

New standards for Mediation Information and Assessment Meetings

Resolution's response to the Family Mediation Standards Board

Resolution's 6,500 members are family lawyers, mediators and other family justice professionals, committed to a non-adversarial approach to family law and the resolution of family disputes.

Resolution members abide by a Code of Practice which emphasises a constructive and collaborative approach to family problems and encourages solutions that take into account the needs of the whole family, particularly the best interests of any children.

We also campaign for better laws and better support and facilities for families and children undergoing family change.

Our current records indicate that 684 of our members are mediators with 285 of those offering legal aid family mediation services.

The content of the MIAMs Standards and Expectations, and the accompanying Guidance

Standards and Expectations

1. We believe that many former couples and parents are potentially uncertain about the purpose of the MIAM and sometimes wrongly think that their only options are mediation or issuing a court application (which defeats the purpose of the MIAM). Mediation is an important and successful dispute resolution process in suitable cases. But the collaborative process, round table negotiations, arbitration (both the children and money schemes) and private FDRs may be more suitable or alternative options in some cases. The understanding of different processes by a professional, and the accuracy of the information and the explanation provided by a professional, are also fundamental to people making an informed choice i.e. knowing about a process, understanding it, believing it is appropriate for them and starting to use it successfully. Otherwise, they may not know about a process at all or simply assume it isn't suitable.
2. To make the best use of MIAMs, accurate information must be given to individuals about the full range of means of resolving matters and joined up approaches. There should be a more detailed explanation of how processes can work to resolve disputes and enable people who maybe can't speak to each other to have a constructive, assisted dialogue aimed at finding solutions.
3. Under the Children and Families Act 2014 a "family mediation information and assessment meeting", in relation to a relevant family application, means 'a meeting held for the purpose

of enabling information to be provided about mediation of disputes of the kinds to which relevant family applications relate, ways in which disputes of those kinds may be resolved otherwise than by the court, and the suitability of mediation, or of any such other way of resolving disputes, for trying to resolve any dispute to which the particular application relates...'

4. Looking at Standard 1 and across the Standards and Expectations, shouldn't the provision of information about other processes (as well as about mediation), and the benefits and challenges of using such, therefore be part of the Standards as opposed to Expectations? Perhaps with an expectation that some couples will be directed to other processes.
5. There should be clearer reference to the importance of accuracy in terms of explaining other out of court processes, and the type and extent of information to be provided. This would also better support mediation in the context of multi-disciplinary working and as part of a range of joined up approaches, rather than it being perceived as a siloed hurdle to court proceedings. Consideration might be given to the FMC's member organisations agreeing accurate online information and factsheets about the various processes. Resolution would be very happy to assist with this.
6. We also query whether Standard 1 should specify 'tailored information' on the suitability of mediation and other out-of-court ways of addressing issues arising from separation.
7. In our view, the provision of information about the importance of legal advice to support mediation should be specified as a standard i.e. it should be more than an expectation, and reflect the good practice of the majority of mediators who themselves encourage parties to have independent legal advice to support and inform the mediation process, and as a protective measure.
8. We suggest Expectation 2ii) should be to ask appropriate questions to enable them to assess each potential participant's emotional readiness to mediate 'or use other processes'.
9. Under Standard 3 on Assessing safety and suitability, in relation to the mandatory recording of reasons, mediators will clearly need to be careful what and how they record information about another person for data protection purposes. Any information seen by the FMSB/within the FMC for assurance purposes would, we think, have to be on a suitably anonymised basis which is of course another burden on the mediator. The accompanying Guidance should cover this point.
10. Members have questioned whether part of Standard 4 'Due to the mediator's obligation of confidentiality to all MIAM participants there must be only one reason declared for mediation not proceeding – that after review with both potential participants the mediator considers that mediation is not suitable' conflicts with Standard 3 – is the requirement to declare only one reason or to record the true reason?
11. In terms of preparing a first client for a mediation before having had any contact with and assessed the second, providing too much detail can be unhelpful if mediation doesn't actually go ahead. It also causes problems when work is undertaken to prepare the first client for mediation only to find that then the second won't or doesn't want to engage which can increase tensions between them in any event, or when information comes to light from

the second client that makes mediation unsuitable. Would provision of perhaps an FMC recommended factsheet be considered adequate?

