This Handbook was first published in October 2018. This version is dated March 2021. 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**

[Supplement documents](#) to this Handbook, which provide condensed information covering online working for mediators, are available. Please read any supplement in conjunction with this handbook for the most up to date information about providing mediation services online or in a blended way.
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 Standards Manual 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 how they will work after successfully completing their training to achieve accredited status.

The provides up to date information regarding the applicable standards for mediation practice and in respect of accreditation. The FMC Newsletter provides all updates relating to family mediation and is provided to all FMC registrants, copies are available on the Family Mediation Council website.

Accreditation

All family mediators are required to attain FMCA (Family Mediation Council Accredited) status within three years of their foundation training, where possible. If you were due to submit your portfolio for accreditation by the end of 2017, there is information available regarding extension arrangements The FMC operates an extensions policy for mediators who have not managed to attain their accreditation within three years of initial training, you should discuss your situation first with your PPC.

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
coronavirus outbreak. These temporary arrangements come to an end at the end of March 2021, after which time the FMC will notify mediators of any further changes or amendments.

As of June 2019, the FMSB has also 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 and to receive information about what may be alternatives to using the Court to resolve matters between them. Section 10 of the Children and Families Act requires those planning to issue proceedings to attend a statutory MIAM. Exceptions to this requirement include 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 solution seeking or dispute resolution, aims to assist them to make the right decision for them and their family and to signpost them to other services which may support or assist them whether or not they ultimately decide to mediate and it is appropriate that they do so. An initial meeting 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 PPC Code of Practice.

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 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 (attended or by remote technology)
  - 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 Manual, 2.1 Post Training Requirements, p.6).

A level of consultancy can be provided via telephone or via remote technology such as Zoom or Teams but be aware that, once restrictions in place as part of the coronavirus pandemic are reliably lifted, this should not be the only way of meeting with your PPC.

Many PPCs lead peer groups (attended or remotely) 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 meeting remotely provides a means of keeping in contact. Some PPCs travel to see mediators at some distance from their own home area, although it is accepted that due to the coronavirus outbreak, this is currently not possible and PPCs may wish to change their arrangements after restrictions are lifted.

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 eventually 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 Zoom/Teams. Phone or Zoom/Teams should not be the only way that you spend time with your PPC, but if you have an ‘at distance’ arrangement, (and during the period of restrictions) 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 remotely or 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 (and record) 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 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 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 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.¹

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 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/or child inclusive mediation. Additionally, you must hold an appropriate level of DBS (formerly CRB) check. If you already hold recognised

¹ For full information, see:
training in DCC practice, 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, 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 (currently not available due to the restrictions) 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. Resolution publishes 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, or barristers but which may form part of insurance requirements.

If you are working outside of regulated practice, there are a number of insurers who offer insurance for mediators and PPCs at reasonable and competitive rates.

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 section related to enduring outcomes from mediation in this handbook.
It is 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.
Theoretical perspectives on mediation

Mediation as a concept has a very long history, exists across diverse cultures, communities, and faiths. In the latter half of the 20th century in our own jurisdiction and in the US, Canada, Australia and New Zealand, the focus on mediation as a means to assist people whose relationship is ending or has ended to find solutions, to problem solve and resolve disputes has gathered momentum as it has similarly in employment and contractual disputes, in education, in medico-legal and international disputes.

From a legal perspective, this is not surprising, mediation has the potential to provide the means to resolve legal disputes cost effectively and quickly, thus avoiding the cost (financial and in time) of proceedings and adjudication.

However, the models for mediation vary considerably from an essentially informal ‘talking solution’ to the more structured, staged models for practice. As a concept, mediation can be difficult to ‘pin down’, can mean different things to different people and can be difficult to understand as a means of seeking solutions or resolving disputes. It is one of a rather larger ‘system’ of solution seeking approaches. Its voluntary nature (in this jurisdiction certainly) places it at the lower end of interventions designed to assist people to problem solve, in a continuum which starts with informal discussion assisted by some form of third party and ends with a process of adjudication. Its value is that, in its’ most widely recognised forms, it provides a means for people to reach their own informed decisions with assistance from a neutral third party who facilitates (or sometimes directs) the process.

Family mediation draws on theories that have shaped mediation from a range of academic schools. Much of what forms family mediation today has its’ roots in labour negotiations (especially in the US) and conversely, in psychodynamic theories of inter-personal communications and understanding the nature of couple and family relationships.

Early approaches to problem solving in family matters in this jurisdiction came from the use of ‘conciliation’, beginning in Bristol and Cambridge and led by those who were broadly from the fields of social work, family court welfare and psycho-dynamic models for counselling. At that time, the focus was on separated parenting and the needs of children. As the movement grew, ‘conciliation’ became ‘mediation’ and with the introduction of family law specialists, mediation process grew to encompass family finances and property, recognising that family matters encompassed all aspects of everyday living and a more comprehensive and holistic approach was needed in mediation, but one which had due regard to applicable law.

With this growing interest came a similar interest in how to ‘professionalise’ what had been an essentially informal approach, operated by professionals working in other disciplines,
mostly as a voluntary service and attention turned to establishing a recognisable professional the ‘family mediator’. Necessarily, this included how best to ‘train’ others to fulfil this role.

As it was an approach offered by existing professionals (but from diverse backgrounds), it isn’t surprising that it was perceived as a set of ‘skills’, within a broad set of principles for practice that needed to be acquired in order to practice as a family mediator.

With the introduction of the Standards set out by the Family Mediation Council, including the competencies for family mediation practice (which had been refined over time between family mediation organisations) and the introduction of a single Code of Practice, family mediation in this jurisdiction now has a definable professional base. It is important to note, however, that the greatest attention is still broadly on skills rather than underpinning theory.

‘As I survey the landscape of the profession of mediation, I see that in practice and in training there is an almost singular emphasis on practice skills and a corresponding failure to teach theory as a foundation for the application of practice skills. Skills building is emphasised over theory. The consequence, for the trainees and the field as a whole, is that mediators lack an appreciation for and understanding of the history, traditions and conceptual foundations of their profession. By theory, I mean the fundamental ideas, concepts, beliefs, and assumptions that guide practice’.

This comment was made by Michael D Lang, Editor of Mediation Quarterly (the forerunner of Conflict Resolution Quarterly) in his Editorial to Volume 18, no 2 of the Winter 2000 edition.

Arguably, similar criticisms could be made of many training programmes in the UK, and across the world in a wide range of fields of practice. It could also be made of many books and articles on the subject of mediation specifically, and dispute resolution in general. This is not to suggest that the courses, books and articles do not provide principles explaining mediation. For example, attention is commonly given to models and principles of mediation; to its components such as the need for balance, even-handedness and consensuality, and the nature of and limitations on the mediator's authority, all of which are now enshrined in the FMC Code of Practice.

The structure of mediation process is also usually covered, with analyses of the effect of family relationship breakdown, applicable law, communication and other skills involved, and related issues such as conflict and negotiation theory, confidentiality and privilege, fairness, ethical approaches, power and rights. Generally, taken as a whole, these components and the skills that accompany a family mediation process are seen as broadly constituting a theory of family mediation and the means of practice.
Many mediation practitioners and writers might take the view that the principles, practice and understanding that they have of the process also constitute a definable theory of mediation. They may feel that a deeper analysis may satisfy academics but would not help them or the public. Others might well find that having better theoretical insights could help them to inform and improve their practice and help them to grow as mediators.

The following provides a brief overview of the developing theoretical basis of the practice of mediation.

**Structured mediation**

O J Coogler was one of the originators of family mediation in the US in the early 1970s. Unusually, he was both lawyer and family therapist. He introduced what he termed ‘structured mediation’ which in many ways combined the approaches of his two professions.

Interestingly Coogler’s particular interest came from his own very bruising experience of divorce. In his book Structured Mediation in Divorce Settlement: A Handbook for Marital Mediators (Heath, 1978) he described the system of structured mediation as "my anger transmuted into what I hope is a power to move toward a more humane world for those who find themselves following in my footsteps".

Coogler’s model also drew on Eric Berne’s model for ‘transactional analysis’ and introduced a set of ‘rules’ for mediation practice. These were designed to enable people to take greater personal responsibility for dealing in a mutually respectful way with their issues. They recognised that couples in crisis were not trained negotiators and generally needed help in trying to reach agreement; that the procedures to help them needed to be defined and understandable; and that they needed to cover the issues in a coherent and comprehensive way.

Coogler’s rules also drew on communication and intervention techniques adapted from labour mediation and the social sciences. They incorporated ideas taken from the laws of those US states advanced in their thinking about divorce. The structure envisaged by Coogler was one in which the couple could sort out their feelings while dealing with their problems, working within a framework that defined their roles and the necessary procedures, but that left them with personal responsibility for resolving their issues. He distinguished this from the legal structure, which was adversarial and primarily managed by lawyers negotiating (or battling) on behalf of their clients, with clients having little active participation in procedures and relying on the advice and action of their respective lawyers within the accepted legal framework.
The work of Coogler is still referenced in family mediation theory, and has been further developed by other theorists and practitioners, including Sarah Childs Grebe, Jay Folberg and Anne Milne, John Haynes and in this jurisdiction, Lisa Parkinson and Marian Roberts.

A common theme remains that family mediation should have a definable structure and is a process and that both should be subject to principles for ethical and principled practice.

Mediation as staged process

Many models of mediation are still seen as essentially, stages in an overall and defined process. Theorists and writers in family mediation have over time, put forward a number of practice models that define, variously, five to nine staged processes. Having a staged process is helpful to mediators in that it provides the means of identifying where they, and their clients are at each point and therefore provides a defined framework which sets out what needs to be done at each stage to move to the next stage in the overall process.

However, it is important to remember that mediation is essentially a flexible and dynamic process, so whilst stages are important, the ability to be flexible is also an essential part of working as a family mediator. This is also important because people don’t necessarily ‘fit’ a staged process and they may not travel through the ‘stages’ in a straightforward way. However, the value of understanding mediation as a staged process is that it is of great help in understanding mediation as a process and providing a valuable framework for new mediators.

The importance of communication theory in the mediation process

Mediators of all disciplines and backgrounds are alive to the significance of communication in the mediation process. The FMC lists theories of communication as a competence for mediators, with communication skills playing a large part in other competencies for practice. Training programmes and workshops are often focussed on developing communication skills, and books in family (and other forms of) mediation also address this subject area.

Knowledge of these theories and the ability to practise them confidently and to a high standard are an important factor in good mediation practice. Communication does provide a broad conceptual component in the structure of family mediation. Having a clear understanding of the ways in which people communicate (or have stopped communicating), past and present patterns of communication between adults and with children and young people is an essential aspect of mediation practice.
It also links directly to theories of conflict and co-operation and provides a means of understanding the basis of conflicts and of conflict resolution. Being able to examine the communication between people, how it has led to conflicts, what might underlie the conflicts and ways of improving communication with a view to resolving conflict is an essential part of the mediator’s knowledge and skill.

A structural/functional analysis of mediation would, for example, look at language intensity cues and identify patterns of interaction, both between the clients and the clients/mediator, to distinguish outcomes. Overall, the importance is the value such analysis might have for mediation clients and for mediators. This school of thought therefore develops a further principle in the communication perspective as uncovering meaning in communication by an appreciation of its social construction. This in turn requires any analysis to be made within a specific textual and contextual situation.

"Mediation, like communication, does not take place in a vacuum. All social action is embedded in layers of context that act and interact to influence both the form, essence, and function and actions of the individuals who produce them" (Folger & Jones).

Understanding the context of inter-personal conflicts and how they have affected communication can therefore assist mediators in selecting the interventions they may make with their clients.

Family relationships theory

An important area of theory for mediators is that which relates to understanding:

- family systems theory
- Attachment theory
- Child development and especially the effect for children of family separation
- adult relationships and the impact of separation
- Power imbalances
- Culture and diversity across family structures

For all family mediators, knowledge of family structures, how individuals make, break and form new relationships and family structures, the effect of family relationship breakdown and family separation are essential components of their learning. Having an understanding of child development and how it may be disrupted by family separation and transitions and the psychological impact for individuals, for parents and children equally so.
Understanding major theories of attachment and family systems underpin the ability to equally understand patterns of communication and of family conflict.

Fortunately, the field of family relationship theory is necessarily broad, with a number of well-known and regarded theorists and practitioners. Academics such as Bowlby, writing about attachment theory in relation to children has led to considerable advances in areas such as family systems theory and a greater understanding of the family as a social construct, which has been further informed by the work of sociologists such as George Murdock. The work of Donald Winnicott around the concept of the ‘good enough parent’ and the work of practitioners such as Arnon and Marianne Bentovim in family therapy have further informed practitioners in regard to dysfunction in families.

Christopher Clulow has also contributed to a greater understanding of separated families and the effect of family relationship breakdown and its’ close association with the experience of bereavement.

Psychodynamic, behavioural and cognitive counselling theories

Psychodynamics or psychodynamic psychology is the study of psychological forces that underlie human behaviour, feelings and emotions and in particular how they might relate to early experiences and learned behaviours. Theory in psychodynamics can be useful to mediators in that they provide an insight into why people may behave in particular ways.

In cognitive counselling theory the focus is on a problem-solving approach, focussed on an individuals’ present situation and distortion or dysfunction in their thinking that may underlie problems they have in terms of being able to think and behave in a more normative way and take a more realistic and/or positive approach in their thinking and actions. Understanding even in outline these theories (along with the closely associated behavioural approaches in counselling) can be helpful for mediators and most importantly, some of the skills used in psychodynamic, cognitive and behavioural approaches to counselling are adaptive and already used in mediation.

Theories of conflict and co-operation

Theories of conflict and co-operation are generally thought of as applicable theory in international relations and diplomacy. Whilst it might seem strange that family mediation might draw part of a conceptual theoretical base from the ideas that come from studies in international relations, there are interesting comparisons when applied to family issues.

It is important for example, to understand the difference between the associative nature of cooperation and the dissociative nature of conflict i.e. in a mediation we may be working
with people whose conflict means that they work against one another (dissociative), whereas in an associative approach, they would work together.

Often this translates at a basic level, as finding the means to unite people in a common goal and/or assisting them to look at the options they might have for resolving things that do not require them to work against one another but rather together. Recognising where people can be assisted to consider working together rather than against one another also has potential to use negative energy previously expended in working against one another to positive energy in seeking a means to achieve a jointly identified goal or a means of achieving an outcome that is workable for each and both.

Conflict is inevitable in life, it isn’t necessarily and always negative, it is the ability as between those in a conflict to resolve it in a way that is mutually acceptable. In mediation, mediators have a role in assisting people to consider what it is they need to resolve, to work with both to help them to identify the nature of their conflicts, understand what interest lie beneath the conflict, mutualise as far as is possible how those interests can be met and help them to work together towards an outcome.

Negotiation theory

The theoretical approach usually associated with mediation is an interests-based model of negotiation. This varies from the approach most often taken in commercial or adversarial negotiations which often relies on positional bargaining and a win/lose outcome.

In an interests-based model, the aim is to define the conflict, identify the interests each individual or party has, whether there is a mutual need or needs and to find the means to reach an outcome that works for both individuals, the so-called ‘win-win’ outcome. This is particularly important in family matters, especially where there are children involved because parents need to be able to form an appropriate parental alliance to ensure that they can raise their children co-operatively. If negotiations between them or on their behalf have been based on a ‘win-lose’ approach, that is unlikely to happen. Generally, win-lose outcomes are going to be damaging as a means to resolve personal conflicts.

Therefore, when working in an interest based, principled model for negotiation, mediators are likely to use the major theoretical tenets of interest-based negotiation theory i.e. understanding the principles and process of interest-based negotiation, analysing the conflict/s, examining positions, identifying interests and needs, mutualising, building consensus and reaching an outcome.
In conclusion

There are many elements that affect the theoretical and ideological base of mediation. The combination of these, in different applications, will affect the model of mediation and the approach taken by mediators:

- **Situational context/s**: Different situations can affect the approach that is or needs to be taken. Mediation is civil/commercial disputes for example, differs in many ways from family mediation but there are meeting points and areas where each can draw on the underpinning theory and practice of the other e.g. in hybrid mediation process which draws on the structure of civil/commercial models of mediation practice. Generally, there are differing approaches in community, public policy and international mediation practices, however each and all are valid within the context of their subject matter.

- **Technological advances**: In this last year family mediation as a physically attended, ‘face-to-face’ process has been completely disrupted by the Covid-19 restrictions. It has meant that previously long held beliefs in respect of the conduct of mediation have been re-thought and it is probably the case that the practical application and delivery of family mediation services will be permanently changed. Working remotely or in a ‘blended’ way with clients brings with it new challenges, not least in relation to appropriateness and safeguarding. As technology continues to advance, there are likely to be more changes to come. As an example, in late 2020, the Australian Legal Services Commission and National Legal Aid service, with support from the Australian government launched amica, a software programme that uses artificial intelligence to act as ‘mediator’ with couples, allowing them to resolve parenting, money and property issues online. It is unlikely that amica will remain the sole provider of this new approach in family mediation.

- **Facilitative and evaluative mediation** Family mediation in this jurisdiction is facilitative in nature. The mediator facilitates the negotiations clients have on an interest-based model which best reflects the need to ensure a workable solution for families, where if there are children, that family will need to be able to function appropriately for the future. How much the mediator intervenes in the couple negotiations may vary. An important component in facilitative mediation is the ability to empower clients to reach their own informed decisions. In some models of facilitative mediation, the mediator may simply see their role as providing the environment and the framework for discussion and may intervene very little, if at all in the clients’ discussions. Generally, the expectation in facilitative mediation in this jurisdiction, is that although the mediator holds no authority in decision making or outcomes, they are expected to manage the process of the mediation and to make such interventions as are necessary to assist clients in their discussions,
including the provision of information, and reality testing proposals with the participants.

- Evaluative mediation in contrast, tends to take a fundamentally ‘rights based’ approach to reaching an outcome, mediators in this model commonly provide a view of the respective merits of any issue and encourage people to resolve matters based on their respective rights and prospects. In an evaluative model, the mediator may take on part of the negotiating role from the clients and it may result in part in an outcome being ‘brokered’ by the mediator rather than a negotiation between the clients to make their own decisions.

