 Directive, as well as in ss330(10)(c), 333(3)(b), and 342(4)(b) of the 2002 Act.... The 2002 Act makes it clear that the distinction is between situations where there are existing or contemplated legal proceedings and other situations, and this seems to us consistent also with the language of recitals (17) and (18) and the second paragraph of article 6.3 of the 2001 Directive'.

And at para 95:

'Information communicated or given with the intention of enabling a court to adjudicate upon the respective rights and duties of opposing parties would not be given for such a purpose, even though it happened to disclose that one or other party had engaged or was

engaged in money laundering activities (eg a VAT or tax fraud). For the reasons we have already given, the issue or pursuit of ordinary legal proceedings with a view to obtaining the court's adjudication upon the parties' rights and duties is not to be regarded as an arrangement or a prohibited act within ss327-9.'

You should be alert to the possibility of money laundering, fraud and other criminal intent. If in doubt about any particular situation, contact your PPC and consider what to do in accordance with your firm's money laundering reporting procedure (if applicable).

Requirements and arrangements in regard to money laundering may change. Make sure you keep up to date on the current guidance. For more information see the Law Society practice note guidance in relation to money laundering.

Payment for mediation documents and concluding the mediation

Remember that if you're a mediator working towards your accreditation, you'll need to have completed three or four mediations that have resulted in a full set of client documentation. One of the more recent changes to the accreditation process is that you can choose to submit one case of your three or four which has not concluded to a full set of client documentation but from which you can produce clear evidence of skills used and are able to reflect on the particular case, why it did not conclude and wht you might have done differently. It is also possible for you to submit a case where although the clients have not wantd the outcome documentation, you have prepared MOU and OFS as if to present to the client but for the purposes of your portfolio. Full information about this is available in Resolution's Guide to Accreditation.

In terms of client service,you should see and promote to prospective and actual clients the preparation of client documents (the Memorandum of Understanding and/or Parenting Plan and Open Financial Summary or Statement) as part of the mediation process and not an 'add-on' to it. Explain it to potential clients as a beneficial outcome integral to their mediation.

Some mediators work the cost of preparing the documents into the overall hourly or fixed rate for mediation so that the clients are not faced with additional costs for documents. However you decide to charge, you should make sure that your fees mean that the service

you are providing as a mediator is good value to the clients and profitable for you.

You should discuss with clients how much you charge to provide relevant documents early on in any contact with prospective clients so they're clear about the likely overall cost of their mediation. Your Agreement to Mediate should set out your overall costs (including for documentation) and the client's attention should be drawn to it before they sign the Agreement to make sure you and they are clear about costs and any questions they might have are answered.

Generally, your Agreement to Mediate acts as both terms of engagement and client care information because the FMC Code of Practice requires that you act only as a mediator, regardless of whether you're working from a legal practice or otherwise as a solicitor. But please also see information set out below in respect of Complaints.

The FMC Standards also require you to ensure that all clients are aware of your complaints process and that details of how to complain are made available to them. This information is included in the template Agreement to Mediate. If they have a concern or a complaint, they should tell you first. If you're unable to resolve it then they may use your firm or practice complaints process to seek a resolution that way.

If it does not prove possible to resolve the complaint between you and the client or via the firm or practice's complaints process, there are a number of routes open to clients to make a complaint and these are set out below.

There is further information about the mediation complaints process on the Resolution website, together with a 'complaints toolkit' to assist you. If your firm or practice require you to use their existing 'terms of engagement' or client care letter, you should adjust it and ensure that it contains the correct information in relation to the FMC Code of Practice and relevant complaints processes. See also 'Dealing with Client Concerns and Complaints'section..

Explain at the outset and remind clients at the conclusion of the mediation that there is a charge for the preparation of mediation documentation if costs are not inclusive to your overall fees. On completing the mediation documents (which should not usually be more than a maximum of 10 working days from the date of the last meeting), you may wish to inform clients that the documents are available and will be forwarded to them on receipt of

payment.

You may also take payment for mediation documents at the last meeting if this is acceptable to both clients. In any event, you should ensure that you have clearly set out arrangements for the payment and delivery of mediation documents.

On release of the documents to clients, be sure to remind clients of the onward path from their mediation – encouragement to see a solicitor for individual advice on their proposals if this has not happened already, with a view to formalising their proposals into a binding agreement/consent order. If you have prepared detailed draft terms or draft standard order, please ensure that you have used the correct MOU template and that clients are clear about their onward path from you.

Consider diarising a 'follow-up' letter to clients to check that they're progressing with their proposals and to invite them to return to mediation if they've encountered any problems.

Variations – documentation

Occasionally, clients prefer not to have a memorandum of understanding, or their mediation may not have included finances and therefore they do not need to make financial disclosure. Early in the process, discuss the clients' wishes and requirements in respect of the documentation that reflects and records the outcome of their mediation.

This might be by way of a confidential, legally privileged, 'without prejudice' letter or a confidential and legally privileged outcome statement or summary. Take care that where you do not provide a full memorandum of understanding, any documentation you do provide is appropriately headed to indicate the status of the document.

Payments on account

You can take payments on account if you have appropriate arrangements to do so, and if that is provided for by the terms of engagement agreed with the clients.

Keep a detailed breakdown of time spent. If mediation ends or breaks down ahead of the time the clients have lodged payment for, ensure a prompt return of any outstanding funds and provide a detailed breakdown of costs incurred. As mediation is a voluntary choice, consider whether taking payment at the end of each session is a more appropriate means of indicating and confirming that it's the client's choice as to whether they'll continue in a mediation process at the conclusion of each meeting.

Non-payment

Generally, you should not send documents until payment has been received from both clients. However, if one client provides payment but the other does not, you must provide the documents to the client that has paid, unless the terms of business the clients have signed provide otherwise. You should contact any client who withholds payment to discuss the reasons why this is the case and to consider how payment can be made.

In the case of non-payment for meetings, inform any client who has not made payment that the mediation cannot continue until it's been made.

Ending a mediation process

We have already touched upon some of the most common reasons for terminating the process. In summary:

- a consensus has been reached on the issues which the clients have brought to the process
- there's a power imbalance between the clients that cannot be addressed
- it becomes apparent that either or both clients lack capacity to take part, negotiate, or to reach a workable, fair and reasonable outcome
- there's an allegation made in regard to harm or abuse, whether between adults or in

respect of a child (here the safeguarding guidelines must be followed)

- there's deliberate non-disclosure of financial information
- information is disclosed, an allegation is made or you suspect fraudulent or criminal intent on the part of either or both clients
- no progress is being or is likely to be made in relation to the issues to be resolved
- either or both clients wish to end the mediation
- you believe that for any reason related to the principles of mediation, it's inappropriate to continue
- the client's individual or joint circumstances change rendering continuing mediation inappropriate in the short or medium term (e.g. pending a property sale or other financial situation, the illness of one or other client).

Where a decision is made to end the mediation, discuss the options that remain available to the clients to resolve any remaining issues or conflicts and ensure they have an onward destination or immediate 'next step' beyond mediation.

Linking with other available means of resolving matters

Mediation is one means of resolving matters and is part of a wider system of family dispute resolution and solution seeking choices. As practice advances and family justice procedure changes, it is useful and important to consider how you might assist clients to move on to or between other choices inresolving matters. . For example, where it is the case that a mediation results in an impasse in one area even though other matters are generally decided upon, it might be helpful to consider with the clients whether the use of family law arbitration (for either a financial or children matter) may provide them with a means to resolve the outstanding issue.

Some mediators are beginning to consider how they might best formulate ways to ensure

that their clients do have choices either as part of their mediation process (working with financial advisers, family consultants, other specialist advisers) or as an option should the mediation reach a partial conclusion or proves inappropriate. Resolution will issue further guidance about these opportunities as it becomes available.

If you are interested in working in this way, you should talk first with your PPC.

Dealing with client concerns and complaints

You have a duty to inform clients of your complaints policy. The agreement to mediate should detail these arrangements. It should also include a clause that clarifies that, upon signing the Agreement to Mediate, clients are also giving their permission for the release of any information and/or the mediation file for the purposes of resolving any complaint (see also the handbook section in relation to GDPR responsibilities and the website for model documents, including separate client consent form). The Resolution Agreement to Mediate includes this information.

Try to resolve any concern or complaint with the client as a first stage wherever and whenever possible. If this fails, provide clients with full information as to how they can complain to your firm or practice (if applicable).

Resolution provides good complaints handling information for members and there are guidelines and standards set by the Family Mediation Council that must be followed.

If it does not prove possible to resolve the complaint between you and the client or via the firm or practice's complaints process, there are a number of routes open to clients.

Complaints to Resolution

Usually, the first step beyond you and your practice in relation to any client complaint about a breach of the FMC Code should be to Resolution. In order to nominate Resolution as the route for any client complaint, you must have a current and valid mediator membership of Resolution. Mediator members of Resolution pay a DR fee and are searchable on the member-facing section of our website. You must also have conducted your mediation under Resolution guidelines, using Resolution template documents or documents that reflect the

guidance provided by Resolution. Once Resolution receives a client complaint, it will be investigated in accordance with the current policy and procedure.

Resolution will accept complaints from anyone who believes that a mediator member has breached the FMC Code of Practice. As the FMC Code of Practice (General Principles 5.1.7) requires mediators to conduct mediation as an independent professional activity, distinguished from any other professional role in which they may practise, it is the FMC Code of Practice that is the primary reference for any complaint made.

If a client believes that you've also breached the Resolution Code of Practice, in rare circumstances this may be considered by the organisation but primarily, it's a breach of the FMC Code that Resolution will consider in line with their responsibilities as a member body of the FMC.

If you work within a legal firm or practice, ensure you discuss your responsibilities to work within the Code of Practice of the FMC with your complaints or compliance officer or partner. Any complaint about a breach to the FMC Code of Practice that you or your firm cannot resolve should be referred to Resolution. However, clients should also be made aware of the additional complaints routes that are available to them.

The SRA and mediators working in a legal practice

We have received information indicating that the SRA believes it has a role to regulate solicitors who are also mediators offering mediation from their legal practice (as opposed to those working in a separate and unregulated entity) under the terms of the Solicitors Act 1974 s.1a.

We suggest that **if you're a solicitor who's mediating from your legal practice and relying on your practice insurance for your mediation cover**, you should amend your information regarding complaints to indicate that it's possible to make a complaint to the SRA and to provide a link to the SRA's complaints procedure. It's also important that you explain that if a client (or third party) wishes to complain about a breach of the FMC Code of Practice (rather than poor service or breach of SRA regulation), they should contact Resolution if it's not proved possible to resolve the complaint via you or the firm's complaints procedure. Please note, however, that the SRA and the Legal Ombudsman may decline to deal with a complaint from a third party who is not directly involved in the mediation or where the complaint refers to a breach of the FMC Code of practice rather than poor service or breach

of SRA regulation.. The FMC Standards however, require Member Organisations (MOs) to have provision to deal with third party complaints.

Resolution and The Law Society have jointly referred this matter to the FMC who have agreed to write to the SRA seeking further clarification so that we can inform members with certainty on this point for the future. We've also requested that they write to the Legal Ombudsman in the same terms as we're aware there's also continuing confusion about the role the Legal Ombudsman has in regard to mediation complaints. We are aware the Legal Ombudsman has investigated some complaints and have conversely written to some complainants to say they do not deal with mediation complaints.

Resolution will ensure that all mediator members are informed of the outcome of any correspondence with the SRA and/or the Legal Ombudsman as soon as it's available.

The Legal Ombudsman

As is mentioned above, there's been a mixed response from the Legal Ombudsman in regard to mediation complaints. In any event, the Legal Ombudsman would normally deal with complaints about poor service rather than a breach of any professional Code. It is suggested that all mediators should explain that it might be possible to make a complaint to the Legal Ombudsman and provide clients with information about how they might contact the Legal Ombudsman.

Consumer Rights Act 2015

This legislation sets out requirements for all traders and service providers. It covers all aspects of consumer rights including, for example, unfair terms and cancellation fees. As a mediator you must comply with the legislation as it applies to all traders and service providers who charge a fee for their services.

Part of the new legislation also implements the requirements of the EU Directive: The Alternative Dispute Resolution (ADR) for Consumer Disputes (Competent Authorities and Information) Regulations 2015.

The aim of that part of the legislation is to provide all consumers with greater access to early resolution and redress if something goes wrong with a purchase of goods or services. If a business is involved in a dispute with a consumer that is not resolved through the

business's complaints procedure, it will need to make the consumer aware of a relevant certified 'ADR provider' and let the consumer know whether or not they are prepared to use the ADR provider to deal with the dispute.

