Guide to Good Practice on Mediation

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The Dispute Resolution Committee of Resolution has drafted the following good practice guide for all Resolution mediators as a means of setting out and encouraging best practice within the mediation community. The guidance sets out an explanation of the principles of mediation and a framework for the conduct of consistent and high quality mediation practice.

1. Qualifications, training and ongoing professional support

All mediators should be aware of and adhere to the training and qualification requirements as set out by Resolution and by the Family Mediation Council (of which Resolution is a member organisation).

Mediators should ensure that they meet continuing professional development (CPD) requirements and have a professional practice consultant (PPC) to support and guide their practice. Information regarding CPD requirements and in relation to PPCs can be found in the DR Documents section of the Resolution website.

1.1 Publicly funded mediation practice

Mediators must hold a family mediation contract if they are to offer publicly funded family mediation and must be accredited/competence assessed to the standard required by the Legal Services Commission/Legal Services Agency. There are only two routes to recognition for delivery of publicly funded mediation: the Family Mediation Council (FMC) Assessment of Professional Competence (APC) scheme and the Law Society’s Practitioner Membership of the Family Mediation Accreditation Panel. Full details and application forms can be downloaded from the FMC and Law Society’s websites.

Mediators who offer publicly funded mediation must also meet all the requirements in regard to qualification, CPD, professional practice consultancy (referred to by the agency as supervision of practice), client service, management and administration, as set out in the Family Mediation Quality Mark Standard (MQM) and contract. All mediators providing publicly funded mediation services must also ensure that they meet the requirements set out by the Legal Services Commission in relation to appropriate administration of their contract, including obtaining all documentary evidence from clients in regard to their eligibility for publicly funded mediation.¹

1.2 Conduct of mediation information and assessment meetings

Mediators who carry out MIAMs must be recognised for the conduct of such meetings. Full information in regard to recognition can be found on the FMC’s website.

¹ For full information, see www.legalservices.gov.uk/docs/cls_main/MQM_Standard_Sep09_with_cover.pdf.
1.3 Child inclusive mediation: direct consultation with children

Mediators who see children directly as part of a parental mediation process must have completed recognised training and assessment, and their 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. Additionally, mediators must hold an enhanced CRB check.

1.4 Accreditation

Resolution encourages all mediator members to work towards achieving an accredited standard of practice. With new arrangements for the provision of family law and justice services, all mediators should ensure that they are working towards an accredited standard of practice and are alert to changes in those standards and any additional professional requirements placed upon mediators.

Full details of the requirements for Resolution mediator accreditation can be found on the Resolution website, but please note that Resolution accreditation is a badge of excellence for its member mediators and does not confer recognition to conduct publicly funded mediation.

1.5 Professional practice consultancy

Professional practice consultancy is designed to ensure that mediators have the guidance, support and help of an experienced consultant or supervisor (who is an experienced mediator, trained and recognised to act as a practice consultant).

The PPC’s role is to:

- assist new mediators as they begin their practice (including checking mediation document drafts);
- support mediators in practice (including assisting them to achieve accredited status); and
- to be available to support mediators with issues that may arise in their day-to-day practice (including providing support to any mediator where there has been a client complaint).

Where mediators provide publicly funded mediation, the PPC provides practice supervision to the terms required by the Legal Services Commission in its family mediation contract, which includes review of mediation files. A PPC who undertakes this role must be accredited to the Mediation Quality Mark (MQM) standard required by the Legal Services Commission via the competence or accreditation standard routes offered by the Family Mediation Council and the Law Society.

The Family Mediation Council (of which Resolution is a member) and the Law Society both set requirements for consultancy in their Codes of Practice, which can be downloaded from their websites.

Mediators are required to meet with their PPC on a one-to-one basis and may also accrue their additional required hours by meeting with a PPC as a member of a peer group. A level of consultancy can be provided via telephone/Skype, but mediators should be aware that this cannot be the greater part of their required PPC hours. Many PPCs lead peer groups or arrange with mediators to offer peer group meetings in local areas. The PPC network is still growing and there are shortages in some areas, so some PPCs travel to see mediators some distance from their own home area. PPCs can also nominate CPD points for other learning activities undertaken by their consultees and mediators should check with their PPC before undertaking/booking courses or other activities that they wish to have counted for this purpose.
There is a charge for time spent with a PPC. Rates vary, so mediators should ask what the individual PPC’s rate is when they make contact with them. Many PPCs offer rates which are lower than their usual hourly rate (in any other professional role they have) in order to ensure that they offer an affordable service to mediators. PPCs who travel to consultees generally charge for travel so mediators should check this too if they choose a PPC who is at distance from them.

It is up to mediators to choose and maintain contact with a PPC whom they think best meets their needs. It is important that the relationship between mediator and PPC is good, productive and comfortable, so mediators are encouraged to choose their PPC carefully. PPCs should offer a contract or agreement for the purposes of setting out arrangements for professional support, which should be signed by both mediator and the PPC. If a mediator wishes to change or move on, then their PPC will expect that the mediator will let them know that is their intention and any new PPC chosen by the mediator will want to check that the former PPC has been informed of the mediator’s decision to change.

Mediators need to be aware that they must meet the requirements for time spent annually with their PPC as set out by Resolution from the Codes of Practice of both the FMC and the Law Society. PPCs generally expect to spread the time and support they provide to mediators over the year as a means to properly support the mediator in practice and mediators should discuss with their chosen PPC a schedule for their consultancy over the year.

PPCs are responsible for assessing whether mediators have met all the requirements for recognition to conduct MIAMS, in line with the requirements of the Family Mediation Council. Mediators should therefore take careful note of the requirements as they apply to their individual situation and prepare any required evidence to discuss with their PPC.

PPCs also prepare a ‘witness testimony’ or professional practice development statement, which forms part of the mediator’s accreditation/competence application/portfolio. Mediators should be aware that in order for their PPC to be able to do this, they must have sufficient knowledge of the mediator’s professional development and practice leading up to their application for accreditation/competence assessment.

2. Scope and principles of mediation

Family mediation is a process in which those whose relationship is ending or has ended, regardless of whether they are a couple or other family members, appoint an impartial third person to assist them to communicate better with one another and to reach their own agreed and informed decisions concerning some or all of the issues relating to their separation, divorce, children, finance or property by negotiation. Family mediation may also be appropriate in other family transitions, in respect of other family disputes or, for example, in relation to inheritance planning or disputes.