- **Therapeutic/transformative/narrative approaches in mediation** - generally facilitative models for mediation are not seen as therapeutic (although they may have a therapeutic effect). In a truly therapeutic approach, the model is rather more closely associated with solution focussed brief therapy using therapeutic skills in problem solving and in re-setting dynamics for each individual as they leave a couple relationship. Transformative mediation relies on understanding the negative conflictual inter-actions between individuals with a view to ‘transform’ their negative patterns of conflict in order to achieve an outcome. A narrative approach involves the mediator in assisting individuals to bring their individual ‘narrative’ to be heard in order that they can find an outcome that fits their individual narratives of what has happened and the new joint narrative they hope to create for the future.

**Resolution’s approach to mediation theory**

The theoretical perspective of Resolution mediation may be summarised as follows:

- It comprises a structured, comprehensive framework, bounded by a body of ethical and practice rules set out in the FMC Code of Practice and Standards

- Mediators are aware of the structure and stages in a mediation process, within which it allows for creativity and flexibility appropriate to the clients' needs and issues.

- An essential component of mediation practice is to recognise when it is inappropriate to mediate (either immediately or at all) and especially the importance of recognising and acting on situations where there is a need to protect vulnerable adults, children and young people from harm

- It follows the principles of established mediation practice, recognising that clients negotiate "in the shadow of the law".
• It accordingly seeks to offer even-handed facilitation, communication and other skills, help clients with their negotiations, understanding the nature of family separation, the effect for children and their needs as a result, and an ability to understand and manage the dynamics of the clients' relationship and their emotions.

• It further seeks to ensure that so far as practicable clients make their decisions on an informed basis, with an understanding of their implications and consequences and with the benefit of independent professional advice where appropriate. To this end, it allows for the mediator to provide information on an even-handed basis.

• and by agreement, involve other professionals or services which assist clients in reaching the outcome they hope to achieve as an inherent part of the process.
An introduction to mediation skills

As a mediator you will need to develop and use a range of skills in the course of the mediation. These are both learned or can be intuitive, and include the following:

Active listening

This is a fundamental mediation skill. Very often, although we think we are ‘active listeners’, we may in fact have become ‘conditional listeners’, that is, we are so attuned to what we want or expect to hear, we are tuning out some of what we hear. In your role as an adviser, it is important that you get ahead of the conversation and are ready to collect information you need or to give advice. In mediation it is important that you stay with the conversation, listen very carefully, so that you can reflect and summarise in order to reassure clients of what you’ve heard, or to let them re-state something we may have heard inaccurately or out of context, because getting mutual understanding in mediation is critical.

We are also running an internal mental dialogue, thinking of a reply, assessing what we think is going on, or checking out whether the ‘hypothesis’ we already have or formulating (the ‘I know what this is about’ thinking). This internal dialogue of our own can block actually listening to what someone is saying and truly ‘hearing’ it. It can mean that we respond before the speaker has finished what they are saying – and we just might cut off the most important part of what the speaker was about to say. Part of that is also being able to be comfortable with silence. People need time to process their own thoughts before they speak, if we jump in to fill that space we may stop them from processing their thoughts and be able to respond having done so.

Mediators need to ‘listen with their eyes as well as their ears’, so we need to be careful observers of non-verbal communications, clues that might tell us that e.g. what we’re hearing doesn’t actually reflect what we see and therefore and potentially that a client is not saying quite what they want to say.

Helping people to hear

We do not always hear what is being said. Individuals may be so caught up with their reply or their own perceptions or emotions, that they cannot take in what has been said. It is not unusual for one client to make a concession or an admission and this will go unnoticed by the other. In situations of extreme conflict, or heightened tension, physiologically the body may start to be affected by the effects of adrenalin, the ‘fight, flight or freeze’ response,
which has been proven to reduce people’s ability to hear (whilst their ability to see becomes sharper).

The mediator has a role in helping people to hear one another. One person may make an unheard concession, or may say something relevant which passes unnoticed: the mediator can ensure that it registers with the other. This can be done, for example, by reiterating the statement, or by acknowledging it, or perhaps by asking for it to be repeated.

Acknowledging

Acknowledgement is one of the mediator’s most powerful tools. It helps people to feel that they have been heard, that might be an acknowledgement of difficult emotions, a grievance, views or feelings. Acknowledging does not mean agreeing but recognising something that is important to that individual. It also does not mean patronising the person. A simple acknowledgment that the mediator has heard and understands the views or feelings will usually suffice. ‘I can see/hear that this is very upsetting’, ‘I appreciate this is very difficult’

If one person makes a creative suggestion or is willing to make even a small concession, it may be worth acknowledging the helpfulness of that, again without being patronising. Acknowledging may often be no more than a nod of response, an indication that someone has been heard and understood.

Questioning

Skilled questioning is a fundamental tool of the mediator. Questions can be used for a number of purposes, including for example:

- They can help the mediator to gather information and get a better understanding of the issues, to clarify facts and to probe aspects that are unclear.

- Simple questions about the facts relating to each client, their address, the children’s names etc., can be an effective way of ‘buying’ clients some time to settle into their surroundings and to get used to being in the room together as answers to factual questions can be given almost automatically and do not require the client’s total concentration. Questions of this nature can also help in bringing clients back from rising emotions as they engage the ‘logical’ left hand part of the brain, and therefore disengages the client from the ‘emotional’ right hand part of the brain. They may therefore redirect the way in which discussions are moving, and may be used as a form of intervention in conflict management to divert clients away from a heated discussion into a more productive field.
• They can help to get a client to examine whether their position, assessment or understanding of the issues is realistic, or a proposed option or whether a course of action is workable in practice. Helping clients to explore their perceptions, positions or preconceived notions with questions which present alternative ways of viewing the situation may be essential in getting necessary and proper understanding and movement.

• Questions can help to promote reflection by a client on any aspect of her/his circumstances or proposals, to become more fully aware of the issues involved in any situation.

• They may be used to encourage a client to review or revisit a position or to focus on specific issues.

• A question may be strategic, these question forms should be used with care as they are questions well known and used by advocates – they are questions that you know the answer to. They might ‘push’ the client into giving the answer they know they must, but that answer may not be what the client actually believes or thinks. Examples such as ‘you would agree that the children need both their parents?’, may result in an answer that appears to be positive, but the client who needs to articulate what is wrong about parenting arrangements, or worse, may have real concerns about the other parent has now been forced into an answer that may prevent them from expressing what they really think.

• Questions may take different forms: They may for example be open, allowing for any kind of answer, or closed and more specific, usually calling for a yes or no response. They may be general or focused. Circular questioning is a form that helps individuals to put themselves in another’s shoes. Examples include ‘How do you think that might work for [your child]?’, ‘If [your child were here now, what do you think they might think/say about that?]’ (planning arrangements for the child). ‘If you were looking at this from [former partner’s] perspective, what might you think about that?’

• Reflective questions are very powerful and useful for mediators. They help people to think about the situation from a different or changed perspective. Questions such as ‘How would you like things to be six months from now?’, ‘Can you think about what will change when [child] reaches senior school?’, ‘Hypothetically, if you were to sell the house, what could you do differently?’

• Questions that help people to imagine a reality can also be very powerful. Helping people to work through ideas or preferred outcomes. ‘Could you ‘walk me through’, ‘how you see that would work on a day-to-day basis?’, ‘Let’s focus on the shortfall you have in income, how might you make that up?’
Summarising and reflecting

Summarising and/or reflecting can be very important and helpful skill to assist mediators and clients. Firstly, it helps the mediator to ensure that he or she has a correct understanding of what has been said and the direction of travel. Secondly, the other person can hear that the mediator has understood what has been said, which helps to establish confidence. Thirdly, it can help to crystallise and focus the issues or the progress, which will in due course facilitate decision-making. It can also introduce a break for the clients to hear where they have got to and to reinforce that they are making progress and/or to help them re-focus when they might have started to get overwhelmed. However, summarising is not simply repeating back, it is about careful paraphrasing with a view to aiding clients to hear where they’ve got to, includes an element of showing their mutual thinking, thinking and help them to think forward rather than back.

Mutualising

Individuals are likely to see their situation primarily from their own viewpoint and narrative, very often this means that they each have a very different perception of the same situation. It can be helpful, where you can, to bring in where you can see or hear that they have similar interests or needs. Where individuals express differing views or perceptions about e.g. who should stay in their home for example, the mutual point is that they are both expressing a concern for where they are going to live for the future, so to mutualise might be to say ‘what I’ve heard is the worry for each of you about being able to arrange your future accommodation in a way that works, I can appreciate how important that is’.

Normalising

Normalising is a technique that assists people to understand that what they are experiencing is ‘normal’ rather than abnormal. Many mediation clients may be very worried or anxious about what is happening, their feelings and behaviour or that of their child. Helping people to understand that what is happening to them is to be expected can help them to regain some sense of reality some relief and to feel less isolated and/or ‘different’. Examples of normalising might include ‘It isn’t unusual to be this upset, separating is a life-changing event for everyone’, ‘many people feel as you do when they separate from a partner’, ‘it isn’t unusual for children to say different things to each of you, most children don’t want to hurt or worry their parents’.
Reframing

The term ‘reframing’ refers to a means of assisting people to change the term of reference in how they might see a particular situation. Reframing can be helpful in presenting a positive from a negative statement. For example, if and where parents are critical of one another about what is happening for their child, it might be possible to ‘reframe’ that ‘What I think I’ve heard from each of you is the importance for you both of getting things right for your child/ren’ Reframing needs to be used with care to avoid being patronising or to ‘flatten’ what might be important issues that each may need to air.

Using language with care

Mediators develop and use a particular lexicon in working with their clients. It is important not to be so caught up in saying the right thing that it effectively stops you from feeling confident about the conversations you have with clients, It is useful to consider using language with care.

Jargon should be avoided, both in personal use and in drafting. If you think that legal terminology has to be used, then think about how you will explain it, if you can explain it in lay terms, you probably don’t need to use the terminology. Acronyms that are familiar to you should not be used or should be simply and properly explained. Particular examples here would include ‘intake’ or ‘MIAM’.

As professional advisers, in our everyday practice, it can be important to use language to show our command of our subject or specialism. We want people to understand that we have the level of expertise they expect. For lawyers, that can mean using ‘legal-ese’ rather than everyday language with clients.

We might commonly refer to ‘the party or parties’, we might talk about financial relief, contact, residence, child arrangements – whilst this is all familiar to us; it is unfamiliar to clients and is not reflective of their everyday life. If people can’t understand what you are talking about, they may rapidly lose engagement with you and the process of mediation. They may feel unable to ask you what you mean because they don’t want to appear stupid. Whilst it is, of course, important that people understand the context of e.g. their situation in respect of the law (as and when it applies), in choosing mediation what is important to them is having the ability to make decisions for themselves and remain in control of their future. They are not ‘parties’ because they have deliberately chosen not to go to law to resolve things but to mediation.

The word agreement’ has to be used with care. It is unfortunate that in recent times there have been challenges in the civil/commercial mediation sector to ‘agreements’ reached in
mediation and mediators need to be aware that challenges might also happen in family cases too.

Family mediation is not binding until the clients have chance to take legal (and/or financial or other) advice on their proposed terms. Clearly, what clients hope and wish for is to be able to reach agreement on matters that need to be sorted out between them and the notion of agreeing is therefore very important to them. Mediators need to handle this with care and use language that reflects the fact that people are working together to reach an outcome (that will be advised upon, we hope before they enter into a binding agreement). Mediators can therefore talk about ‘reaching decisions together’, ‘the proposals you’ve reached’, ‘your intent is to... ‘etc.

A careful use of words should not result in confusion as to what is meant. Usually, most individuals will appreciate direct speaking. It is just a matter of doing so with the necessary sensitivity to the clients and their situation and experience.

Managing conflict

(see also managing conflict and Impasse sections)

It is important that you develop skills and confidence in managing conflicts that may arise in your mediations. It is useful to talk to individuals in initial meetings about how they communicate with their partner (and vice versa), how they resolve arguments between them and/or what normally happens when they disagree.

If the same subject of conflict repeatedly emerges during mediation, it may well be because the client or clients feel that whatever it is they have raised has not been ‘heard’ or acknowledged and you should take care, where this is the case, to ensure that you allow for whatever it is to be said and to acknowledge it.

We all communicate in different ways and for some couples, conflictual conversations may be their particular pattern of communication. Equally, people get caught into negative and circular communications as a result of their relationship breaking down.

This is often exhausting and frustrating for them, if you can ‘say what you see’ and ask questions about whether this is normally what happens when they try to talk together or make decisions, then it may also be possible to help them break the cycle and communicate differently, if only when they are in the mediation room.

You might manage this by acknowledging that they are getting caught into an argument and by saying ‘with your permission, if I see/think that you are getting caught up in the same argument, I will stop you so that we can refocus on what is important for you to sort out’. 
Facilitation skills

The mediation model adopted by the Family Mediation Council (FMC) is a facilitative one. The Oxford English Dictionary definition of facilitation is:

to make (a task or procedure) easier. The aim of facilitation is to provide enough information and the appropriate environment to allow people to apply the subject for themselves.

This really sums up your role. You will need to create the right and safe environment, provide information and use your other skills to encourage and assist people in their discussions together to reach a workable outcome.

You will need to manage the process of mediation, including practicalities, (timekeeping, organising meetings etc.), use your skills to help your clients to keep on track, hear one another, keep power balanced between them, ensure everyone has access to the right information and materials, and that there is sufficient flexibility in the process to work with their needs.

The way in which you facilitate will reflect your own style and your authenticity. This is an essential component as your clients will need to feel able to put their trust in you.

Managing the process

A very important skill for you to develop is managing the mediation process. To do this, you will need to keep clarity of the stages of the process and be able to reflect on where you are within the stages during any meeting.

It is easy for clients to get distracted, to change the subject or go off at tangents about their situation. To manage, you need to develop skills designed to gently refocus people on the task in hand. It is also important to remember that although you are managing the process according to the stages and/or the client’s agreed agenda, there will be times when people really need to deal with a subject that doesn’t immediately fit into the stage of the process you’ve reached or what they had agreed they wanted to discuss or resolve in the meeting. Be flexible, reflect to the clients the purpose of the meeting as you had understood it, that you can see/hear that a particular subject is important to them and simply ask them if they would like to continue to focus on it for the remainder of the meeting.

You will also need to monitor discussions carefully to ensure that each are engaged in discussions, that power imbalances aren’t arising, or if they are, that you are able to deal with them and if/when it might be appropriate to pause, reflect and summarise.
Problem solving and lateral thinking

Generally, you will need to help clients to work in a problem solving way. This will require them to think differently and laterally about what might help to solve the issues they have.

Often people come into a mediation viewing their negotiation together in a win/lose way as it is the way that people most often view and/or understand negotiation.

Problem solving is about ‘win/win’, finding resolutions in which each can achieve some of what they hope for but importantly, something that is ultimately workable for both of them and if they are parents, that works for their children and the family as a whole.

Lateral thinking is about changing perceptions, using reflective, open and circular questions can help people see things in a different way, they can ‘re-set the default’ where clients are positional and open possibilities and options.

Helping people to ‘externalise’ a problem they are struggling with (rather than ‘how long have you had this problem’, ‘let’s look at how this problem has you’) can help them approach it differently.
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 even-handedly and 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 your 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 is 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 will be conducting any process of mediation impartially and have a responsibility to act in an even-handed and balanced way.

**Please note: what is set out in the Code of Practice** regarding conflicts of interest 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 – developing even-handedness and balance

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 which is an impossible task for any individual as we all carry our own views and values.

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, initial individual 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. Ideally, it should be a positive choice for clients and an appropriate choice for you as mediator.

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 clients make informed decisions, but you must make it clear that you do not provide partial, individualised or ‘best interest’ 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 or individual 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, that although pensions can appear to have similar values, they might vary significantly in what is or might be achievable or 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.
Signposting

Signposting generally refers to providing individuals with information about services of support, pertinent to their needs. Part of initial, individual meetings and MIAMs should include thinking together with the client about other services or links which might be helpful to them, regardless of whether they are going to mediate or need another pathway.

Even where individuals are going to mediate, it is useful to think with them about e.g.

- Who is supporting them and if they lack some form of informal support (within their family or from friends), whether some level of professional support, a family consultant or counsellor, might be helpful to them.

- What they know about their own or the family finances and whether they might need some help to sort out what they know and to make sense of it. This is especially important if they have significant debts or if their home may be at risk.

- What needs they think their children might have and how those needs can best be met, so for a parent it might be thinking through sources of support, help and information or more practical support via a family consultant or a more specialised children’s service. For their children it might be thinking through whether there is anyone in the family who could act as a ‘next friend’ to the child or appropriate links to children’s organisations, books that parents can read with their children etc.

- Problems of alcohol or substance misuse, where this is the case, mediation might not be appropriate but there is a need for them to reach services that can support them

- Abuse within the relationship requires you to make sure that you signpost to services that can provide protection, so there may be a need for urgent legal advice, contact with e.g. Women’s Aid or Refuge or a local service and if there is an immediate risk of harm and where necessary, the police, see also Appendix 2

- Child Protection concerns are also an immediate priority for appropriate signposting and for you to meet your responsibilities in relation to keeping children safe from harm, see also Appendix 1

Many people already have a cluster of problems that are additional to the needs they have as a result of their separation. Those problems might have fuelled their decision to separate and will need to be addressed once they have separated. This can make it very difficult to be as focussed as they need to be if they are going to mediate successfully, so helping them to get some additional information or support before or during their mediation can really improve things for them.

It is also important to do what you can to give clients a ‘next step’ if they are not going to mediate or mediation isn’t appropriate or suitable. Sometimes, it may be that having sought
appropriate information, support or assistance elsewhere, mediation may well be appropriate or that they manage to work things out between them because they were able to access the right or most appropriate help from information you gave them.

Please remember, you should be able to discuss other forms of resolution with them, so please ensure that as a minimum, you are able to accurately discuss services such as collaborative practice, early neutral evaluation and family arbitration (all of which can also be used as an adjunct service to mediation – see also Providing information about other linked services to clients).