As in all mediation processes, you and the clients have to agree to use an ADR provider. It is not compulsory for you or the clients to do so, unless the business operates in a sector where existing legislation makes it mandatory, such as financial services.

Further information on how the Act affects mediators is available on the Resolution website.

What Resolution will do if a complaint is made

Full details about the Resolution mediation complaints procedure is on the website. If a client has already contacted the SRA or the Legal Ombudsman (or an ADR provider under the Consumer Rights Act), Resolution will not deal with the complaint until the client has received an outcome to the complaint from that other body.

Resolution will always endeavour to seek an informal resolution to a complaint if that might be possible. However, if a complaint goes on the formal procedure, the way in which that will progress is set out in the complaints procedure.

Mediator members of more than one organisation

If a complaint reaches the stage where your membership organisation needs to be involved, you must make it clear which mediation organisation complaints route your client must take.

Generally, if you've conducted the mediation under Resolution guidelines and are a Resolution trained or converted mediator member or affiliate, the stated complaints route should be to Resolution. If, however, you conducted mediation under the guidelines of another mediation organisation, or if you're a member of another organisation and not Resolution, then it should be made clear that the route for any complaint is to that membership organisation.

Take care not to confuse clients about appropriate complaints routes or to leave yourself

open to multiple or cumulative complaints across member organisations. The relevant complaints route should be made clear within the Agreement to Mediate. For more information, see the Guidance note and template Agreement to Mediate on the Resolution website.

Monitoring performance/practice – client feedback

Wherever possible and practicable, consider how you'll gather client feedback to monitor your practice and performance. Mediators who provide legally aided mediation service are required to do so as part of the terms of their contract. If you work with private clients, you should also consider the importance of monitoring your practice.

The professional relationship between mediators and solicitors

It is important for both solicitors and mediators to understand the critical nature of working together to assist clients inreaching solutions.. Mediation is not a competitor to solicitor practice and neither mediators nor solicitors should behave as though the client or prospective client is making a choice between solicitor service (collaborative practice or any other solicitor-led service), or mediation.

People need tailored information and assistance to understand the ways in which they might resolve their issues. Where solicitors and mediators work closely together, the outcomes for clients are likely to be improved and both solicitor and mediator stand to gain from client recommendation as a result.

The Children and Families Act 2014 makes it clear that people will be expected to consider mediation before issuing proceedings. However, solicitor members are also reminded that Resolution's Code of Practice requires them to inform clients of the options (mediation, collaborative law, family law arbitration as well as other options such as counselling, family therapy, round table negotiations, and court proceedings). The Law Society Family Law Protocol has a similar requirement and endorses the Resolution Code of Practice.

General guidance for solicitors supporting clients through a mediation process

Solicitors should have an accurate understanding of the principles, process and conduct of mediation (and of any other family dispute resolution process) to inform clients about the range of ways in which they might resolve issues and be able to answer any questions the client has. Mediation is most effective when clients, solicitors and mediators work together. In order for this to happen, it is essential that solicitors have a clear understanding of

mediation and can support clients throughout it.

It is therefore important that all clients are made aware of how mediation works, that it's a voluntary choice and that they cannot be compelled to take part, but that it's important to at least consider it. Generally, the earlier a client is referred to a mediator in order to consider whether mediation might be appropriate for them, the better.

Solicitor members may consider that an assessment as to whether mediation is appropriate should be made between the solicitor and the client. However, solicitors are working with a single client and not both, so the dynamic which exists between the client and solicitor may make it difficult for an appropriate assessment to be made.

The responsibility for making an assessment as to suitability for mediation (excepting where it is clear than an exemption applies) lies with the mediator as mediators can make that assessment with each and both clients. The solicitor's responsibility is to provide accurate information about mediation (and the exemptions to and reasons why it might not be appropriate) and encourage clients to find out about mediation.

Solicitors should also inform clients that they may be required to attend a MIAM if they intend to issue proceedings and are not exempted from doing so. They may also be ordered to do so by the court. But it will remain the clients' choice as to whether they take up the opportunity to mediate matters.

Resolution member solicitors should be aware that there is or can be variation in the way in which mediators conduct initial meetings and MIAMs locally, and solicitors should ensure they have an understanding of how a referral should be made to their local providers.

Only accredited mediators can conduct what the FMC describe as 'statutory MIAMs'. A statutory MIAM is best described as a MIAM for individuals who are intent on issuing proceedings. Solicitors can assist their colleague mediators best by discussing whether an intent to issue proceedings is the most appropriate pathway with their client.

If someone decides to proceed with mediation and it subsequently breaks down, the client or their respective solicitors may self-certify on the required court form, rather than having to attend a MIAM to get a court form signed by a mediator. (Further information is available on the flowchart and guidance)

Resolution best practice standards require mediators to conduct these meetings to a high standard of client service and usually a MIAM or initial meeting will take between 45 minutes and an hour (and for which there is usually a charge). Solicitor members should note that MIAMs cannot be conducted by telephone (except in rare or exceptional circumstances).

Mediators do not provide information about the client's decision not to undertake mediation. It's also the case that a mediator may decide that mediation is not appropriate for a range of reasons – similarly, mediators do not provide information as to how that decision has been reached to either client, to their solicitors or to the court.

Mediators may, as a courtesy, inform solicitors if clients enter mediation but will not report any aspect of the discussions (which are confidential and legally privileged) unless the clients agree that the mediator should have contact with their solicitors, and on what terms.

During a mediation process, mediators will encourage clients to seek individual legal advice on any aspect of their discussions where it's pertinent to do so. Mediators will provide information about the legal process, general legal principles and associated matters (e.g. the operation of the Child Maintenance Service [CMS] – formerly the Child Support Agency) but won't provide any individualised advice. It's therefore very important that clients are able to take advice as and when they need it.

Mediators will also explain the importance of having legal advice and the solicitor's responsibility to provide 'individual best interest' advice to clients, whereas in mediation, people are seeking to make proposals that best meet their collective needs – especially those in relation to the needs of any children.

Proposals made in mediation are legally privileged and without prejudice. The privilege belongs to the clients and together they may choose to waive it. This will usually remain the same should a mediator prepare more detailed draft terms or standard order. (see helping participants realise an enduring outcome section in this handbook).

The confidentiality and privacy of discussions within the mediation, however, remains with the mediator and clients, as should be clearly recorded in any agreement to mediate. Even if the clients choose to waive privilege, confidentiality and privacy, the mediator may enforce the confidential and private nature of the discussions since they're a party to the agreement. This is so, except where an order of the court or the law imposes an overriding

obligation of disclosure.

Clients in a mediation are informed they will be required to make appropriate financial disclosure and that such disclosure is made on an 'open' basis. During a mediation process where clients are dealing with financial matters, mediators will prepare an open financial summary of the participants' financial situation from their completed Form E's and from documentation provided to evidence the information provided in their Form E. The summary may be provided in either draft form (where financial disclosure is not yet complete) or in final form, which they may take to their legal advisers, independent financial advisers or other professionals in order to discuss their financial situation.

They will continue to use the draft summary during the process of mediation as a means to consider their options for resolving financial issues between them. Mediators do not verify documentation provided by participants, but will explain that their respective solicitors may need to do so and will detail and attach copies of documents seen to the summary document if so agreed with the clients.

On completion of the mediation process, mediators will generally supply a memorandum of understanding or outcome summary that details the proposals made within the mediation. Clients will require independent legal advice on this, and will usually instruct their solicitors to draft a consent order in suitable terms. Mediators will also detail in the memorandum any other legal matters that will need to be considered by clients with their respective solicitors (e.g. wills, tax considerations). Some parents may also prepare with their mediator a Parenting Plan in which they set out their arrangements for the future parenting of any children.

It should be noted that there is variation in the presentation and content of mediation documents. What is outlined here is the best practice standard currently required by Resolution of its mediator members.

For specific guidance in relation to solicitors being directly involved in a mediation process see page 81.

Responsibilities of member solicitors in relation to family mediation and family mediators

Solicitor members have a responsibility to:

- adhere to the requirements of the Resolution Code of Practice, which makes clear the importance of informing people of the options for resolving matters
- discuss accurately and appropriately the range of family dispute resolution and solution seeking options available and encourage clients to find out whether mediation may be appropriate
- ensure they are aware of the range of mediation providers in their locality, what they offer and how they would expect any referral to be made
- act cooperatively and professionally with mediator colleagues
- support their client through mediation and not to disturb any mediation process by inappropriate correspondence in respect of matters known to be in discussion in mediation.

Responsibilities of mediators

In order to provide the best client service, consider the role the client's legal advisers have and the importance of creating a cooperative working relationship that best aids the clients. This will involve:

- how you will keep in touch with the clients' solicitors or with any other professional working with the couple as part of their mediation process
- informing solicitors, as a matter of courtesy, when you have been in contact with a client in regard to a mediation process or if a mediation process is about to start, provided you are authorised to do so by the clients

agreeing with clients whether it would be helpful for you to update their solicitors on progress of the mediation (ensuring that you also inform them that their solicitor may make a charge for reading or responding to any documentation provided),

referral to solicitors for individual advice and the particular areas/subjects for such advice, and copies of mediation documentation.

- contact with legal advisers being neutral and balanced and with the agreement of both clients

- remaining observant of the principles of mediation and ensuring that any contact with legal advisers does not breach fundamental principles of practice and that the status of any communications is clear in respect of confidentiality and privilege.

Involving lawyers more directly in the mediation process is dealt with in a separate section later in this handbook.

Diversity, equality and ethical practice

As a mediator you have a responsibility to ensure that you respect individual identity, diversity and equality. The concept of diversity encompasses acceptance and respect. It means understanding that each individual is unique and recognising our individual differences.

Diversity is a broad and over-arching term that is used to describe variously, race, colour, ethnicity, culture, faith, religion, class, age, physical abilities, social and sexual orientation and gender identity. Diversity recognises the importance of paying attention to individual identity and its uniqueness and the important components that make up how someone regards themselves as an individual. Respecting diversity and understanding *who* the parties are without stereotyping, can also empower individuals from diverse backgrounds, beliefs and identity to feel confident to speak on their own behalf.

It is essential that you are alert to and act and practise in a way that affords respect to individuals and what is important to them about their personal and individual identity. This should apply equally to adults, children and young people.

Equality remains a central tenet of mediation practice and it is your role to ensure that clients in a mediation have an equality in their ability to openly discuss, debate and decide on the issues that they bring to the mediation. As mediators we have particular responsibilities to ensure that power imbalances are addressed, that individuals have equal opportunity in discussions and that each individual has the capacity to take part fully and freely. You should also ensure that the voices of children and young people are heard as members of their family in a range of ways, and that overall you provide a safe, balanced and even-handed environment for clients.

Mediators work to a set of principles which are enshrined in a Code of Practice. Although the FMC Code does not overtly refer to matters of diversity, equality and ethical practice, the required mediator competencies do reference them as part of respecting the needs and individuality of participants. As a professional it will be essential that you act ethically in your practice by ensuring that you are familiar with the principles of your practice and the

Code of Practice which you are required to adhere to. You should also ensure that any client or prospective client is also aware of the principles (and Code) by which you work. You are likely to encounter any number of challenges in your practice and when you do, you should ensure that you re-visit principles and the Code to assist you in making an appropriate assessment and decisions and not judgements. Remember that your PPC is also there to assist and support you and may provide a very effective sounding board in matters of ethical practice.

Faith, culture and religious belief

For some individuals, their identity within their faith, cultural or religious community play a critical part of who they are, the values they have and the principles by which they act and live their daily life. You will work with individuals from a broad range of cultures, faith or religious belief, some of which may not be familiar to you. Firstly, it is important not to make any assumptions about the culture, faith or religion that the individual identifies with or which forms part of their identity. This is important because even within cultural, faith or religious communities there may be a considerable range. As an example, someone may identify themselves as holding Christian beliefs and regard it as their faith, but they may not be part of a particular Christian religion, whereas another individual may identify their faith through being part of e.g. the Methodist church, Christian Quaker community etc.

Where an individual client's culture, faith or religion is unfamiliar to you or you have little knowledge of it, it will be important that you listen carefully to that individual to get a sense of what is important to them. You may need to discuss with them whether it would be preferable to them to have a mediator who is more knowledgeable about their culture, faith or religion or whether they have chosen you as a mediator precisely because you are outside of their own community. This may be because they may not wish for such a sensitive issue as family separation to be aired within or with a member of their own community, even if, in reality, someone from their own cultural, faith or religious community would afford them the same level of confidentiality and respect as you will or they may have concerns that ending their relationship or marriage is in direct conflict with the expectations of their faith or cultural community. Where the latter is the case, it will be important that you also take the time to explore what support they may have or might need. Always be aware that faith and culture can raise complex and sensitive issues, for individuals, within families and within wider communities.