Family mediation is a principled and structured process of family dispute resolution. In assessing for suitability and in conducting mediation, all mediators should ensure that they fully explain the principles of mediation to prospective clients/clients and make sure that at all times they adhere to those principles in practice.

2.1 Impartiality

The requirements in regard to impartiality and conflicts of interest are set out in the code/s of practice of both the Family Mediation Council and the Law Society. Generally, mediators must:
• Be aware of and act in a way that is impartial and balanced as between any participants to the mediation.

• Have no 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 or continue to act if they or a member of their firm has acted for any of the individuals in issues not relating to the mediation.

• Not accept referrals from any professional practice with whom they are employed, in partnership or contracted and which is involved in advising one of the participants on matters that relate or are capable of relating to the mediation, even though the practices are separate legal entities.

• Not refer a participant for advice or for any other professional service to a professional practice with whom they are employed, in partnership or contracted, if that advice or service relates or is capable of relating to the mediation, even though the practices are separate legal entities.

• Conduct mediation as an independent professional activity and must distinguish that activity from any other professional role the mediator may practise.

**Impartiality in practice**

Mediators have a particular responsibility to ensure that they seek to prevent any manipulative, threatening or intimidating behaviour by either client. They 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 or is likely to prevent the mediation from being a fair and/or effective process, mediators should consider taking appropriate steps, including ending the mediation if necessary.

In setting up or assessing for suitability for mediation, mediators should ensure that prospective clients are informed as early as possible of the mediator’s duty to conduct any mediation process in an impartial and balanced manner. This can be done in a range of ways:

• through the early provision of information to prospective clients;

• in any early telephone or other discussion with prospective clients;

• in any pre-mediation meeting or MIAM;

• at the point of discussing and preparing to sign the agreement to mediate; and/or

• giving permission to clients to raise any concern they may have at any point as to the mediator’s impartial conduct of the mediation.

### 2.2 Voluntary participation

Mediation and the participation of all – mediators and clients – is voluntary at all times.

With the introduction of the pre-application protocol and the new arrangements to come into place as
a result of the government’s response to the Family Justice Review, the Legal Aid, Sentencing and Punishment of Offenders Act and the introduction of court-referred mediation schemes, it is critical that all mediators continue to ensure that:

- Prospective and current clients are alerted to and reminded that mediation is a voluntary process.
- Prospective clients have the opportunity to explore whether mediation is the right and voluntary choice for them.
- They consider whether a mediation process should commence or continue if there are concerns in relation to voluntary participation, and particularly where the mediator considers that either or both clients are unable, unwilling or lack appropriate capacity to take part in the process fully or freely because of, for example, abuse or threat of abuse (in which case the mediator must raise the issue and discuss their concerns with the clients and consider whether to suspend or end the mediation process).
- They do not give reasons for people deciding not to take part in mediation, or apportion blame of any kind to a decision not to enter or continue with mediation, for the purposes of completing an FM1.

As above, the principle of voluntary participation can be made clear to prospective clients/clients in a range of ways.

2.3 Neutrality

Mediators must remain neutral as to the outcome of any mediation. This requires that mediators monitor their practice at all times to ensure that they are not seeking to impose their own preferred outcome or to influence either or both clients towards an outcome not of their choosing.

Resolution mediators do have a responsibility, however, to inform clients if they consider that the outcome/s they are considering might or would fall outside that which a court might approve or order. Mediators may also provide legal and other information designed to assist clients in a mediation process to make informed decisions, but must make it clear that they do not provide partial advice of any kind. Information should be provided as neutral and mutual, and not ‘individualised’ to either client. Mediators should also 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 that would assist them in reaching an outcome.

2.4 Confidentiality

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

Mediators should be aware of the existing precedent that guides confidentiality in the mediation process: 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 later in relation to finance and property etc).
Mediators should also be aware of other more recent precedents in relation to civil/commercial cases which may impact upon family mediation, and of the European Directive (2008) Art 7.

Any correspondence and/or discussions with either client’s legal or other advisors can only take place where the clients have given permission for this to happen and mediators must act in a balanced way in providing information so that any information is provided in an even-handed way to both legal advisers. It is too often the case that 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 mediators should consider the usefulness of keeping in touch with legal advisers and of forwarding mediation documents to them as part of good client service. Resolution mediators are expected to hold in mind the importance of good legal advice and that mediators and legal (and other advisers) should endeavour to work as a team to provide the best, most efficient and economical client service. However, they must also ensure that they have explained principles of confidentiality to the clients and have obtained their permission to be in contact with their legal advisers.

2.5 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’ (DfE 2010). Mediators should also be aware of the local arrangements set out by each children’s safeguarding board for their area, which are available via the internet (enter the name of the nearest town or city followed by ‘children’s safeguarding board’). Wherever possible, mediators should make contact with their local children’s services duty team to discuss local arrangements for reporting, to gain an understanding of if, where and when it is appropriate to report, and the action that the team would take should a report be made.

Where a specific allegation that a child has suffered significant harm or is at risk of significant harm, mediators must stop the mediation process and discuss with the clients the limits of confidentiality, their responsibility in regard to protecting children from harm, and the allegation that has been made. They must then decide what action should or must be taken, which includes making a report to their local children’s services duty team.

Where a mediator is concerned that a child is at risk of immediate significant harm they must, having discussed and agreed their course of action with the clients, report immediately. If the mediator is concerned that discussing with the clients their concern about an allegation would place the child or children at immediate or increased risk of significant harm, they should not discuss the issue with the clients and make an immediate report to children’s services (Working Together, Ch 5, 5.16).

Mediators also have a duty of care in relation to adults at risk of or subject to harm due to an abusive relationship. They must consider the potential for honour-based or other violence and where this is the case, mediators should take appropriate steps to ensure that they discuss with clients an appropriate course of action, which may include reporting or referring clients to an appropriate agency. Mediators should not make judgements about either client in regard to what has been reported but seek to provide information and assistance to each and both clients in an even-handed way. Mediators should also take care to ensure that in all cases of safeguarding concerns, ‘next steps’ are discussed with clients and an appropriate onward destination from the mediator is agreed. Great care must be taken to ensure safe exits for clients in these circumstances.

A brief record of what happened and the actions of the mediator should be made as soon as possible.

In all cases relating to safeguarding concerns, mediators should be in contact with their PPC for support, advice and guidance as soon as is possible and practicable.

Full details on how practitioners should deal with such situations can be found in the Resolution protocols for mediators, which are available on the Resolution website.