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.

Be aware yourself of what is published on the gov.uk website in terms of assistance for those who are e.g. contemplating divorce or financial and children’s proceedings, much of which is now an online process.
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 Resolution’s 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.

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 (and financial) 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.

If you are working remotely with your clients, remember that you need to ensure that you have dealt with issues of confidentiality, privacy and privilege as they may apply. Resolution provides an Addendum document to the Agreement to Mediate to cover arrangements which should be agreed when working remotely.

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 Multi-Agency Safeguarding Hub’ or ‘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 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, without alerting the parents.

Safeguarding adults

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. You should also 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, including considerations if you are working remotely with clients are set out in appendices 1 and 2 of this handbook.

Please remember that the way in which abuse is reported in relation to adults is not the same and there is different legislation which covers each. You are likely to be familiar with domestic abuse matters but you may not be as well informed about issues of e.g. capacity and the requirements of the Mental Capacity Act 2005 in relation to adults at risk.
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 (and any Addendum if working remotely), 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, BL v TC & OD [2017] EWHC 3363.
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. This last is an important distinction in a hybrid mediation process.

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. 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.

At the present time and during restrictions, mediators have been considering the appropriateness of seeing children and young people by remote means information about this is available as part of the Safeguarding Appendices and in the section below dealing with working remotely with children and the section dealing with Child Inclusive Mediation later in this handbook.

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 working directly 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 with the parents and, if you can provide them with a ‘next step’ beyond you and ensure that this is outlined in any closing or future communication.

Working remotely with children and young people

(see also ‘Working Remotely with Mediation Clients’ and ‘Hearing the Voices of Children and Young People’)

Talking directly with children and young people online is a new means of practice for which the Family Mediation Council and Standards Board (FMC/SB) has not issued any specific
guidance as yet. You should be aware of the applicable standards set by the FMC/SB in relation to Child Inclusive Mediation (CIM) and ensure that, should you want to practice in this way, you remain compliant with them and with the FMC Code of Practice. You should also discuss any plans to do so with your PPC and be guided by them. It is very likely that there will be mixed opinions about how appropriate (or not) it is to work remotely with children and young people. There is little doubt that as users of technology, children and young people may probably prefer to meet mediators online. That does not mean it is always (or more) appropriate. (See also 4. Working Remotely with Mediation Clients)

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. Please also be aware of the potential for power imbalances between those who are mediating remotely (including greater control or management of remote technology, the ability to use technology as a means of controlling meetings (by talking over someone, by exiting meetings suddenly etc.)
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 recommendations of the President’s Private Law Group Report and the Family Solutions Group, ‘What About Me? (Reframing Support for Families following Parental Separation) have been clear that the content and presentation of the statutory MIAM is critical. The FMC has issued guidance in relation to the conduct of MIAMs and will be issuing a new, revised specification which is based on the recommendation of the President’s Private Law Group Report (and particularly Appendix 8 of that document). All mediators (whether accredited or not) should familiarise themselves with the available guidance and regularly check for any changes.

Conducting Initial Meetings and MIAMs

Initial Information and assessment meetings and/or MIAMs 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.
Generally, whether an initial meeting or a MIAM, time should be given to provide clients with the opportunity to talk about their situation and receive information and support that is relevant to their individual and family needs. These meetings should be at the minimum, 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 approaches are available for resolving matters and, in the case of those seeking a statutory MIAM, may have settled on an intent to issue because they’ve been unable to find another route.

In the case of statutory MIAMs, 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 range of ways in which they might sort things out between 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 solution seeking or dispute resolution might be available and suitable for them. You should be familiar with information about other forms of family resolution and solution seeking. As a minimum, this should include collaborative practice, solicitor negotiation and arbitration. You should be able to discuss these approaches 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. Try, as far as you can, to keep ‘the other person in the room’ by use of questions (‘if X were here, might they agree with that?’, ‘what do you think that X might want to sort out or achieve if you mediate?’; ‘what do you think might be most important to X?’).

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 have 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.

It is important to understand and remain alert to the fact the mediation is not suitable for all individuals and may not be appropriate in certain situations. Where there is or has been issues of abuse, you must think very carefully about how appropriate or suitable it is for mediation, even when you are concerned that those involved may have ‘nowhere else to go’. It is not and never should be a reason to mediate.

Successive research outcomes have identified that there are concerns about mediators and their ability to assess properly for issues of harm and abuse and/or to listen and accept when an individual has reported their concerns, worries or fears about being in a mediation with a former partner who they believe is an abuser.

Please ensure that you do all you can to understand how to make an appropriate assessment with individuals, are alert to behaviour (including non-verbal clues) which may indicate that someone is concerned about abuse and above all, be confident about talking with clients about abusive relationships.

Conducting MIAMs via other media

(see also ‘Working Remotely with Mediation Clients’)
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 (once restrictions are lifted) to consider whether agreeing (or offering) to conduct meetings via other technology is appropriate in each case. 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.

Once restrictions are reliably lifted, you may want to re-consider whether conducting MIAMs remotely is appropriate in all cases. For some people, being able to access services remotely will remain essential or desirable (e.g. those with a disability or where travelling to see you in person is difficult).

Working remotely has become commonplace and many 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 remains 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 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 approaches or opportunities to resolve things between them 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 e.g. 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

Working remotely with mediation clients

This section focusses on working remotely across your mediation practice, please read in conjunction with the other relevant sections in the Handbook (as are indicated).

As a result of the Coronavirus outbreak, all mediators have been faced with new challenges to the way in which they work. Very long held norms of face-to-face practice have been seriously disrupted and changed and it has meant that many of you will have moved to online and remote working and some will have done so at some speed in order to ensure continuing service to individuals and families.

It may well be the case that once restrictions begin to be reliably lifted, some individuals will remain reluctant to take up face-to-face meetings when they have become aware that it is possible to use an online technology. As practitioners, we all need to be aware this may be the case. If we are beginning to work in this way, we will need to develop our practice in order to make it a professional service to offer to individuals. We might also consider how we could offer mediation services in a way that makes best use of the time spent in face-to-face contact with clients supported by the use of technologies. Mediation is not immune from the overall advances in technology and the way that it has changed everyone’s lives.

You may need to engage at some level with new technologies even if you decide that you prefer to generally offer meetings on a face-to-face basis. As a mediator, you will play to your strengths. There will be room for all practitioners to do so, as some individuals will still want the opportunity to meet face-to-face with a mediator and others may prefer to mediate online.

For the time being, there are some key issues to take account of as you make the move to online working, if only temporarily and it is essential that all mediators take careful account of the importance of protecting individuals, themselves and those they work with when working in new ways.

Firstly, you should be aware of any advice or guidance that is issued by the FMC (see their website for their Guide to Online Mediation and any additional regulatory notes), the LAA, your own Membership Organisation and if you work within a regulated practice, by the SRA or The Law Society.

Many of us will have ready access to online video technologies such as Teams, Zoom etc. and if so, your firm or practice may well have already produced its own guidance in relation to usage, which you should follow. It may be that these technologies have, up until now,
been used for inter-firm use, for meetings with representatives from other firms or business
meetings generally etc.

If you’re planning to use video technologies to work directly with mediation participants,
please take careful account of the following:

- **Plan ahead** – for example, plot your mediation process through and think about
how it translates across to an online process of working. Talk compliance issues
through with your COLP/Practice Manager, check your insurance. Talk through and
agree with your colleague/s (remember that might include co-mediators, family
consultants and/or financial professionals), how the process will be managed.

- **Choose a platform which is secure and encrypted**, easy to use (for participants and
any colleagues) with ‘one step’ entry and test it out, including making sure clients
have a sufficient signal to use it and are confident about it if they are going to be
remote from you. Nowadays there are a number of providers that have e.g.
multiple screens, breakout rooms, conference muting, screen ‘toggling’ etc. Always
ensure that you have management of any technology to be used even if one of the
participants offers to host the meeting in order that you avoid any potential
imbalance.

- **Ensure that any laptop, tablet or computer system you are using** has the relevant
security systems in place, and if necessary, have your IT section check it and/or
carry out appropriate penetration testing.

- **If you are going to run the entire process remotely via video technology**, take sufficient time in any initial and individual meetings to really
engage and get a sense of each individual and the issues. This can be harder to do
when working remotely. Make sure you have discussed and checked matters such
as capacity, safeguarding concerns and abuse in the relationship. Individual
meetings also give you the opportunity to establish how clear any video link is,
whether it is possible to see more than just ‘head and shoulders’ etc.

- **Think about balance**, everyone should be on a separate link, please do all you can
to ensure this is the case and, if working in a ‘blended’ way, once able to resume
physically attended meetings, do not have one person in the room with you and
the other remotely.

- **Some couples may state that they want to use a single link** and that is
understandable, especially if they remain living together and are genuinely wanting
to work together to sort things out. The difficulty is knowing whether that is really
the case and whether there is or may be a prospect of controlling behaviour etc.
They also need to consider what might happen should they disagree during the
meeting or either of them becomes upset. It may also mean it is impossible for them to be separated for individual meetings during the mediation process.

- **Make sure the clients are clear** about e.g. confidentiality (including GDPR issues), that any kind of recording unless previously agreed is not allowable, who can be in the room at the time of the meeting and practical arrangements e.g. what to do should the signal drop out or it becomes necessary to end the meeting.
  Arrangements can be incorporated into any agreement or set out separately in an additional document that everyone signs (which could be done electronically).
  Resolution has produced an addendum to the Agreement to Mediate to cover these aspects. This should include ‘contractual’ and practical arrangements.

- **If you are going to share documents on screen**, make sure that you remain compliant with GDPR requirements and that you are doing so through a secure connection. Always ensure that participants are also provided with notice of the papers they should have for any meeting in advance, and that you have provided or they have the means to access, (and if necessary, download and print) anything that is needed so as to save time and to work as efficiently as you can. There are a number of software programmes available that allow you to synchronise, update and store information of all kinds across and between devices simply and securely.

- **If you decide to use Apps such as WhatsApp**, as an additional technology (it is not suitable for meetings), please ensure that you have used settings that do not allow an individual to add another user to the ‘group’. Be aware too that applications like WhatsApp are immediate, that is, people can message you at any time they wish, during and outside of office hours. WhatsApp does have secure encryption, some of the other and similar technologies do not, please check the level of security available for any App you choose to use.

- **Be clear with individuals** that they need to make sure that they are comfortable and not going to be interrupted. It’s surprising how many people think it’s possible to have meetings with e.g. family life going on in the background or can manage with a laptop or Facetime connection balanced on their knees or at arms’ length! Use your initial individual meeting/s to ensure that you have properly checked out how they are going to be able to join and be in the meeting in a way that makes it possible to conduct the mediation process.

- **Time keep effectively and remember that people will still need ‘comfort breaks’**. Make it easy for everyone to be able to ask for ‘time out’, watch for signs of fatigue or growing frustration in clients that might signal a break might be appropriate.

- **Remember that although this is effectively a business meeting** for you (and any co-mediator or colleague/s) and you may be very used to using video technology, it
may not be a familiar medium for participants so do everything that you can to make it comfortable and manageable for them.

Engaging with individuals

(see also First contacts, Initial Meetings and MIAM sections)

Many of us are concerned that the use of online mediation removes some of the very important ways in which we can appropriately engage with and make an assessment with those who wish to mediate. It is true that when an individual (or both individuals) are not physically ‘present’ in the room with you, it is more difficult to feel that you are able to observe significant or nuanced aspects of physical behaviour or body language which you might wish to explore further to aid your understanding, to follow up on a concern or just to assist you in establishing a more physical feeling of engagement.

When working remotely it is therefore very important to take as much time as possible to ‘settle’ each individual, to explore the type and extent of the visible link that will be possible and to use your skills effectively to ascertain as much information as you can to assist in your assessment for suitability. Please think carefully about your use of questions, your ability to sit with silences to give people time to process their thinking and your ability to observe individual responses.

You and the clients need time to reflect and summarise in order to gain an accurate understanding of the client’s needs and concerns.

Once you have started mediating with both individuals, please remember that just as you would in any face-to-face meeting, you must continue to observe their behaviours, what is their established way of communicating together and if communication is very poor between them, how best to encourage them to establish new means of communicating together rather than solely through you.

In a sense, if you are an experienced mediator, this may feel as it did when you first started to mediate. It will and does take time to develop and to sit comfortably with this new way of working. For new mediators, this is likely to be your introduction to mediation practice. In either case, if you can, take the time to discuss how you are developing your practice with your PPC.

Managing Mediation Information and Assessment Meetings

(see also MIAM sections)
It is possible to conduct a MIAM via an online video link. For those who are planning to issue and will be concerned to be able to do so quickly, it will be important that you consider whether you are able and willing to offer an online MIAM. Should you decide that you cannot or would prefer not to conduct MIAMs online, you should ensure that your website information makes that clear and you should explain to anyone who contacts you that is the case as soon as is possible when they first contact you. Note any colleagues who are able to do so and provide that information to any prospective client.

An online MIAM should not be any different or less in content from a MIAM (or any Initial meeting) conducted face-to-face. If you are in legal aid practice, please ensure that you have planned for how you will arrange for the required information in order to make an assessment with each individual, making sure that you are also able to confirm their identity and that you can arrange for the required signature/s to the MEANS 7. The LAA has issued information about what is acceptable.

The FMC has issued updated information as a reminder to mediators that they should not conduct MIAMs via telephone unless there is a good reason to do so and that mediators are required to have recorded the reason/s should they decide to do so. It may be tempting to think that the current crisis is a good enough reason for conducting a MIAM by telephone. However please read the guidance issued by the FMC to ensure that you do not breach the FMC Code of Practice should you decide to do so.

Mediation documentation

(see also Financial disclosure, Parenting Plans and Preparing to draft documentation)

Resolution has produced an addendum document to the Agreement to Mediate, which you can access here Addendum for Agreement to Mediate – Remote Working (docx). You may choose to use this document alongside the existing template Agreement to Mediate or any Agreement to Mediate you have produced for use in your firm or practice. You may prefer to incorporate the major points from the Addendum into your own and existing Agreement, if so, please be aware of the guidance available.

There are a number of secure and efficient ways of displaying, sharing, working on and transferring documentation via the use of the various file synchronisation software. These are a real boon to clients and mediators alike as they make it easy for you all to work together, to display and circulate financial information readily and easily.

Please make sure that you research the type and security levels of the software you choose. Read reviews on the various software available and if you are fortunate enough to work with others who are already using software applications (including any financial professionals you work with), talk with them about what they think may be the most
suitable programmes to use. Once you have selected your preferred software, please take the time to experiment and get proficient in using it.

At present, sending documents by mail may lead to delays, and may be time consuming for you, so think about how to utilise all the secure and confidential electronic means at your disposal to ensure efficiency. Even if you do not have file sharing or file synchronising abilities, most of us have scanners which can be used. This also avoids the potential risk of original documents such as mortgage statements, P60s etc. getting lost in the post.

A reminder that Memoranda of Understanding/Outcome documents should be carefully marked as ‘Confidential and Legally Privileged’ (as should any other relevant documentation) and you should ensure that you protect the document (click in the File tab, select ‘Protect Document’ and then select ‘Restrict Editing’ and choose the most appropriate action from the dropdown menu displayed) alternatively, send in PDF format but be aware that it remains possible to edit a PDF file using Adobe Acrobat.

Use of telephony

Mediators may wish to supplement working remotely with telephone contact and if so, careful thought should be given to how that contact is to be managed. Essentially, there should be no real need to vary practice by any great deal from using telephone contact when working face-to-face. Mediators should, as now, think carefully about contacts by phone, managing any phone contact from individual clients in a balanced and even-handed way and should think carefully about whether any phone contact they intend to make with individuals is necessary and is also managed in the same balanced way. You should also think carefully about the use of other supporting technologies (e.g. WhatsApp, as above) which could result in individuals having unmanaged access to mediators and/or which may carry security risks.

Involving other professionals in an online mediation

(see also Other Professional Practice Considerations)

It is entirely possible to involve other professionals in an online mediation process. However, it is essential that any involvement is discussed and agreed with each and both participants, that clients have a free choice to agree on any professional to join the mediation and that they are clear about any costs or fees arising from the involvement of that person. Mediators should also carefully consider whether it would be helpful for each
participant to be able to meet the joining professional individually and ahead of any joint meeting.

When working remotely with other professionals in a mediation, especially in a hybrid model or solicitor supported mediation; arrangements should also be in place so that if any individual meeting/s is/are planned, it can be carried out easily and without unnecessary disruption to the overall mediation process. Technologies such as Zoom provide access to ‘breakout’ rooms and waiting spaces and mediators should be aware of and conversant with these capabilities. Please remember that you should still have the consent of the participants for any contact you have with their respective lawyers.

Please note that any other professional involved in a mediation need to sign an amended Agreement to Mediate or a separate Agreement that sets out their role, any pertinent information related to their Code/s of Practice, complaints processes etc.

‘Shuttle’ Mediation

(please see also and read in conjunction with Handbook Section ‘Shuttle Mediation’)

Working online may also be perceived as a useful way of conducting mediation where clients wish to mediate but are unwilling to ‘sit together’ in the same room. It will be important that you assess the situation as presented to you very carefully, especially if either individual is concerned about domestic abuse and particularly coercive control or controlling behaviour and/or where separating individuals remain under the same roof.

An individual who is a victim of coercive or controlling behaviour over a length of time will not necessarily be aided by being physically separated from their partner.

Controlling or coercive behaviour often results in an inability of the person in receipt of such behaviour to be able to speak on their own behalf, to assert their wishes or be able to express their own needs without fear of consequences. They may, in effect, lack the capacity to do so in any realistic way. As a mediator, you must be able to address power imbalances (principles of mediation and FMC Code of Practice at 5.4) and in cases where coercive or controlling behaviour is a feature of the relationship, the power imbalance may be too deeply established to be properly addressed. Moreover, an individual might also react to subtle cues from their partner as to what it is that is expected of them by their partner and/or agree to proposals or make proposals they know to be acceptable to their partner.