It will also be important for you to consider whether the individual's culture, faith or religion might have aspects that cut across principles of mediation. Some cultures can still be essentially patriarchal in nature or may not generally view or treat men and women equally. Others may have specific 'norms', rules or expectations regarding marriage, parenting and family separation. If this is the case, you will need to consider carefully with the prospective clients whether mediation is an appropriate choice for them, having explained the important principles by which you work and the responsibilities you have to ensure even-handedness and balance, that individuals reach their own informed decisions and that they each have capacity to speak on their own behalf (and have their views heard). You should be aware too that forms of mediation have existed in many cultural (and faith) communities over time. It will be important that individuals understand the model of mediation that is offered in this jurisdiction and not confuse it with the forms of mediation which might be generally available within their own faith or culture. This may be because in some communities, 'mediation' may be e.g. focussed in first instance in effecting a reconciliation rather than as a means of effecting a separation. It will therefore be important to check individual's understanding of what they are or might be expecting from you and the mediation process and to ensure that both are fully aware of how the mediation process works.

It is also important that participants understand that any mediation process you undertake aims to facilitate proposals being reached which will hopefully and eventually (and as appropriate) be approved by the England and Wales jurisdiction and resulting in a binding enforceable court order. This may be at variance from what they might expect from another jurisdiction or within or from a culturally or religiously based authority relevant to their own culture or religion. Always remember however that it will be equally important to listen carefully to what might be important aspects of their culture or religion which they hope will be possible to incorporate into their discussions and decision-making together.

Sensitivity to religious and cultural etiquettes should also be kept in mind. For example, in some strict or orthodox religious communities, members of the opposite sex will not shake hands or have any other form of physical contact with the other (or with you); an issue that sometimes arises when one greets another professionally. If there has been a religious divorce and the civil divorce is still to take place, they will see themselves as already being 'legally separated' from the other and this might have a direct impact on how they communicate with each other i.e. all communication is undertaken in the presence of a third party. They may also choose to mediate in terms of discussing both their civil and religious divorce. It may also be the case that a third party needs to be present In relation to

'handovers' as children go between their parents.

In some cultures or religions, it will be important to check with individuals what particular needs they might have in terms of timings and environment, e.g. ensuring that appointments are not made that might interfere with attendance for religious services or observances. For members of the Muslim community, individuals may need to take a break to pray. This does not need to disrupt any mediation process, requiring perhaps 5 – 10 minutes break but remember they will need a private and quiet, non-crowded space to do so.

It will be an essential part of your practice that you do all that you can to understand what is important for each individual insofar as their cultural, faith or religious needs are concerned. This will include considering with each individual the appropriateness (or not) of a mediation process, whether it might be more appropriate for the mediation to be conducted by another mediator (or co-mediator) who is more knowledgeable or experienced in the particular culture, faith or religion and/or whether there are other professionals or representatives from within the particular community who might be able to assist, taking careful account of the individual's thoughts or concerns about their own community and whether they wish for any involvement. As a bare minimum, it will be essential that you remain alert to needs and check that you have understood any aspect of discussions which is about cultural, faith or religious needs.

Harmful practices

'Harmful practice' is a term applied to practices such as forced marriage, so-called 'honour based' violence and female genital mutilation (FGM). In our jurisdiction, none of these practices are acceptable or lawful. Although they are often directly identified as belonging to certain cultures, it is very often the case that those same cultural communities would not identify them as either acceptable or as part of their culture. Conversely and for some, these practices may be part of long-held and embedded philosophies, regarded as an essential part of their culture or belief and individuals may struggle to understand why they are regarded as unacceptable or unlawful. As a mediator, you have a responsibility to keep people safe from harm and a special responsibility for the welfare, safety and wellbeing of any child or young person. If you are concerned that any of these practices are contemplated or have happened, you must act as you would where there is any threat of or actual harm.

Belief in spirit possession and/or forms of witchcraft is also present in some communities. Spirit possession itself may not be harmful, e.g. in some religions (including branches of the Christian community), 'spirit possession' may form part of religious services as part of spiritual healing or of the receiving or communicating of spiritual messages. Similarly, 'witchcraft' as a term is very broad and varies from beliefs that may be long held and relatively harmless superstitions to individuals for whom the existence of witches and witchcraft is part of their everyday reality and which they can believe to be a causal factor for the behaviour of others, including their own children. What is important is that you should be and remain alert to the possibility of abuse whether directed towards another either accused of possession or witchcraft or an individual who believes themselves to be a victim of it. This is especially so in terms of the safety and wellbeing of children and young people. You have a responsibility to adhere to the requirements of the FMC Code and in respect of the guidelines of 'Working Together' and must act if or when you are concerned about the welfare or safety of a child or young person. Further information about safeguarding responsibilities is set out in the appendices of this handbook and Resolution's Screening Toolkit for all members is available on the website.

Use of Interpreters/Working bi-lingually

The use of interpreters within a mediation process remains a complex one. Generally, mediators should be careful about using an 'interpreter' who is suggested by one or other client, is a member of the extended family or perhaps comes from the local community because of the difficulties it may cause in terms of partiality, confidentiality or in value or cultural conflicts. Where possible, you should always use a professional interpreter but be aware that most interpreters will not be familiar or conversant with mediation process.

Professional interpreters work to their own Code/s of practice and some of the ethics and principles familiar to mediators are also embodied in these Codes. However, and even so, they will need to be carefully briefed about any role they may play in a mediation process.

If you are working within a Legal Aid contract, please be aware of the arrangements contained in the standard civil contract 2018 mediation specifications at paras. 2.42 – 2.46 in relation to the use of interpreters/translators. Please also ensure that any interpreter you appoint records travel from post code at start of journey to post code at end and you may find it helpful to download a google map of the journey to justify the route taken. Retain all information relating to the interpreters' costs on file. You may also use a British Sign

Language interpreter but you should be aware of 3.7 Costs of Communication Support Professionals in the specification because BSL interpreters are dealt with separately under the obligations flowing from the Equality Act 2010 and must also be notified to the agency separately so that the cost does not get passed on to the BSL client.

You may be a mediator who can offer mediation in more than one language. If so, it will still be important for you to consider how this may affect your role where it is the case that you are working with clients where one client speaks a different language from the other. This is because, e.g. there is a danger of being perceived as supportive of the individual whose first language corresponds with that of the mediator (which can also be an issue for non-bilingual mediators), how easy it is to build sufficient trust to manage what is being said in conversations and exchanges in different languages and interpreting it to the other person and being able to manage interpreting faithfully what is being said rather than changing or 'shading' it to avoid further conflict etc. It is also the case that you will also need to think carefully about working alone and whether the additional pressures of interpreting may affect your ability to remain focussed on your role as mediator and managing the progress of the mediation.

Ability and capacity

Mediators have a responsibility to do all that they can to make a mediation process accessible for the broadest range of people. It is also important to assess whether it is possible to ensure equality of accessibility. For example, ensuring that for someone who is deaf, you are alert to whether their first language is sign language and if so, whether it is possible to engage a neutral interpreter or whether they prefer to lip-read and to discuss fully with each and both clients how any process of mediation could be conducted in a way that is comfortable for both (see also BSL interpreter costs, Legal Aid above). It is also generally important not to make assumptions and be led by the individual's choice and right as to how they regard themselves and how they wish to be treated.

Children with disabilities or chronic, long term or life limiting illness

Similarly, in family separation where there is a child with a disability or impairment, relationship breakdown, separation and change can have profound effects. Any parent who

has a child with a disability will already be dealing with their own struggle with the emotions and the practical consequences of family life which differs from that of their friends and wider family and which may lead to them feeling isolated. The parent who has left may be trying to deal with a considerable level of strong emotions and anxiety whilst the parent who remains caring for the child may be struggling to manage day to day, practically and with their own emotions. Both parents will be struggling with their own emotions and anxious about the future. For any child with a disability the sudden absence of a parent may be confusing or disruptive and it may well cause considerable distress to them.

These families are often and already dealing with quite considerable day to day stresses (which sometimes is a trigger to relationship breakdown of itself) and simply on a practical note, it may be difficult for parents to attend appointments or be available to you and you should therefore bear this in mind, make it clear what flexibility you can offer and explore with client parents how best to plan face to face appointments with you.

Wherever it is possible to do, you should discuss with parents sensitively and carefully whether there are particular concerns they have about future arrangements for the parenting and care of their child/ren and whether they, as parent, have sufficient support for themselves following a separation. It may also be helpful to signpost to agencies who can provide practical, emotional and/or information about e.g. additional financial support.

Mental and Emotional Health

It is essential that we also take full account of issues related to mental or emotional health. Family separation or transitions are most often a traumatic time for all those involved and can cause temporary disturbance to mental or emotional health. It is known that a large percentage of the population have suffered a mental or emotional health issue and where this is the case, family separation may prompt further illness or may exacerbate an existing condition. In all cases, you have a responsibility to discuss carefully with individuals whether any mental or emotional health issue might affect their ability and capacity to mediate.

'Emotional readiness' is a term sometimes used in mediation circles to refer to the ability of an individual to engage in a mediation process at an appropriate time and when they are able to effectively manage their emotions following a family separation. Although individuals will still be processing the trauma of separation and the ending of their relationship, they should be able to discuss matters reasonably, rationally and be focussed

on the resolution of issues. This is difficult territory for mediators because people may need or have to seek resolution for a range of practical reasons. Even so, it will be important that you do all you can to understand their emotional or mental health and assess whether a mediation process is appropriate. Mediators are not diagnosticians in respect of emotional or mental health issues but have expertise in the mediation process and must assess with individuals whether a mediation process is appropriate immediately or whether it is better delayed or takes place with some support in place (or not at all). For some individuals, having the support of someone alongside the mediation process (a neutral friend, family consultant or counsellor) may be a means of ensuring they are properly supported to take part but it is important to be alert to signs of distress or of worsening mental health.

If someone has a chronic mental health issue but still wishes to mediate, you should do all that you can to assess with them how that might be achievable and whether it is appropriate. It may be that it is possible for them to be supported by a lay mental health advocate or that they have arrangements in place for their continuing support outside of and during the mediation. Equal attention must also be paid to their former partner in order to achieve balance in approach and during any subsequent mediation.

Mental Capacity Act 2005 (MCA 2005)

You should be aware of the requirements of and the Code of Practice associated with the MCA 2005 and the responsibilities of the Office of the Public Guardian and their Code of Practice standard. Mediation is directly referenced in the MCA 2005 Code of Practice (see 15.7 'When is mediation Useful?', MCA 2005 Code of Practice). It may also be the case that mediators may be dealing with clients or potential clients who may have a range of issues or illness that could affect their mental capacity as is described in the Act and/or may have or who may wish to make a Lasting Power of Attorney due to e.g. a progressive illness which may affect their mental capacity over time.

The MCA 2005 has five principles:

- that you should assume a person has capacity unless it is proved otherwise
- that all practicable steps to enable people to make their own decisions must be taken
- not to treat someone as unable to make decisions merely because they have made an unwise decision
- act in the persons' best interests (the MCA Code of Practice produces a summary

checklist to help at Ch. 5 of the Code)

- consider actions to ensure the least restrictive option is taken

In mediation, you should always ensure that you have appropriately assessed whether the individual and joint circumstances of any potential clients and the matter/s they wish to mediate are appropriate for mediation.

If you have concerns about a vulnerable adult or that someone may lack capacity and who may be or has been subject to abuse of any kind, Local Authorities have Safeguarding Adults Boards that provide information about who to contact, often have referral forms (including making a referral anonymously) and with a range of other resources and information about safeguarding vulnerable adults.

Working with all family formations

As mediators, we have a responsibility to be mindful and respectful of all family formations. Modern families take many forms and as society changes, we all need to be aware that the way in which people choose to form and live their family lives will be increasingly varied.

There are already many more unmarried families, families that are headed by single sex partners and parents and extended families that may have more than two parents to their children. The LGBTQi+ community is one that is growing and it is important that mediators are as aware as they can be about what is important for these family members and mindful that if and when they are considering using mediation, we work carefully and sensitively with them to ensure that we are able to understand what is important to them as members of their families, what will help most in any discussions they plan to have and how best to involve all those who play an important part in decision making, especially in respect of children and young people.

Gender Recognition Act 2004

The Gender Recognition Act has introduced the ability of individuals who have lived in their preferred gender for at least two years or who have changed gender under the law of a

country or territory outside the UK to be entitled to apply for a gender recognition certificate (GRC) and, if a UK citizen, a new birth certificate that shows their acquired gender. An individual granted a GRC and birth certificate will assume all of the legal entitlements of a person of the same birth sex, for example in employment, marriage and pension rights. (They will also be dealt with within the criminal and civil justice systems as a person of that sex).