2.6 Confidentiality, privilege and legal proceedings

Discussions, client negotiation and proposals made within mediation must be conducted on a legally privileged basis. Mediators have a responsibility to ensure that clients understand the nature of confidentiality and of legal privilege, and are content to sign the agreement to mediate on the basis that, in doing so, they agree that discussions and negotiations in the mediation process are not to be referred to in any legal proceedings and that mediators cannot be required to 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.

For clarity and as information for mediators, in Farm Assist v DEFRA [2009] EWHC 1102 (TCC) Ramsey J, having reviewed all available mediation precedents, defined ‘confidentiality’ and ‘privilege’ as follows:

- 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 is 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/property discussions or proposals.

Mediators should also be aware that, more recently, attempts to utilise other civil judgments have started to emerge, whether it is 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] 1 WLR 2436), or on interests of justice principles (Farm Assist v DEFRA [2009] EWHC 1102).

Clients must also understand and agree that all factual information in regard to financial issues must be provided on an open basis, so that it can be referred to in any legal proceedings.

All prospective mediation clients should also understand and agree that all information or correspondence provided by either of them in a mediation process should be shared openly and not withheld, excepting any address or telephone number or as the clients may agree otherwise.
2.7 Safeguarding and privilege

Mediators must make clear to clients 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.

2.8 The welfare of children

Mediators have a special responsibility in regard to the welfare of any child of the family and should encourage and assist client parents to focus on the needs and interests of their children and their future parenting.

Mediators must consider the wishes and feelings of any children of the family and encourage parents to consider the ways in which they may consider their children’s views, wishes and feelings.

Where it is appropriate to do so, mediators may discuss with client parents whether and to what extent it is proper to consult with their children directly in order to ascertain their wishes and feelings. Where clients and mediators agree that it is appropriate to do so, and there has been appropriate discussion with the parents as to how and when this might take place, the consent of any child or children must first be obtained in a way that is appropriate to each child, taking into account their age.

Any mediator consulting directly with a child or children must have been specifically trained to do so and must hold an enhanced CRB check; they must also provide appropriate facilities for direct consultation. They must offer children confidentiality as to any discussions, except where the child discloses an issue of significant harm. Where a mediator suspects that any child is suffering or likely to suffer significant harm, they must ensure that the child understands that another person, responsible for the safety of children, will be informed and, unless it would place the child at further or immediate risk of significant harm, the mediator must talk to the parents about getting help and advice. In any event, mediators must also inform parents (excepting where in talking with the parents it would place the child at risk of immediate or further significant harm) that they have a duty to report the matter to an appropriate agency.

Where mediators consider that client parents are or are proposing to act in a manner likely to be seriously detrimental to the welfare of any child of the family, they must consider ending the mediation, having discussed with the client parents their reasons for doing so and ensuring that this is outlined in any closing or future communication.

See the Resolution protocols for further advice.

2.9 Abuse and power imbalances within the family

As touched on above, all mediators must be alert to the likelihood of power imbalances existing or emerging between clients in a mediation. Mediators must ensure that all clients take part in mediation willingly and without fear or threat of violence or harm. They must undertake appropriate screening procedures before the commencement of and during any mediation process.

Where a mediator has concerns that there are, may be or have been issues of abuse, harm or violence, they must discuss with each and both clients whether taking part in mediation is appropriate, the client’s capacity to take part and must provide information about available support services.
Where mediation does take place, mediators must ensure that principles of voluntary participation, fairness and safety are adhered to and that they ensure the safety of all clients, especially on arrival and departure.

Mediators must also ensure that they endeavour to prevent manipulative, threatening or intimidating behaviour by either client during the mediation.

3. Conduct of mediation

3.1 First contacts: assessing suitability and appropriateness

Mediators must always ensure that prospective clients are given full information about the principles and process of family mediation in order that they can assess for themselves and with the mediator whether it is the right choice for them in all the circumstances.

Whether through or from another professional, or directly from a prospective client, on receiving a referral mediators should ensure that they carry out appropriate checks in regard to any conflict of interest.

At the first point of contact, whether by telephone or personally, mediators should check the individual’s understanding of mediation and discuss principles, including that:

- mediation is a voluntary choice for all those involved;
- it is confidential – subject to the usual caveats set out above;
- the decision-making authority rests with the clients; and
- the mediator acts in an impartial way.

Mediators should also provide an outline of the mediation process, and stress that as they conduct an impartial process and act in a balanced and neutral way, they would prefer not to take details from prospective clients as to how they individually view the situation, but rather that it would be helpful to know what the prospective client hopes to achieve via mediation, what they believe to be the most important issues to deal with, and the reasons for those hopes or objectives.

Mediators should start their process of screening by stating their responsibility for safeguarding individuals, especially children, and by asking open and direct questions about whether the prospective client has any concerns about meeting together with their former partner (see also safeguarding/screening in the MIAM below). At all times, mediators must remain aware of the importance of maintaining impartiality and balance in any dealings with clients – both before and during mediation. Care must be taken in relation to the prospective client’s opinion of, or narrative around their former partner and/or their individual perception of the situation, to ensure the mediator does not become (or be perceived to have become) partial to the view of one client rather than the objectives and aspirations of both.

Information should also be provided on the mediation process, eg an indication of length and average number of sessions required, and the documentation that will be prepared by the mediator. This should include an explanation of financial disclosure and the privileged status of the memorandum of understanding or outcome summary/statement (and that it is an expression of the proposals reached in mediation and not a binding agreement, the value of individual legal advice, and how clients may
then achieve a binding agreement. Prospective clients should be provided with the following ahead of any first meeting:

- a preliminary information form (which should be completed and returned to the mediator ahead of any first meeting);
- a blank agreement to mediate;
- information about the mediation process; and
- details of fees and charges.

Generally, where direct contact is made by one prospective client, mediators should ask them to ensure that their former partner makes contact with the mediator. This avoids mediators making a ‘cold’ contact with a prospective client who may be unaware that their partner or former partner is considering mediation. Great care should be taken in handling the sensitivities of first contacts at all times.

Resolution precedent documents may be downloaded from the Resolution website.