12. Standard 6 which specifies that 'The mediator must conduct MIAMS for each potential mediation participant separately', and the first part of Section 6 of the Guidance are welcome. It is the experience of our members that the LAA is pressing for more meetings to be joint for the purposes of approving payment. This approach risks individuals being coerced into attending with an abusive partner. It is also the case that the thought of a joint meeting can be a deterrent to some respondents, who might otherwise attend and benefit from an individual meeting. However, will the FMC Code of Practice be amended to ensure clarity and consistency? This needs to be dealt with as well as consideration of the issue of consecutive meetings.
13. Members have expressed concerns about the expectation that 'The mediator is expected not to conduct a MIAM immediately following a meeting with any other person who may be a participant in the same mediation, unless conducted via a video call. The mediator is expected not to arrange MIAM which is to be followed immediately by a mediation session in the same case.'
14. Now and in future we believe both more assessments and statutory MIAMs are likely to be conducted remotely, and this standard is likely to encourage that.
15. We understand that there are a range of views, for example, there can be advantages to back to back meetings, including personal autonomy, equality of engagement and efficiency and effectiveness, provided participants are given informed choice, questionnaires are completed in advance and warnings given that there may be circumstances where there may be a need to pause on a case by case basis. There shouldn't be any real or perceived hurdles for those who both or all wish to mediate.
16. We expect mediators and other family justice professionals to carry out appropriate screening and make an assessment of risk factors in relation to safeguarding issues in relation to the protection of any child or adult from harm, understand coercive control as well as 'violence', and to be aware of what is going on in the background for families. Assessment of the capacity of the individuals concerned to take part in mediation and its suitability, with appropriate safeguards if necessary, for resolving their particular dispute is critical.
17. We query whether the approach proposed in the consultation is necessary if acceptable processes are in place, and whether such will be workable and possible under legal aid contracts. But we agree that the safeguarding of vulnerable individuals is the most important factor and that, on balance, this approach should be taken.
18. Expectation 7 indicates that a MIAM would usually be expected to last for at least an hour. To require mediators to justify their reasoning in respect of each MIAM which does not last for one hour will be unduly onerous. We believe it is unnecessary and the length of the MIAM required is a matter for the mediator's professional judgment.
19. The wording of Standard 8 seems to us to contradict Standard 6. This is confusing.

20. It may be helpful to clarify the expectations (in 8) around contacting the other party/ies where the prospective applicant wishes only to proceed to court.
21. Generally, our members will ask how a mediator professional proves they have met the standards and how will those be audited. Some of the purpose of the planned assurance process is to provide that veracity check, but even so, whatever paperwork is required, it is still possible for a mediator not to have done what is required. The FMC and FMSB must have some level of trust in the integrity of mediators and their PPCs further to them meeting training and accreditation requirements.

Accompanying Guidance

22. In Assessing safety and suitability (Part 3 of the Guidance), it could perhaps be clearer that the presence of a 3rd party supporter relates to a mediation rather than a MIAM, or it might be better omitted from this guidance and covered elsewhere.
23. In determining next steps (Part 4 of the Guidance), there should be clear reference to 'if mediation is suitable' before determining the most appropriate method of mediation.

The proposed MIAMs assurance processes

24. There is already an onerous training and accreditation process (and the extensive costs of such) in place. The monitoring aspects of the confirmation of continuing adherence to professional standards requirements seem to us to be unnecessarily burdensome and potentially bureaucratic, particularly around Data collection and submission and Case sampling/spot checks, rather than contributing to how it will actually be known whether a mediator has done a good job or not.
25. Those mediators with legal aid contracts are already subject to heavy and sometimes unnecessary administration and audit requirements which, together with the rates of legal aid pay (the current legal aid rate is £87 per MIAM from first engagement, including financial assessment, to sign off), impact the sustainability of providing legal aid services.
26. Initial meetings and statutory MIAMs themselves should not become overly convoluted and audited. This would not effectively evidence what mediators are actually doing. And, as the FMC and FMSB are aware, there is a commercial reality to being able to deliver MIAMs even if the mediator doesn't do legal aid work.
27. Specific points:
 - a) Client feedback forms, which are rarely returned, are not necessarily a reliable source of evidence or reassurance.
 - b) In any event, it will be onerous for a participant to have to complete a feedback questionnaire after their initial meeting or MIAM if they then proceed to mediation. Surely the correct time should be at the end point of their use of the mediation service and the conclusion to a case (which is when legal aid providers have to seek feedback). It would make sense for there to be one feedback form, with one set of questions. We suggest this needs to be drafted with the Legal Aid Agency in mind

to avoid unnecessary duplication of work for practitioners and duplication of forms for clients.