The Act has also introduced a new offence of disclosing confidential information (s.22, Gender Recognition Act 2004). It makes it an offence for a person who has acquired protected information in an official capacity to disclose the information to another person. There are exemptions to this:

- The information does not enable the person to be identified
- The person has agreed to the disclosure of information
- The information is protected information by virtue of Subsection 2(b) and the person by whom the disclosure is made does not know or believe that a full gender recognition certificate has been issued
- The disclosure is in accordance with an order of the Court or tribunal
- The disclosure is for the purpose of instituting, or otherwise for the purposes of, proceedings before a court or tribunal,
- The disclosure is for the purpose of preventing or investigating crime

The Gender Recognition (Disclosure of Information) (England, Wales and NI) Order 2005 further sets out conditions where it will not be an offence to disclose including for the purpose of obtaining legal advice, religious and medical purposes, and in certain conditions relating to insolvency and credit reference agencies.

Whilst it is unlikely to be commonplace that mediators will be working with those who have a GRC, mediators should nonetheless be aware of their responsibilities in regard to confidentiality of information and act accordingly. You should also be aware that it will be important to those who are trans, transitioning or living in a new gender to be recognised in their chosen gender and treated respectfully. As with all personal and individual situations, you should ensure that you discuss the individual's needs (and those of any partner or former partner) sensitively and in order that they can take part in a mediation comfortably

and confidently.

Other professional practice considerations

Each client's situation is unique and will require, within the framework of mediation principles and process, a bespoke approach. Family mediation is also a young profession and new or varied means of design and delivery within the principles of mediation are emerging. If you believe that varying your approach to the process is appropriate, you should discuss your ideas with your PPC and follow the guidance given. You must check that your planned approach does not breach any of the fundamental principles of mediation or the FMC Code of Practice. Examples of variations might include:

- involving others in the mediation process who you believe have a substantial or meaningful part in the conflict or in the potential resolution of any conflict
- any kind of 'shuttle' mediation process (especially where this may relate to an abusive relationship between the clients) - see *Shuttle mediation* section below.
- Working with colleagues as part of your mediation process, e.g. financial advisers or neutrals, family consultants, other specialist advisers pertinent to the clients' situation
- the involvement of adult children in the mediation
- any other client situation where you believe that mediation has a good chance of success but requires a variation in the way in which it will be conducted.
- Linking with other family dispute resolution or settlement seeking opportunities, e.g. family law arbitration

Set out below are some of the more commonly used methods.

Co-mediation

Co-mediation can be an effective means of conducting mediation where:

- there are complex family or financial issues
- a gender-balanced team of mediators might afford a valuable resource or model for those who are in high conflict as a result of the ending of their relationship
- there may be clients from different cultural backgrounds or who speak different languages from one another, and one mediator can offer bi-lingual services and/or may be more familiar with the particular cultural aspects and the mediation would be assisted by two mediators being available
- the balance between mediators from different professional backgrounds might assist in the resolution of a particular issue (e.g. an independent financial adviser mediator or psycho-therapeutically trained mediator working with a mediator from a legal professional background)
- support is needed for a new mediator, working with a more experienced mediator or it is a mediator working towards their accreditation who is co-working as part of their requirement to observe practice
- a mediator working towards accreditation may co-conduct a statutory MIAM to ensure there is an FMCA colleague who can sign any required court forms
- there is a need to conduct the mediation as a shuttle process. This might be for all or at least part of the mediation process. Unaccredited or less experienced mediators should consult with a PPC as to the appropriateness of a shuttle co-mediation.

Resolution encourages all mediators to consider co-mediation as a valuable model of practice and one which may afford particular assistance to some clients.

If you intend to offer co-mediation, you should:

- discuss the potential for co-mediation and why it may be of particular assistance to clients
- consider an appropriate fee
- properly plan any co-mediation and ensure that the co-mediator is prepared to work as a balanced team, rather than as two individual mediators
- make sure clients know that both mediators work as a balanced team rather than as mediator and expert
- where it would be of assistance, talk to your PPC to ensure a professional approach

to co-mediation

- where it is for purposes of observation or where you are co-conducting a statutory MIAM, gain the client's permission to do so. There's provision for this in the template Agreement to Mediate.

Shuttle mediation

Shuttle mediation refers to mediation conducted with clients in separate rooms for some or all of the mediation process with the mediator or mediators conducting the mediation by going between the clients to facilitate their negotiations.

It has been perceived as a suitable means of offering mediation where there is or has been abuse within the relationship. Using a shuttle model does not guarantee client safety, particularly away from the mediation, nor does it ensure equality of negotiation between participants. At present, there is no national standard for it, or the practice of it by mediators. You should discuss any plan to conduct shuttle mediation with your PPC.

There are a number of very important considerations in relation to shuttle mediation. Ensure that:

- you do not breach the fundamental principles of mediation or the FMC Code of Practice
- you make an appropriate assessment as to whether shuttle mediation is or would be appropriate. This includes a screening and assessment process undertaken before and during any mediation as the use of shuttle mediation does not necessarily resolve issues or guarantee equality of discussions or negotiations in a mediation
- you are careful not to hold confidences or 'mediator secrets' as part of a family mediation process conducted as a shuttle mediation. (See also section relating to hybrid practice: individual meetings). This requires explaining to each and both clients and reaching an agreement as to how information from individual discussions will be shared (see also handbook section on advances in practice).

Mediators who are suitably trained and qualified to conduct civil/commercial mediation might choose to conduct the mediation under civil commercial rules in certain circumstances. Civil commercial process allows mediators to hold confidences in a

mediation and it is therefore possible to make suitable arrangements in relation to the confidentiality of separate discussions. (see also hybrid practice: individual meetings section)

You should be careful about the reasons for undertaking the resolution of a family dispute as a civil commercial case. Always be aware that in doing so, you will be subject to the rules and governance of your civil/commercial membership body and not Resolution. Reasons for considering conducting the case under civil/commercial rules might include, but is not limited to, family businesses and trusts or financial complexity or TOLATA cases where civil proceedings are being considered.

You must be clear as to the organisational or professional rules by which you are conducting the mediation, the appropriate code of practice you're working to and complaints route for any complaint that cannot be resolved by you or your practice.

Shuttle mediation where there is or has been abusive behaviour in the relationship

Where clients have disclosed that there is - or has been - abuse within their relationship and where they still wish to mediate, you must take considerable care to discuss with each client whether the process would be appropriate and if so, how it is to be conducted.

It's possible to consider whether shuttle mediation is appropriate, and if so, whether in doing so you can ensure:

- protection from (further) abuse or harm. This is particularly important to consider if clients remain under the same roof
- each client has appropriate capacity to take part, even if the mediation process is undertaken in a shuttle model. Mediators should be aware of the effect of controlling behaviour in abusive relationships that may result in an individual's inability to make truly independent decisions
- you discuss other support or assistance that may be required to ensure suitable help for either client during a process of mediation
- you consider working with a co-mediator as a suitably balanced professional team to best manage all the circumstances
- you are particularly alert to the issues that may arise in relation to confidentiality and impartiality.

Please note that where issues relating to the safeguarding of children and where parents wish to mediate, you must always ensure:

- there's no current investigation or assessment by local authority children's services (in which case mediation should be deemed unsuitable)
- where there's been an investigation or assessment, you've seen any outcome report, the terms of any contract or agreement between the parents and the local authority, or any court order that clarifies the nature of the issues involved and the outcome (and that a decision on suitability for mediation is based on the information available)
- where a key worker remains involved with the family, you seek to discuss with the parents or carers whether and how the key worker should be informed or involved in any subsequent decision to mediate.

Involving solicitors in a mediation

, Where appropriate, it may be helpful to involve the solicitors directly in the mediation process. This may be helpful to consider where:

- there are particularly complex legal issues to be considered
- the support of solicitors may assist the clients in engaging confidently in a mediation process
- there are concerns in regard to imbalance of knowledge or information between clients
- there are or have been particularly high levels of conflict between the individuals
- there has been a history of abuse between individuals and where they want, if at all possible, to resolve matters between them but there are concerns about capacity and balance between the clients.
- Because it is a more bespoke and efficient means of conducting the mediation in the

particular circumstances

All mediators need to consider carefully the direct involvement of solicitors in a mediation process, including:

- a clear understanding by each solicitor and client as to mediation
- the role of the solicitor within the mediation
- when solicitors will be involved (e.g. for one or several meetings or at the conclusion of the mediation as a means of setting out any consent order)
- an outline agreement for and with solicitors taking part in any mediation that sets out the expectations of the mediator, the role of the solicitor, expectation of provision of advice to clients privately during the mediation process etc.
- the confidential, private and privileged nature of discussions and any relevant exceptions.

Take care not to compromise the solicitor's relationship with their client. For example, you should be aware of whether a client's solicitor would be prepared to accept an invitation to participate in a mediation process. Any discussion with clients in regard to solicitor attendance should be on the basis that it would be up to the client and solicitor to decide whether it might be possible and practicable.

You should make it clear that such attendance will attract additional fees for their solicitor's time in attending.

As already stated, you should consider all aspects of involving clients' solicitors. This includes the responsibility of ensuring solicitors are protected from any breach of professional regulations set by the SRA, should they attend as part of a mediation process.

Solicitors who receive a request, whether via their clients or directly from a mediator, to attend a mediation should be aware that participation for anyone is a voluntary choice. They should therefore consider with their client the purpose of their attendance and whether it's appropriate given all the circumstances.

Solicitors should also be clear as to their role in attending and mediators should provide full information of this aspect. This may encompass (but is not limited to):

- attending with their client with a view to establishing the issues and matters pertinent to the mediation process and supporting their client in clarifying such matters
- attending as observers to the mediation with a view to advising their client on aspects identified as requiring specific advice that would assist the parties in reaching decisions
- attending both to support *and* advise their client (individually and out of the room). This may include playing a part in assisting in the client's process of negotiation
- attending with their client for the purpose of drafting a consent order on decisions and proposals reached in the mediation process.

Mediators should provide a form of agreement in relation to the terms of the solicitor's involvement for discussion and agreement between mediator and solicitor. It's always useful to consider whether the solicitors should also be signatories to the Agreement to Mediate.

Conversely solicitors, who in consultation with their client believe it would be useful and appropriate for them to attend, should inform the mediator and suggest that this is discussed in order to explore whether it's an option the mediator would like to consider with the clients. Similarly, solicitors should take care they do not compromise the mediator's relationship with clients where they may be uncertain as to whether the mediator would accept a request for a solicitor to attend the mediation process.

In all cases, this should be understood as a matter for consideration as between mediator, clients and their respective solicitors. It's therefore good practice that professionals keep in communication on such matters – and wherever possible have local means of keeping in touch with each other in respect of opportunities to assist clients through the provision of solicitor-attended mediation and/or mediation generally (see also handbook section on advances in practice).

Involving other professionals as part of the mediation

The involvement of other professionals (e.g. financial advisers, family consultants, lay advocates or other professional supporters) may be helpful in supporting individuals and couples make best use of a mediation process.

As practice changes and develops, it is important that you are aware of the benefits for your clients (and for you) of involving other professionals. Mediation is a flexible process and its' elasticity provides the opportunity to plan with clients the most effective way of helping them towards well informed decisions and solutions.

Speak to the clients about what might be most helpful. Make appropriate arrangements for involving and contracting professionals, including the terms of confidentiality that will apply.

Who, how and in what way other professionals can be involved, what information will be shared, and what will or will not remain confidential must be carefully planned for and the clients must be aware of and agree to the suggested arrangements.

Be alert to any professional code of practice to which other professionals are signed and take care not to compromise the practice of any other professional. It's also important that you ensure you and your colleagues are all clear in relation to complaints handling and have provided accurate information to clients about this aspect. Generally, you should apply the same considerations as stated above in relation to the involvement of solicitors in a mediation process.

Advances in practice, hybrid models and working with families in other settings

Family mediation has application in a broad range of settings and situations. As the use of mediation becomes more established and better known and understood, it's likely that family mediators may be asked to consider providing mediation in new ways or in a range of new settings.

Mediators are being asked to work in matters relating to intergenerational disputes, Court of Protection matters and at the cusp of public law children proceedings.

The Family Justice Council appointed working group (to consider the potential for and use of a model of mediation that could be appropriate in public law proceedings - pre, during and post proceedings)have reported to the Family Justice Council and await a response.

If you're asked to take part in any of these matters, it's very important you act professionally. You should be in touch with your PPC to work through:

- the appropriateness and suitability of mediation
- whether and if it's possible to offer mediation that's compliant with the fundamental principles of mediation and within the Code of Practice of the FMC
- whether you're suitably qualified and experienced to offer mediation in the particular setting or dispute
- ensuring you've made suitable checks with your insurers in respect of continuing validity of your insurance cover.

