Lawyer’s guide to Victoria Legal Aid Family Dispute Resolution Service (FDRS)

How to get the most out of going through FDRS, for your client

October 2023

# About this guide

This guide has been prepared to support new family lawyers who may be unfamiliar with the VLA Family Dispute Resolution Service, and how to support clients through the mediation process. It may also be useful for more experienced practitioners, as a refresher or as additional information to consider.

Please provide any feedback you have on the guide to sam.lawry@vla.vic.gov.au

# Acknowledgement of Country

This resource was written on the land of the Wurundjeri and Boon Wurrung people of the Kulin Nation. We acknowledge and pay our respects to Aboriginal and Torres Strait Islander peoples and Traditional Custodians throughout Victoria, including Elders past and present. We also acknowledge the strength and resilience of all First Nations people who today are still arrested and imprisoned at rates far higher than other Australians.

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## ABOUT FDRS

Victoria Legal Aid (VLA) has provided a family dispute resolution service since 2004 (prior to the legal requirement to attempt dispute resolution), through what is now named the Victoria Legal Aid Family Dispute Resolution Service (FDRS).

We operate a lawyer-assisted model of family dispute resolution, to help vulnerable families resolve their family law disputes. We conference cases with a range of issues, including:

* parenting issues
* division of property
* spousal and adult child maintenance, and
* international child abduction cases.

We offer a multidisciplinary, case-managed service. We have an external panel of Chairpersons, with both social science and legal backgrounds, as well as in-house mediators, as well as a panel of Child Consultants who support our Kids Talk program.

We generally deliver 1000 conferences a year, out of approximately 1500 cases referred to us, some of which are assessed as unsuitable or otherwise don’t proceed to conference.

### Approach to resolution

Family systems and conflicts are complex, and the way conflict is handled is crucial for the participants. FDRS provides an opportunity for a facilitative conversation between vulnerable family members, with lawyers playing the role of supportive professional participant, managed by experienced FDR practitioners (what we call Chairpersons). We support families to manage separation issues and negotiate outcomes, with decisions made by participants outside of the court environment and the opportunity to explore issues that may be affecting the workability of arrangements.

With parenting arrangements, FDRS encourages parents to focus on their children so they can:

* develop parenting plans that are in the best interests of the children (focusing on maintaining safe relationships, connections with culture, and promoting child development and participation)
* improve parental communication and co-operation, and
* reach solutions that work for the family as an alternative to litigation.

We offer subsequent conferences, so that participants can test and review any arrangements made.

### Key FDRS features

* Available at **early intervention** (before court) or **litigation intervention** stages (after court proceedings have started).
* Each grant of legal aid for FDRS includes **two conferences**, with the ability to apply for an extension for a third conference or more.
* Promotes a **child inclusive process** by offering a Kids Talk program, through which children’s voices and experiences can be heard.
* Offers support to **each party** in a family dispute, including intensive case management by case managers and conferencing by experienced legal and social science mediators.
* Responsive to client needs:
	+ for **Aboriginal and Torres Strait Islander clients**, community members or important family members can participate in the conference, which can be facilitated by an Aboriginal mediator, where possible
	+ a trauma-informed, **inclusive client-centred approach**, to support diverse families
	+ **safety planning and safe conferences** for vulnerable clients, with referrals to family violence and other support organisations
	+ **support people** can ensure participation, where needed
	+ **referrals** for support with mental health, drug and alcohol abuse, parenting courses and to legal assistance, where people are unrepresented.

### Interpreters and other supports

If a client requires particular support to be able to participate, such as an interpreter or other aid, FDRS will arrange and pay for this for each stage of the process, including any conference.

### Cost to your client

There are no fees for parties to attend FDRS. When an initiating party (P1) has a grant of aid to attend FDRS, this covers the costs of preparation and attendance at up two conferences. Any other party (P2, P3 etc) will need to apply for a grant for FDRS or pay a lawyer privately, to be represented. In some cases, FDRS can arrange a duty lawyer service for P2 or any other invited party, where this is necessary.

### Client eligibility

To use our service, one of the parties (which may be an Independent Children’s Lawyer) must have a grant of legal assistance from Victoria Legal Aid.

To be eligible for a grant of legal assistance in parenting cases at FDRS your client must:

* satisfy a means test and a merit test
* demonstrate a ‘substantial issue in dispute’ AND
* be a priority FDRS client or fit other criteria.

See Guideline 1.2 FDRS for adults in parenting disputes for further information.

To be eligible for a grant of legal assistance in property cases at FDRS, your client must meet the relevant criteria for property matters (see Guideline 9), which includes the requirement that they are a priority FDRS client and may include a requirement that there is no current legal parenting dispute.