Where there has been actual violence between partners, there remains a risk of further harm even where partners may be living separately, either because the mediation itself prompts a further incident of actual or threatened violence, against the victim or in relation
to threat of harm to a child or children. If the two people remain under the same roof, then you must be aware of putting an individual (or a child/ren) at real risk of further harm.

In both cases, whether coercive or controlling behaviour or violence in the relationship, there is a risk that mediation may be used to further intimidate or re-establish the threat of harm or of consequences to a decision to separate.

There is no doubt that the use of online mediation does increase the ability to conduct mediation flexibly, to make greater use of separate and individual meetings and to have greater flexibility in how the mediation is conducted generally. It is important however not to lose sight of the principles of mediation, the fact that it is a facilitative process for the most part aimed at assisting people to reach their own informed decisions based on their expressed needs and interests and not simply an opportunity for mediators to become the negotiator and to ‘broker’ an outcome. This is also important from the point of view of the participants ‘owning’ an outcome they have reached together with the added advantage of improving communication between them wherever it is possible to do so (especially if they are parents).

If you plan to offer a hybrid model of working online, which will include separate and individual meetings where separate confidences are agreed, please be aware of the section available in the Mediation Handbook (p. 94/5) about working in this way and also to ensure that you do not breach rules of confidentiality set out in the FMC Code of Practice.

Child Inclusive Mediation

(see also ‘The Welfare of Children’ and ‘Hearing the Voices of Children and Young People’)

(see also other Handbook Sections in relation to the Welfare of Children and Working directly with Children and Young People)

At the current time, there has been no information or guidance issued by the FMC in respect of involving children and young people in mediation through online meetings. Please remember that you must have successfully completed the required training to work directly with a child or young person. [See the FMC Standards Manual, Part 6. Standards for Child Inclusive Mediation]

Children and young people are used to online technologies, much more so than most adults. Many will use these technologies for keeping in touch with friends and will now be getting used to schooling by remote technology too. There is little doubt that as users of technology, children and young people will probably much prefer to meet mediators online. That does not mean it is always (or more) appropriate. There are a number of important aspects you must consider when thinking about involving a child or young person.
First and foremost, all the current arrangements for careful exploration with parents about e.g.:

- the family situation,
- each individual child and how the parents think their child is managing or coping with the situation and
- an assessment of levels of conflict between parents and their ability to be able to put their child or children’s interests ahead of their own conflict
- most importantly, an assessment in respect of safeguarding and the child’s capacity to take part must have been worked through as in any face-to-face mediation.

It is also essential that you remember that, with the permission of both parents, you (or your colleague) may offer an invitation to a child to have an opportunity to meet with you (or your colleague) and it is essential that any child who is invited is able to decline the invitation easily and should not feel in any way compelled to meet with you or your colleague (which, even if the child/ren accept your invitation initially, should still be checked again at the beginning of any meeting with them).

Mediators should also thoroughly discuss and agree with parents how appropriate it is or might be to meet with their child/ren through an online connection, whether there are other professionals or agencies already involved who may be talking with any child/ren and how any meeting will take place and the arrangements that will apply.

If you work with a co-mediator who would normally see any child or children, check with them as to whether they are willing to offer to meet a child or children remotely. Remember that your colleague will need to talk with the parents separately and together about any arrangements that will apply.

You/your colleague will also need to have addressed with parents that any child or young person is going to be able to have a conversation with you/your colleague that is private, that the child is not concerned about e.g. being overheard or ‘monitored’ in anyway by either parent or any other adult and is generally free to have an open conversation with you/colleague. Do not forget that parents will need to sign the additional parental agreement and consent form relating to child inclusive mediation arrangements and that your agreement and consent form may need to be amended to include arrangements for any online meetings.

You should, as now, ensure that the child has some information about you (or your colleague) ahead of any meeting and has information about the purpose of any meeting, roughly how long it will be etc. All the arrangements which are currently required when meeting with a child or young person should also remain in place. This includes ensuring that any child understands the privacy or confidentiality of any meeting (and when it might
not apply), that they are clear that they have an opportunity to say what they think will be most important for their parents to know and consider in discussing how the family will live in the future and that although you can pass that information on, their parents will be making the decisions and they are not being asked or expected or presume that any decision making is theirs (the child’s) to make. They should also know that if they don’t want any information passed on to their parents, that is their choice (subject to the usual exceptions that apply).

Children and young people themselves do not necessarily think about when is or is not appropriate to have an online conversation, so they will need to understand and be prepared for the fact that this isn’t a conversation they might have entirely casually and perhaps not whilst engaged in other activities. This will need careful discussion with parents so that they can inform you (or your colleague) about how their children usually expect to or do use technology and how best you (or your colleague) can prepare with parents and with the child/ren for any meeting.

You or your colleague will also need to be able to discuss with any child or young person the fact that they should not record any meeting (unless it has been agreed with you and with their parents). Please be aware that children and young people may well be under some pressure (or feel that they are under pressure) from their parents and may want to do what they think will please an individual parent (and may be influenced simply by being in their home with a particular parent at the time of any meeting.

Mediators will also need to think carefully with parents about siblings and sibling groups and how best to manage any meetings involving each individual child and any sibling group.

Above all, you must think carefully about how you will engage with each child. It may well be the case that some children and young people may find engaging through technology much easier than a face-to-face meeting, particularly as it may feel much more familiar territory to them. However, you have an absolute responsibility to ensure that you act as professionally and as sensitively as you can in any contact you may have with a child or young person. It is also the case that if you do not feel comfortable or confident about working remotely with a child or young person, you should not do so and there is no requirement that you should.

In cases where a parent does not wish to give permission for their child to be contacted or where it is clear that it would be wholly inappropriate to do so because e.g.

- there are safeguarding concerns, or
- where a child has learning difficulties or mental illness or
- where there are concerns about the level of conflict between parents or their mental or emotional health
You should still, as you always have, assist parents to focus on the ways in which their child’s views may be heard.

Depending on the circumstances, it may be possible to help parents to think about the ways in which they might communicate with their child or children, whether there might be a relative, godparent or friend who is significant in their child’s life and who both parents would trust and respect to talk with their child and/or whether there may be another professional who could talk with their child/ren, (but remembering that school and other counsellors have a duty of confidentiality of their own that they cannot breach, so although they may be able to talk with a child about how the child could talk with their parent/s, they could not pass on any information that a child may have shared with them).

You should also make sure that you provide parents with information about sources of help and support to assist them in thinking about how to ameliorate the negative effects of parental separation, what helps children and young people most when their parents separate or family life changes, what to avoid and what may be damaging for their child at a time of separation together with the importance of forming positive parental alliances. The Resolution website has a great deal of information for parents and agencies such as CAFCASS also publish information for separating and separated parents, and for children and young people.

Working with people in the current crisis

As mediators we are very used to dealing with people who are or may be in crisis, who are emotionally upset and/or angry and confused. Please remember that at this time individuals are also dealing with an ‘overlay’ of emotion caused by the outbreak. This is very likely to have heightened their emotion, their fear and their levels of anger. They may also be struggling to remain resilient in the face of all that has happened.

Please ensure that you take the time with them individually to talk with them about how they are, how they are managing, what particular worries they may have, whether that is about the health and well-being of their own family, their finances or their own health. Check with them who is supporting them, who they are able to be in contact with and who may be able to offer them a ‘listening ear’. They may be carrying additional burdens, caring for elderly parents for example, coping with a bereavement or they may be struggling simply to manage their own worries and how they get through each day.

Above all else, there are particular worries being voiced nationally about a rise in the incidence of domestic abuse and violence so make sure that you assess very carefully and that you can make sure you are able to provide accurate information about sources of immediate help and advice such as National Domestic Abuse helpline, Men’s Advice Line and Galop (for members of the LGBTQ+ community).
If at all possible, signpost individuals to other sources of help and support for worries that may overwhelm; whether that is about rising debt, loss of employment or emotional crisis. There are agencies available online to help, such as Step Change, CAB online debt advice and the Money and Pensions Service. For emotional help, Mind, Relate, Switchboard, the Samaritans and Cruse Bereavement care may also be useful sources.

You will need to bring all your skills in active listening, acknowledging and normalising (where appropriate). Individuals will need a calm space where they can order their thoughts, think about what is most important for them to sort out and have the opportunity to hear one another.

If you think that mediation might not be immediately appropriate, think about what might be helpful ahead of a ‘full’ mediation. You might suggest that they mediate some form of temporary arrangement which will help them through the next few weeks, together with using some supporting services that helps to improve their situation, emotionally, practically or financially, so that they are more able to think rationally about the medium to longer term and return to mediation at that point.

Remember that mediation is wholly flexible. People can use mediation to help them plan and decide together how they will manage day-to-day life until they are able to separate physically. Separated parents can use mediation to devise childcare arrangements whilst schools are not operational, family members can use it to plan the caring responsibilities (shopping, keeping in touch etc.) for older or vulnerable members of their families. If you think you could help in this way, set it out on your website and in any social media you use.

Finally, remember that during a time of national and international crisis, people are more likely to try and make the best of their situation for the time being, they may stay together simply because they have to be focused on getting through each day and/or (in the current situation) because they physically cannot separate. This will mean that referrals and potential clients will drop, even in the short term and/or the number of referrals that are inappropriate or unsuitable for mediation may rise. Think about how you can promote your service differently, offer people the opportunity simply to find out about how mediation might help them, in other ways and in the current situation, be flexible and creative.

Looking after yourself

We all have a great deal to deal with at present, whether that is workwise, in managing our own families and our personal situation and in simply coping day by day. As mediators, we have also had to face new challenges and adapt at speed. We are not unaffected by the current situation ourselves and it is important to take account of that fact.
Make sure that you are taking the time to look after yourself. Get regular breaks, try to limit work worries to those which you can have control and management of and if at all possible, try not to catastrophize. Be aware of protecting your own resilience. Mediation can be stressful and isolating work in normal times, please make sure that you are in contact with your PPC and if at all possible, be in contact with your colleague mediators to discuss how you are all managing, what hints and tips you can share and perhaps to experiment between yourselves in managing new or unfamiliar technologies. Resolution also has a mentoring service available free of charge to members, please contact 121@resolution.org.uk for further information.

The pandemic and all that has flowed from it will not last forever. When things start to recover, we will have learned a great deal and much of it will stand us in very good stead for the future.

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 up to 90 minutes each but that it can be flexible to their needs depending on what they have to deal with, and which starts 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, explain that at this early stage, individuals may simply want to look through the headings and that you will take them through it as part of their meeting with you (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. If you intend to
work remotely or in a blended way, remember you will also need to discuss how that works, how easy it will be for them to join you from separate links and who else is in their household and how easy it will be for them to have a space that is private, where they can’t be overheard and won’t be disturbed.

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, if intending to work remotely or in a ‘blended’ way, you may want to explain that individual meetings may be a part of their mediation in order to check in with how they are each doing, when a break might be helpful etc. 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, including preparing for working remotely if that is what you all agree and 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 is critical to remain alert to factors in the client’s past or continuing relationship that may put either client (or their child/ren) 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. This is an essential step in your management of any process that might latterly result in mediation.

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 or where mediation isn’t appropriate immediately or not at all, to have information that will help them take a next step in resolving things.

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. Whether you are working in the room with clients or via remote means, remember that the first joint meeting may be the first time
clients have sat together (literally or remotely) 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. When working from your physical base, Reception staff should be briefed to be able to welcome and arrange waiting for each client. If you are working remotely, ensure that you are able to manage waiting and break out spaces and have explained how things will be managed to clients.

- mediation rooms should be comfortable and all required documentation and resources should be available within the room. If working remotely, ensure that you have covered with the clients their comfort, what they will need to have accessible to them and have taken the opportunity to ensure that you can see them (and they can see you) as clearly as is possible on screen). (see also Working Remotely with Mediation Clients) as much of them on screen as is possible

- 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).

- If working remotely, you should have discussed with clients the means by which they can alert you to needing a break and what to do if things start to feel uncomfortable for either of them (please do not simply use the ‘mute’ button, you should be alert and aware to rising anger, anxiety or discomfort and manage it appropriately).

- wherever possible, mediators should have an appropriate and private space available should either client need to take a break during the mediation meeting. When working remotely, this can be achieved by the use of break out and waiting rooms.

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 (and which can still be achieved when working remotely, with clients forwarding to you their signed copy after the meeting. 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 - remember that ‘agenda’ for some individuals may not be an easy or familiar term, so talking with them about understanding what is important for each of them (and for their children, if they are parents) and agreeing together a mutual plan and priorities may be easier for them to understand

• 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 – collecting and agreeing financial disclosure

(see also Template Open Financial Statement and guidance)

Please remember that financial abuse as part of a coercive or controlling relationship is not unusual or uncommon and can have serious and detrimental effects on an individual and their ability to negotiate fully and freely on their own behalf and may be or result in a critical power imbalance.

Managing risk

Please remember that when people reach the point of considering their financial situation together, the reality of their separation and the future may suddenly feel very real to them. Please be aware that this is a time when there may be a rise in the risk of abusive behaviour between them, even where there may have been no indicators of it beforehand. It is the case that on occasion, people can react uncharacteristically as a result of the trauma of the separation and/or the reality that is prompted by considering their financial situation, especially if there are anxieties around e.g. having insufficient funds for the future, becoming aware that they have debts that are actually going to be difficult to meet etc.

If, when you receive the Forms E from the clients, you spot what might be bad news or what may be particularly worrying facts for clients, think about how you can best manage that, who else might be able to support and help them and how best to follow up with them about any concerns you have. You can’t make the reality of their situation different, but you can seek to manage it as effectively as you can.
Beginning to gather financial information

If the clients wish to deal with their finances in the mediation, time should be set aside to discuss with them what financial disclosure means and how the information will be gathered and provided.

Working remotely

At the present time and in/for the future, it is likely that we will all be offering mediation remotely or in a ‘blended’ way (a mix of remote and face-to-face working) as well as physically attended meetings when it is possible to do so). This means that you will need to develop the means to explain, collect and collate financial disclosure in a range of ways.

Primarily, regardless of how you are working it is very important to remember that part of the exercise to gather financial information is to assist your clients to have a clear idea of their own individual and joint finances. Please make sure that you consider how best to ensure that each client is fully aware and informed as without having that clarity, they will not be in a position to negotiate or to make informed decisions with their former partner.

It remains a selling point in mediation that clients will increase their confidence in their knowledge of their own finances, be able to make decisions in an informed way, that they will also have a ‘portable’ document to use with other advisers and that they will not have to duplicate the exercise of gathering their financial information and formalising their financial disclosure in order to e.g. move to another approach or apply for a consent order.

Collecting information ahead of a joint meeting

If people choose to sort out their finances as part of their mediation process, you will need to collect and collate the clients’ information ahead of any joint meeting where they will be looking at their finances. Once they are each clear about their individual and joint finances, this can then be used as a basis for the clients to begin to explore options and for them to start looking at possible solutions.

You must ensure that you are aware of who is likely to have more or most information, who may have been managing the family finances and who may be less well informed. You need to check this carefully with clients at first individual meetings, help them to think through whether they need assistance in either gathering or having an understanding of their financial position, for example, by working with a financial neutral or adviser.

It is also worth checking with clients individually whether they have concerns e.g. about a financial situation that their former partner doesn’t know about e.g. debt or loans.
Explaining the importance of appropriate financial disclosure (and the consequences of failing to do so) is very important, together with what the clients will need to do prior to any joint meeting to consider their finances together. Whilst you will raise this (probably in outline at their individual meetings), this has traditionally been understood as best done towards the end of the first joint meeting.

You will need to use your professional judgement to decide when will be best to explain to clients the pertinent sections to their disclosure and provide any information to assist them in assembling the information. It may be inappropriate or simply ‘overload’ in a first and individual meeting, it may not be particularly useful at the end of a first joint meeting if their energies have been exhausted by the experience of sitting in a room, remotely or physically with their former partner.

If you are working remotely, some mediators, shorten their first joint meetings and/or have an additional meeting which is simply aimed at discussing how best to gather the financial information that is needed, and again, it is important to use your professional judgement in terms of what will work best for individual clients.

It is worth spending time with them going through each section of the Form E (or your own form, schedule or excel document) to discuss whether it applies to their circumstances, what documentation they might need and where they can get or find information or documents. If either client expresses concern, or you feel that they might be uncertain or unsure, explain how they might find out whether or not the particular subject area of disclosure (property, businesses, stocks etc.) might apply to them.

Forms and schedules

The benefit of using Form E for financial disclosure in mediation is that it is the standard form used by solicitors and courts and saves on the need for duplication from a ‘Mediation’ Financial Disclosure Form to a Form E. You will know best what the normal ‘custom’ or procedure is between your solicitor colleagues and your local court and can make decisions accordingly.

If you intend to use Form E, be aware that it is not particularly mediation friendly and may prompt 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 E, 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) are therefore not relevant for the purposes of their immediate discussions in the mediation. You may wish to remove these sections from the forms that you intend to use with clients, but if you are suggesting or
relying on your clients to download the Form E from the HMCTS or gov.uk website/s, you will need to ensure that you have provided an explanation about these sections to clients.

You may decide that you can use a form or excel you have designed yourself to aid clients in completing their financial disclosure, which is your choice. The important areas to have considered is what is likely to be most effective and ‘user friendly’ (for clients in particular) and isn’t likely to incur further costs should they go from you to a solicitor/s to finalise matters or to start proceedings.

A growing number of clients now download Form E for themselves or may have discussed financial disclosure with a solicitor. Please remember that to an individual already struggling with their emotions and worried about their future, they will need acknowledgement that the Form E can look daunting and complicated, that it isn’t unusual to find it so and reassurance that it is unlikely that every section will apply to their circumstances (not all clients will have other properties, business assets or directorships) and overall, how useful it will be in helping them to reach clarity about their financial situation.

However you decide to deal with this, you should then in a joint meeting:

- Do what you can to 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 to that which is appropriate.

In doing so, it will help you to:

- gather an understanding of how much each knows 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 may be being ‘hidden’ by the other (and be aware, if an individual voices concerns in an initial individual meeting about their former partner hiding assets or other financial information, it may not be a suitable case for mediation). Reiterate the importance of appropriate disclosure and note what the concerns are for discussion.