Hybrid practice: individual meetings

In 2018 Henry Brown wrote an outline and training programme to offer a hybrid model encompassing individual meetings with clients that is inclusive of separate confidences. The first course was held in London in February of 2018, co-presented by Henry Brown, Suzanne Kingston and Karin Walker. Further courses (presented by Suzanne and Karin) are being made available by Resolution and available dates are published in the training and events section of the website. Mediators who wish to use this model for practice are strongly advised and encouraged to attend training.

The process recognises that individuals may agree together the level of confidentiality that will apply to their mediation process (FMC CoP 6.5.3). Although this provision has formed part of civil/commercial practice over many years, it has not been the case in family mediations. Henry Brown has identified those situations where this particular hybrid process may have application:

- Where the couple's finances require more complex planning and negotiation
- Where either person has real difficulty in negotiating on a face to face immediate basis in joint session and needs the space, time and perhaps advice to reflect on ideas and proposals being put forward so as to respond to them thoughtfully and effectively
- Where either person has certain personality traits that make it hard to reach

agreement

- Where a person has a genuine inability to understand the other's thinking or intent and needs the space and help that separate meetings can offer
- Where an individual wants to mediate but has genuine concerns or feels intimidated about negotiating directly with the other
- Where either person wishes to have a legal adviser alongside during some or all of the negotiations (and this is especially suitable for use within the collaborative process)
- Where negotiations are stuck and joint sessions are no longer helpful

The model recognises that for some individuals, direct face-to-face negotiations in difficult circumstances is not what they want or can cope with. They will simply not be able to manage effectively in joint meetings, and many of them will simply avoid the process entirely. It is also useful when thinking about how best to assist in issues such as cohabitation, family businesses or inheritance disputes.

This model can provide lawyer colleagues (and other professionals) with a more constructive and direct role within the mediation and by drawing on the civil/commercial model for practice, encompasses other aspects of accepted, long standing mediation practice, providing for greater creativity and flexibility.

As practice has advanced, mediators have become more comfortable with individual meetings (which form a vital part of preparing for mediation and are commonplace in the conduct of the MIAM) and in managing information which is shared by an individual in a separate meeting and how to deal with it. This hybrid model formalises how confidences can be handled in a way that is helpful and useful to the participants to the mediation. It also brings together in a defined model some of the ways in which mediator members are already practising e.g. holding individual meetings, involving lawyers and other professionals, use of shuttle practice. It is important to remember that this model is defined and formalised and requires an appropriate Agreement to Mediate and practitioner members should be aware of the importance of specific training.

International parenting/leave to remove/potential child abduction

Mediators are receiving more requests to mediate in relocation cases and especially those

that may have an international element. Where there is prospect of the child being relocated outside of the jurisdiction, great care must be taken to manage any risk of potential or actual child abduction, especially where it might involve a non-Hague country.

Where a parent discloses they intend to, or are considering, removing children from the jurisdiction, you must:

- provide information on the general principles of the law in relation to removal and child abduction
- encourage them to seek individual legal advice as soon as possible
- provide information about services of help and support (e.g. Reunite International)
- if disclosed in a separate meeting and the mediation is ongoing, remind them that all information disclosed must be shared and discuss with them how that is to happen
- if the parent doesn't want you to share the information, make it clear that as per the terms to mediate, you must disclose the information. You have to give the same information about general principles and services of help and support to the other person and that you'll encourage them to also seek immediate legal advice
- explain that mediators have a duty and responsibility to make a referral to the local authority children's services where any child is at risk of harm. The abduction or threatened abduction of a child is or may be deemed to present a risk of harm to the child. In most circumstances a parent who abducts a child will be committing an unlawful, if not criminal, act (under the Child Abduction Act 1984). The agreement to mediate also refers to the committing of or the intent to commit an unlawful, illegal or criminal act as being exempted from confidentiality.

If a potential client discloses this information to you (that is as part of a MIAM or preparatory meeting), then you should provide the same information referred to above, encourage and recommend them to seek legal advice. If appropriate or necessary, inform an appropriate authority if you believe a child is at risk of abduction or immediate, serious or significant harm.

Where threatened child abduction may result in Hague proceedings, you should be in contact with Reunite International, which is funded by the Foreign and Commonwealth Office and recognised by the High Court to offer mediation in such cases. Reunite also provides telephone and online advice and support to both parents.

Potential for child abduction is a serious matter and you must act appropriately to refer or to report to the appropriate authorities if you believe it is or may be in prospect. You should also be in contact with your PPC for assistance where you have concerns about the potential for child abduction and the appropriateness of mediation.

Working with or as part of a collaborative process

From time to time, you may be asked to provide a process of mediation for clients in a collaborative process. This may be because there is a single issue or conflict that the collaborative team believe may be best dealt with in a mediation. Please ensure that you act within the FMC Code of Practice and fundamental principles of mediation and also consider appropriate contracting if the solicitors are likely to be involved directly in the mediation process (see p.55).

Occasionally, collaborative practitioners may request you to conduct or chair a four-way meeting. This may be because:

- there are particularly high emotions in play between the clients, and the collaborative team believe it may be of assistance to have a neutral person to manage the meeting
- there are particularly complex legal or other matters that require considerable attention from the collaborative practitioners, leaving them less able to manage the meeting
- there are other reasons or concerns that led the collaborative team to believe that the assistance of a neutral professional would assist progress.

Whatever the case, carefully consider whether the circumstances are appropriate for your involvement. Discuss with the collaborative team their understanding of mediation and the skills/role of the mediator. Check with both clients that the involvement of a mediator is acceptable to them. Make sure you have an appropriate agreement in place to provide mediation assistance in the context of the collaborative process. This should include the expectations, responsibilities and role of all those involved (including any fees). If unsure, seek the guidance of your PPC.

Court-referred mediation

In the recent review of the Child Arrangements Programme (The President's Private Law Report) , there has been mention of the potential for a wider roll-out of 'at court' mediation. The Report is a consultation and the suggestion is one of a number of recommendations. It will be important that you consider a number of issues if you are considering providing mediation or MIAMs at Court.

As a mediator, you should be aware of the Resolution guidance on working with the court and of the FMC information issued to judges, magistrates and court staff relating to family mediation.

Generally, you should not breach the fundamental principles of mediation in offering or providing mediation services to your local court. Be particularly alert to the fact that the court environment is an alien, unfamiliar and stressful environment for clients, who may find it difficult to fully understand the nature of independent mediation. Wherever possible, provide any mediation process away from the court environment and avoid providing time-limited mediation on the court premises.

Any suggestion that a child be consulted as part of the court process to provide information to the court relating to the child's wishes and feelings should be refused as this breaches fundamental principles in relation to the child's right to privacy and confidentiality.

Current arrangements for direct consultation with children as part of an adult mediation process and the new arrangements for Child Inclusive Mediation is governed by a set of principles and procedures that should be adhered to in order to protect the child and the parents, and to preserve a clear understanding of the limits of mediation principles, the process and the role of mediators.

Mediation precedent documents should not be altered to accommodate the needs of the court to have information about the process of mediation (and mediators should be aware that this may affect their insurance cover). Ensure that clients understand, as in any mediation process, that they may waive their legal privilege if they so wish and agree in order to assist them in any court proceedings, but that you will not provide information to

the court in regard to the discussions held in mediation.

An increasing number of courts have adopted the protocol first established by HHJ Greensmith, which provides a more formalised approach to the involvement of mediators alongside family proceedings. The protocol respects the independent nature of mediation and the applicable principles relating to mediation and mediation practice.

Helping participants realise an enduring outcome to family mediation

In 2018, a small working group of representatives from Resolution and The Law Society met on a number of occasions to consider and to draft guidance for those mediators who wish to provide more detailed draft terms or draft standard order to mediation clients where it was appropriate to do so. Reproduced below is the guidance note that came from those discussions and which was approved by the FMC in June 2019:

This guidance relates to the preparation by mediators of draft proposals and terms in respect of financial matters or marital agreements following resolution reached in mediation. It is relevant to all mediators regardless of profession of origin.

The principles which underpin the preparation of terms following a successful outcome are the same as for any other aspect of mediation:

- that the mediator remains impartial;
- does not give advice; and
- informs participants of the importance of taking independent legal advice.

The FMC Code of Practice requires that you should do this, together with providing information about the risks and disadvantages of not doing so (FMC CoP 8.14).

It is also essential that you consider whether, in drafting in more technical or formal detail than a summary of proposals, you do so within the limits of your competence. The FMC Code also requires you to have appropriate and adequate professional indemnity insurance.

For mediators who are lawyers, it is especially important that in drawing up terms following a successful mediation, the participants are clear that you are still acting as a mediator and not a lawyer. The FMC Code of Practice makes clear that you must ensure that mediation is

conducted as an 'independent professional activity and must be distinguished from any other professional role in which you may practice' [FMC Code of Practice 5.1.7].

Generally, mediators either encompass any proposals in regard to children's arrangements in a Memorandum of Understanding (MOU) or prepare more detailed Parenting Plans in respect of any children's arrangements which can be appended to C100 application to the Court for formal recognition should parents wish to do so.

For some participants in mediation, having only draft proposals set out in the Memorandum of Understanding (MOU) causes them to view mediation as deficient to their need to establish a binding outcome. It is also the case that an increasing number of people do not instruct or seek advice from solicitors prior to, during, or following mediation. With increasing levels of self-representation and the availability of standard orders, many mediators are offering to assist participants who want a form of outcome summary that could readily be used to achieve a binding outcome. This might be because they intend to represent themselves or because they wish to limit the costs of seeking legal advice on their proposed outcome.

As a mediator, it is essential that you work within your professional boundaries and expertise and that you have made an appropriate assessment of what will help individuals most (including in protecting each of them and any children).

There are a number of considerations you must weigh if you wish to assist participants in having a draft document that sets out their proposals at a level sufficient to aid them in securing a binding order. As, when and if appropriate, it may be helpful for you to discuss with your PPC the appropriateness of providing a detailed draft and/or what needs to go into the draft to ensure that you have considered matters of enforcement. Any draft should also achieve what the participants intended (potentially without any re-drafting after they have taken advice – or indeed, if they choose not to take advice). You should also ensure that you are aware of guidance issued by your own Membership Organisation (MO), within your own practice or service or by the FMC to assist you. Courses relating to the drafting of documents are also available from MOs.

Family Mediator acting as a draftsperson

As a mediator, you already draft a Memorandum of Understanding (MOU) and Open Financial Statement or Summary (OFS). The MOU generally sets out what has been discussed and the proposals that have been reached as a result of those discussions. The proposals are and should be usually set out in a 'Summary of Proposals' or similar, which

forms an integral part of the MOU and assists both participants and solicitor/s to prepare a draft consent order.

It is therefore possible to consider whether greater detail could be added to the Summary of Proposals such that it would, in effect, provide both participants with a draft for any order they might seek. With the introduction of the President's Standard Orders (and in particular the Financial Remedy Omnibus), Standard Orders may be useful as the base for a Summary of Proposals.

If you decide to act in this way, it is essential that you ensure that it is clear that the Summary remains within the MOU as a whole document and is protected by mandatory precedent paragraph/s provided in the template documents provided by MOs and that makes clear the status of the document (i.e. the confidential nature of it) and that until the individuals have sought and received legal advice on the proposals, they are not binding upon them.

You should add:

- that the proposals are that of the participants' alone and the mediator is not endorsing the merit of them or facilitating a binding settlement and
- that the mediator has explained the importance of appropriate financial disclosure and
- that the mediator has not and will not be providing any legal advice
- the importance of their individual right and opportunity to seek legal advice, which the mediator recommends and encourages them to do before entering into any binding agreement
- they understand that if the court makes an order in the proposed terms, they are very likely to be prevented from making an application for alternative financial provision or resiling from it

(You should be aware and make use of any precedent template/s or other information and guidance provided by your own MO)

Robustness of mediation process

In providing more detailed settlement or proposed terms, it follows that you must have ensured that clients have provided the appropriate disclosure of their finances. Participants should be aware of their individual obligations in providing disclosure of their finances and

the consequences of not doing so. This is of considerable importance if you are to set out detailed proposals and it will also be important for you to make clear and to remind individuals of the importance of having appropriate verification of their financial disclosure which falls outside of your role as a mediator

Keeping a professional distance – considerations

You need to consider carefully how you ensure that you have maintained your role as a mediator (especially in the understanding of the clients). Clearly, providing clients with a more detailed set of proposals, even if following one of the available standard orders, is not all that they will require. You need to consider whether to e.g. prepare or assist participants to prepare the D81 financial summary and in doing so whether you could or might start to 'blur the lines' as to your role. Bear in mind that lodging papers at the Court is ancillary to the conduct of litigation, which is a reserved activity, and must not be undertaken by a family mediator.