### 3.2 The importance of screening processes

All mediators should be aware of and conversant with the scope of abuse in couple relationships, which is not limited to forms of violence alone. Some forms of abuse are subtle, and may include controlling behaviour which has resulted in one person’s inability to be self-determined or act independently of the other, forms of emotional abuse or bullying that have led to a serious loss of self-esteem in an individual, reducing their capacity to take part in discussions on an equal footing. It is essential therefore that all mediators ensure they have a clear understanding of, and carry out a process of, screening for all aspects of harm or abusive behaviour, whether in the past, ongoing or alleged. It is also critical that mediators remain alert to factors in the clients’ past or continuing relationship which may put either client (or their child) at risk, or affect either client’s capacity to take part equally in a mediation process. Prior to starting a mediation process, mediators should offer a confidential meeting to each client (as mentioned above) in which they outline the main safeguarding/screening issues discussed above, and discuss any concerns they may have voiced in any telephone conversation or recorded or indicated in their returned preliminary information form.

This is to clarify whether mediation is the right and voluntary choice for them and consider with them what would assist in ensuring that they can take part in any process of mediation comfortably, openly and without fear or anxiety.

Where it is the case that mediation is not an appropriate or suitable choice, mediators should ensure that they have discussed with that prospective client next steps to ensure their individual safety or that of any child or children (including any report that the mediator will make to appropriate authorities where it is appropriate to do so).

Mediators are not under any obligation to share or to disclose information relating to abusive behaviour discussed in individual meetings to the other prospective client as the meeting is offered pre-mediation and as a confidential meeting. (Note however, that mediators should make clear that confidentiality offered in an individual meeting is subject to the usual caveats set out above and 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 subsequent mediation process). The mediator’s role is not to make judgements about either or both clients and/or their situation, but to
assess with each the suitability of a mediation process given all the circumstances and where it is not, that each client has a forward path beyond the meeting that ensures the safety of all concerned.

3.3 First meetings

Good practice dictates that an individual meeting is conducted with each prospective client. Even where the clients’ stated preference is to meet together, mediators should explain and ensure that prospective clients are seen separately in order to carry out a screening process, to check information provided by the client on their preliminary information form, and to discuss any special needs or arrangements that would assist them to engage in the process comfortably and confidently.

3.4 Mediation information and assessment meetings

At present, MIAMs are triggered by intent to issue proceedings. Clients in this situation may be less likely to engage with mediators in the first instance and care should be taken in making contact with each and in providing an explanation as to the purpose of the meeting. Resolution believes the information and assessment meetings offer a significant opportunity to engage with clients and to 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. Good practice guidelines are that these meeting should not be less than 45 minutes and more generally one hour, and should be charged for accordingly. (The FMC guideline suggests that mediators should not charge less than the current publicly funded rate.)

Wherever possible, appropriate and practicable mediators should offer an information and assessment meeting to both the applicant and respondent, even where the prospect of mediation might seem slight, as it is also important that individuals have an opportunity to consider the other options available to them and to discuss any other information needs they may have and for which the mediator may ‘sign-post’.

Mediators should consider carefully how they can best and most economically provide information to referrers and to prospective attendees about the purpose of information and assessment meetings, and consider the means by which they will gather information ahead of the meeting in order that they may use the time spent with the attendee to best advantage. This may include:

• Information provided on the mediator’s/practice website.

• Leaflets provided to referrers for client use.

• A short, preliminary information form to be completed by prospective clients and returned to the mediator (bearing in mind that attendees may not wish to provide a great deal of personal or sensitive information prior to meeting).

Mediators should provide information about the purpose of the MIAM, ensuring that prospective attendees understand that it will provide an opportunity to consider:

• Whether and what process of dispute resolution might be available and suitable for them.

• Any information they might need in relation to their circumstances, eg the effect of separation for children, parenting apart, the legal process, and ‘signposting’/next steps information
pertinent to their circumstances, eg in relation to debts, housing/ accommodation, benefits, personal professional support services etc.

Mediators need also to ensure that information is provided in a neutral and mutual way, bearing in mind that they may subsequently be acting as mediator with the two people whom they have met separately.

Mediators conducting information and assessment meetings may conduct these as confidential, subject to the usual caveats. However, and with a view to the potential for mediation, they should also explain that mediation is an open process and that if individuals subsequently choose to mediate, pertinent information would need to be shared.

### 3.5 Safeguarding/screening in the MIAM

It is essential that mediators carry out a process of screening for harm or potential harm as part of the invitation to, and at, the MIAM. It is likely that people who have been or are in an abusive relationship which has remained unreported will be among those who will be required to come to a MIAM. Where there are issues of harm, mediators must ensure that, as above, they adhere to their duties and responsibilities in relation to safeguarding and ensure the appropriate reporting and that information is provided to clients as to next steps. See the Resolution mediation protocols for more detail in this area.

### 3.6 Public funding

All mediators are required to be able to assess prospective attendees for eligibility for public funding for mediation. Mediators should provide information to prospective attendees about eligibility limits and/or refer them to the Community Legal Advice Service. Information can be found on the direct.gov website, or use the eligibility calculator. Much of this information will migrate to the new information hub towards the end of 2012.

Mediators who do not hold a contract for the delivery of publicly funded mediation should make clear to both referrers and individuals that this is the case and refer them to those practices that can offer public funding. Where prospective attendees state a preference to meet with a mediator who cannot offer publicly funded service even though they know that they are or would be eligible for public funding (and who wish to pay privately) those clients should confirm in writing that this is the case.

### 3.7 The first mediation meeting

Prior to any first meeting, whether an individual or joint meeting, mediators should take care in establishing an appropriate environment for mediation. This should include:

- Appropriate arrangements for waiting – especially where either client has voiced concerns about seeing or meeting with their former partner in the first instance. Reception staff should be properly briefed to be able to welcome and arrange waiting for each client.
- Mediation rooms should be comfortable and mediators should ensure that all required documentation and resources are available within the room.
- Mediators should check that there is easy exit from the room for both clients and for themselves (and that they have properly briefed support staff and have a strategy in place should any issue of abuse arise during the mediation).
Wherever possible, mediators should have an appropriate and private space available should either client need to take a break during the mediation meeting.

At a first meeting mediators should ensure that 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 mediation process. Care should also be taken to ensure that arrangements for payment have been discussed and agreed before commencing the first mediation meeting.

Mediators should then...

- establish the issues to be discussed and resolved;
- create with the clients a mutual agenda; and
- begin to discuss with the clients 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.

If the clients are intending to deal with their finances in the mediation, time should be set aside towards the end of the meeting to go through the (mediation) form E or other financial form to be used in order to explain to clients the sections pertinent to their disclosure and to provide any information to assist them in assembling the information and documentation that will be required to provide a full and frank disclosure. Mediators should provide clients with information about the necessity and requirements of financial disclosure and that whichever route they choose to settle financial issues between them, an open disclosure of finances will be required.