The issue of pension valuations remains a difficult one for the purposes of 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.

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. It can be useful to suggest that clients make copies of their supporting documents so that they have a copy to send to you, a spare copy for their records/use elsewhere and they keep original documents safely so that they are only sent as and when they are required to provide the original documents.

Ensure that you make clear with clients that you need them to return completed financial forms to you ahead of the meeting (usually at least 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.

Remember to carefully consider the practicalities, if you’re working remotely, unless you are using some form of file synchronisation, the clients will need to download, complete and then scan the Form E/schedule documents or post them back to you, (unless they have access to the relevant software) along with scanned copies of their supporting documentation. You may have software that provides support to clients uploading documents directly and confidentially; even if you have, please remember that clients may have limited knowledge and experience of more sophisticated software or may simply not have access to the technology to allow them to do this.

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.

It is useful to note that mediator practice in regard to financial disclosure varies and that variation has increased as a result of moving to work remotely. However, keep in mind the sensitive nature of financial disclosure and the emotions that this can raise. It can be tempting to think that providing a blank Form E ahead of any individual or joint first meeting may 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 (or suggesting that the clients do so) to each other as well as to you and/or sending any draft schedule to each ahead of your joint 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.

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 (and if you are working remotely, for you to have prepared a draft joint schedule).

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 in preparation for sharing so that eventually, you and each client has a set of both forms

Using the Flipchart in attended meetings

If working directly with clients prepare an outline for scheduling client information on the flipchart/via an online tool (if you are working in this way, it is still useful for you to have prepared a draft joint schedule for yourself as an aide memoire for the meeting with your 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

You will normally provide each person with a copy of the other’s completed form E at the beginning of the meeting. Tell them that you will all work through the Forms E on a page-by-page basis to record/check 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
explain that all the information noted on the flipchart during the meeting 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.

Remember above all, 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, even at the point of having shared their information, it can be useful to invite each to a short, individual meeting to discuss with the client you are concerned about what may be of help to them. Perhaps explaining (or re-introducing) the possibility of using a financial adviser or financial neutral to assist them to get a clear sense of financial matters) or signposting to a source of assistance such as the Money Advice Service. It’s also important to ensure that you act even-handedly so if you intend to offer individual meetings, you should also use the time with the other client to check that there isn’t anything they might have a question about and/or that they are sure they have disclosed all relevant information.

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.

Working remotely with a draft schedule

Once you have the completed Forms E returned from clients you will need to prepare a draft schedule ahead of meeting with them to discuss their finances.

Generally, you should ensure that any schedule is prepared in a similar way to that you would have produced from a meeting where you have flipcharted together their financial information (see also Guidance Note for the Open Financial Statement/Summary). However, in preparing the schedule, please also carefully consider:

• whether it is clear and likely to be easily understood by your particular clients?
• can or have you spotted any ‘surprises’ that could prompt conflicts or misunderstanding?

• are there discrepancies, e.g. lack of agreement on the value of a property, or the outstanding balance for a mortgage?

• is there any key information missing that you will need to follow-up, or which again, might prompt conflict between them?

You can share the draft joint schedule in your meeting by screen sharing (or use of other software), remember, they will subsequently need to receive a copy of the draft schedule as a draft Open Financial Summary/Statement and a copy of the other person’s financial disclosure form (see cautions below).

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 that you have prepared a draft, joint schedule of finances to check and discuss and that you will be going through it with them carefully and at a pace that works for you all and that after the meeting, you will prepare and send a draft open financial summary or statement which will be sent to each of them as a working document (as above).

You will need to consider how best to manage providing them with a copy of the other’s Form E i.e. whether given the client’s circumstances, you could do so ahead of any meeting to discuss financial disclosure, whether it can be sent to each just ahead of the meeting or after the meeting. Be and remain aware that the arrival of the other person’s Form E has the potential to seriously disrupt a meeting, or the mediation or cause anger, you must consider this aspect carefully, you may decide not to share the Forms E until a later or more appropriate point in the mediation.

It is more than possible to work with them both, with each referring to their own Form E, helping them to clarify each to the other what they have recorded on their own form and which has been transcribed by you into a draft joint schedule. Be aware of those areas that might be contentious and be ready to manage their discussions at those points.

Share the draft joint schedule you have prepared (usually by screen share, if you are all working to a previously shared ‘hard copy’ then your and their focus and attention is on the schedule and not on the screen) to provide the basis of discussions during the meeting, with each client checking the information on their own Form E, and you providing a narrative in relation to any differences/questions you have noted between their two returned forms. At the end of the meeting, you can then explain that you will be sending to each of them an
updated draft open financial summary or statement and, as appropriate, a copy of each other’s completed Form E.

Your draft joint schedule should follow a similar format to that you would have used for flipcharting, that is, it should be a clear and visual record of their individual and joint finances.

If or where you have concerns about an individual’s understanding or knowledge of their financial situation, even at the point of having shared their information, it can be useful to invite each to a short, individual meeting to discuss with the client you are concerned about what may be of help to them. Perhaps explaining (or re-introducing) the possibility of using a financial adviser or financial neutral to assist them to get a clear sense of financial matters or signposting to a source of assistance such as the Money Advice Service. It’s also important to ensure that you act even-handedly so if you intend to offer individuals meetings, you should also use the time with the other client to check that there isn’t anything they might have a question about and/or that they are sure they have disclosed all relevant information.

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.

Income/outgoings budget schedules

Practice varies in relation to income and outgoings schedules. Whether in the room or working remotely, it can be a long and laborious task to record a complete schedule on the flipchart/via remote means 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 subsequent mediation meetings if necessary. Some couples can or prefer to 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 and are considering the options they have about what their respective individual needs might be in terms of outgoings for the future.

There are various software packages and programmes that provide templates for budgets and many can be used regardless of how you are working with your clients. Alternatively, some mediators use e.g. excel schedules for the same purpose.

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 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 so ‘affordability gaps’ will be important to address.

Some clients ask to photograph the information on the flipchart, or a ‘screen grab’ if working remotely, pending receiving an agreed and/or updated written draft open financial statement or summary. If this is the case, ensure the flipchart sheets or schedules are marked as ‘without prejudice’ to avoid any confusion about the status of the recorded information as you may have noted something that refers to a potential financial arrangement, which would not technically be ‘open’ information.

However you are working with your clients, having discussed their respective financial information and any draft schedule, you should have a clear understanding of:

• what needs to be included in any draft Open Financial Statement or Summary (see also Guidance Note) and

• how any areas of discrepancy, uncertainty or missing information is to be addressed.

• Ensure both clients also have a clear understanding of the information recorded and why it is required.

Remember that an essential 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/scheduling what is in the family ‘pot’ (which should not create any expectation of division or financial provision)

• discussing possible 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

It is important that, as a mediator you are as informed as you can be about the effects and impact of family separation and divorce for parents and especially for children and young people.

Please don’t forget that children and young people have also had to deal with the trauma of all that has happened as a result of the Covid-19 outbreak, they may have had to deal with not seeing other important members of their family and their friends, (both of whom would normally provide some level of support to them in a parental separation). They have had to deal with their own worries about their parents or other family members being ill, or an unexpected bereavement and/or they may be worried about having missed school and what that might mean for their exams or for their future. They may well have had to internalise all their fears and worries because they are aware that things are going wrong between their parents or that their parents have separated and either not feel able to talk to their parents or not want to upset them further.

Where parents are in conflict about arrangements for their children or in a conflict that has spilled into arrangements for their children, it will be important to help them to understand that they remain parents together, they will need to focus on helping and supporting their children and will need to find ways to form an alliance as parents for the benefit of the future security and happiness of their children.

Most parents want to do so, very rarely would a parent want to cause unhappiness for their children. Their day-to-day function and judgement can be clouded by the emotion and anxiety that surrounds their separation from what has been an intimate couple relationship. They are not ‘bad parents’ they are ‘parents in a bad place’ and in your role as a mediator you can do much to help them because you provide a unique opportunity, a safe place to discuss their parenting in every aspect.

Most parents will be concerned about how best to protect their children, will not want to hurt them but their abilities as a parent are affected by their own responses to what is a life-changing event. They may simply not have had time or have been in the right place to really think about the needs of each of their children.

Adverse childhood experiences

It is helpful to parents to have information about what helps children best when their parents separate and what are the things to avoid. Essentially, parents need assistance in knowing what to do that helps build their children’s resilience during a family transition in order that they can move as easily as is possible into the new parenting arrangements that their parents agree. Much has been written about children’s resilience, however in recent
years there has been a focus on what are considered adverse childhood experiences (ACE) and the lifelong effects they might have.

Instability caused by parental separation is an adverse childhood experience, identified in the ACE study. Whilst single ACE experiences are relatively common for children, it is the combination of several experiences that can lead to life-long effects for individuals.

For example, in families where a child experiences any form of abuse or neglect, where there may be substance or alcohol abuse or mental health problems for adults in their household, if coupled with parental separation, that child will have experienced multiple ACE indicators leading to the potential for lasting, negative effects on health, wellbeing and opportunity.

The ACE study replicates other findings in relation to ‘problem clusters’ for adults, where it is known that those who separate commonly have other problems that have either led to a separation or have happened because of a family separation.

The importance of understanding the effect ACE experiences or ‘problem clusters’ may have is useful to bear in mind as a mediator when helping parents.

Key messages for parents

There are simply and useful key message you can give to parents about their children:

- **Children need** reassurance that both their parents still love them
- **Conflict between parents** is the major cause of unhappiness and poor outcomes for children
- **Children need** reassurance that what has happened is not their fault
- **Children and young people** need information about what is happening in their family – in ways they can understand – and without a blow-by-blow account or whose fault it is
- **Children don’t** want to take sides – don’t make them
- **Children benefit** from being raised by and seeing both their parents – and their wider family, provided it is safe for them to do so
- **Children will tell each parent** what they want to hear – opposing views are not uncommon, they don’t want to hurt either of their parents
- **Children can cope** with short-term disruption in their lives – as long as they continue to feel loved and supported by both their parents
• **Children cope best** when they can go easily between their two homes

• **Children need** parents to make decisions for them and with them – remember they will have a view about things that will affect them

It is also important for parents to understand:

• The importance of looking after themselves so that they can look after their children

• Trying not to involve children in what is happening between them as far as their relationship is concerned

• It is important to try and present a united front as parents

• It is better not to make promises, if parents don’t know what might happen, they can still explain that they are sorting things out and will talk to their children as soon as they can

• It’s important that children understand that it is okay to be sad, that it is sad for parents too and they will do their best to sort things out

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 and remain alert to 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 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).

Managing conflicts

Conflict management is a vital part of mediation. It is important not to muddle conflicts with anger. People who separate are very likely to show a range of (negative) emotions. Hurt, anger, mistrust is all likely to feature and it may be that they need to express those emotions, in a managed way, to one another. Your role as a mediator is in part, to provide them with the environment where they can say some of those things to each other. That is different from the environment that they have outside of your mediation ‘room’ where they may have been increasingly unkind to one another simply because what they say is just not being ‘heard’ by the other.

If they are not able to express some of their anger or hurt, they may well get stuck and add conflicts to their anger. It is important that if there are things to be said, you can manage how that happens with each and both of them. You will have a sense of what has been happening from your initial meetings, and where it is the case that they are demonstrating their anger with one another by stinging remarks, indifference or taking opportunities to anger or upset the other, then you need to step in, acknowledge their anger, ‘say what you see’ and offer them the opportunity to say to each other what it is that they believe it is important for their former partner to hear. If necessary, you need to put appropriate cautions around that e.g. ‘I can see how upset each of you is, in different/your own ways, I wonder if there are important things you need to say to each other before we move on? It would be helpful for that to happen in a quiet and reasonable way, would either of you like to say …’ ‘I can see how difficult this is, are there things that need to be said? Often it is helpful to take the time to think about and say whatever is important about what has happened, in this private space …’

Whatever the case, please think about getting management of their anger or upset to help them avoid either using conflict as a reflection of their anger or hurt with one another or their anger or hurt just continuing to re-surface because they can’t get past it.

Although people who choose mediation may not have necessarily displayed signs of serious conflicts as they will be those who, for the most part, want to resolve things together, conflict is a feature of everyday life. Being able to disagree, to debate differences of opinion and to reach some form of decision or compromise is an important behaviour to be able to achieve. The ability to disagree constructively and be able to deal with disagreements, anger and conflicts is an important skill to have learned and internalised.
We all develop the ways in which we behave and react to conflict through a range or series of experiences. That may include our ‘learned’ behaviour, how we have evidenced conflict in our families and the way it has been dealt with etc. People develop strategies and habits in their communication which sometimes are deficient in terms of their ability to deal with conflict.

When individuals separate, the emotions they feel regarding all that has happened are likely to flood to the surface at some point and may result in conflicts that may feel impossible to resolve or even discuss.

For some, conflicts and conflictual behaviour may be endemic to or a feature of their relationship. Over time, their ability to deal with conflict reasonably and positively has been lost, or perhaps was always subsumed by patterns of behaviour in their couple relationship. Conflicts may have been resolved perhaps by one person deciding on behalf of both, or each taking unilateral action on something they wanted to do, or individuals whose need to have their ‘own way’, or their defensiveness or resentment has led to their partner ‘giving in’. It may be the case that conflicts have never been satisfactorily if ever resolved between them and have just become an underlying part of their unhappiness and distrust with each other and growing resentment and dysfunction in their relationship.

Not being able to deal with conflict can also be a feature of poor communication in couple relationships and where it is happening between parents, is likely to be evidenced by children who are in turn, upset by what they see and hear but who may also mimic the behaviour they see in their parents with their siblings, with their parents and/or with friends.

It is important for you get a sense of what may be underlying any conflict or conflictual behaviour you see. It is also why having conversations with each individual about how they communicate, how they deal with conflicts and disagreements can help you to get a sense of what may be underlying their conflicts.

An obvious cause may well be the relationship conflict, caused by strong emotions and repetitive negative behaviour that may have been a feature of their relationship over time. This is where skills such as acknowledgement are very important. People need to hear that their anger and emotion has been heard and the difficulty of it appreciated, they may not be able to do that one to the other, but they may respond to hearing an acknowledgement from you. Wherever possible, acknowledgements should be mutualised, ‘I can see that this is upsetting/difficult for each of you, although in different ways’. As a mediator, it is not your job to change long held and established patterns of behaviour, however, you can use your skills to assist and facilitate the way in which people talk to one another and negotiate together in their mediation.
Another common cause of conflict is a lack of information or information that is misunderstood or regarded differently by each or just plain wrong. It is always worth asking what they each understand about whatever it is they are in conflict about, whether they feel they have enough information or what information they think they might need.

Very often, people in conflict become very positional and do not feel able to move from that single position, that may be because, in the past, that is the strategy they knew to resolve a conflict, or they may perceive themselves to be in a ‘fight’ that they have to ‘win’. It is not unusual for individuals to slip into this, for many of us ‘negotiating’ can be synonymous with a ‘win/lose’ approach. Where this is the case, a gentle reminder and re-focus on how they came to choose mediation and what they hope to achieve can help re-set their thinking.

Be aware that holding a position can also be because of fears or worries that they won’t get what they need, or that the other person has more control or authority. Where this is the case, it is useful to explore what the concerns are, this needs to be dealt with carefully and may need to be done individually so as to avoid either feeling exposed.

Finally, people may have differences in their values, they may see the world differently, they attach different values to things than their partner, they may have different views about ‘fairness’. Helping people to voice what it is they need by the use of carefully framed open, reflective (where they would like to be in six months?) or circular questions (if you were in X’s shoes, what would be most important to you?) can help them to move from a position to discussions about how they could meet their interests and get to an agreed outcome.

Dealing with impasse

Along with the ability to manage conflict, impasse rates very highly on the list of concerns for mediators. It isn’t unusual for people to get stuck in their negotiations and there is a range of ways in which you can help them if and when they do.

It is important to remember that it is their impasse and not yours. It isn’t your role to resolve it but theirs. Sometimes the most powerful tool in impasse strategy is simply to acknowledge the impasse. Often couples will then feel free to consider other ways of moving out of their own ‘stuckness’ – or indeed may find a means to ‘rescue’ you or their mediation process.

It can be helpful to review and reflect on how far they’ve come or what it is they hope to achieve in using mediation. It can also be worth helping them to consider whether there is anything that has been misunderstood between them or not acknowledged? Sometimes, a short individual meeting with each to get an understanding of their individual perspective and to talk thorough how any concerns they have might be raised when you come back together can help their thinking.
When individuals or couples feel that their issues or concerns have not been properly heard or taken account of, they may ‘stick’ until they do, so having the opportunity to allow them to ‘think out loud’ with you separately can help in their feeling heard and perhaps exposing something vital or important that has been missed or misunderstood.

It isn’t unusual for people to get stuck because they have not each ‘mentally’ and emotionally understood the needs or interests of the other, the context of their problem, or perhaps, the issue. If this is the case, this also requires you to be alert as to whether individuals have or are able to truly ‘hear’ the concern of the other, whether they need further information, or to deal with a misunderstanding that is causing the impasse.

Remember too, that working in an interests based negotiation, it is important to check the underlying interest and/or need each has (so a simple example could be that they each want to keep e.g. the family car, one will be concerned about perhaps the school run etc., the other may be concerned about getting to work, reflecting each of their needs, mutualises the issue and it might then be possible to get them to think about what their options are for managing meeting their individual interest or need).

Sometimes individuals may feel that they have insufficient information to move position. It is always work checking with each of them that they feel well-informed enough about the issue to move from their current position. Re-iterating the information already gathered around the issue may assist – where it involves ‘best interest’ in a legal sense, it may be useful to define with each and both what else they may need to know on an individual basis from their respective legal representatives.

Often people get stuck in their negotiations because they are continuing to work in a win/lose style and have lost (or perhaps not found) the ‘problem-solving’ mode that would assist them in finding a way through the impasse. Mediators need to work as facilitators, assisting clients to stay focused in problem-solving and to set aside combative, competitive negotiation in favour of solving the problem. It can be helpful to assist them simply by re-focussing them on externalising their problem, for example, ‘let’s look at what the issue actually is or means, you both need to resolve (e.g.) where you will live/how the children spend time with each of you/how you ensure you each have sufficient funds in the future, if you were looking at this simply as what could be done to get to something workable, what might that look like? What might need to happen? Or alternatively, if this was something your friends were trying to resolve, what might you suggest?’ ‘What advice might you give yourselves about resolving this?’