#### VLA Handbook information

* [4 – Commonwealth family law and child support guidelines | VLA Handbook for Lawyers](https://www.handbook.vla.vic.gov.au/node/5732)
* [Guideline 9 – property disputes | VLA Handbook for Lawyers](https://www.handbook.vla.vic.gov.au/node/6159)
* [Important information about FDRS | VLA Handbook for Lawyers](https://www.handbook.vla.vic.gov.au/node/6038)

#### Priority FDRS client

A priority FDRS client is either:

1. a person with one or more of the following vulnerabilities:
* [a disability](https://www.handbook.vla.vic.gov.au/node/6054#disability-def)
* [a diagnosed serious mental health issue or psychological illness](https://www.handbook.vla.vic.gov.au/notes-key-definitions#diagnosed-psychiatric-or-psychological-illness)
* [cultural and/or language barriers](https://www.handbook.vla.vic.gov.au/node/6054#cultural-andor-language-barriers-def)
* [literacy barriers](https://www.handbook.vla.vic.gov.au/node/6054#literacy-barriers-def)
* [drug and/or alcohol issues](https://www.handbook.vla.vic.gov.au/node/6054#drug-or-alcohol-issues-def)
and this

makes the person unable to participate effectively in family dispute resolution at VLA's [Family Dispute Resolution Service (FDRS)](https://www.handbook.vla.vic.gov.au/node/6054#FDRS-def) without legal representation.

or

1. a person who:
* is experiencing [homelessness](https://www.handbook.vla.vic.gov.au/node/6054#homelessness-def)
* identifies as Aboriginal or Torres Strait Islander, or
* has experienced, or
* is at risk of experiencing [family violence](https://www.handbook.vla.vic.gov.au/node/6054#family-violence-def).

For guidance notes, documentary requirements and examples for the above criteria, please refer to the notes linked to each of the definitions.

### Client safety

FDRS takes client and child safety very seriously. Case managers are trained to conduct a comprehensive risk assessment in every case, and safety plan if needed, and all staff have training in how to work with people experiencing family violence and others at risk. If risks are too high, we will assess that a case is not suitable for dispute resolution.

We can adapt our service delivery to promote safety, such as by setting up conferences in a shuttle format, and staggered arrival times. We can also make warm referrals to services, support safety planning and otherwise respond to client need.

### Prioritising children

In parenting matters, all decisions should focus on the children's needs. However, children cannot attend conferences.

In some cases, where a case manager assesses it as suitable during the assessment process, and if everyone agrees, we can arrange for any children of school age or above to speak to a qualified Child Consultant, through our [Kids Talk program](https://www.legalaid.vic.gov.au/kids-talk). This occurs before the conference. Each party would be provided with feedback from the child consultant, and a confidential inadmissible written summary is provided to each party, the lawyer and the Chairperson, which includes a Kids Talk agenda.

FDRS prioritises the right of children to have a voice in decisions that affect them, and promotes child focus during mediation, which can lead to very positive outcomes – nearly 90% of cases with Kids Talk resolve.

### Approach to property mediation

Our approach in property mediation is similar to that followed in children’s cases but provides the parties with an opportunity for a facilitated conversation about the division of their property, to discuss the pool, identify future needs and explore options. Our goal is to ensure full and frank disclosure as early as possible. We require each party to complete an FDRS Financial statement before the case will be allocated to a case manager.

If parties are willing to participate, but are unable to pay for a lawyer, we may be able to refer them to a community legal centre partner to assist them to prepare for mediation and for representation at the conference.

If there are children, a person is only eligible for a property grant if there is no current legal parenting dispute, or they are also eligible for a parenting grant.

Find out more about the [Property Program](https://www.handbook.vla.vic.gov.au/guideline-9-property-disputes).

### Confidentiality

What happens during the family dispute resolution process is confidential. This includes information obtained during screening interviews, provided during Kids Talk, and in conferences.

Section 40J (2) of the Legal Aid Act 1978 also provides that a party or lawyer must not give any information, acquired in the course of or otherwise in connection with a conference, to any other person or body including a court. There are penalties that apply for breach of this section, as well as exceptions.

We may disclose confidential information in certain circumstances, such as where:

* we reasonably believe that a child has been or is being abused or is at risk of being abused
* there is a risk of harm to any person involved or to their property
* a crime involving violence or threats of violence may be prevented
* this disclosure to an ICL would assist that ICL to properly take up their role
* it is included in a dispute resolution certificate, such as a section 60I, and/or
* the chairperson makes grants recommendations (these are sent to a lawyer acting under a grant of aid and may be provided to Grants & Quality Assurance).

**We are often unable to share the reasons for a decision that a case is unsuitable for mediation, as we obtain information from parties other than your client.**

## THE FDRS CASE MANAGEMENT PROCESS



Note: the above is generally for parenting matters, it varies a little for financial cases, CIR=Child impact report.

### 1. Intake

FDRS will write to you and your client about FDRS, to confirm that we have received the case in our system and request contact details for each party and copies of relevant documents.

Sometimes there can be delays in grant approvals, or the case entering our case management system. If you have a grant and have not heard from us, please feel free to contact us to check on its status, especially if court is pending.

At this stage, if your client has any concerns about FDRS writing to the other party, **please let us know immediately**.

Please advise of pending court dates and provide copies of any relevant court orders, intervention orders or reports as early as possible, as this will support us to triage urgent cases (especially where FDR is court-ordered) as well as enabling a full assessment.

For the matter to progress through the FDRS program, we require the current phone number, email address and/or residential address of the other party so that we can contact and invite the other party to participate in the dispute resolution service. FDRS can only issue a Section 60i certificate stating that the other party has declined if we have made at least two attempts to contact that person in writing.

It is important to let FDRS know if there are any difficulties in ascertaining the other party’s contact details or whether there is an intervention order made (interim or final) in relation to the parties and their child/ren, and particularly if the order allows for mediation or not.