Mediators should explain to clients that they will require completed forms E or other financial form returned to them ahead of the meeting (usually 3-4 days ahead) and that if the completed forms are not received then it may not be possible to proceed with the meeting. An explanation of the importance of supporting documentation should also be provided to clients, along with the fact that although the mediator is not responsible for verification of documentation, they will assist clients in how they might ensure that this happens appropriately and to an acceptable standard.

The issue of pension valuations remains a difficult one for the purposes of recording financial disclosure as it can take considerable time for documents to be produced. Mediators should discuss this fact with clients, suggest that they contact the pension provider as soon as is possible and enquire as to the expected length of time it may take to get a pension valuation.

Generally, a gap of not less than four weeks should provide clients with sufficient time to gather most of the information and documentation that they need in the absence of a pension valuation, and mediators should ask clients to use their most recent annual pension statement unless and until they receive a valuation. Clearly, this will vary between individual clients and mediators should plan with clients according to their individual and joint situation.

3.8 Establishing financial disclosure

Before the mediation meeting where finances and financial disclosure is to be discussed, mediators should ensure that they have received from each client a completed (mediation) form E or other financial form to be used and copy supporting documents (unless it is the case that the clients are to bring the documents to the meeting and the mediator is to copy them then.) If the completed forms have not been received by the date agreed at the previous meeting, mediators should take steps to
contact clients to check whether there has been a problem in returning them and whether the client can ensure they are with the mediator in good time before the meeting.

On receipt of the completed forms, mediators should:

- Check through each one, noting any areas of discrepancy between each client’s recorded figures, missing information that will need to be provided and any other features of note.
- Copy both forms in order that mediator and each client has a set of both forms (and, if provided, any supporting documentation).
- Optionally, mediators may wish to draft a ‘pencil’ schedule of major figures as an *aide memoire* for themselves in the meeting with the clients.
- Prepare an outline for scheduling client information on the flipchart.

At the meeting, mediators should, as in all meetings, first check with both clients whether any matter has arisen since the last meeting that may need to be dealt with ahead of the scheduled recording of finances.

**Mediators should then...**

- Reiterate the purpose of the meeting.
- Explain the use of the flipchart and check that each and both clients are comfortable with the recording of their finances on it.
- Explain that they will transcribe the information once listed on the flipchart into a draft open financial summary/statement and send it to each client as a ‘working’ document for the remainder of the mediation process and until financial disclosure is complete.
- Explain that they have copied both form Es or other financial form to be used so that all will have a copy of each, and ask that clients work with them on a page by page basis to record their joint financial situation.

Financial information provided by both should then be recorded on the flipchart to set out:

- Assets.
- Liabilities and debts.
- A family budget of income and significant outgoings – this last relates to the ‘here and now’ – future income/outgoings/budgets should be reserved to discussions relating to options for the future as part of reality testing any proposals the clients are considering.

Resolution mediators, as family specialists, will have a clear understanding of what needs to be included in any financial disclosure and how to check out areas of discrepancy, uncertainty or missing information. Mediators should also ensure both clients have a clear understanding of the information recorded and why it is required. An important part of recording financial disclosure is for clients to be properly informed about their own finances and confident in their ability to negotiate together towards developing options for settlement.
Mediators have a responsibility to ensure that they assist clients in making a full and frank disclosure of their finances. However, it is not the mediator’s role to interrogate. Where it appears to the mediator that financial information is being withheld or where either or both clients are unwilling to disclose financial information, then the mediator should consider whether to end the mediation and to discuss with the clients alternative means of resolving financial issues between them. Otherwise, financial disclosure should be at a standard equivalent to that which would be required by a legal process or court-scrutinised route, unless as otherwise agreed and recorded by both clients.

3.9 Arrangements for children

Where separating or separated parents are considering future arrangements for their children, mediators should ensure that they:

- Gather information about each child as an individual in order 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.
- Set out the factors that can cause emotional harm to children and young people.
- Provide information about services of support and assistance for separated parents, children and young people – bearing in mind that it is often the case that reactions to parental separation are generally within a normative range. Children benefit most from the support of each 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.
- Mediators should, however, be alert to parental concerns about their child’s behaviour that is clearly outside that which might be considered normal – eg self-harming, eating disorder, risk-taking behaviour, drugs, alcohol abuse etc – and for which parents should be provided with information and links to specialised services of assistance.

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. Parents should be assisted in considering:

- What and how to tell their children about their separation and future living arrangements.
- How to balance their parenting between each and both parents and the importance of children being able to grow up in a close and loving relationship with both of their parents, though apart.
- How to manage parental communication in a way that best meets the needs of their children and especially in relation to providing appropriate boundaries for their children.
- Sharing information such as addresses as to where their child or 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 new relationships of the parents might best be managed as far as children are concerned.
• Arrangements that have significance for children and young people – eg for 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.

• Consideration of 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.

Wherever it is appropriate, mediators should assist parents in setting out their aspirations as separated and co-operative parents in the memorandum of understanding or annexed to it as a parenting plan/parenting agreement. Parenting plans/agreements should not be a means of simply setting out the ‘metric’ of separated parenting – the time children will spend with each parent – but a statement of how parents hope to raise their children though apart.

3.10 Developing options

Once mediators and clients have gathered all the information that is needed to make informed decisions about the future, clients should be assisted to consider all the options that may be available to them. Mediators must take care not to provide clients only with options that they, the mediator, believe would be an appropriate outcome, but they can assist clients by providing other options that the clients may not have thought of or put forward, so long as they avoid any indication that the option 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 order or approve. Mediators should also be alert to where and when it would be helpful for clients to seek individual legal or other advice and encourage clients to do so.

3.11 Preparing to draft documentation

Resolution provides model document outlines for both open financial summaries/statements and for the memorandum of understanding. Mediators should be aware of the headings in these documents and ensure that at a point where the mediation is coming to a conclusion, they check with clients that they have covered all pertinent areas, including eg the drafting of wills, signing of articles of severance, any prospect of inheritance, tax and benefits.