Confidentiality and without prejudice communications – considerations

It is essential that mediators keep in mind the need for confidentiality that applies to the mediation process.

Should mediators decide with participants to provide a detailed draft as part of an MOU there are considerations in terms of confidentiality. It is important to be aware that confidentiality is conditional and is subject to caveats ranging from issues of safeguarding, any over-arching or over-riding obligation in law, over-riding public policy considerations, ECHR imperative and/or where there is or has been concerns in regard to unlawful activity (fraud, criminal act, money laundering). Over the years of mediation practice, notably in civil/commercial matters, the canon of precedent judgements relating to the confidential nature of mediation has grown and it is clear that there will be more occasions when challenges to the confidentiality of mediation process will be made.

Established precedents such as Brown v Rice & Patel [2007] EWHC 625 (ChD), or Unilever v Proctor and Gamble [2000] 1 WLR 2436 and Farm Assist v DEFRA [2009] EWHC 1102 may all have resonance in relation to potential challenges to detailed drafts prepared as part of family mediations. (See also FMC Code of Practice in relation to confidentiality, 5.2, 6.4 and privilege and legal proceedings 6.5). A more recent case, BL v TC & OD [2017] EWHC 3363 has added to the available precedents in relation to confidentiality of mediation process.

For all of the reasons cited, it is essential that mediators consider very carefully how they provide explanations to participants (and as necessary, their respective legal advisers) and ensure that matters are clearly set out in any Agreement to Mediate and in client outcome documents.

Suitability for drafting detailed proposals

You must carefully consider the 'appropriateness' of drafting detailed proposals. You should be clear that the proposals are those of the participants alone and that you as the mediator are not endorsing the merit of them or facilitating a binding settlement.

Beyond that, you must ensure that you adhere to the requirements of the FMC Code of Practice in terms of e.g. possible imbalance of power, that individuals are reaching decisions about which they are fully informed, that the proposals do not fall outside of that which a court would order or approve etc.

'Cooling off' period

It is good practice that if you are drafting detailed formal terms that you repeatedly emphasise the importance of legal advice on any proposals. This is clearly set out in the FMC CoP (8.14)

Mandatory Preamble

It is essential that you explain to participants that the draft provided to them as part of their Memorandum of Understanding is provided on an evidentially and without prejudice draft basis and should not be signed by them until they have each received independent legal advice on the terms as drafted in order to protect their individual rights. Resolution provides template documents for this purpose.

Summary

It is essential that any family mediator who intends to draft the terms of a mediation outcome, beyond the traditional MOU document, must consider carefully:

- Whether you have an appropriate level of professional knowledge and skill
- That you do not blur the boundaries of your role as mediator and ensure that you are acting within the principles of mediation and the Code of Practice of the FMC
- As in all mediation practice, you should ensure that clear caveats are in place warning participants that they should take legal advice on the proposals contained within the MOU **before** drafting the terms or that it is clear that the MOU and detailed draft is provided on an evidentially privileged and without prejudice basis and does not record or create a binding agreement between participants and is intended to provide a draft on which independent legal advice may be sought and which they have been recommended to do.
- That you ensure that you have made clear in writing or have the written agreement of the clients confirming that you have explained, and they have understood the terms by which you will draft any terms and the status of the draft terms.
- Confirming appropriate professional indemnity cover

In some jurisdictions it is usual practice for mediators to draft orders as part of their role. If there is an international element, you may therefore be asked or expected to do so. Remember also that in some jurisdictions the proposals or settlement terms coming out of mediation are open, and not confidential as in the law of England and Wales. Much greater care must always be taken when mediating a case with an international element

Mediators who are qualified to act as civil/commercial mediators are able to draft suitable 'Tomlin Orders' from a civil mediation procedure. If and when they do, it is within the applicable rules and Code/s of their governing or training organisation. If you are so qualified, it may be more appropriate to conduct certain mediations within the auspices of civil/commercial practice, e.g.:

- Where a family business is involved
- TOLATA matters
- Complex family trusts and inheritance issues

However, if such matters are dealt with in family mediation and parties wish the mediator to provide detailed draft terms as a free-standing document, conducting the mediation under civil/commercial rules may be appropriate.

Working with representing solicitors

Clearly, where individuals are individually represented, you should always ensure that the solicitors are aware that you will prepare a detailed draft if so agreed with the participants to the mediation. You should inform the solicitors that any draft will make it clear that individual legal advice will be required before any binding agreement can be made and that solicitors usually undertake the final drafting of any order. It is essential for you to explain to participants the need for contact with their respective solicitors and that you have their permission to do so. Wherever possible and practicable, participants should be clear about who they can choose to provide draft detailed terms.

Where individuals are unrepresented, you should still ensure that they have been properly informed and that you encourage participants to seek individual legal advice, as is set out in the FMC Code of Practice.

In August 2015 the SRA issued guidance on the preparation of consent orders by solicitors who are mediators by way of a separate retainer.

Mediators must note the cautions surrounding this practice as are pointed out by the SRA in its own guidance, including that it will not be suitable for everyone. These cautions must also be considered together with the FMC Code of Practice and in particular ensuring that you have carefully and clearly separated out what are two very different roles and associated responsibilities and are confident that those involved are clear about the terms and have provided their written consent.

Use of new technologies in the mediation process

It is important you're responsive to the needs of clients. People will expect a range of ways to access and use mediation. There are considerable advances being made in the use of new technologies in legal matters including in family law. Family mediation is not and should not be immune to advances in the use of new technologies.. In everyday life these days, we are all used to being able to deal with a very broad range of personal matters either online or via some form of technology. Now that these opportunities have extended to e.g. online or telephone medical consultations and counselling, it is understandable that the way in which mediation works can feel frustrating or awkward to potential clients especially as it involves sitting down face to face with an ex-partner who they may feel unhappy or uncomfortable about. It is therefore important that you consider the ways in which you can present the value and advantages of mediation best to prospective clients and be prepared to explain how the way in which it is conducted by you is a positive and useful way of reaching solutions. It is always useful to think about 'user experience', that is, what it is about what you offer that will meet what an individual wants, needs or hopes for. Rather than focussing on the process or procedures of mediation, think about how it might or can meet their stated wants and needs.

It is also worth considering whether there are ways in which you can improve your practice offer to meet with client expectations. This might be but isn't limited to having access to lots of useful and helpful information on your website, having an online 'call back' system or enquiry form, having preliminary information forms that can be completed online etc. Many solicitor firms and practices are beginning to use client inception/induction or triage software such as Settify and Family Law Lab's Engage. These systems gather and analyse client information, provide new clients with information about processes and procedures and can provide a level of analysis in respect of what is likely to be the client's priorities and their preferences in dealing with them. They also provide 'early warning' alerts where there may be aspects of abuse to be aware of. These are important early advances in providing potential clients with a link to services and assist in gaining engagement and freeing practitioners to focus on the client and her/his needs in first and subsequent meetings. These systems may also be useful in early identification of those who are interested in using mediation to resolve matters. Although they are built primarily and at the moment for use by solicitors, it may be that similar software will be available for mediation practices in the future.

Overall, you should be aware of the rapid advance in the use of technologies which in turn means that many potential clients will expect services that are offered via a range of supportive technologies, that are accessible and affordable.

If and when you consider using new technology, for example, Skype or online mediation, you must take care not to breach the FMC Code of Practice. Guidelines have been issued by the FMC to assist mediators who wish to offer online video mediation (including the use of Skype or similar technology). As general guidance, you should consider:

- discussing the use of new technology or conducting mediation by other or remote means with your PPC

- what training or professional development you might need in order to conduct mediation using new technology to a professional and high-quality standard and as required by the FMC Code of practice and Guidance.

- the reasons for the use of the new technology and whether it's appropriate and consider carefully whether using such technology (including any specialised software packages) is compliant with the FMC Code of Practice

- checking whether each client feels comfortable about the use of such technology

- an appropriately worded Agreement to Mediate encompassing the use of new technology, including arrangements relating to confidentiality that's signed by all of you

- careful assessment of the clients and the circumstances in each case. This should include consideration in respect of abusive behaviours and client capacity. Don't assume that mediation via remote or textual technologies will remove or deal with abusive or controlling behaviour, or that it'll allow the victim of abuse to negotiate equally and make decisions free from concerns

- careful pre-planning and testing any technology such as Skype (especially in relation to the reliability of the link), video conferencing and clear contingencies for if the link fails or is lost

- managing any online or Skype mediation meetings to take full account of the very different dynamic that exists in remote meetings

- how issues such as information display and exchange will be managed

- avoiding the use of Skype where one person can be present with the mediator but the other is not (to avoid inappropriate alignment). It is more appropriate for each person to be in a separate room, even if one individual could be physically present with you.

- where a mix of technologies to transfer information by writing or via discussion forum, that great care is taken to ensure the appropriate confidentiality and protection of written materials or documents.

For information in regard to the conduct of MIAMs via telephone or other technology please see page 29.

Care should also be taken to ensure that individuals are clear about the confidentiality and security of any mediation process. With the advancement of technologies, it has also become easier for individuals to record, video or photograph during sessions and photographing e.g. flipchart sheets has become commonplace and can be helpful and useful provided mediators are careful to ensure that any document is properly protected and its' status is clear (it is always useful to ensure that any photographed pages are marked 'without prejudice' especially as they may contain information that is not yet confirmed or verified or which may refer to possible proposals).

It is also useful to make direct reference to the use of phones to record or video in sessions at individual meetings and at the time of signing the Agreement to Mediate and mediators may wish to add it to their Agreement to Mediate to ensure that everyone is clear. Sadly, despite all of these measures, it is not possible to stop individuals from posting confidential material on social media but if you become aware that something has been posted, you should formally request, in writing, that it is taken down and refer to the confidential nature of mediation as is set out in the Agreement to Mediate. In any event, if this happens, you should consider very carefully the appropriateness of continuing the mediation.

Online Legal Administrative Procedures

All mediators will be aware of the gov.uk online divorce procedure. The use of this facility by individuals is increasing rapidly and for those who wish to manage applying for their own divorce, the online procedure is helpful and useful. Her Majesty's Courts and Tribunal Service (HMCTS) has a target to have end to end uncontested divorce procedure available online by the end of 2019, so it is important that you are aware of and conversant with how the online procedure works and can provide information about it to clients. It will also mean that mediation clients may well not consider getting legal or other advice and it will be important that you discuss with them what advice is useful for them to have and from whom in order that they can make informed decisions.

Appendix 1: Safeguarding children and young people – duties and responsibilities

Please note: In line with the requirements of '*Working Together*' Resolution is producing a public-facing Safeguarding and Child Protection Policy Statement, a Safeguarding Policy applicable to everyone working for - or on behalf of - Resolution on a paid or volunteer basis, and a Safeguarding Practice Note for all members. These documents are due be released as part of our 2018 Awareness Week (26-30 November).

Everyone has a responsibility for safeguarding children and young people. Family mediators also have a responsibility to safeguard vulnerable adults.

Confidentiality principles for family mediation include the ability to breach confidentiality where there is an allegation or disclosure of harm against another person – especially a child. If you believe that a child is at risk of, or is suffering, significant harm, then you must immediately refer this to the appropriate authority – usually the local authority children's services duty team, the police or the NSPCC.

In England the law states that people who work with children have to keep them safe. This safeguarding legislation is set out in the Children Acts of 1989 and 2004. It also features in the United Nations Convention on the Rights of the Child (to which the UK is a signatory) and sets out the rights of children to be free from abuse. The government also provides statutory guidance in Working Together to Safeguard Children, first published in 2010 but

now replaced by a 2018 (July 2018) edition, which encompasses changes to legislation following the implementation of parts of the Children and Social Work Act 2017.

The *Working Together* document sets out how all those involved in working with or providing services to children and families should act to protect children from harm and to promote their welfare. It emphasises that a child-centred approach is fundamental to safeguarding and promoting the welfare of every child.

A child-centred approach means keeping children in focus when making decisions about their lives and working in partnership with them and their families. It is critical that all mediators are aware of the content of this document and the statutory guidelines that apply as it may affect your practice as mediators working with families, particularly where you may see a child or children as part of a mediation process.

The guidance sets out:

- A clear framework for local 'safeguarding partners' to establish, lead, manage and monitor the effectiveness of local services.
- The legislative requirements and expectations on safeguarding partners and on individual services to safeguard and promote the welfare of children.

The arrangements set out in *Working Together* supersede the framework for the assessment of children in need and their families (2000) and the 2007 statutory guidance for making arrangements to safeguard and promote the welfare of children under s11 of the Children Act 2004.