## Please note that we receive limited information through ATLAS, due to information barriers.

When writing to parties, FDRS will provide written information about how FDRS works, as well as the Kids Talk program (see factsheets provided in the practice tools), where there are children.

#### Financial statements

If the matter involves property or maintenance, we will send out the FDRS financial statement. We will not allocate it to a case manager for assessment until this has been completed and returned by all parties. (We will also accept the family law courts financial statement form.)

Prior to the conference we will provide your client’s completed financial statement and supporting documents to the other party and their lawyer (both parties must be represented in property cases).

### 2. Suitability assessment

Once all parties agree to FDRS, or if FDRS was initiated by an independent children’s lawyer (ICL) or court-ordered, the matter will be allocated to an FDRS case manager. In all cases, including returning cases, a case manager will assess whether the matter is suitable for FDRS by conducting **an assessment interview** with your client and each other party (which includes a detailed risk assessment) and reviewing any materials available.

The [*Family Law (Family Dispute Resolution Practitioners) Regulations 2008*](https://www.legislation.gov.au/Details/F2021C01095) set out the factors a FDR practitioners must consider in making assessments for the suitability of a case for FDR, and in issuing section 60I certificates under the *Family Law Act 1975*.

**Reg 25(2)** The family dispute resolution practitioner must be satisfied that consideration has been given to whether the **ability of any party** to **negotiate freely** in the dispute is affected by any of the following matters:

* + a **history of family violence** (if any) among the parties
	+ the likely **safety** of the parties
	+ the **equality of bargaining power** among the parties
	+ the risk that a **child may suffer abuse**
	+ the **emotional, psychological and physical health** of the parties
	+ any other matter that the family dispute resolution practitioner considers relevant

We consider client capacity to negotiate, and willingness to participate. Even if a party may seem fixed, we will still consider FDR, as shifts can still occur through the mediation process.

In children’s matters, our case managers will help prepare the parties for a conference by asking them child focused questions. In property matters, case managers will go through financial statements briefly with clients and explore what options they are considering and what advice they have had.

We encourage clients to focus on future arrangements, rather than past conflict and we provide information about how potential conference formats and how conferences run.

#### Risk assessment

This is a critical component of the assessment process. We ask a series of detailed questions about family violence, with an assessment tool aligned to the MARAM framework and consistent with DOORS. We take client and child safety very seriously. If safety is an issue, the FDRS case manager can:

* develop individual safety plans with clients who are concerned about their safety and their children’s, which can include setting up staggered arrival and departure times for in-person conferences.
* arrange for your client to have no direct contact with the other party (the parties can be in separate rooms (including in a videoconference))
* arrange for clients to have an appropriate support person, such as their family violence worker, attend.

#### Assessment for Kids Talk

In assessing for suitability for mediation, case managers will also consider if Kids Talk is appropriate, for children of school age or above. If so, they will ask a series of Kids Talk questions during the assessment interview and seek the parties’ consent.

**Case managers are happy to speak with lawyers about any concerns they may have about Kids Talk, and why Kids Talk may be recommended.** All Kids Talk referrals are reviewed by the Manager, Kids Talk, who will then refer it to a Child Consultant, as part of the conference booking process.

### 3. Conference booking

#### Finding a conference date

If we assess a case as suitable for FDR, we will consult you and any other lawyer involved to confirm a conference date and time. We generally need to coordinate at least four participants, as well as mediators, and often to accommodate pending court hearings, so finding dates can be challenging. For this reason, our cancellation policy is strict so once a date is confirmed we will only reschedule in exceptional circumstances.

**Delays in confirming dates will result in delays to conferences, or potentially conferences being unable to be held. If parties do not make themselves available within a reasonable timeframe, a view may be formed that they are declining to participate.**

The case manager will have noted each client’s availability to attend and assessed the most appropriate venue and format for the conference. While most conferences are delivered via videoconference at this time, each case will be assessed individually, and in-person conferences or teleconferences may also be felt to promote the best outcomes for clients, particularly if there are accessibility issues. Where possible, FDRS will use VLA offices across Victoria for in-person conferences.

If conferences are by videoconference or phone, we expect you to have your client with you in your office for the duration of the conference, as this provides a better client experience and outcome, including the ability to have any agreements easily signed.

#### Arranging Kids Talk

If a case is suitable for Kids Talk and it is agreed to, the Child Consultant will arrange conversations with the parents or carers to arrange time to meet the children, and for parent feedback (by phone).

When meeting the sibling group, the Child Consultant will explain the process and confidentiality, seeking the child’s agreement to the process and answering any questions. The children may choose to remain together or be seen individually. Depending on the developmental age of the child, a variety of methods are used to engage them in conversation about their family and their experience of separation and parenting arrangements.

When giving feedback to parents, the Child Consultant shapes the feedback in a way tailored to the parent’s ability to process that information and respond, focusing on key messages about the children. The Child Consultant then prepares a confidential summary report, **only for use in the FDRS conference**. The report contains a draft Agenda, description of the children with a developmental overview, their reaction to current arrangements, and their wishes for the future. Issues such as conflict and safety will be explored, as well as how individual children can best be supported.

We provide the confidential Kids Talk report to the parties and their lawyers **prior to the conference,** to allow clients time to speak with their lawyers about the report and prepare.

### 4. At the conference

We have experienced, qualified family dispute resolution practitioners (called ‘chairpersons’) who run the conference. They have authority to issue section 60I certificates.