It is important for individuals not to feel they have failed. When a relationship ends or is ending, people are already feeling vulnerable and that they have somehow failed. Getting stuck in negotiations can compound those feelings of failure, of ‘uselessness’. Emphasising and reflecting their positive achievements can help to lift people back into feeling they can do this and will achieve an outcome.
Couples may also become inappropriately centred in their mediation – in meeting together they are in a sense being catapulted back into a partnership from which they are endeavouring to escape or to end. In doing so, they may also re-adopt the patterns of conflictual behaviour that has led them to resolve to end their relationship. It is important to keep them focused in their mutual commitment to mediate – to resolve the problems and issues arising from their decision to separate and to help them by reflecting to them when it appears they are re-visiting old patterns of behaviour or communication. Equally, they might get stuck on something that appears to be unimportant, that may be because they have realised that once that is resolved, that is it, they have no need to meet again, they are going to be finally taking leave of one another.

It is also important not to let people get overwhelmed by what they have to resolve. If something looks too big, too hard or too complex, they can feel ‘frozen’ and overwhelmed by the enormity of it. Try helping them by breaking it down into manageable parts.

Considering the alternatives to not reaching agreement (BATNA/WATNA – Best Alternative/Worst Alternatives to a Negotiated Agreement) can help couples to re-focus in their determination to negotiate their own outcome. (Please ensure though that it is considering the alternatives and not a veiled threat!)

Sometimes it can be very helpful to actually identify the difference or distance between two individuals, e.g. ‘so, if I’ve understood this clearly, what we are talking about is two hours every other week-end?’ ‘Let me just check this – the difference is about £5000?’ When couples see it is a very small margin in comparison with what they may have already dealt with; they can sometimes more readily make that last step. Often, in financial terms, they can see that if they do not reach an agreement – the disputed amount may be eaten up in fees to fight for it.

Sometimes it is important to recognise that an issue can be moved no further – by setting it aside it may be possible for it to be resolved at a later stage once another piece of the jigsaw has been dealt with. (If you are to come back to it – ensure that you remember to do so). It may be that it remains irresolvable as a single issue, life doesn’t always neatly package itself – and there will be occasions when it will be simply enough to ‘to agree to differ’. Not everything has to be resolved in mediation.

If conflict has not been properly ‘vented’ or addressed, impasse may occur more readily – check that people feel they have said what they need to say.

It is also important to us all not to lose face – is there a concern (or an influence) outside or within the mediation for each or both that is keeping them from moving?

You should also monitor for ‘negotiation exhaustion’. If people have been working very intensively to find resolutions for emotive and difficult issues, they may simply reach a point where they are ‘all negotiated out’. If individuals reach this point, an impasse may be a
reflection of their exhaustion, loss of focus or concentration. Where this may be the case it is worth identifying that everyone may need time and space to reflect on advances made, the position reached and the options each of them believes they have for a return after a suitable break – or in the next session. This type of exhaustion also affects mediators too – you may simply have done as much as you can for that session, and you need to give yourself space to re-energise.

**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 Resolution 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 want and 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 effect 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 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](https://ico.org.uk). The ICO also produce a very helpful [Code of Practice](https://ico.org.uk) and [Checklist](https://ico.org.uk) 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](https://ico.org.uk).)
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 Handbook.

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).
Generally, in drafting any Memorandum, 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. Remember that if you are working remotely, you will need to arrange for clients to agree and sign the document remotely, either using electronic means or that they will sign and return hard copies.
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.

Please note: If you’re working towards your accreditation, the FMC Standards require that your PPC sees your drafted outcome documentation before they are sent to your clients.

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, making interim arrangements until such time as they can properly conclude their negotiations in mediation.

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). 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 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 what you might have done differently.

It is also possible for you to submit a case where although the clients have not wanted 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 and when you are working directly with clients, if you are working remotely, please ensure that you have thought about and arranged how payments will be managed. 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.

(Please note that if you are working towards your Accreditation, you can still prepare client documentation on a case where the clients have not wanted them and use the case for your portfolio, you may include cases that have been conducted remotely or directly with clients. Preparing client documentation even where clients do not want them may also be a useful way of practising your drafting skills for discussion with your PPC).

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. This may be an important consideration if you are working remotely with 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 in resolving 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 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.

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.

Resolution provides good complaints handling information for members and there are guidelines and standards set by the Family Mediation Council that must be followed. You should generally make clients aware that it is your policy to have tried to answer and resolve a client complaint within 8 weeks (Resolution, the Legal Ombudsman and the SRA will inform any client complainant that they should have allowed you this length of time to
investigate and to try and resolve a complaint and will not take a formal complaint until that time has elapsed other than in exceptional circumstances).

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 their 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 are 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 has 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 have 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 unless the client/s have given you sufficient time to have investigated and tried to resolve the complaint (up to 8 weeks) or if they have complained to either the SRA or the Legal Ombudsman, 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 to 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 can 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 in reaching 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. This is becoming more important as all family justice professionals move towards a more comprehensive and holistic approach to resolving family issues as it should be possible for clients to move seamlessly through the range of services they may require.

People need tailored information and assistance to understand the ways in which they might resolve things. Where lawyers (and/or financial professionals, family consultants and other advisers) and mediators work closely together, the outcomes for clients are likely to be improved and all professionals involved 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, ethics and conduct of mediation (and of any other family or out of court resolution service) 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, and where appropriate, drawing on other professionals to assist. 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 may be available to them as a remotely conducted process in addition to working face-to-face with a mediator (once restrictions are lifted) or in a ‘blended’ way. 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 and/or other ways they might approach resolving things.

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 (unless their circumstances fit one of the exemptions). 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 may be longer if the meeting is conducted via remote means (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 and may 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 (and other advice) 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 or ‘best interests’ advice. It’s therefore very important that clients are able to take individualised 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 are 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). 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.

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.

For specific guidance in relation to solicitors being directly involved in a mediation process
see page 144.

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 range of ways that are available 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 (or other advisers) 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, or that a ‘mediator’ may offer the terms of a resolution having heard each side of the issues. 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, if working directly rather than remotely with them, 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 anxieties 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 their appointments with you, whether remotely or physically attended.

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. At the present time, the trauma that we are all dealing with as a result of the pandemic and that has happened should not be underestimated. 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 immediately. 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 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 (see also Appendix 1 and 2).

**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:

(a) The information does not enable the person to be identified
(b) The person has agreed to the disclosure of information
(c) 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
(d) The disclosure is in accordance with an order of the Court or tribunal
(e) The disclosure is for the purpose of instituting, or otherwise for the purposes of, proceedings before a court or tribunal,
(f) 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 and of any children) 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 solution seeking opportunities, e.g. early neutral evaluation, 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.

If you are going to comediate as a remotely conducted process, please take the time to work out with your co-mediator how that will work effectively between you and your co-
mediator, how you will manage the technology effectively and so as to provide a seamless service to your clients.

Shuttle mediation

Shuttle mediation refers to mediation conducted with clients in separate rooms, or (when working remotely) in separate meetings 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 in hybrid mediation or trained and qualified to conduct civil/commercial mediation might choose to conduct the mediation under the Agreement to Mediate produced for hybrid mediation approaches or 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. (and 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 is 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.

You should also consider carefully how you will conduct an ‘shuttle’ mediation process remotely, making appropriate arrangements for everyone involved.

Remember that for either person who is having to wait between individual meetings, it can be useful to provide them with a task or some thinking to do, so that they are not left in a breakout space or waiting room (whether remotely or physically) anxious about the conversation they are not party to.

Involving solicitors in a mediation

Where appropriate, it may be helpful to involve 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. (or at the very least, that solicitors have also signed the Agreement to Mediate)

• 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 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. As a minimum
of arrangements, it’s always useful for the solicitors to 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 hybrid models and advances in practice).

Please remember that if you are choosing to involve solicitors as part of a mediation process conducted remotely, it will be important that any clients and their respective solicitors are clear about how the mediation will be arranged and conducted and that everyone is able to join using an appropriate individual link for any meetings.

Providing information about other linked services to prospective clients

For some prospective clients there are understandable concerns about whether mediation will achieve all that they hope. It is known that a common concern is that mediation does not produce a ‘binding outcome’, they may also be concerned about how else and who else will help them deal with all that they need to resolve, or perhaps how they can get the additional help or support they might need whilst they are trying to negotiate decisions together. In the past, many people were able to rely on their solicitors to help them during mediation. We are now aware that an increasing number of people are not talking to or appointing a solicitor and that some of them regard it as too expensive.

Often what is most important to your mediation clients is that they are able to reach an outcome that will best serve their future needs and that is comprehensive and workable. The current separation between the various forms of solution seeking or dispute resolution can be confusing and unhelpful for clients. It is also essential to understand that processes like mediation, collaborative practice and arbitration are all types of solution seeking or dispute resolution and they are better joined rather than always perceived as separate entities that have no relationship one to the other. By understanding how these processes link, it is possible to expand how clients can secure an outcome by moving between these opportunities.
Talking with prospective clients about what will get them from where they are now to where they hope to be is an important part of our role as mediators. Dealing with concerns about what might happen if they can’t agree everything in their mediation or worries that they have about being supported and accessing the right level of information, help and support is also important to undertake. Meditation is and should be a flexible means of reaching solutions. Although it is perceived as a free-standing ‘process’, it has the ability to ‘dovetail’ very effectively with linked services and because it does, it provides a very good means of ‘joining up’ people’s needs with the services that will ensure they can achieve a comprehensive outcome.

Early Neutral Evaluation

Early neutral evaluation can be a very useful additional service to mediation clients, especially if they have chosen not to have appointed solicitors or to seek legal advice. A neutral evaluation which gives them guidance in relation to how a Court may view or decide on their particular circumstances can be of particular help as part of their mediation, especially where they may be struggling with exactly what their options might be or have become ‘stuck’. Although mediators can inform individuals of a proposal or decision that might fall outside what a Court may order, it can be difficult to give an indication of what might.

Mediation linked with arbitration

Quite often mediation clients may reach an impasse of some kind during their mediation process, or they may have decided on the majority of their issues but may have a discrete issue on which they are unable to make a decision.

Where an impasse has proved difficult or impossible to resolve and when appropriate, it may be useful to consider with clients whether family arbitration may offer a means of securing an outcome. Similarly, where there may be a discrete issue, especially if it is related to a financial matter (but it might also extend to a discrete issue in relation to children, such as choice of school) arbitration may offer a helpful way forward and one that complements the work already undertaken by the clients to reach solutions.

Providing information about the potential for arbitration

As a mediator, if you think that family arbitration would be a useful link or option for your mediation clients, it would be helpful to discuss this with them at an appropriate and early point in any discussions about coming to mediation. If so, it should also be part of your
promotional information whether on your website or in any printed information you provide to the clients.

**Appropriate links with arbitrators**

If you wish to consider discussing family arbitration with your clients, you should ensure that you are clear about how family arbitrators work and it would be useful for you to have links with arbitrators and an understanding of the scope of the work that they offer. It is the client’s choice as to whether they jointly agree and how they might choose to appoint an arbitrator (you should be able to provide information about arbitrators in your area or generally or be able to signpost clients to the relevant sections of IFLA so that they can search for an arbitrator or ask IFLA to appoint one on their behalf). As a mediator, whose role is even-handed you must be careful to ensure that you act in an appropriate way when discussing the use of arbitration and the appointment of an arbitrator and not seek to influence either individual in their choice.

**Including details about arbitration in the Agreement to Mediate**

The Agreement to Mediate template now includes information about other forms of resolution. Remember that it remains the choice of the individuals involved whether they might choose to arbitrate in appropriate circumstances and at an appropriate time and therefore care should be taken in there being any perceived assumption that they will arbitrate. Their circumstances and views may change during their mediation process and they should not be compelled to take up any arrangement that is not a choice for each and both of them. This must be handled sensitively and carefully in each case. Many clients are concerned to have certainty and certainly do not want to have to ‘start again’ should their mediation reach a hiatus, however, it is critical for them to understand that in choosing, deciding or agreeing to arbitrate, they will, unlike mediation, have a binding outcome which cannot be easily, readily, if at all, be resiled from.

**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. If you are working remotely, you will need to think carefully about orchestrating any meetings, who needs to attend and when and to have appropriate arrangements for waiting/breakout areas. Please also remember that everyone will need to join from an individual link, and you may be managing a number of people’s attendance and you must plan carefully for that. You should also ensure that you have contracted with everyone involved carefully and appropriately and that as a minimum, everyone has signed the Agreement to Mediate.

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.

Please be aware of the recommendations of the Family Solutions Group, ‘What About Me? (Reframing Support for Families following Parental Separation) and of any further report and recommendations from the President’s Public Law Working Group. 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, competent 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 what he has termed 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 and should hold accreditation as a mediator

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 meetings 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.

However, it is very important to point out that the same careful assessment of appropriateness and suitability of mediation is carried out as the hybrid process is not a means of making an unsuitable or inappropriate case necessarily possible or appropriate.

However, 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, have become an important aspect of remotely conducted mediation and which 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.

The current 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 (i.e. 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.

Please ensure that you take great care when dealing with international relocation cases and assess carefully whether there is or may be a threat of child abduction.
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.144).

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 review of the Child Arrangements Programme (The President’s Private Law Report)\(^2\), there has been mention of the potential for a wider roll-out of ‘at court’ mediation. The first Report was consultative and the suggestion was one of a number of recommendations. The recommendations of the Family Solutions Group has built on these early recommendations and the potential for closer involvement of mediators within or adjacent to the court and proceedings, whilst recognising that overall, there needs to be careful thought about out of

\(^2\) A Review of the Child Arrangements Programme: Report to the President of the Family Division June 2019
court resolution services and the piloting of a range of approaches. It will be important that you consider a number of issues if you are considering providing mediation or MIAMs at or connected to the Court.

As a mediator, you should be aware 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.

As a result of the Family Solutions Group report, it is very likely that there will be a number of pilot projects in local court areas. If you are in any doubt about taking part, or the arrangements that are being proposed in respect of mediation principles, please be in contact with your PPC to discuss.
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.

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3 thanks and acknowledgements are recorded here to The Law Society and Resolution Joint Working Group and especially to Caroline Bowden and David Hodson

4 (For simplicity of expression throughout this guidance, reference to drafting financial terms includes drafting marital agreements on the basis that the latter would be quite probably of persuasively binding effect under Radmacher case law).
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.

In providing this guidance the SRA itself pointed out a number of cautions to be observed, including that it is unlikely to be suitable for all cases where it might appear to be an option, that individuals would need to have appropriate explanations, that were clear and sign an
appropriate disclaimer. 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. The recent move to working remotely during the pandemic has shown how quickly and effectively new technologies can work and be adapted, and mediators have mastered the use of new technologies with relative ease. It is very clear that other parts of the family justice system (not least courts) will be relying heavily on online and visual technologies for the long-term future.

People will expect a range of ways to access and use mediation. There are considerable advances being made in the use of 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 mediation out of necessity, we should be aware that the way in which mediation formerly operated as an essentially physically attended, face-to-face service, could 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 meeting in person.

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 using 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 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/their 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 or are using remote technology/ies, for example, Teams, Zoom for 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 Teams, Zoom 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 information, assistance, additional training or professional development you might need in order to conduct mediation using 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 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 and any mediation conducted via remote means is safe and appropriate for them
- an appropriately worded Agreement to Mediate or the use of the Addendum to the Agreement to Mediate encompassing the use of 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 (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 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 Teams/Zoom 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 on an individual link, 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 more detailed information, please see ‘Working Remotely with Mediation Clients’

Blended working with clients

As we all move forwards, it is likely that we will need to be prepared for requests from potential and actual clients to work differently and more flexibly. It is an issue that we will all be thinking about as everyone draws on their experiences of the last several months and starts to plan for the future.

Working remotely has increased accessibility and flexibility for many of our clients, which in turn, has and does increase our reach and potential for future service delivery. However, not everyone wants to work remotely or, if a client, to receive services remotely and it will be important that all of us think about our future practice.

It is likely that many clients will want to take advantage of some of the ways in which services might be delivered differently but equally, may want the opportunity to work directly with you for some part of the service they are using. This is generally referred to as ‘blended’ working.

When working collaboratively or in mediation there are a number of issues to consider:

Being responsive and maintaining balance

It will be very important in a business sense to be able to offer the broadest range of service that you can. However, if that includes an offer to work in a combined remote and attended way, it is important to consider when that is likely to be most appropriate, what might be

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the risks and pitfalls, as well as the advantages and plan your messaging, promotion and your practice appropriately.

**Increasing your offer and working with others**

Many of us hope to work with other colleagues in providing the best of service to our clients. The use of remote working increases our opportunity to do so. Our colleagues can join our remote meetings, or clients can meet with them remotely without having to travel. It is easier to arrange appointments for all concerned through the use of shared or synchronised diaries and ‘paperwork’ can be shared and updated confidentially via cloud-based file synchronisation and with the permission of clients.

It is entirely possible to set up ‘virtual chambers’ or inter-disciplinary practices to work together to offer a comprehensive service to our clients.

**Being confident in making choices and decisions**

Many of us long for a return to ‘normal’ and have found working remotely to be a challenge, others have found that working remotely has been a real boon to practice. Whatever the case, it will be important that you play to your strengths. There is likely to be just as many potential clients who feel as you do. Some may welcome being able to meet directly with you, others will prefer to have services available remotely. In all likelihood, the balance that is finally struck will be delivery that combines the best of your experience and skills, and the best of available technologies. So in making decisions and choices about how you work in the future, always consider what technology will aid your practice whether you are working remotely or face-to-face and promote what you can offer.

**Managing practicalities**

**Be confident with technologies**

We have all had to learn how to use new technologies at speed. Now is the time to explore just what the available technology might be able to do. Having mastered setting up and managing remote meetings, exploring the use of whiteboards, file synchronisation or software that can usefully engage clients, collect and analyse first data ahead of your first meeting are all worth your time and effort as they offer considerable business enhancement and efficiencies.