3.12 Drafting and presentation of mediation documents

Mediation documents are of great significance to clients, recording as they do the commitment they have made and the work they have undertaken in the mediation, often in difficult and emotional circumstances. Documents should always be of a quality and standard that reflects that significance. Mediation documentation is also the ‘shop window’ of mediation – that part of a mediation that is seen externally – and mediators should therefore ensure that documents are carefully prepared, well presented, and accurate.
3.13 Recording

Any recording undertaken by the mediator as part of the mediation process is open to the client’s scrutiny. Mediators should explain this to clients and, if note-taking, should keep such notes to the bare minimum of facts, tasks yet to be undertaken and any other information that assists both clients and mediator to progress the mediation. Mediators may wish to consider whether they should send 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, separately if they prefer. Mediators who choose to do so should also ensure that their fee information reflects this, or that any such correspondence is costed into their overall fee.

For professional practice purposes and particularly when working towards accreditation/competence assessment, mediators 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/or techniques they used in the mediation;
- what went well, and what, on reflection, they might have done differently; and
- what areas of professional practice they 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 the mediator and their PPC, and as a means of preparing their accreditation portfolio.

3.14 The memorandum of understanding/outcome statement or summary

This document should be clearly marked as ‘confidential’ and ‘without prejudice’ and the precedent paragraphs from the Resolution model document must be used at the opening of the document.

All headings in the model document should be addressed and if a particular issue has not been discussed in the mediation, it should be indicated that this is the case. Where there are outstanding matters to be resolved, these should also be noted in the document. If a mediator has 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 the mediator should record this as a caution within the document.

Language used in mediation documents should be clear, unambiguous, neutral and balanced. Formal legal terminology should be avoided (unless an explanation as to the term used is also provided). Use of the words ‘agreed’ and ‘agreement’ should be avoided in the memorandum of understanding in order to ensure there is no confusion as to the status of the proposals made in mediation.

Mediators should ensure that they have drafted a bullet point summary of the proposals that clearly sets out the proposals reached, with a timetable wherever possible and practicable.

The memorandum or outcome statement/summary is the mediator’s recording of the outcome from the mediation and is signed by the mediator and not by the clients (this also ensures that there can be no misunderstanding about the non-binding nature of the document).
3.15 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 and an indication given in the opening paragraphs as to whether the document is a full disclosure, or whether disclosure is not yet complete and the date that the clients have agreed applies to their disclosure.

Usually, a ‘working’ draft of this document will have been prepared by the mediator following the joint recording of the financial information provided by the clients. Once all financial information has been finalised as far as possible, the mediator should prepare a final version that can be signed by the clients at the last meeting.

Background information should be factual and care should be taken when recording 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 set out the client’s finances clearly (including details of account/policy numbers/references) and any significant points flagged up – including where there is any information still to be provided/not yet available. The schedule should include all assets and liabilities, and a separate schedule setting out income and present outgoings should also be included. A further schedule of documents seen should be provided, with copies of these, and the client’s individual (mediation) form Es or other financial form attached.

This document is signed by the clients rather than the mediator as an indication that it is their agreed financial disclosure.

3.16 Variations – disclosure

Obtaining financial information, particularly in relation to CETV/pension valuations, can cause considerable difficulties in mediations. Where it does not prove possible to obtain a valuation but the clients wish to proceed with their negotiations, or clients state that they do not wish to deal with any pensions, mediators must make clear that as pensions can represent a significant family asset there is a danger that any proposals reached in regard to their finances may be set aside once a valuation of the pension is made. A caution should also be placed in any documentation as to the fact that pension information has not been made available or that clients, having received information about the importance of pensions, have stated their wish not to discuss or deal with any pensions and that the clients need to be aware of the effect this may have on any proposals reached/recorded.

Occasionally, clients may decide that they wish to proceed as far as is possible in their negotiations even though they are waiting on a pension valuation/CETV – and especially if they are aware or have been informed that information may take months rather than weeks to be available. Having provided information about the importance of pensions, mediators should 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. Whatever the case, mediators have a duty to ensure that clients are provided with the best possible service – and one that does not result in proposals that are unfair or cannot be taken forward to a workable or binding conclusion as a result of missing financial information.

As noted earlier, where clients decline to provide full information on any aspect of their finances, or the mediator has a concern that disclosure is being withheld, they should consider with the clients whether
to terminate the mediation. If so, they should provide clients with a written confirmation as to the reasons for ending the mediation and a note of any proposals outside of the financial matters that have been reached in the mediation. If this is provided as a memorandum of understanding, the mediator should record that the mediation was ended as it was not possible to obtain full financial disclosure and record only those proposals made in relation to non-financial matters.

3.17 Money laundering, fraud etc

Mediators have a responsibility to ensure that prospective and current clients are properly informed about the mediator’s duty to disclose suspected or actual fraudulent or criminal intent. This information is detailed in the agreement to mediate and the client’s attention should be drawn to it and reminders provided if the mediator has any concern that the client may make such an allegation or disclosure.

Where mediators have any concern in relation to allegations – or potential allegations – of a fraud or other criminal offence, they should pause the mediation process, remind clients of the limits of confidentiality and of their duties, and where necessary or appropriate end the mediation, ensuring that clients have a ‘next step’ for assistance beyond the mediation process.

3.18 The effect of *Bowman v Fels* – mediation

‘Money laundering’ refers to the process of concealing the source of legally, illegally, and grey area-obtained moneys. The Proceeds of Crime Act 2002 (and as further amended by the Serious Organised Crime and Police Act 2005 and the Serious Crime Act 2007) sets out legislation in relation to money laundering offences and includes provisions requiring businesses within the ‘regulated sector’ (banking, investment, money transmission, certain professions, etc) to report to the authorities suspicions of money laundering by customers or others. One consequence of the Act is that solicitors, accountants, and insolvency practitioners (and some businesses, eg banks), who suspect as a consequence of information received in the course of their work that their customers or clients (or others) have engaged in tax evasion or other criminal conduct from which a benefit has been obtained, are required to report their suspicions to the authorities (since these entail suspicions of money laundering). 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 in *Bowman v Fels* [2005] EWCA Civ 226 excluded settlements of existing or contemplated litigation from ss327 to 329: that decision, logically, applies equally to mediation and to mediators.

The Court of Appeal 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, eg 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.’

Therefore in general and practical terms, mediators and mediation is excluded from ss327–329 of the Proceeds of Crime Act.

Mediators should also be in contact with their PPC for early guidance and support in relation to concerns about money laundering, fraud or criminal intent.

3.19 Payment for mediation documents/concluding the mediation

In all cases, the mediator should discuss with clients the cost of providing whatever type/nature of documentation they want.