The chairperson’s role is:

* to explain and manage the process of the conference (3.5 hrs), including confidentiality and safety
* to work with each party (and their lawyers) to encourage them to explore options and consider proposals
* to provide information about next steps, and options, including covering what a court will consider and the paramount best interests of children
* to provide a certificate (s60I) that confirms dispute resolution was attempted, and
* liaise with the case manager, to report back and request any follow up, including confirming that a further conference is anticipated.

Lawyers are responsible for drafting any agreements reached at the conference, usually as parenting plan, minutes of proposed consent order, or even heads of agreement. If one party is unrepresented, the Chairperson will encourage them to seek legal advice prior to signing.

### 5. After the conference

**Outcomes**

FDRS provides an outcome letter to parties and their lawyers, including a section 60I certificate and a grants recommendation report.

A Chairperson can make an assessment that there is partial agreement, even if this is based on an agreement as to next steps procedurally, or something like a new method of communication. From our perspective, a mediation can still be valuable even if there is no resolution of substantive issues, as the process itself can lead to greater long-term shifts.

FDRS relies on the assessment of the Chairperson as to the outcome of a conference.

**Further conferences**

If the matter has not fully settled, and a further conference is anticipated, you can request a second or further conference if your client continues to be eligible for a grant of legal assistance. Ensure you make your request with sufficient time for FDRS to further assess for suitability and arrange the conference booking, if suitable. FDRS will not automatically schedule a further conference without this assessment.

**Settlement (or otherwise) after a conference**

Often it may not be possible for consent orders to be finalised during one conference, so further discussions can occur between parties and their lawyers, to take the next steps.

The Chairperson’s certificate and outcome reached is based on an assessment of the view they form at the conclusion of the conference. Once the conference is concluded, their facilitative role ceases.

If there is a full agreement reached after the conference, or if an anticipated agreement is not reached, there will be no retrospective change to the recorded outcome.

If clients contact FDRS after a conference to ask about the implementation of agreements, they will be referred for legal advice.

## THE LAWYER’S ROLE

## Dispute resolution in a family law context

### Best practice in Alternative Dispute Resolution (ADR)

This guide is intended for new lawyers as well as other practitioners and should be read alongside other guidelines for best practice, and other legal requirements, including:

* **VLA Practice Standard and Measures**

In particular, PS 4.2.1 – Alternative dispute resolution

[www.legalaid.vic.gov.au/information-for-lawyers/practitioner-panels/panels-conditions](http://www.legalaid.vic.gov.au/information-for-lawyers/practitioner-panels/panels-conditions)

* **Federal Circuit and Family Court of Australia (FCFCOA)** [**Central Practice Direction** – Family Law Case Management](https://www.fcfcoa.gov.au/fl/pd/fam-cpd)  (see 5.26 – 5.46 but especially 5.37- 5.40)
* **Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015**

<http://classic.austlii.edu.au/au/legis/nsw/consol_reg/lpulascr2015658/>

The FCFCOA Central Practice Directions, for example, emphasise the role lawyers play in facilitating dispute resolution, at all stages of a case. It promotes referral to private mediation/FDR, Legal Aid conferencing (where available) and other FDR publicly funded services providing FDR, such as Family Relationship Centres. Such referral can occur at any stage of a case, early or litigation stage.

Aside from best practice approaches, it is worth considering how FDR works, the opportunities it offers, and the benefits lawyers can bring to the process.

FDRS mission: to offer an independent, inclusive, safe approach to FDR that promotes a child and future focus and people working together, supported by mediators, child experts and lawyers using a legally assisted model of FDR

### Opportunities offered by family dispute resolution

Most of the FDR that is conducted in Australia is by government-funded services, without lawyers. A recent evaluation of Commonwealth funded family and relationship services (CIE Report, FRSA Evaluation 2023)[[1]](#footnote-1) found that FDR contributed to improved family functioning, reduced relationship distress and reduction of child harm, all of which (in combination with services such as counselling and parental education and other supports) had the outcome of improving mental health and improved family wellbeing. This report suggests that for each dollar spent providing Family Law Services (which includes FDR), there are $7.85 of benefits to society including improved wellbeing, better family functioning and reduced court costs (this latter being the highest saving) (CIE Report, 2023). On average, it takes 201 days on average to resolve a civil or family law matter (PwC report 2023[[2]](#footnote-2)), but the earlier issues can be resolved, the greater there is a potential reduction in damage to the parental relationship.

A recent *Public Understanding of Law Survey* (PULS)[[3]](#footnote-3), of 6008 Victorians confirmed that family problems tended to last longer than other justiciable problems, too, with associated levels of distress over that period.

With experienced FDR practitioners facilitating, and supportive lawyers, it is possible to achieve significant shifts in perspective and for agreements to be reached in even the most high-conflict and challenging cases. Mediation has also been shown to have longer term impacts for families, including improved parental communication and reduced conflict. FDRS is well regarded by the court for achieving good outcomes and providing a valuable lawyer-assisted service.

Formal dispute resolution, whether at an early intervention stage or after court proceedings have commenced, offers a space for a more transformative approach, where all participants can fully consider their needs and interests and explore creative solutions. This is significant in a family context, where identity and needs are intertwined, and the participants are part of a broader family system.