When you trained to be the professional that you are, it took time for you to gain in your confidence of your knowledge and skills. In a similar way, we all have to take the time and gain the confidence we need in the use of increasingly sophisticated technologies.

Technology is an aid to how we all live and work. That, together with the considerable commercial efficiency that it offers is why usage has grown and spread in every part of our daily lives. Most technological applications are broadly intuitive and are increasingly able to
meet quite intricate human demands. If you think about how much your phone can do, how it can learn, predict when e.g. you might want to set up an alarm or need a reminder without any direct input from you, it perhaps prompts thinking about just how much technology influences and aids us in everyday living. We have all learned to manage technology like our phones because they are an invaluable aid to us.

In the same way, technology is an invaluable tool to efficient and profitable business, if we take the time to build our confidence in using it. Where technology fails, it is often more about the human who may have selected the wrong technology or who is failing to use it properly. Technological applications are tools, you need to ensure that you know and understand what that tool is designed to do and how you should operate it.

Most technology today comes with a lot of help and support, online video tutorials, demonstrations, step by step dashboards, ‘pop-ups’ etc. More direct help, in fact, than you probably had when you first started to practice.

If you are thinking about investing in technologies, ask others what has worked for them. If you are using an external source, (a consultant or adviser) make sure it is someone who a. knows about your business or is prepared to listen to what it is you need and b. can talk to you without the ‘industrial jargon’ that might sound impressive, but doesn’t actually help you. If you’re buying a package for yourself, most have free trials, so use them to get a ‘feel’ for that software or application – and shop around.

Taking the time to explore and ‘practice’ using these technologies will all pay off for your business and with clients.

**Be more prepared**

Think carefully about what your advance information tells the client about how you work. Emphasise what you can do rather than what you can’t (or won’t). Make it clear that you are able to design the services they need to suit their particular situation.

If you would rather work directly with clients, emphasise the positives of that. Remember however, to review what part of supporting work could be more efficiently handled via online technology because clients will expect you to be able to do so (as most of us expect all personal services banking, insurance, health services etc. to have these aids).

We have all found that we are spending more time in preparing ahead with new clients. It is really essential to do so regardless of whether you are working wholly remotely or in a blended way. A particular aspect of the work that we do is the engagement that we have with each client.

You are going to be guiding clients through a difficult and lifechanging time, the work that we do is necessarily intimate and sensitive to each family we work with and most importantly, it is critical that you are able to do everything you can to ensure the safety of
all concerned. You can’t do that if your initial engagement is perfunctory or fails to gain an appropriate level of engagement. It isn’t just about how much of either person you can physically see on a screen, it is about engaging enough to get beyond what they present and getting an understanding of their real situation, their needs, wants and concerns, what is important to them to sort out and how they think you can help.

If you are spending more preparation time with your potential client, commercially, there are a number of ways to approach this. You can simply adjust your fees if that’s viable, you might consider using a client engagement software package. Although this requires an initial investment is likely to pay for itself very rapidly in terms of the work it can do ahead of your meeting with a client and which will free you to concentrate on really talking with your client about what they hope to achieve and how you can help them most; which will better aid your engagement in any event.

You could also consider monitoring how income varies over the first six months of working in a range of ways in order to collect data to allow you then to make adjustments to your fees, including whether and at that point, you might be able to make e.g. fixed fee or flexible package offers.

Thinking through what will work best

Part of preparing ahead is to recognise that some clients may want to work wholly remotely, others may want to be able to meet with you face-to-face, and most will expect some kind of flexibility.

They may not see that it might be an issue if one of them is remote from you and the other chooses to be in your office. Most of us have now had experience of e.g. remote court hearings where this type of ‘blended’ situation has arisen and some of those experiences have pointed up the problems that can arise, not least in feelings of fairness and equality.

If you are going to work in mixed and blended ways, take the time to work through for yourself and with the clients what will need to be in place. When mediating please make sure each client is on a separate link, even if that means that one client is in the next room to you. Whilst clients may not think that their partner being physically present with you (when the other client is not), the actuality of that situation is likely to cause feelings of unfairness, even unconsciously.

Be clear in your contracting

It is important to set out in a simple and straightforward way what has been agreed in terms of how you will work with your client. This should include what is essential in terms of remote working, such as who should attend, not recording (or live streaming) meetings unless agreed, managing loss of live links, use of file synchronisation software, reminders about confidentiality, privilege and GDPR (including in relation to any other professional
who may be joining you) and any special arrangements that have been agreed for that client (or set of clients’’) situation. Resolution produces a template Addendum to the Agreement to Mediate that covers these aspects.

Client consent

If you are offering ‘in person’ meetings of any kind and during the period of Covid-safe requirements and guidelines, you may want to consider whether you have an agreement in place that makes clear your own and client’s responsibilities. This might detail that the client confirms that neither they or any member of their household have symptoms of coronavirus, that as far as they are aware, they have not been in contact with anyone who has symptoms or has been diagnosed with coronavirus, or who are currently quarantining; and the confirmation that the conditions also apply to you. You could also set out what precautions you have in place, or simply that you comply (to the best of your knowledge and belief) with government guidelines for Covid-safe operations etc. The question of vaccination certificates is under discussion within government, for the time being, you cannot insist that people must have been vaccinated to attend the office (once restrictions are lifted), nor can a client insist that you are vaccinated. Be aware of the information that is issued by government, by the FMC, your Mediation Organisation and if you are working within a regulated practice, by the expectations of your firm, or The Law Society or SRA.

Not being ‘bullied’

Consumers are powerful and demanding. This might present itself in any number of ways; from the person who pushes you to get what they want to the client that worries you so much that you will endeavour to do whatever makes it possible for them to have the services they need and everything in between. If you’re working with both clients, you must think carefully about maintaining an effective balance in working with each and both of them and especially planning any work to ensure that neither feels disadvantaged or that there is an inherent imbalance or unfairness, which in turn may leave you open to further bullying or a complaint.

Safeguarding

The privacy and intimacy of family life has been heightened by the recent pandemic lockdown measures. We are all aware of the increases in incidents (including fatalities) as a result of domestic violence and abuse and in the increased reporting of child protection concerns, including online abuse.

Talk with any provider of client engagement software you contact about whether their particular algorithm includes a screening function and make sure that you and any colleagues are confident about carrying out a proper assessment of the client’s situation, even when you are using software to begin enquiries in respect of safeguarding.
We all have a responsibility to ensure as far as we are able, the safety of any individual client or potential client and especially, of any child or children. Please ensure that your website has links to support agencies such as Women’s Aid and the NSPCC and makes clear your own responsibility to ensure safety and help on accessing specialist services of help and support.

Online legal administrative procedures

All mediators will be aware of the gov.uk online divorce procedure and of the fact that new divorce legislation ([Divorce, Dissolution and Separation Act 2020](https://www.gov.uk/divorce-dissolution-separation-act-2020)) will be implemented in Autumn of 2021. The use of the current online procedures by individuals is increasing rapidly and for those who wish to manage applying for their own divorce, the online procedure is helpful and useful.

It is important that you are aware of and conversant with how the online procedures work (both now and in the future) 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 produced has g 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.

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

Since the first lockdown arrangements in March 2020, mediators have moved to working remotely with mediation clients. Whilst this has increased the flexibility of family mediation, it has also raised issues in relation to Safeguarding which are new and different and must be addressed by all mediators who offer remote or blended opportunities in mediation services.

Most mediators are now working online using visual technologies such as Teams or Zoom. The change to practice brings new challenges in relation to the safeguarding of vulnerable adults and especially children and young people.

It is essential that all mediators are aware that their responsibilities in relation to safeguarding remain in place and it is therefore critical to think carefully how safeguarding principles and responsibilities will continue to be at the forefront of your practice. During this time, many people will be faced with difficult living arrangements where there is an increased likelihood of harm, either between adults or involving children and young people. Nationally, there has been a considerable rise in the reporting of incidents of domestic abuse and sadly, a rise in the number of recorded deaths as a result of domestic violence.

Work at government level is continuing to establish ways that victims might safely report incidents and receive immediate help and protection. Please be aware of any announcements that may come from government or specialist agencies offering protection and support to those who are caught in abusive relationships and/or where there are child protection concerns.

Also remember that some forms of domestic abuse, such as controlling and coercive behaviour and emotional abuse are very subtle, (but no less gross or damaging) and difficult to identify, especially as some victims of this type of behaviour (including children and young people) may be unaware of the level of control or coercion to which they are subject.
Safeguarding policies – children and young people

Please review any safeguarding policies that you publish whether that is internal or public facing to ensure that they are updated in line with any change to your working practices. The NSPCC has issued guidance to assist and are also offering a free, 30-minute consultation with an adviser if you need help. (see Useful Resources at the end of this supplement)

Mediation documentation

Please also review your documentation, notably your Agreement to Mediate to ensure that you have covered working remotely from a safeguarding angle. Resolution has produced a template Addendum agreement covering remote working which can be accessed here.

The effect of lockdown/social distancing

It is important to be aware of and not to underestimate the psychological, emotional, and practical effects of the current situation. Those who may have been experiencing relationship difficulties before the outbreak of the virus may well be struggling to manage living arrangements. Even those in intact relationships may have found that the effects of the pandemic are resulting in:

- financial and employment fears
- worries about caring responsibilities
- concerns as a result of being, or partner to, a front-line worker
- fears about illness and death for themselves, their children, or members of their family
- sudden bereavements

Many people are experiencing a general raised anxiety and have fears for the future. All of these aspects can have very destructive effects on emotional and mental health as well as on relationships between adults and within the family.

Safeguarding and child protection concerns

Just as the situation may prompt or exacerbate abuse between adults, the current situation may well prompt or increase abusive behaviour towards children and young people in the family, or from children and young people towards adults and/or members of their family.
The NSPCC reported a 20% rise in reports of child abuse to the end of April 2020 and has also recorded that children and young people have reported to them their own increased fears and worries about the current situation.

Although adults in many households may be doing their best to shield and reassure children, they are unlikely to be immune from the effects of the situation or from abusive behaviour. Children and young people in homes where there has been violence or where there is continuing abusive behaviour or violence are at risk and you should act accordingly.

For some children and young people in situations of great stress, it may increase their own risk-taking behaviours. Their stress or worry may prompt them to be abusive either verbally or physically towards other members of their family or conversely, they may become withdrawn and they may develop mental or emotional health issues.

A further aspect of concern is children and young people’s use of the internet. They may be spending a great deal of unsupervised time on tablets, phones and laptops. It is known that there are delays to the taking down and removal of pornographic, harmful materials and content from the internet as an effect of the current pandemic. You should listen carefully to what individual parents are saying about what activities their children are undertaking, whether they have worries about changes in behaviour, withdrawal or distress, reports of aggression towards a child or young person or from a child or young person towards other members of the family or pets.

Be aware and stay informed

Please ensure that just as you would keep yourself aware and informed in relation to domestic abuse agencies, that you have done so in relation to children’s safeguarding and child protection. Check your local Children’s Services website for information about referring concerns. Some local authorities now have information about referral of child protection concerns together with referring for early help because of the potential for crises arising in a family or a specific need for additional support.

It is especially important at a time when local authority Children’s Services are not necessarily making home visits that any information about concerns is referred to them as it may prove critical to ongoing concerns that have been previously referred.

Please add information about crisis family services, including the local authority children’s services to your website. If you know there are local support agencies in your area and have accurate information about their current operation, please add that to your website too.

Your PPC is a good source of early help and support and remember too that the NSPCC helpline is also available if you cannot access local advice due to pressure on their helplines but remember that the NSPCC is also subject of considerable pressures itself. Above all else,
remember that it is better to discuss with individuals where you sense there are worries about coping day-to-day and especially any worries about children than not to address it at all.

Child Inclusive Mediation

See also Supplement to Handbook ‘Working Remotely with mediation clients’

Talking directly with children and young people online is a new means of practice for which the Family Mediation Council and Standards Board (FMC/SB) has not issued any specific guidance as yet. You should be aware of the applicable standards set by the FMC/SB in relation to Child Inclusive Mediation (CIM) and ensure that, should you want to practice in this way, you remain compliant with them and with the FMC Code of Practice. You should also discuss any plans to do so with your PPC and be guided by them. It is very likely that there will be mixed opinions about how appropriate (or not) it is to work remotely with children and young people. There is little doubt that as users of technology, children and young people may probably prefer to meet mediators online. That does not mean it is always (or more) appropriate.

It is essential that you consider very carefully your safeguarding responsibilities and consider how you will ensure these remain in place if you are working remotely with children and young people. This should include thinking through what you will do should a child or young person disclose a safeguarding or child protection concern to you or you become aware and have concerns that there may be a safeguarding or child protection concern to address. This must include thinking through the fact that the child or young person may be at significant risk in their home. Please do not forget that domestic abuse and child protection is not limited to any social or economic class or to any minority or group. Most importantly, at a time of crisis, such as the current pandemic, matters of abuse may arise in any family situation.

Useful skills and considerations

Whether in relation to domestic abuse or safeguarding and child protection, you need to make full use of your skills when making an assessment with individuals or dealing with a concern or a disclosure made when working online.

- **Always make sure that you have explained** your responsibility to keep people and especially children safe from harm, including on your website and in any information, you may provide to prospective clients.
• **Plan ahead**, be comfortable and confident with the use of any technology you use (your own anxiety will easily distract you and transfer to individuals). If at all possible, test ahead with others (and with the individuals you meet) the quality of any connection you intend to use/are using for meetings to get a sense of how good the link is, how well you can see an individual (and they can see you).

• **Always check with individuals that they are able to have a private meeting**, where they will not be overheard or observed in anyway and away from distractions as much as it is possible for them to do.

• **Get as much preliminary information ahead of the meeting as you can**, (and especially whether there has been involvement by any other agencies e.g. local authority children’s services, police etc.). Check for ‘clues’ or indications that there might be concerns you need to clarify but don’t assume, if they are not there, that there isn’t the prospect of abuse or child protection concerns. If you are using software such as Engage, this will aid your ability to spot safeguarding worries.

• **Make sure you have taken individuals through** any additional agreement/arrangements within your Agreement to Mediate setting out arrangements for meeting remotely.

• **Ensure that just as in your face-to-face practice**, you maintain management of the mediation process. Always manage the use of the video technology, inviting people to you even if one or other individual offers use of their own software account (see Supplement to the Mediation Handbook in relation to maintaining balance, clients under the same roof etc.)

• **Take the time in the meeting itself** to ‘connect’ with individuals, remember it is important to socially engage, get the conversation going before asking questions about domestic abuse or safeguarding.

• **Observe body language as carefully as you can**, listen carefully to the responses from the individual.

• **Provide people with sufficient time to answer any questions** (remember they will need time to process information or the question they have been asked) and be confident in using silences.

• **Be confident about exploring any worries that you have in relation to what you hear, or anything said to you**
Using acknowledgement

Making assessments with individuals about very personal matters is a really tough call. It requires very careful use of your skills and your abilities to engage and establish rapport with an individual in a very short time. Adding in the additional layer of doing so online can both help and hinder this process. Some people may find it easier to engage remotely (in the same way as we know people will share quite intimate information via online software programmes, because they feel more anonymous). For others, it may feel awkward and uncomfortable and much more difficult.

Acknowledgement remains a powerful tool for mediators. Just at this time, it is particularly important to have acknowledged the difficulties people are facing; together with allowing them time to say something about their own situation and feelings. This is a very important part of connecting and engaging with an individual and will aid you in being able to reach a point where you can talk to them about what are very personal and intimate issues around abusive behaviours.

Practitioners work in very different ways, some of you may prefer to be very ‘upfront’ and direct about issues of abuse, others may take a more incremental approach. It is very important to try and get a sense of the individual you are meeting with and mould your conversation around what might be most comfortable for them. We know that most people do not find it easy to disclose abusive behaviours and may be very fearful of the consequences of doing so.

Abusive behaviour, whether involving adults or children and young people takes very many forms and your role in making an assessment relates to:

- Is mediation an appropriate, safe choice for each individual?
- If not, what might be an alternative?
- If anyone is at risk, what information/action do they need to ensure their safety (and especially the safety of any child)

You are not ‘fact-finding’ and it is not your role to make any kind of ‘diagnosis’ or judgement about whether there is or is not abusive behaviour and who is responsible for it. It is your responsibility to assess whether mediation is a safe and appropriate process and to act appropriately on any concerns you have.

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.
Working together

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:

1. A clear framework for local ‘safeguarding partners’ to establish, lead, manage and monitor the effectiveness of local services.

2. The legislative requirements and expectations on safeguarding partners and on individual services to safeguard and promote the welfare of children.


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’.

Suspicious 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

Whether you are working with child/ren in physically attended meetings or remotely, 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.

Useful resources:

Resolution Guidance Note: Safeguarding children and young people
NSPCC: Coronavirus: 5 steps to updating your safeguarding policies and procedures (includes booking for free 30 min. consultation)

Resolution Supplement to the Mediation Handbook ‘Working Remotely with Mediation Clients

Resolution Addendum to Agreement to Mediate (for remote working)
https://resolution.org.uk/mediation/handbook/resources/

Family Mediation Council – Code of Practice and Standards in relation to CIM
https://www.familymediationcouncil.org.uk/
Appendix 2: Safeguarding vulnerable adults and domestic abuse

There are critical considerations for all mediators in respect of domestic abuse when working remotely with mediation clients. For some people, the last several months may have increased the risk of abuse happening within their relationship or they may already be suffering increased levels of/or further harm as a result of being together in their home for most in not all of the time. It is essential that mediators are alert to the potential for abuse between adults and/or involving their children and that you do all that you can to assess risk, not mediate where it is not safe, or you are concerned that it may not be safe to do so and ensure that you provide people with a mans to seek protection for themselves and for any children.