- c) We are not persuaded that the key data recording proposals need to be part of the formal assurances process, and we ask that they be removed. They appear to us to be onerous and would need to cater for all according to whether a case was legally aided, private client or some form of mix. Legal aid providers already have systems and case management software (which can be expensive to alter) in place and report that they will not have the administrative resource to complete information for the LAA, case management information, and separate information for the FMSB.
 - d) Given that legal aid fees have not increased for many years, the fees charged are relatively small for a MIAM and to have to then spend additional non chargeable time collating information not readily available needs to be reconsidered.
 - e) It will be impossible to use this form of data gathering as a means of evidencing mediator compliance, client choices or other matters. For example, how is it suggested that a provider captures information about what steps a client chooses next (assuming it is not mediation)? Where the court form is signed it should not be presumed that they are always used. Court forms might not be requested for weeks after the MIAM. Many go away to digest what they have heard (given the amount they are told and given) and mediators won't know what is happening if they don't come back.
 - f) Whether private paying participants will feel it appropriate to consent to certain information being shared with the FMSB also requires consideration.
 - g) How will 'national rates of conversion' be set? We don't think that they can be because of the demographic, socio-economic mix of the population and any number of other factors.
 - h) How exactly will the FMSB cover off and monitor the information that is being provided e.g. the quality and accuracy of information being provided about for example about other processes and co-parenting? There are of course a number of processes, and they change or develop organically over time. What are the FSMB's expectations around this, particularly as new approaches are increasing and in light of recommendations for more 'joined up' and 'holistic' services? No one service (for the time being) can necessarily deal with everything and approaches should not be regarded as competing with one another but as relatable and joined for the benefit of clients.
- 28.** We reiterate that our members will ask how a mediator professional proves they have met the standards and how will those be audited. Some of the purpose of the planned assurance process is to provide that veracity check, but even so, whatever paperwork is required, it is still possible for a mediator not to have done what is required. The FMC and FMSB must have some level of trust in the integrity of mediators and their PPCs further to them meeting training and accreditation requirements.

The two general approaches adopted being

- a) The three-layered format of the new standards – that of Standards, Expectations and Guidance; and**
- b) The principle of reliance on the rigorous establishment and demonstration of the professionalism of mediators, to underpin assurance processes.**

- 29. We support in principle the approach of Standards, Expectations and Guidance. There should be rigorous (which does not mean complex, costly or difficult to attain) standards, and this review is a positive step.
- 30. But this remains an enormous, onerous, one size fits all and prescriptive specification for what is an initial, relatively short and low paid meeting, important though it is to get it right in terms of content and delivery. Having two parallel but separate audit systems which are not joined up is a real concern for legal aid providers.
- 31. It will be important for the FMC and FMSB to carry the mediator community with them in introducing new standards. We would strongly urge the FMSB to have in mind the fragility of the remaining legally aided mediation supplier base and the number of mediators prepared to offer a statutory MIAMs service. Our members report that conducting MIAMs, together with the pre and post work involved, has proven to be not economically viable at legal aid or private rates (when so many people are not financially eligible for legal aid but have little disposable income, and even if undertaken remotely).
- 32. As an FMC membership organisation, we are minded of the need to balance the standards requirements with the needs of mediation businesses and the wellbeing of individual mediators so that they can continue to meet the needs of families and children.
- 33. It is in fact both timely and imperative to reconsider the requirement for a mediator to be accredited to conduct a MIAM (which is of course not a mediation) with mediators receiving robust MIAMs training as part of qualifying as a mediator. There are currently multiple barriers to achieving mediator accreditation, not least cost. It is a nonsense that qualified mediators are available but not able to conduct MIAMs at a time when it is critical to direct separating couples to out of court issues resolution including, but not limited to mediation.

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