Mediation is a very different process to lawyer-lawyer negotiation, and actively includes the parties. It follows a specific process, to bring parties towards an outcome, and skill is required to facilitate this process. Mediators are independent of participants, and will manage power imbalances that may occur, seeking always to remain impartial.

Under the Family Law Act, an FDR practitioner is not strictly neutral, as they must ensure decisions are the best interests of children and they do have advisor obligations. Legally qualified FDRPs can provide legal advice (if appropriate), but all Chairpersons provide legal information about what courts can consider and their own perspectives on what can work and what may be inappropriate. FDRPs use a facilitative model, focusing on the interests of each party (the ‘interests-based model’), seeking to balance these interests, using their skills in mediation alongside of their knowledge of the family law system and how family systems and relationships work. There are many overlapping skills between FDR practitioners and family lawyers.

Mediators develop theories about the case, in preparing for a session and during it, and will use a variety of approaches to test this theory, using specific techniques to help bridge a gap or create an opportunity for a shift in viewpoint. Mediators are interested in creating a change in dynamics and can work with parties on a very practical level to help build their skills in navigating and reducing the risks of future disputes, as well as to build other skills.

They use skills such as summarising, reframing, open-ended and curious questioning, active listening, and other mediation techniques.

Foundational to successful mediation is for FDR practitioners to hold enough time at the beginning of a mediation session to allow the parties to feel heard and understood, and for the mediator to get more of a sense of what may be driving the conflict, or what unmet needs may be that are separate from the stated issues in dispute. Some lawyers and parties can become frustrated at this point, seeking this as a waste of time and wishing to focus on outcomes, but the evidence is that people are not willing to genuinely engage in assessing options or shifting their viewpoint unless they have had an opportunity to share their perspective, and feel heard.

Rather than considering FDR as simply a process to get through prior to litigation, as part of case management, we encourage lawyers to take advantage of the opportunity to use an experienced facilitator to consider a wide range of options and identify what may be possible.

Also, narrowing issues in dispute is also a critical part of the dispute resolution process, as is generating alternative options if there is still a substantial issue that cannot be agreed upon (there may be option A if a party moves, and option B if they don’t, for example). In other cases, it may be clear that certain issues need further investigation before options can be fully considered and any agreement made (for example, enquiries made by an ICL or investigations by child protection).

Courts place great significance on efforts made to attempt resolution and the narrowing and clarifying of remaining issues in dispute.

### Legal aid commission models of mediation

Legal aid commissions offer assistance to the most disadvantaged, with highest legal need, and **all** operate a lawyer assisted model of FDR. Due to differences in each state and territory, different models of lawyer assisted FDR are used. Since 2004, VLA has operated a case managed, panel mediator model.

### Value of lawyers

‘I'm not good at asserting myself… I need a firm voice. I would have been very lost and like jelly without a lawyer. Or I could have been pig headed. Having someone to say 'if this went to court... this is what would happen’ was helpful’ - Client, FDRS feedback survey 2019

Lawyers make significant positive contributions to parties’ capacity to negotiate and are an important component of a service that provides safe FDR to survivors of family violence and other vulnerable clients.

There is significant research available on the contributions that skilled family lawyers make to FDR such as Hardy and Rundle ‘Mediation for Lawyers’ (2010), Batagol ‘Bargaining in the Shadow of the Law’ (2010), and Cooper and Brandon ‘Lawyers Role Options in Family Dispute Resolution’ (2011) *22 ADRJ 198.*

FDRS regularly conducts client feedback surveys, specifically asking about the experience clients have with their lawyers, and overwhelmingly clients report feeling supported. In addition, our rate of over 80% of full or partial settlement of issues in dispute in our cases would indicate that lawyers play an invaluable role in family dispute resolution.

Participants in an evaluation of the FDRS model and the role of lawyers (Bailey, 2012) all valued the role lawyers played – 93% of clients were satisfied, particularly with conference preparation, advice about the law and their ability to have a say and ‘own’ the outcome; lawyers and Chairpersons valued the ‘team’ approach, working inter-professionally and collaboratively to support clients.

A lawyer who can represent a disadvantaged family member, or a person who is significantly disadvantaged compared to their ex-partner, will boost that person’s negotiating capacity in FDR. However, lawyers don’t render all unsuitable cases suitable – the risks may be too high, the capacity too compromised or the timing may not be right. If FDRS assesses that a case is not suitable for FDR, we recommend further legal advice and make individual referrals to support services.

Approximately 15% of cases are assessed as unsuitable for dispute resolution.

For more information read *Thinking outside the square: The role of lawyers in Roundtable Dispute Management* [vla-thinking-outside-the-square\_role of lawyers-Bailey-2012](https://www.legalaid.vic.gov.au/sites/default/files/2022-03/vla-thinking-outside-the-square-Bailey-2012_0.doc)

##  Key tips for lawyers

Effective participation in an FDR conference does require sophisticated skills, and subtlety and the ability to manage legal expertise with managing the client’s needs, the other party and other lawyers, while working with the Chairperson.