Be aware and stay informed

It is important that you have done all that you can to usefully inform yourself about local and national agencies offering immediate help and support to those who are at risk (especially children and young people) or who are or have been victims of domestic abuse (please remember that children whose parents have an abusive relationship are regarded as victims of child abuse. You should also ensure that this information is available on your website and/or in any information that you provide to potential or actual clients. Some local and national agencies have changed the way in which they offer services and may have either increased capacity, or sadly, decreased capacity due to funding issues. You should check so that you remain aware of current arrangements. Please be aware of domestic abuse specialist solicitors in your locality (Resolution Specialist Accredited members are listed in the Resolution directory). Please also be aware of the changes that have been made to Legal Aid Agency regulations to assist those who require funding in relation to domestic abuse advice and representation and especially where it concerns evidence requirements.

Individual Meetings and Information and Assessment Meetings

(See also ‘Working Remotely with mediation clients’

All mediators have a responsibility to carry out assessments with potential clients as part of any individual meeting. Whether meetings are conducted remotely or face-to-face, they should be comprehensive and of sufficient time and depth to ensure that you have carefully assessed with each individual their situation, any concerns they may have, which includes checking carefully with them about their own safety and that of any children.

A further and important aspect for consideration by mediators is the capacity individuals have to participate fully in a mediation process. Emotional capacity can be affected by stress and distress and/or by being subject of domestic abuse and particularly controlling or coercive behaviour. An individual who lacks the capacity to think or speak on their own behalf, lacks access to e.g. financial information or who may be conditioned to act or behave in a certain way or who is fearful of the consequences of speaking up or speaking out is unlikely to be helped by mediation and it may result in their being put at further or greater risk. Remember that some abusers may welcome an opportunity to mediate as a means of continuing their abusive behaviour towards their partner/former partner.

A reminder too with regard to the use of shuttle mediation (see Handbook section). Shuttle mediation where there has been or there is risk of any form of domestic abuse does not afford protection of itself, even where the individuals are living separately. If one is unable to speak for themselves or is fearful of the consequences of doing so, being in a separate ‘room’ (even remotely), is unlikely to aid their capacity to take part fully, freely and equally. If people (and their children) remain together under the same roof, special care must be taken when considering mediation.

Working remotely can make it more difficult to establish rapport with a prospective client and you should think carefully about how to structure your meeting. It is also important to take account of the fact that if there is or has been abuse in the relationship, the individual and/or their partner are likely to have a heightened awareness of any situation where the abuse may come to light, or any action taken that might lead to the abuse being disclosed. Generally, you should check that:

- The individual is in a place and space where they are able to speak openly and are not likely to be overheard or observed
- If they and their partner are still under the same roof, whether they are able to be comfortable about taking time to speak with you and if not, how it might be arranged for them to have a meeting with you when e.g. their partner may be absent from the home or perhaps when the individual is outside of the home (e.g. in their garden, sitting in their car or simply at short distance from their home). Please act appropriately, if you consider that conducting a meeting may lead to placing an individual at risk, try to consider what might help that individual more immediately.
• In any case where it is clear that the individual is at serious risk and a meeting is likely to increase that risk, to consider how to assist the individual to report and seek immediate help.

• If you have a concern that there is a risk of serious or immediate harm but the individual is too afraid to act, you report it to an appropriate agency or at the very least, you speak with your PPC or an agency specialising in domestic abuse/violence about your concerns and seek their advice.

You should, as in your usual mediation practice, seek to engage individuals in any meeting to give them time to settle and feel comfortable in talking with you. Ensure that you have explained that you have a responsibility to keep both adults and children safe from harm and that it is very important to you to make sure that mediation is the right choice for individuals and that people are able to speak on their own behalf without risk or concern about the consequences of doing so. Please make sure that you have explained that an individual meeting is confidential and that you will not be sharing any information without their expressed permission, including with their partner.

Joint mediation meetings

Please remember that just because no-one has mentioned and/or has actively denied abusive behaviour or safeguarding/child protection concerns on initial assessment, it doesn’t mean they are not present, or that something may prompt an incident or incidents once they are in a mediation process. It is not unusual for Individuals to feel unable to disclose at the point of initial contact/s. It is therefore essential that you continue to monitor for concerns throughout the mediation and to make sure that you are able to separate people for individual meetings as may be necessary using your online software. Software such as Zoom has the ability to provide both ‘waiting spaces’ and ‘break out’ rooms. So, in planning ahead, think about making sure that people are aware that from time to time, you may wish to meet with them separately, for a short period, that you will be arranging breaks and that the length of meetings may vary. Please think through and be confident about how you will handle expressed concerns or disclosures where e.g. both people (and any child/children) remain under the same roof.

Vulnerable adults

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:

a) has needs for care and support (whether or not the authority is meeting any of those needs),

b) is experiencing, or is at risk of, abuse or neglect, and

c) 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:

a) having money or other property stolen,

b) being defrauded,

c) being put under pressure in relation to money or other property, and

d) 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. The Mental Capacity Act 2005 has similar legislative requirements in relation to mental health and capacity, please see the relevant section in the Handbook (Equality, Diversity and Ethical practice: Mental Capacity Act).

**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 and emotional aspects of abuse can occur in controlling and coercive behavior.

Controlling behavior

Controlling behavior 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 February 2021, the Domestic Abuse Bill is at its report stage in the House of Lords. 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/](http://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/](http://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](http://www.gov.uk/guidance/domestic-violence-and-abuse)

and in relation to FGM:


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


**Useful questions**

Questions are a very useful tool in exploring an individual’s situation. Please be careful not to interrogate individuals, think about ways in which you can space questions through any meeting, keeping the conversation going and keeping things as comfortable as is possible for the person you are talking with. The questions set out below can be reformulated to suit your own style and they are grouped below (in no particular order) into initial, further exploratory and direct questions. You may well have other questions of your own to add, this is not an exhaustive list, nor is it suggested that you would use all or the majority of these questions in any one meeting.

- How are you at the moment?
• Are you worried about your emotional or mental health at all?
• Who do you think has more say in your relationship?
• Who makes the decisions in your relationship/do you think you make decisions equally, or does one of you usually make decisions?

(Follow up) Is that usually for all decisions, or just the most important things?
• Can you tell me how disagreements get resolved between you?
• Do you think you get into rows a lot? What normally starts a row between you?

(Follow up) who normally starts any row? And who do you think normally ends it?
• How do you manage money between you? Does one of you take control of the money?

(Follow up) Does name [partner/former/partner] control your money?
• How easy is it for you to have information about the money each of you have?
• Does name [partner/former partner] ever access your phone or computer without asking you?
• Do you think you always feel able to speak your mind or express your point of view?
• How do you think name [partner/former partner] might react if you express a different view to theirs?
• How does name [partner/former partner] let you know how they feel?
• How do you think your children [names] are coping at the moment?
• Do you have any worries about any of the children?

Further exploration:
• Do you think you ever get the blame for things if something goes wrong?
• If/when name [partner/former partner] has been or is angry, how does that affect you/what do you do?
• Do you think that name [partner/former partner] controls you in anyway or prevents you from doing things?
• Have you ever felt afraid of name [partner/former partner], or their behaviour?/Do you think name [partner/former partner] is or has been afraid of you?
• Do you think any of your children are afraid of either of you?

• Do you ever worry about name [partner/former partner/] use of alcohol or any kind of medication/drugs?/Do you have worries about your own use of alcohol or any medication/drugs?

• Have you ever worried or are you worried about abuse in your relationship?

(Follow up) Could you give me an example of behaviour or something that happened that has worried you?

• Do you or have you ever felt harassed/controlled by name [partner/former partner]

• As a parent, have you ever been worried or afraid that name [partner/former partner] might harm or hurt any of the children [names]?

Direct questions

• Has there ever been an incident of physical violence between you? Can you tell me what happened?

• Has there been more than one incident? When was the last time? Are they getting worse/more frequent?

• Who do you think was responsible for what happened?

• Have you ever felt that your children may be at risk from name [partner/former partner] or that you might need to protect them in some way?

• Have any of the children ever been hurt or harmed by name [partner/former partner]/you?

• Have you ever had any worries or concerns about name [partner/former partner’s] behaviour with/towards any of the children [name/s]?

Helping and Supporting Individuals

Mediation is not always the right or most appropriate means for people to resolve things between them, doing so remotely brings particular challenges and it is very important that you are careful to make sure that you do all you can to ensure that it is an appropriate and safe choice for them to do so. Please remember that if mediation is not an appropriate means forward for individuals that you have taken the time to discuss and to provide an onward destination or contact from you. This applies equally when, because of a disclosure
or concerns that you have identified, you have decided to refer or report that concern. It is very important in this situation that individuals know what will happen next and particularly that they have the means to protect themselves (and especially any child or children) and know where to get advice and support.

**Useful resources:**

Resolution Domestic Abuse Alert ‘Toolkit’:
https://resolution.org.uk/domestic-abuse-alert-toolkit/

Resolution Supplement to the Mediation Handbook ‘Working Remotely with Mediation Clients’

Resolution Addendum to Agreement to Mediate (for remote working)
https://resolution.org.uk/mediation/handbook/resources/

**Code of Practice and Guidance - Family Mediation Council**

Gov.uk – Home Office guidance – reporting domestic abuse:
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, especially as a result of the current restrictions.

- 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 and individual meetings 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, or mediator and clients altogether in a remote meeting is important – and check out whether that causes the prospective client any concerns. Mention that you always see people individually before starting a mediation process, even if their stated preference is to meet together.

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 Handbook)

At first meetings:

- Always see individuals separately ahead of any joint meeting, whether that is remotely or in person. 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, if you are holding physically attended meetings, 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.

- If working remotely, ensure that you have carried out a careful assessment in relation to abuse or safeguarding issues.

- Even if people are no longer living under the same roof, do not underestimate the potential for abuse of some kind and especially that which relates to controlling or coercive behaviour.

- Ensure that if you are going on to mediate remotely (or in a blended way), you have talked at length and made a careful assessment with individuals, including talking through joining remote meetings with their former partner, ask what they need to help them feel as comfortable as is possible and carefully observe them and consider their answers to questions about their comfort in joining meetings or any request from them to have their mediation conducted without having to see their former partner.
• 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.

• If a physically attended mediation, 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 or safeguarding issues of any kind and that you ensure you remain alert to any signs of any 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. If it is a remotely conducted mediation where both clients remain under the same roof, discuss with them in separate and immediate meetings how their individual safety and the safety of any child can be assured.
• 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. You must do this regardless of whether you are working directly with the child/ren in a physically attended meeting or if you intend to or are working remotely. You should also ensure that you have dealt with all matters referred to in Appendix 1 and in the sections relating to the welfare of children and Child Inclusive mediation.

• 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.
- If working remotely with the child/ren and you are concerned about an immediate risk of significant harm, report immediately and ensure that the Children’s services team are aware of your concern of and the immediate and serious risk.
- 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, be especially alert to the additional pressures and stress because of the current restrictions.
- Ensure information is explicit in pre-mediation materials – website, 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/meeting altogether remotely - is that likely to present any concerns for them? Be clear 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.

If working remotely, do all that you can to assess risk and any concerns you have or that are raised by potential clients. Talk with individuals about how any remote meetings can be arranged, especially if adults remain living under the same roof. Explore with them how they might manage any conflicts that might arise during any meeting, after the meeting is ended.

Listen to/observe clients carefully – ask direct questions (see Useful Questions and 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.

When working in physically attended meetings, ensure safe exits for each and both clients.
• When working remotely, manage meetings to ensure that emotions do not run out of control, leading to an abrupt end to a meeting, plan contingencies carefully with client/s about what will happen should either need to leave a remote meeting.

• Be in touch with your PPC.
Appendix 4: The FMC professional 
compétence standards for family mediation

Introduction

These standards apply to the work of family mediators generally, with specific application to 
assessment for accreditation. They are designed to apply across the contexts in which family 
mediators work – e.g. voluntary sector, private practice, law firms, sole practitioner, co-
mediation etc. They aim to avoid assumptions that limit the context in which they can be 
applied (or make them hostage to changes in regulations, funding regimes, etc).

Note that the term ‘participants’ is used to denote the mediation clients rather than being 
inclusive of the mediator or anyone else who may be involved in the mediation.

A. Theoretical underpinnings

A1 Understand and draw on theories-in-use that inform the practice of mediation

These include:

- theories concerning the impact of separation, loss and conflict on families and 
  individuals
- theories of child development and the impact of separation and other family 
  changes on children and young people
- theories of conflict, co-operation and competition
- theories of communication and engagement
- key processes for resolving family disputes.

A2 Understand the ethical basis and key principles of family mediation

This includes:

- key principles of mediation including independence of the mediator, ‘without 
  prejudice’, child focus, fairness, voluntariness, client competence, confidentiality 
  and its limits, impartiality and neutrality, and participant self-determination within 
  the relevant legal framework
• the impact of the mediator’s personal beliefs, values and style
• distinguishing between the process of mediation and employing other forms of intervention.

A3 Understand the key methods and techniques employed in family mediation

These include:
• different types of intervention and when it is appropriate to use them
• methods that enhance communication in the mediation process
• techniques for dealing with conflict, power imbalance and impasse
• ways of bringing the perspective of children and young people into the mediation process.

B. Professionalism and ethics

This section applies as relevant throughout the mediator’s work.

B1 Work within legal and professional guidelines and the limits of personal capability

This includes:
• working in accordance with the Family Mediation Council’s Code of Practice and with the procedures of the organisation(s) of which the mediator is a member
• operating within the law and following any legal requirements and processes
• only undertaking work that is within the mediator’s competence and capacity, seeking guidance or recommending alternative sources of support where necessary.

B2 Maintain the ability to practise competently and ethically

This includes:
• maintaining an adequate and up-to-date understanding of legislation, policy developments, research and practice relating to the field of family mediation
• maintaining an adequate level of support from a Professional Practice Consultant (PPC)

• taking responsibility for personal learning and development, including identifying areas for development, acting to meet learning objectives, and learning from practice.

B3 Respect the needs and individuality of participants

This includes:

• maintaining sensitivity to the needs of individual participants
• acting in accordance with the principles of equality and diversity
• responding to and addressing cultural and gender issues effectively and sensitively
• taking into account, and acting with sensitivity towards, any issues of mental health, learning disability or other potential barriers to participation in mediation.

B4 Balance the need for confidentiality with that for safeguarding

This includes:

• applying and upholding the principle of confidentiality and respecting the privileged nature of family mediation, other than where there are overriding and ethically sound reasons to do otherwise
• responding appropriately and effectively to any domestic abuse, safeguarding or child protection issues.

B5 Act with integrity and fairness

This includes:

• acting in an even-handed manner
• acting with openness, transparency and integrity.
C. Mediation practice

C1 Explain mediation to participants

This includes:

- being clear about the difference between an initial consultation or assessment meeting and a mediation session
- explaining the principles, potential and limitations of mediation
- explaining the different methods of mediation that are available and how they would work
- explaining CIM and the child’s rights perspective to parents/carers, discussing ways in which children and young people can be listened to and encouraged to offer their perspectives and suggestions and to giving active encouragement to parents/carers to provide such an opportunity for the child (for mediators submitting portfolios from 1.9.19)
- explaining that the principles of CIM are consistent with the fundamental principles of mediation (for mediators submitting portfolios from 1.9.19)

C2 Assess the suitability of mediation for participants

This includes:

- assessing, initially and on an ongoing basis, suitability for mediation in respect of (a) the dispute, (b) the participants, and (c) all the circumstances of the case
- helping the participants to decide on the appropriateness of mediation for their situation
- signposting participants to complementary or alternative services where appropriate
- ensuring that participants are aware of their right to seek independent legal advice.

C3 Check eligibility for financial support

This involves identifying any public or other funding that is available and, where appropriate, carrying out and recording accurate financial checks for eligibility.
C4 Assess and respond to domestic abuse and child or other safeguarding issues

This includes:

- screening effectively with each participant separately for domestic abuse or harm to themselves, children or others
- identifying any potential for unreported domestic abuse or harm
- providing appropriate information on sources of assistance and protection from harm, including emergency remedies
- notifying appropriate outside agencies, and the mediator’s PPC, where necessary.

C5 Provide relevant information about services and options available to participants

This includes, at the level appropriate to the participant and the situation:

- providing information about family law and its processes
- providing unbiased information about other relevant means of family dispute resolution
- providing information about sources of assistance for parents, children and families
- maintaining (and explaining to the participant) the distinction between information and advice.

C6 Establish the environment, agenda and ground rules for mediation

This includes:

- setting up mediation as appropriate for participants’ needs
- creating a safe and neutral environment for mediation
- identifying and agreeing the issues that will form the agenda for discussion
- establishing the principle of balanced participation, and agreeing how this balance will be maintained throughout the process
- clarifying issues of, and limits to, confidentiality.
C7 Use effective skills and interventions during the mediation process

These include things such as:

- using different types of question appropriately
- using relevant listening, communication and mediation skills to aid mutual understanding and rapport, help participants to move forward and to overcome blocks in progress
- facilitating participants’ lateral thinking, problem solving and option development.

Further guidance on the skills that will be looked for during assessment are provided in the portfolio guidance document.

C8 Maintain progress towards resolving issues

This includes:

- managing the discussion of matters in a way that facilitates effective progress
- managing effective financial disclosure
- recognising and dealing effectively with impasse
- managing strong emotions and conflict sufficiently to allow the mediation process to move forward
- managing power imbalances to avoid detriment to either participant.

C9 Produce an appropriate and agreed outcome statement

This includes:

- ensuring that all mediated outcomes follow a clear rationale, are reality-tested, and are approved by both participants
- using appropriate language and drafting formats
- ensuring congruence between ‘without prejudice’ mediation summaries and open financial statements
- ensuring that only appropriately open facts are included in open financial statements
• drafting financial settlements that are capable of legal implementation and accord with current legislation
• setting out any matters that have not been resolved.

C10 Record decisions and maintain participant files
This includes recording, at the appropriate points in the process:
• the assessment as to the suitability of mediation
• participants’ agreement to mediation
• any ground rules that are established
• the location, timetable and practicalities of mediation
• details and outcomes of each session, including any proposed actions (for participants and the mediator) and matters to be taken forward to the next session.

C11 Review individual cases and overall practice
This includes:
• identifying any significant personal learning points from cases
• initiating case discussions with PPCs
• contributing as needed to reviews of individual cases and to overall service provision.