Mediators should ensure that they have explained at the outset and have reminded clients at the conclusion of the mediation that there is a charge for the preparation of mediation documentation. (Generally, the recommended charge for documents is the cost of a mediation session.) On completing the mediation documents (which should not be more than a maximum of 10 working days from the date of the last meeting), mediators may wish to inform clients that the documents are available and will be forwarded to the clients on receipt of payment. Mediators may also take payment for the mediation documents at the last meeting if this is acceptable to both clients. In any event, mediators should ensure that they have clearly set out arrangements for the payment and delivery of mediation documents.

On release of the documents to clients, mediators should ensure that they remind clients of the onward path from their mediation – encouragement to see a solicitor for individual advice on their proposals with a view to formalising their proposals into a binding agreement/consent order.
Mediators should consider diarising a ‘follow-up’ letter to clients to check that the clients are progressing with their proposals and to invite clients to return to mediation if they have encountered any problems.

3.20 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, mediators should 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. Mediators should take care to ensure that where they do not provide a full memorandum of understanding, they ensure that any documentation they do provide is appropriately headed to indicate the status of the document.

3.21 Payments on account

Mediators may take payments on account if they have appropriate arrangements to do so and should ensure that they keep a detailed breakdown of time spent. If mediation should end or break down ahead of the time the client/s have lodged payment for, mediators must ensure a prompt return of any outstanding client funds and provide a detailed breakdown of costs incurred. Mediators should also be aware that as mediation is a voluntary choice, they should also consider whether taking payment at the end of each session is a more appropriate means of indicating and confirming that it is the client’s choice as to whether they will continue in a mediation process at the conclusion of each meeting.

3.22 Non-payment

Generally, mediators should not send documents until payment has been received from both clients. However, from time to time it is the case that one client provides payment but the other does not. In this case, mediators must provide the client that has paid with the documents (as they have been paid for). Mediators should contact any client who withholds payment to discuss the reasons why this is the case and to consider with the client how payment can be made/collection.

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

3.23 Ending a mediation process

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

- There is a power imbalance between the clients that cannot be addressed.
- It becomes apparent that either or both clients lack capacity to take part or to negotiate together or to reach a workable, fair and reasonable outcome.
- There is an allegation made in regard to harm or abuse, whether between adults or in respect of a
child and the mediator decides that it requires appropriate protection action. Here the safeguarding guidelines must be followed.

- There is deliberate non-disclosure of financial information.
- Information is disclosed, an allegation is made or the mediator suspects 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.
- The mediator believes that for any reason related to the principles of mediation, it is inappropriate to continue.

Where a decision is made to end the mediation, the mediator should ensure that they have discussed with clients the options that remain available to them to resolve their issues or conflicts and ensure that they each and both have an onward destination or immediate ‘next step’ beyond mediation.

3.24 Dealing with client concerns and complaints

Mediators have a duty to ensure that they have provided information to clients in relation to any concerns or complaints they may have in relation to the mediation process or the mediator. The agreement to mediate details these arrangements for ease of information giving. Mediators should endeavour to resolve any concern or complaint with the client as a first stage where it is possible to do so. Where it does not prove to be possible to resolve a complaint, clients should be provided with information as to how they can make a complaint for investigation by Resolution. All mediators must ensure that they have current and valid membership of Resolution if they have nominated Resolution as the route for any client complaint. Once a client complaint has been received by Resolution, it will be investigated as set out in the practice support ethics and standards section of the website.

3.25 Monitoring performance/practice – client feedback

Wherever possible and practicable, mediators should consider how they will monitor their practice and performance by gathering client feedback as to their experience of the mediation. Mediators who provide publicly funded mediation service are required to do so as part of the terms of their contract and mediators working with private clients should also consider the importance of this aspect of monitoring their practice.

3.26 Relationships between mediators and solicitors

In order to provide the best client service, mediators should carefully consider the role the client’s legal advisers have and the importance of creating a co-operative working relationship that best aids the clients. Mediators should consider with clients whether and how the mediator will keep in touch with their solicitors. As a matter of courtesy, mediators should inform solicitors where they have been in contact with a client in regard to a mediation process and/or if a mediation process is about to be undertaken. Otherwise, mediators should agree with clients whether it would be helpful for the mediator to send solicitors any updated information as to progress of the mediation, a note on referral to solicitors for individual advice and the particular areas/subjects for such advice, and copies of
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mediation documentation. Mediators must ensure that any contact they have with legal advisers is in a neutral and balanced way and have the agreement of both clients as to the level of any contact. Mediators must also remain observant of the principles of mediation and ensure that any contact with legal advisers does not breach fundamental principles of practice.

Involving lawyers more directly in the mediation process is dealt with below.

4. Other professional practice considerations

Thus far we have has set out the mediation process as it is usually expected to be conducted. However, 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. Where a mediator believes that varying their approach to the process is appropriate, they should, in the first instance, discuss their plan with their PPC and follow the guidance given. At all times, they must first check that their planned approach does not breach any of the fundamental principles of mediation. Examples of variations might include:

- involving others in the mediation process who the mediator believes 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);
- the involvement of adult children in the mediation; and/or
- any other client situation where the mediator believes that mediation has a good chance of success but requires a variation in the way in which it will be conducted.

Set out below are some of the more commonly used/considered methods of practice and practice considerations.

4.1 Co-mediation

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

- There are complex family and/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.
- The balance between mediators from different professional backgrounds might assist in the resolution of the particular issues in a mediation (eg an IFA 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.
- There is a need to conduct the mediation as a ‘shuttle’ process for all or at least part of the mediation (where this choice is made because of issues of abuse between clients, unaccredited
or less experienced mediators may wish to 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.

Where mediators intend to offer co-mediation, they should ensure that:

• They discuss with prospective clients the potential for co-mediation and why it may be of particular assistance in their mediation.

• Consideration is given to an appropriate fee.

• They properly plan and set up any co-mediation and ensure that they and their co-mediator have prepared to work as a balanced team rather than as two individual mediators.

• Clients know that both mediators work as a balanced team rather than as mediator and ‘expert’.

• Where it would be of assistance, they talk with a PPC to ensure a professional approach to co-mediation.

4.2 Involving solicitors in a mediation

Generally, mediation is a discrete process conducted with the clients alone. However, on occasion and where appropriate, it may be helpful to involve the client’s 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/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.

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 and the involvement of solicitors within it.

• The role of the solicitor/s within the mediation.