Working Together focusses on the core legal requirements, making it clear what individuals, organisations and agencies must and should do to keep children safe. In doing so, it seeks to emphasise that effective safeguarding is achieved by putting children at the centre of the system and by every individual and agency playing their full part.

Working Together 2018

In summary, the document is divided into five chapters:

1. Assessing need and providing help

Chapter 1 sets out assessing need and providing help and the importance of providing early help, that is providing support as soon as a problem emerges - at any point in a child's life - from the 'foundation years through to the teenage years'. It further recognises that in order for that to happen, local agencies must work together to identify those children and families who would benefit from early help, assessments of the need for early help and targeted early help services to address those needs.

For mediators, this should translate as a means of ensuring that families can be assessed for appropriate help at an early point should a referral be made in regard to a safeguarding concern, but also where it is clear that the family is in need of support or help to avoid reaching a crisis point.

Working Together highlights specifically that practitioners should, in particular, 'be alert to the potential for early help for a child who:

- is disabled and has specific additional needs
- has special educational needs (whether or not they have a statutory Education, Health and Care Plan)
- is a young carer
- is showing signs of being drawn into anti-social or criminal behaviour, including gang involvement and association with organised crime groups
- is frequently missing/goes missing from care or from home
- is at risk of modern slavery, trafficking or exploitation
- is at risk of being radicalised or exploited
- is in a family circumstance presenting challenges for the child, such as drug and alcohol misuse, adult mental health issues and domestic abuse
- is misusing drugs or alcohol themselves
- has returned home to their family from care

- is a privately fostered child'.

In practice, any safeguarding issue will be carefully considered by the local authority so that the appropriate and proportionate level of assessment and subsequent help can be established. Local authority children's services teams hold responsibility for determining the nature of any referred matter or reported concern and to lead any assessment or, in the case of a safeguarding child protection concern, any subsequent investigation. Therefore, you should ensure that rather than endeavouring to determine the 'seriousness' or veracity of a concern or allegation raised, you act to ensure that a referral is made to the appropriate and nominated agency for support and any further action.

Chapter 1 is also very clear about the importance of information sharing and makes clear that:

> 'fears about sharing information 'must not be allowed to stand in the way of the need to promote the welfare, and protect the safety, of children'.

It further sets out principles in relation to local arrangements and the importance that 'all practitioners should not assume that someone else will pass on information that they think may be critical to keeping a child safe. If a practitioner has concerns about a child's welfare and considers that they may be a child in need or that the child has suffered or is likely to suffer significant harm, then they should share the information with local authority social care and/or the police'.

Alongside the publication of *Working Together*, is an updated document, 'Information sharing: advice for practitioners providing safeguarding services to children, young people, parents and carers. All mediators should be familiar with this document as it provides essential information in relation to information sharing.

In general, this places a responsibility on you as a mediator to ensure that you do not avoid sharing information because of any fears in relation to breaching confidentiality or because you are uncertain as to the veracity of the allegation or concern. It is also a reminder of the importance of not making assumptions about the fact that someone else, or another agency will already have passed on or be aware of information.

Information is also provided in *Working Together* on the relevant data protection principles which allow them to share information, as provided for in the Data Protection Act 2018 and

the General Data Protection Regulation [GDPR]

This chapter also makes clear the importance of 'contextual safeguarding'. This is being aware that children may be vulnerable to abuse or exploitation from outside their families at school, from within peer groups, online or from the wider community. This abuse might include exploitation by criminal gangs, trafficking, online abuse, sexual exploitation and the influences of extremism leading to radicalisation.

Chapter 1 also includes a range of very helpful flow-charts showing how the local authority are required to respond depending on the seriousness or urgency of the referral. Mediators should be familiar with these.

2. Organisational responsibilities

Chapter 2 sets out organisational responsibilities, including those placed on 'voluntary, charity, social enterprise, faith based organisations and private sectors', and makes clear that they 'should have appropriate arrangements in place to safeguard and protect children from harm'

Chapter 2 also makes clear that organisations should have policies in place to safeguard and protect children from harm and should have systems in place to ensure compliance in this. Such a policy should ensure that individual practitioners (paid or volunteer) are aware of their responsibilities for safeguarding and protecting children from harm, how they should respond to child protection concerns and how to make a referral to local authority social care or the police if necessary.

Mediators should also be familiar with their local Children Safeguarding Board resources which may also include example policies, information about available training and about how to make a referral in your local area and usually has a referral form available on the website. Remember that a referral must be made to the local authority children's social care team in the area where the child lives

The NSPCC Safeguarding Tool provides a valuable set of resources designed to assist practitioners in putting in place the appropriate policies and protocols and includes an example safeguarding policy

3. Multi-agency Safeguarding Arrangements

Chapter 3 sets out how the provision of the Children and Social Work Act 2017 will replace the current local safeguarding Children Boards with new local multi-agency safeguarding arrangements led by three strategic partners:

- the local authority,
- a clinical commissioning group for an area any part of which falls within the local **authority** area and
- the chief officer of police for an area any part of which falls within the local authority area

This chapter also sets out the role and function of the 'Safeguarding Partners' and the multi-agency safeguarding arrangements, including the move to Multi-Agency Safeguarding Hubs (MASH).

Information is also set out to explain how safeguarding partners must arrange to work together, local leadership arrangements and how they will work within their particular geographical area.

This includes information in relation to 'relevant agencies', that is, those organisations and agencies whose involvement the safeguarding partners consider is required to safeguard and promote the welfare of local children.

Chapter 3 also sets out the framework for publication of local safeguarding arrangements and what such arrangements must include.

As a mediator, you should be aware of your own local arrangements and in particular, information relating to Information Requests as this sets out that:

> 'safeguarding partners may require any person or organisation or agency to provide them, any relevant agency for the area, a reviewer or another person or agency, with specified information.'

Such information must be that which enables and assists the safeguarding partners to perform their functions to safeguard and promote the welfare of children in their area,

included as related to local and national child safeguarding practice reviews. The safeguarding partners should be aware of their own responsibilities under relevant information and data protection laws and to have regard to guidance provided by the Information Commissioners Office (ICO) when issuing and responding to requests for information.

It is important to note that you must comply with such a request for information and not to do so may result in legal action. You will need to consider the appropriate exemptions to confidentiality (of which safeguarding has primacy) and ensure that you are working within the FMC Code of Practice. If you receive such a request, you should be in contact with your PPC in the first instance for support and assistance.

4. Improving child protection and safeguarding practice

Chapter 4 focusses on the importance of improving practice and therefore on the purpose, responsibilities and aim of safeguarding practice reviews. It points out the complexity of a multi-agency system with many different organisations and individuals playing their part.

Working Together introduces a new and changed framework in relation to reviews and introduces the child safeguarding practice review to aid in identifying improvements to be made to safeguard and promote the welfare of children.

At a national level this includes the introduction of the Child Safeguarding Practice Review Panel who will hold responsibility for how the system learns from serious safeguarding incidents. The Panel will also have oversight of the system of national and local reviews and how effectively it is operating.

Further information and guidance regarding commissioning for and the place of safeguarding practice reviews, local and national reviews and 'rapid' reviews and actions in response to local and national reviews is also included in Chapter 4.

Mediators should be aware of the information regarding local arrangements as published on their local authority safeguarding children board/multi-agency safeguarding hub (MASH)

5. Child Death Reviews

Chapter 5 focusses on child deaths and the duties and responsibilities of the safeguarding

partners. It also sets out the statutory requirements and the responsibilities of other organisations and agencies following a child's death. A response flowchart is also inclusive of the information provided.

Significant harm, immediate protection and urgent action

The new guidance makes clear that there may be a range of actions that will be considered following a referral to the local authority, encompassing:

- an early help assessment
- assessment under s.17 Children Act 1989 (children in need)
- assessment as to whether there is reasonable cause to suspect that the child is suffering, or likely to suffer, significant harm and whether enquiries must be made and the child assessed under s.47 of the Children Act 1989
- consideration of whether there are any services required by the child and family
- further specialist assessments in order to help the local authority to decide what future action to take.

Be aware of this enhanced range of duties and responsibilities placed on the local authority in order that you are able to provide information to parents about the range of help and support for children and families that may be available to them as a result of a referral for assessment.

In general, the responsibility placed on mediators remains as previously: to be alert to concerns in relation to harm to a child or a vulnerable adult, and any allegations made in respect of such harm, in particular where an allegation or concern provides reasonable cause to suspect that the child or children is suffering, or likely to suffer, significant harm – and/or, in the wording of the new guidance, the child requires immediate protection and urgent action is required.

What is 'significant harm'?

This concept was introduced in the Children Act 1989 as the threshold that justifies compulsory intervention in family life in the best interest of a child or children and is defined as:

> 'Any physical, sexual, or emotional abuse, neglect, accident or injury that is sufficiently serious to adversely affect progress and enjoyment of life'.
>
> 'Harm' is defined as the ill treatment or impairment of health and development. This definition was clarified in section 120 of the Adoption and Children Act 2002 (implemented on 31 January 2005) so that it may include; 'for example, impairment suffered from seeing or hearing the ill treatment of another'.

Suspicions or allegations that a child is suffering or likely to suffer significant harm may result in a core assessment incorporating a section 47 enquiry.

There are no absolute criteria on which to rely when judging what constitutes significant harm. Sometimes a single violent episode may constitute significant harm but more often it is an accumulation of significant events, both acute and longstanding, which interrupt, damage or change the child's development.

Local authority duty to investigate

The duty of the local authority to make enquiries following information received suggesting that a child may need protection is contained in Part V of the Children Act. The local authority has a duty to make enquiries where it:

- is informed that a child who lives, or is found, in their area is the subject of an emergency protection order; or is in police protection; or
- has reasonable cause to suspect that a child who lives or is found in their area is suffering or likely to suffer significant harm.

The authority will make any enquiries as it considers necessary to decide whether it should take any action to safeguard or promote the child's welfare (s47(1)).

Arrangements for making a referral because of a concern or an allegation made in relation to harm, or potential harm or abuse, are clearly set out on the website pages of each local safeguarding children board or multi-agency safeguarding hub. Please remember that you should be clear with parents where you think you may or will need to make a referral and wherever possible, should seek their consent to do so. Parents should be encouraged to refer themselves in any event but even where this may be agreed, you must explain that you have a responsibility to follow up their referral.

If you have a concern that a child is at risk of immediate significant harm, you must act quickly to refer the matter. If you are uncertain, you should talk to your PPC (and your COLP if mediating in a regulated practice), and you can also contact the NSPCC helpline.

Child Sex Offender Disclosure Scheme

Mediators should also be aware of the Child Sex Offender Disclosure Scheme. This scheme lets those who care for children and young people find out if a person has a record for child sexual offences. The scheme is available across England and Wales. Full information is available at:

https://www.gov.uk/guidance/find-out-if-a-person-has-a-record-for-child-sexual-offences

Important pointers for mediators and those talking directly with children and young people

You must work within statutory guidelines and must take care to ensure that you are properly and currently informed of arrangements in your local area.

Ensure that the arrangements required and set out in chapter 2 of '*Working Together*' (Organisational responsibilities) are appropriately established and effectively monitored in your practice or service.

You must ensure that parents, children and young people are made aware of your duties

and responsibilities in relation to safeguarding and the exemption to confidentiality that applies in respect of safeguarding and child protection concerns.

You must provide any explanations to children and young people about confidentiality and your responsibility for keeping them safe from harm in age-appropriate terms and check that they have understood. Where a child or young person discloses or tells you of any harm to them, they need to know that you will need to inform someone who has responsibility for keeping children safe.

Make sure that you have put in place a suitable safeguarding policy for internal use and that everyone (paid or volunteer) is aware of their responsibilities in relation to safeguarding.

You should also consider having a public-facing policy statement in respect of your safeguarding arrangements so that any parents, carers, children and young people are clear about your responsibilities.

Appoint a Designated Safeguarding Officer (DSO) within your practice who will be the identifiable person who will keep up to date on safeguarding matters, provide a first point of contact when needed and who will be responsible for keeping everyone informed of requirements.

Consider what training or learning is required for you or for those who work with you, in whatever role. Everyone should be aware of what safeguarding means and how to act appropriately if they have any kind of concern.

Ensure you are aware of how you should make a referral to the local authority (or to the NSPCC or to the police) when it is appropriate or essential that you do so.

Wherever possible, you should have a nominated, named contact within the local authority with whom you can liaise in order to keep currency of information in regard to referral procedures, the role and function of ‘Safeguarding Partners’ and the multi-agency safeguarding arrangements, including the move to Multi-Agency Safeguarding Hubs (MASH).

In some areas it may be possible to arrange an informal consultation procedure with the local authority children’s services team, which would allow you to consult with the local

authority to assist in deciding whether to make a formal referral.