‘I would have to say that the lawyer-assisted conferences are by far more productive and more likely to produce an outcome. Feedback from the lawyer is immediate and a client’s thinking can be challenged immediately whereas without lawyers, clients often over inflate their case and have little checks and balances on this over inflated view. Given the choice I would opt for lawyer-assisted every time.’ FDRS Chairperson (Bailey, 2012, p.67)

### Preparing the client for mediation

*“Put the client at ease. Explain the process in layman’s terms, explain possible outcomes”.* (Bailey, 2012, p.26)

Clients are much more satisfied about the process, and less anxious, where they are provided with information by their lawyers about the purpose of dispute resolution, how the conference will be run, the role of each participant (including the FDR practitioner and any ICL) in the conference, and what potential outcomes can be achieved. There can be an element of reality testing undertaken at this time, as this can help clients clarify their own goals and needs.

In particular, the client should understand that it is an opportunity for self-determination and fuller participation than may be possible if a court is the decision-maker.

### Understanding where your client is at

As one client has said, (Bailey, 2012, p.26) “Try to understand where the person is coming from, the emotions they’re going through”.

Mediation is a very stressful experience for all clients. Many worry that they will be pressured to agree to something. Also, it can be difficult to contain some clients. Careful listening and acknowledging what is said are important and can create connection, which then allows you to have more difficult conversations. Having a trauma-informed approach is important as it helps you to recognise when your client may be heightened, or their triggers, and ways to help a client feel calmer. What can appear as aggression or hostility may suggest anxiety, or a defensive state.

Using simple techniques such as mirroring language (repeating the last three words back to a client, to show you’ve heard, for example), using a calm, lower voice, and encouraging breaks and redirecting attention to what is immediate can support your client. Conversely, lawyers can trigger negative outcomes by heightening their client’s reactions if they display strong reactions to proposals or become adversarial themselves.

Asking a client in advance what you should look for when they are stressed, and how you can help, can also build trust. Clients can feel pressured to settle, sometimes by the other party’s threat to go to court, or simply to make the stress of the situation go away. You can provide practical advice about the value of reaching an agreement.

[Tips for Family Law Professionals — High Conflict Institute](https://www.highconflictinstitute.com/hci-articles/toptipforlawyers)

### Allowing the Chair to facilitate

FDRS Chairpersons are experienced mediators and have the same goal as you – to use the available time to progress discussions towards agreement, as much as possible. Mediators focus on the process, which works, and do not rush to an outcome. They know that encouraging parties to canvass issues important to them, and to create their own agreements can lead to more sustainable outcomes and longer-term change. They will use their conflict resolution skills to guide the parties; allow them some time and trust them to do this. If you have concerns about where a conversation is going, you can of course ask questions, or seek to clarify.

### Using clear, simple communication

The mediation room is not a courtroom, so all participants are encouraged to be less formal, and to speak simply and more neutrally, regardless of how experienced they are.

Clients can react strongly to phrases like ‘abuse’ and ‘violence’ and can get caught in narratives around ‘systems’ so it can be helpful to be specific about behaviours and their impacts (especially on children) rather than using concepts. In considering options, Chairs will often ask questions like ‘What would that look like?’ to encourage clients to be specific and pragmatic, and to think through their proposals, rather than accepting general statements.

Lawyers can use phrases like ‘Can I clarify something?’ or ‘Can I make a suggestion here?’ to ensure their client’s position is understood, or to make a proposal aligned with their client’s needs.

### Focusing on what your client needs, and solutions

Focus on what your client wants, while acknowledging (but not focusing on) the other party’s views. Ask what they think is best for their children, what they need for the future. Help them to figure out their top priorities. This can be a positive approach – empowering the client to focus on their needs (while having some appreciation of the other party’s too).

Tactics such as using opening gambits, threatening to walk away, or issuing ultimatums can undermine the environment the Chairperson is trying to create, and their ability to build consensus. Often very small concessions and gestures of goodwill can create momentum and lead to real progress.

## Before the FDRS conference

### Taking initial instructions prior to FDR

An early assessment prior to the application for aid being made can allow a lawyer to provide strategic advice, including whether any urgent action needs to be taken, as well as to assess for eligibility, and to check a client’s capacity and for any potential vulnerabilities that may affect their ability to participate in dispute resolution. This includes as a history of family violence, mental illness or other disability, language barriers, or other barriers such as distances between households or financial means.

### Providing FDRS with required documents as soon as possible

See ‘Intake’ above for information about this, but the more information we have at an early stage, the more quickly we can progress the file.

### Corresponding with the other party

We encourage correspondence with the other party in advance of FDR, so that we are all clear about which parties are represented, and to allow for initial proposals to be put forward, if appropriate. If an ICL is involved, they should be copied into correspondence.

### Liaising with the FDRS case manager as needed

The case manager may contact you to discuss the case before finalising their assessment of suitabilityfor family dispute resolution. For example, they may have sought your client’s permission to discuss with you an issue arising out of the screening interview or whether the matter may be appropriate for our child-inclusive Kids Talk program. You are free to contact the case manager if you have questions about the process or to provide updated information about your client.

### Being assured of confidentiality

We will speak directly with your client. Any discussions you or your client have with FDRS staff or chairpersons are subject to confidentiality and inadmissibility provisions set out in s40J of the *Legal Aid Act 1978* (Vic) and ss10H and 10J of the *Family Law Act 1975* (Cth). Exceptions to these provisions are set out in the legislation, as outlined above.

### Meeting with your client before the conference

Preparing a client for a conference is the best way to maximise the use of conference time. Use the checklist, in the toolkit.

## At the FDRS conference

The FDRS Chairperson is responsible for managing the conference process, but the parties are the decision-makers.