• When solicitors will be involved – for one meeting/throughout the mediation/as felt necessary and appropriate/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/s, expectation of provision of advice to clients privately during the mediation process etc.
Mediators should take care that they do not compromise the solicitor’s relationship with their client where they may be uncertain as to whether the solicitor would accept an invitation to participate in a mediation process. Any discussion with clients in regard to solicitor attendance should therefore be on the basis that it would be for the client and solicitor to discuss together whether it might be possible and practicable in all the circumstances.

Mediators should also make clear that such attendance will attract additional fees for their solicitor’s time in attending.

4.3 General guidance for solicitors supporting clients through a mediation process

Solicitors should ensure that they have an accurate understanding of the principles, process and conduct of mediation in order to inform clients accurately as to the appropriateness and/or suitability of it in relation to their client’s situation. Mediation is most effective when clients, solicitors and mediator work together in achieving an appropriate outcome. 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 important that all clients are made aware that mediation is a voluntary choice and that they cannot be compelled to take part. They may be required to attend a MIAM (under the terms of the pre-application protocol), or if encouraged or ordered to do so by the court in order to be informed about mediation and other forms of dispute resolution that may be available to them and to consider with a mediator whether their particular circumstances are appropriate for a process of dispute resolution. But it remains the client’s choice as to whether they take up the opportunity to mediate matters.

Mediators do not provide information about the client’s decision not to undertake mediation. It is 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.

Mediators will generally and as a courtesy inform solicitors if/when clients decide to enter a mediation process but will not report to the solicitor any aspect of the discussions between the clients in mediation unless and until the clients agree that the mediator should have contact with their solicitors, and in what terms.

During a mediation process, mediators will encourage clients to seek individual legal advice on any aspect of their discussions where it is pertinent to do so. Mediators will provide information about the legal process and general legal principles and associated matters (eg the operation of CSA/ CMEC) but do not provide any individualised advice. It is therefore very important that clients are able to take advice as and when they need it. Mediators will also explain their respective solicitors’ responsibility in providing ‘individual best interest’ advice to clients, whereas in mediation, people are seeking to make proposals that best meet their collective needs – and especially those in relation to their future parenting and the needs of any children.

Proposals made in a mediation are legally privileged and without prejudice – the privilege belongs to the participants to the mediation and together they may choose to waive it. Confidentiality of discussions within the mediation, however, remains with the mediator and clients. Even if the clients choose to waive their confidentiality, the mediator may enforce the confidentiality provision, except where an order of the court or the law imposes an overriding obligation of disclosure.
Participants in a mediation are informed that they will be required to make full and frank 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 Es and from documentation provided to evidence the information which has been provided by them in their respective 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 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 it will be likely that their respective solicitors will need to do so and will detail and attach copies of documents seen to the summary document.

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 and on which clients will require independent legal advice, and usually a consent order to be drafted 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 (eg wills, tax considerations etc).

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 required by Resolution of its mediator members.

4.4 General guidance for solicitors participating or considering participation in a mediation process

As already stated, mediators should consider all aspects of involving clients’ solicitors. They should also take responsibility to ensure that solicitors are protected from any breach of professional regulations set and/or required by the SRA should they attend as part of a mediation process.

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

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

- Attending with their client with a view to establishing the issues and matters pertinent to the mediation process and supporting their client in clarifying such matters.

- Attending as observers to the mediation with a view to advising their client on aspects identified as requiring specific advice that would assist the parties in reaching decisions.

- Attending to both 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/s.

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 is an option the mediator would like to consider with the clients.

In all cases, this should be understood as a matter for consideration as between mediator, clients and their respective solicitors. It is 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.

4.5 Working with or as part of a collaborative process

From time to time, mediators 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. Mediators should ensure that they approach any mediation of this type and nature in the same way as they would any other mediation process, that is:

- Check with the prospective clients that this is a voluntary choice for them and is suitable for mediation.
- Provide information as to what mediation is and how it is normally conducted.
- Carry out appropriate screening and safeguarding.
- Ensure that the clients are content to sign an agreement to mediate.
- Provide appropriate documentation at the conclusion of any mediation process.

Occasionally, collaborative practitioners may request that a mediator conducts or ‘chairs’ 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 the considerable attention of the respective collaborative practitioners, leaving them less able to manage the forward progress of the meeting.
- There are other reasons or concerns that have led the collaborative team to believe that the assistance of a neutral professional would assist progress.

Whatever the case, mediators should ensure that they carefully consider whether the circumstances are appropriate for their involvement, and discuss with the collaborative team their understanding of mediation and the skills/role of the mediator. Mediators should check with both clients as to their agreement that the involvement of a mediator is acceptable to them. Mediators should then ensure that they have an appropriate agreement to provide mediation assistance in the context of the collaborative process in which they will assist. This should include the expectations, responsibilities and role of all those involved (including in relation to fees). Mediators should seek the guidance of their PPC in relation to involvement in a collaborative process.
4.6 Mediation where there is or has been abusive behaviour in the couple relationship

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

It is possible for mediators to consider whether a form of ‘shuttle’ mediation may be appropriate, and if so, they must still seek to establish whether in doing so they can ensure:

- Each client’s protection from (further) abuse or harm can be assured.
- 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).
- They have discussed other support or assistance that may be required to ensure suitable help for either client during a process of mediation.
- They consider working with a co-mediator as a suitably balanced professional team to best manage all the circumstances.
- They are particularly alert to the issues that may arise in relation to confidentiality and impartiality.

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

- That there is no current investigation by local authority children’s services (in which case mediation should be deemed unsuitable).
- That where there has been an investigation, the mediator has 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, they seek to discuss with the parents/carers whether and how the key worker should be informed or involved in any subsequent decision to mediate.

4.7 Court-referred mediation

All mediators should be aware of the guidance published by Resolution in relation to working with the court and of the FMC information issued to judges, magistrates and court staff in relation to court-referred or annexed practice.

Generally, mediators must ensure that they do not breach fundamental principles of mediation in offering or providing mediation services with/to their local court. They should 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, any mediation process should be provided away from the court environment and mediators should avoid providing time-limited mediation on the court premises.

Mediators should also ensure that any suggestion that a child should be consulted as part of the court process in order to provide information to the court in relation 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. Direct consultation with children as part of an adult mediation process 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). Mediators should 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 the mediator will not provide information to the court in regard to the discussions held in mediation.

Resolution thanks Angela Lake-Carroll for writing this good practice guidance, September 2012.