Note that the **NSPCC host a helpline, available 24 hours a day,** every day of the year, which provides any professional who is concerned about the safety and well-being of a child with advice and guidance. The helpline can be contacted in a number of ways: telephone: 0808 800 5000; email: help@nspcc.org.uk ; or through its website. The NSPCC also offers CASPAR (Current Awareness Service for Practice, Policy and Research) which provides free weekly email alerts to keep you updated with all the latest safeguarding and child protection news. You can sign up at their website.

As arrangements and guidelines are subject to change (and not just changes in legislation), keep a regular contact and monitor your local Safeguarding Children Board website for updated information in regard to reporting procedures. In some local areas, it might be possible to link into a locally-based updating service or newsletter provided by the local authority. (See also NSPCC CASPAR). Remember that the Children and Social Work Act 2017 is only partially implemented and there will be continuing change to local provisions as new arrangements are either implemented or introduced.

You should hold sufficient information to enable you to accurately explain to client parents and/or any children and young people you see what will happen following a referral, and should ensure that you are able to properly ensure that clients have an immediate 'next step' or onward destination from you.

Appendix 2: Safeguarding vulnerable adults and domestic abuse

The Care Act 2014 established that each local authority must establish a Safeguarding Adults Board (similar to the local Safeguarding Children's Boards).

Be aware that there are policies and procedures in place in all local authority areas in relation to the statutory guidelines relating to the Care Act legislation. As with *Working Together*, you should be aware of local arrangements in your own area in relation to the protection of vulnerable adults. Each local authority has a safeguarding adults board where information about local arrangements is published.

A 'vulnerable adult' is described as someone who:

- has needs for care and support (whether or not the authority is meeting any of those needs),
- is experiencing, or is at risk of, abuse or neglect, and
- as a result of those needs is unable to protect himself or herself against the abuse or neglect or the risk of it.

'Abuse' includes financial abuse, which is defined as:

- having money or other property stolen,
- being defrauded,
- being put under pressure in relation to money or other property, and
- having money or other property misused.

Your local Safeguarding Adults Board will provide all local information about making a

referral, including what you should do if you have an urgent concern.

Domestic abuse

There is now a cross-governmental definition of domestic abuse:

'any incident or pattern of incidents of controlling, coercive, threatening behaviour, violence or abuse between those aged 16 or over who are, or have been, intimate partners or family members regardless of gender or sexuality. The abuse can encompass, but is not limited to:

- **psychological**
- **physical**
- **sexual**
- **financial**
- **emotional**

Controlling behaviour

Controlling behaviour is a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.

Coercive behaviour

Coercive behaviour is an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim.

This is not a legal definition'.

As of April 2017, the government is working on new draft legislation in respect of domestic abuse (The Domestic Violence and Abuse Act). Two new offences have been introduced to

existing legislation, The Serious Crimes Act 2015, s.76 which establishes controlling or coercive behaviour as an offence and s.67 a new offence of sexual communication with a child.

The Domestic Abuse Disclosure Scheme is now available across England and Wales. Under the arrangements of this scheme an individual can ask police to check whether a new or existing partner has a violent past. This is called the 'right to ask'. If records show that an individual may be at risk of domestic violence or abuse from a partner, the police will consider disclosing the information. Further information can be found on the gov.uk website.

Victims of domestic abuse in any form should be entitled to legal aid and the government has made amendments to regulations to change time limits and to expand the acceptable reporting arrangements to ensure that victims have access to legal help and representation.

As a mediator, you are not expected to be an 'expert' in domestic abuse legislation, or in assessing whether an individual is or is not a victim or perpetrator. Your role is to assess whether mediation is an appropriate and safe process for prospective clients.

However you must ensure that you are properly up to date and informed about how to signpost those who are concerned about or who are victims of any kind of abuse to those who can best assist and protect them. You should also be able to signpost those who may be or who are alleged to be perpetrators as they too require help and protection. In order to do this, you must ensure that you have carried out an appropriate assessment which includes asking direct questions to each prospective or actual client about any concern/s about abuse in the relationship. Resolution's Domestic Abuse Committee has produced Domestic Abuse 'Toolkit' Guidance aimed at assisting professionals in a process of screening and assessment, the toolkit also includes links to expert agencies.

Resolution's Domestic Abuse Screening Toolkit can be found at www.resolution.org.uk/toolkits/

There is also guidance in relation to safeguarding where there is or may be concerns about female genital mutilation (FGM) for similar purposes. Resolution also has members who hold specialist accreditation in domestic abuse matters. Their details are on the Resolution website: www.resolution.org.uk/find_a_specialist/

There is also information and links on gov.uk in relation to domestic abuse and how to report: www.gov.uk/guidance/domestic-violence-and-abuse

and in relation to FGM:

www.gov.uk/government/collections/female-genital-mutilation

If you are concerned about someone at risk of, or who is a victim of FGM, you can contact the NSPCC anonymously:

Helpline: 0800 028 3550

Email: fgmhelp@nspcc.org.uk

Website: https://www.nspcc.org.uk/preventing-abuse/child-abuse-and-neglect/female-genital-mutilation-fgm/

Appendix 3: Safeguarding and abuse - dealing with allegations or disclosures

Pre-mediation process:

- Be and remain aware of and alert to the prevalence of unreported abuse.
- Ensure that you have started your safeguarding and screening/assessment process from the very first contact with prospective clients.
- Ensure that information regarding screening/safeguarding is explicit in pre-mediation materials – information sheets, leaflets etc. and that you make clear that mediation starts with individual meetings.
- Ensure that you explain carefully and early in pre-mediation phone calls that mediation is a voluntary process and not one that anyone should feel coerced or pressurised into.

In explaining confidentiality, ensure that prospective clients know that an exception to that confidentiality is any reported harm against another person and particularly a child. This is to protect vulnerable people and ensure that appropriate assistance is provided. Ask questions that are designed to prompt clues for you of any concern.

Explaining to clients that, normally, mediations are conducted with both clients and the mediator in the room is important – and check out whether that causes the prospective client any concerns. Mention that you always see people separately before starting a mediation process.

Ensure that wherever possible, an agreement to mediate is provided to prospective clients ahead of any meeting – and ask them to read it through.

Similarly, preliminary information forms need to be provided to clients and returned to you ahead of any first meeting. This is so that checks can be carried out in relation to any

answers that would indicate that there may be issues of harm/concerns about harm.

Where social services or police investigations/court injunctions are indicated, you must clarify with clients the status of the investigation. If it is ongoing, do not enter into a mediation process. If it has been completed, you must have evidence of outcome in order to assess the appropriateness of a mediation process. Where there have been injunctive proceedings or an injunction, you must check whether the injunction is current and the conditions related to it. Generally, the presence of an injunction is likely to make a mediation process inappropriate. (Please also see information regarding shuttle mediation processes in the Guide to Good Practice on Mediation)

At first meetings:

- Always see individuals separately ahead of any joint meeting. Screening and safeguarding checks should be carried out again at the point of first meetings. Good practice guidelines would indicate that individual screening and assessment is a prerequisite for mediation.
- Check out any comments provided by clients in completing their information forms.
- Ensure that any staff are aware of and alerted to the potential for abuse between clients – help them to manage your clients before they get to you by ensuring they are properly and appropriately briefed. This should include ensuring that your staff are aware of their safeguarding responsibilities and what they should do if they have a concern.
- Think carefully about arrangements for client, mediator and staff safety and ensure that you have a contingency in place should you need to separate clients and/or alert staff that there is a problem.
- Always ensure that mediation rooms are carefully laid out, allowing sufficient personal space between clients – and with a clear line of exit for all.
- At the point of starting the mediation process and signing the agreement to mediate, point out the major principles within the agreement, including exceptions to confidentiality.

- Observe clients carefully, listen carefully - observe client behaviour when together.
- Do not leave clients alone together in the mediation room.

At subsequent meetings:

- Always check at the beginning of each meeting whether anything has happened since the last meeting that clients need to discuss or report.
- It is important to be aware that in some relationships it is possible for a 'one-off' episode of violence to occur between individuals – this has been categorised as 'post separation or divorce trauma' and is caused by the stress of separation. The reality of a client's situation – whether it is that they are to divorce, or that they realise that their finances are less than or insufficient to their future needs, or where there are difficulties in relation to shared parenting may all be 'flash points' for an episode of violence between adults.

When something is reported or talked about as an isolated incident, mediators should be alert to this situation and be careful to assess, as far as it is possible, whether that is the case or if it may be - or is part of - an ongoing and/or long standing pattern of violence.

It is essential that you do not 'play down' (for yourself or with either individual) anything shared by either prospective or actual clients in relation to abusive behaviour. You must always ensure that you have properly assessed with individuals ahead of any mediation process whether they have any concerns about abusive behaviour of any kind and that you ensure you remain alert to any signs of abusive behaviour throughout the mediation process.

If an allegation or disclosure about harm to a child or young person is made:

- Stay calm – put the meeting or process on hold.
- Be clear about safeguarding duties and your organisation's policy and procedures – take a problem-solving approach between you all.
- Listen very carefully.
- Ask open questions for clarification, but do not interrogate.
- Reflect back what you have heard and check mutual understanding.
- Do not make judgements about either individual or any allegation made – keep a balanced stance.
- Explain procedures and what you intend to/must do – and be aware of statutory guidance and local referral arrangements.
- Give parents as much information as you can as to next steps – check that they have an immediate 'onward destination' from you.
- If parents agree to contact the local authority or report a third party abuser, explain that you will need to check that they have done so and make a referral yourself.
- Ensure safe exits for all.
- Act immediately where there is immediate concern of a child at risk of significant harm and/or where a child requires immediate protection and urgent action is required.
- Record promptly and clearly the facts – not your opinion or view – noting the precise words used, action decided upon and when/how taken.
- Seek advice/guidance as appropriate – be in contact with your PPC.

If a child or young person discloses:

You must in the first instance ensure that you have explained to the child, in an age

appropriate way, your responsibilities to keep children safe from harm and the limits of the confidentiality of any conversation. You must ensure you have checked with them that they have understood what you have said and have been able to ask any questions they may have.

React calmly so as not to frighten the child.

- Listen carefully.
- Reassure the child that they are right to tell.
- Do not make promises of confidentiality and explain that you will have to tell another adult whose responsibility is to keep children safe from harm.
- Take what the child says seriously and recognise the difficulties there are in interpreting what is said by a child.
- Keep questions to the barest minimum to ensure a clear and accurate understanding of what has been said.
- Do not ask leading questions.
- Explain to the child in an age-appropriate way what you will do next and with whom you will share information.
- Record promptly and carefully (using the child's own words), not your opinion or view. Record action decided upon and when/how taken.
    - Seek advice/guidance as appropriate – be in contact with your PPC.

Assessing for domestic abuse

Quick checklist

- Be aware and remain alert to the prevalence of unreported abuse throughout the mediation process.
- Ensure information is explicit in pre-mediation materials – information sheets, leaflets etc.
- Cover exemptions to confidentiality early in pre-mediation phone calls – ask questions that are designed to prompt early warning of potential of/for abuse. Inform individuals that mediations are normally conducted with both people in the same room - is that likely to present any concerns for them? Mention that you see people separately before starting the mediation process.
- Check preliminary information forms carefully.
- Check your office and mediation room, consider seating arrangements and exits. Cover aspects of screening and abusive behaviour with your staff. Consider carefully the safety of individuals, your staff and yourself.
- Listen to/observe clients carefully – ask direct questions (see Domestic Abuse Screening Toolkit above). Explore, but do not interrogate or judge, in order to get clarity. Observe clients' behaviour and body language when together. Consider individual capacity to take part in mediation
- Discuss exemptions to confidentiality in separate meetings/first joint meeting and when they sign the agreement to mediate.
- Be prepared to deal with reporting of a 'one-off' episode of separation or divorce-engendered trauma that has led to violence. Assess as far as you can that it is not emerging evidence of a pattern of long standing abuse between them
- Always ask at the beginning of each session whether anything has happened between sessions that they need to talk about.

- Have currency of information in relation to local services of support and protection. Also ensure that you are familiar with referral or reporting procedures and ensure that clients have a clear 'next step' from you should an allegation or disclosure be made that will end the mediation/lead to referral.

- Always consider with the parents the impact of an abusive adult relationship on any child. Remember that if children are either witnessing or caught up in parental abuse or violence, this is a risk situation for the child.

- Always consider whether discussing any expressed allegation/disclosure with a/either/both parents would place a child at increased risk of significant harm – if so, referring or reporting, not the discussion of or agreement to reporting, is the priority.

- Ensure safe exits for each and both clients.

- Be in touch with your PPC.