### The conference process

Generally, the process is that the Chairperson will do a quick separate check in and welcome with each party and their lawyer, and anyone else attending. They will often check in with clients at this stage about whether anything significant has occurred since the client last spoke with the case manager and will observe how the client is presenting, confirming that they have been fully briefed. They will seek to clarify the key issues to be focused on, and will indicate that they will be back for a fuller introduction, and also who they will start with once the conference gets underway.

This is only a quick process, before the Chair will do their opening statement/introduction, confirming conference process, aims, roles, ground rules for the conference and then confidentiality. They then move onto confirming the agenda, identifying any key issues they are aware of. They then go back and forth between each party (if they are in the same room, or via shuttle between different rooms, if this is the appropriate format) on agenda items, exploring options and then conveying proposals. If it looks as if there may be agreement, they will confirm who will be drafting any terms, and will then continue the process, managing time. There is only 3.5hrs, which goes quickly, so there will need to be time allowed for next steps to be discussed.

The process may vary a little, as each Chairperson works differently, and they will adapt their approach according to what they believe the clients and the case need. In all cases they will encourage parties to speak for themselves as much as possible, and will seek to speak with them directly, to engage with them in the process. This is critical, as agreements are more effective if parties feel they have been heard and are active participants and decision-makers. The Chair will also advise if they are intending to have a caucus with just the lawyers and explain to the clients why this happens.

### The supportive professional participant: different lawyer roles

We find that the most successful lawyers in FDR are those who are respectful, helpful, non-inflammatory and work with their clients to achieve a resolution for the benefit of their client as well as in the best interests of any children. If there is no resolution, lawyers will have canvassed options and next steps with their clients.

We encourage lawyers to be ‘supportive professional participants’ during our conferences. This role is both legal and non-legal. This may involve taking up different types of roles in a conference, as needed, and as outlined below.

#### Lawyer as legal advisor

During the conference, you will have opportunities to meet privately with your client to reinforce or update your legal advice, as issues are raised during the conference. Canvas all available options and focus on what is achievable. Trust your judgement.

There will be times you will need to provide your view upon the application of the law to the circumstances. You can also work with the Chairperson to help your client focus on the best interests of the child, as required by law.

#### Lawyer as advocate

The FDRS process encourages parties to speak on their own behalf. The chairperson will directly address your client, encouraging them to be fully involved in the negotiations.

Effective advocacy in mediation is non-adversarial. In this situation, the advocacy should address the client’s needs and concerns, rather than re-stating a fixed position taken on instructions. For example:

* adversarial advocacy: “My client instructs that ….”
* non-adversarial advocacy: “I think what Alex is concerned about is…”

#### Lawyer as mentor

You have an important role to play as your client’s mentor, especially when alone with them. This may happen before and/or during the conference.

Some of the following can be useful questions:

* What do you hope to achieve, and why?
* What are you willing to give to make this happen?
* What seems to be the other person’s concerns?
* What actions are you able to take that would minimise their concerns?
* What are the needs and interests of the children?
* Is there a difference between what the children need and what you need?
* What options are there for resolving the dispute?
* Are you able to listen to other points of view, even when you do not agree?
* How can you communicate your concerns effectively?

#### Lawyer as reality-tester

Any good legal advisor assists a client to explore various options and ideas to ensure that any outcome is **workable and realistic**. To assist your client in reality-testing proposals or outcomes, you may ask questions such as:

* Is the proposal reasonable, given the legal advice provided?
* How would this idea work in practice?
* Who is affected by your proposal? Do they need to be consulted?
* What could go wrong? What back-up plans do you have?
* What happens today if you do not reach an agreement?
* What are you prepared to offer to reach an agreement today?
* What effect do you think this dispute is having on the children?
* How can you protect the children from the conflict?
* How will you ensure your safety in the future?
* What will you do if your safety is compromised?

#### Lawyer as problem-solver

Use the experience you have in dealing with families in dispute to help your client generate options and ideas for settlement. Be creative, especially when there are practical issues (such as a long travel time between parties) that will affect arrangements. The chairperson may invite you to be involved in this way, especially if clients are having difficulty suggesting proposals. In private sessions, you can assist your client to develop workable realistic proposals as things develop.

#### Lawyer as dealmaker and negotiator

On some occasions, your client’s interests may only be met by you becoming more actively involved in the negotiation process. Using your authority as a lawyer can influence both your client and the other side to reach an outcome. This may be particularly important if the other party (and/or their lawyer) is highly adversarial and your client is vulnerable.

#### Lawyer as provider of professional support

Your client will rely on you for support and trust that you are working in their best interests. Generally, parties are more confident in attending and participating in the conference with a lawyer present. This professional relationship, and support, is critical.

#### Lawyer as drafter

During the conference the chairperson will facilitate the agreement-making process. Any proposed agreement needs to be thoroughly explored and reality-tested before there is final settlement rather than it being rushed.

### Drafting of proposed agreements

It is preferred that there be a written record of any agreement, which can minimise any confusion about the conference outcome in the future.

The two main forms of agreement, which are signed by the parties and dated, are parenting plans or proposed consent orders. The lawyers attending are responsible for drafting this agreement. It is important that lawyers turn their minds to the workability of the proposed parenting arrangement in a practical manner but also in the context of the conditions in a current intervention order.

The drafting process plays a crucial role within the conference. It can serve to consolidate the spirit of cooperation or further aggravate underlying tension between clients. In recording the agreement, escalation of conflict can be avoided by being neutral and mutual.

*For example, “A and B agree that they will not make negative comments about the other in the presence of the children”, rather than “A will not denigrate B in front of their children.”*

Some lawyers bring pro forma or partially completed draft parenting plans to a conference, but this can be risky as it can lead parties to become positional or fixed in certain aspects rather than thinking creatively and of the big picture.

Many parties wish to sign an agreement at the conclusion of a conference and with legal representation and advice they are more likely to be ready and confident to do so. Self-represented parties will be encouraged to seek independent legal advice before signing a parenting plan or proposed consent orders.

## After the conference

Sometimes there is negotiation back and forth to settle the final terms of any agreement after the conference has concluded. At other times this negotiation breaks down, and any in principle agreement reached during the conference may be effectively nullified. The parties may choose to continue to negotiate through lawyers or take other steps.

Lawyers can play an important role in supporting clients to follow through with an agreement, including facilitating children’s relationships with their other parent. This may be needed for an anxious client, who can be helped by a focus on the big picture, even if they feel they may have conceded too much. It can be useful to remind clients of the delay, costs, stress and uncertainty associated with going to court to ask for a judicial decision.

Likewise, confirming with clients what they may have achieved, even if not a full agreement, is an important aspect of supporting clients through dispute resolution.

Sometimes lawyers or clients may be dissatisfied with an outcome, or an FDRS process. If so, we encourage them to get in touch with a manager at FDRS, as it is important for us to be aware of this.

### Useful resources

Visit: [Family law resources | Victoria Legal Aid](https://www.legalaid.vic.gov.au/family-law-resources#guide-for-lawyers-at-our-family-dispute-resolution-service) for practice tools for lawyers to use:

* FDRS service brochure
* Kids Talk factsheet for parents
* Kids Talk factsheet for kids
* Property program factsheet for clients
* Property program factsheet for lawyers
* FDRS file checklist for lawyers – parenting
* FDRS file checklist for lawyers – property
* FDRS financial statement

### Find out more

Call 1800 136 832 (toll free) or (03) 9269 0500 Email fdrs@vla.vic.gov.au

Visit [www.legalaid.vic.gov.au/using-victoria-legal-aid-family-dispute-resolution-service](http://www.legalaid.vic.gov.au/using-victoria-legal-aid-family-dispute-resolution-service)

## Contributions in FDR: a supportive professional participant model

| **Lawyer’s Contributions** | **Client’s Contributions** | **Chair Contributions** |
| --- | --- | --- |
| Providing legal advice in light of information that is shared at mediation. | Presenting his or her individual view of the issues to be discussed. | Drawing on lawyer expertise. |
| Discussing legal issues with the other lawyer(s) to demonstrate the different legal arguments that apply to the case. | Discussing the issues with the other party, expressing needs, expanding upon non-legal interests that ought to be considered. | Bringing lawyers together to discuss legal issues. |
| Supporting and coaching the client in negotiation and communication skills. | Negotiating with the other party, together with the lawyer. | Clarifying, containing, and assisting the client to participate. |
| Reality testing with the client about the alternatives to a negotiated settlement and the range of likely legal outcomes (and potential costs involved). | Generating imaginative options, proposing settlements and deciding upon the final outcome. | Drawing on lawyers to provide reality tests to clients about possible legal outcomes. |
| Reality testing the workability of settlement proposals and identifying matters that have not been discussed which should be resolved. | Speak about the background of the issues drawing from personal experience. | Reality testing workability of proposals (non-legal) and maintaining agenda of issues for discussion. |
| Assisting with the drafting of any mediation agreement. | Seek support from lawyer in drawing up any settlement agreements. | Review drafts for clarity and workability as required. |
| Carefully negotiate the workings of his/her collaborative relationship with the client. | Use the lawyer as a resource for legal advice. | Encourage client/lawyer collaboration, and utilise lawyer as resource for client as required. |
| Support the client throughout the mediation process by monitoring the behaviour of other participants, analysing information that is shared, guiding negotiations where appropriate and requesting a private session with the client where appropriate. | Discuss with lawyer the ramification of any outcome and the alternatives to a negotiated agreement. | Facilitate/manage the dispute resolution process to support all parties, manage power imbalances, and ensure safety for all. |

\* Note: this model has been adapted from Rundle (2009) for this study.

1. [CIE Final Report\_FRSA\_Family and Relationship Services Evaluation - 11092023](https://frsa.org.au/wp-content/uploads/2023/09/CIE-Final-Report_FRSA_Family-and-Relationship-Services-Evaluation-11092023.pdf) [↑](#footnote-ref-1)
2. [Final-Public-Report\_PwC\_The-Benefits-of-Providing-Access-to-Justice1.pdf (nationallegalaid.org)](https://www.nationallegalaid.org/wp-content/uploads/2023/03/Final-Public-Report_PwC_The-Benefits-of-Providing-Access-to-Justice1.pdf) [↑](#footnote-ref-2)
3. [Everyday Problems and Legal Need (victorialawfoundation.org.au)](https://puls.victorialawfoundation.org.au/publications/everyday-problems-and-legal-need) [↑](#footnote-ref-3)