

# Universal Disclosure Protocol for Mediation (UDPM)

This Protocol is intended as guidance regarding best practices for informing the parties regarding the mediator’s process and approach and documenting the exercise of self-determination by acceptance of the disclosed items.

## Part A - Introduction

### Purpose and administration

#### *Purpose*

A1.1 The purpose of the Protocol is to give guidance to mediators regarding disclosure of information about the mediation process. The Protocol also gives guidance to participants in mediation regarding the general mediation environment into which they are entering, and the behavior they can expect from the mediator. The Protocol also specifies for any official in an adjudicative process (e.g., arbitrator or judge) a baseline of expectations established among the parties and the mediator in a specific mediation.

A1.2 The Protocol sets forth guidance about content for a range of information, such as the meaning, in context, of confidentiality, a description of the role of the mediator, and adherence to any legal or regulatory requirements that may be in effect for each participant or the participants’ venues.

## Part B – Disclosure Principles

### Background

B1.1 The focus of the guidance contained within the Protocol is on the information parties to a mediation need to understand and agree to before mediation begins. Parties and the mediator are free to add other topics for disclosure if the topics are deemed necessary and are accepted by both the mediator and all parties.

B1.2 Enactment of and use of the Protocol would promote transparency and “process enlightenment,” and would encourage and support self-determination on the part of all parties to the mediation.

### Principles

#### *Support Self-determination*

B2.1 There are, across cultures and legal jurisdictions, a broad range of mediation styles and “norms.” The concept of self-determination, the right and ability of the parties in mediation to freely and with understanding engage in the mediation process, is as close to a universal principle in mediation as can be found. Encouraging and supporting true self-determination is central to fair and effective mediation.

#### *Acknowledge Cultural Influences*

B2.2 Existence of a Disclosure Protocol will not, in and of itself, remove the influence of cultural bias from cross-cultural mediation. It will, however, inform parties of the potential for cultural nuances affecting the mediator’s process, and it will give them a chance to either accept or reject those cultural influences as part of their mediation experience.

#### *Promote Transparency*

B2.3 Any mediation style, in the proper setting, can be effective, and any mediation style, mismatched to the parties without clarification, can be ineffective. Use of the Protocol to present a transparent description of the mediator’s process ensures that cultural, regional, and

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practice differences are clearly presented and that the parties agree to undertake mediation with the protocols in mind.

### *Respect for the flexibility of the mediation process*

B2.4 The Protocol is not intended to advantage or disadvantage any particular mediation style or approach. It does respect and acknowledge that there are significant differences in mediation approaches that may be used by individual mediators, and it respects the diversity of practice that exists across the world.

## Part C– List of elements for disclosure

(Conflict of interests, Confidentiality, General Process, Role of the Mediator and Parties, Technology, Impact of Venue)

Goal: The elements of the UDPM outlined below address the major areas in which parties to mediation may have expectations, or they may provide information for those parties who have no experience with and no expectations about the mediation process. **There is no single way to apply the UDPM.** Each specific mediation context will suggest that some elements are more important to the parties and should have more attention.

The goal is to use the elements as a framework to ensure that parties enter into mediation with the critical information they need to be comfortable with and trust the process, and for mediators to use their best judgement regarding the specific issues discussed under each element. The mediator should engage in discussions with the parties to collectively clarify their expectations and his/her role in relation to the following:

### Elements

#### *Conflict of Interest*

C1.1 The mediator should clarify her or his independence and impartiality and reveal any relevant relationships.

*Notes:* Conflicts, and particularly perceived conflicts, are difficult to identify. The mediator should take an expansive view of conflicts and discuss with the parties not just conflicts involving relationships or perceived relationships with the parties or other interested parties. Perceived conflicts can also be related to platforms used by the mediator for which the mediator has an economic interest, with prior experience mediating or advocating for particular issues.

#### *Confidentiality*

C1.2 What confidentiality assertions or provisions may the mediator offer, and under what confidentiality provisions is the mediator bound? This disclosure should have two parts: confidentiality related to communication of any type during and after the session.

#### *Optional topic: Record Keeping*

*Notes:* The fact that all mediators currently use some form of technology (even if the technology is limited to stand-alone, non-web-connected laptops, desktops, or tablets) suggests that discussions of confidentiality should include a clear declaration of the risk involved in whatever venue in which the mediation is being held, and what the mediator will do to reduce the risk that party information can be inappropriately shared. In many venues the mediator becomes a mandatory reporter of certain types of information (criminal activity, physical abuse, etc.) which should also be addressed. Record keeping is also a key issue to address regarding confidentiality. The mediator should discuss what information will be retained after the session is completed, where the information will be stored, and how the mediator will secure and use the information.

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### *General Process*

C1.3 The mediator should preview the general flow of the mediation and highlight basic elements that the parties should expect as part of the process.

*Optional topics* : Venue, Contact Modes, How to handle mid-session corrections, Use of Co-Mediators, How to handle “walk-away” or termination, How to handle agreements (signatures, etc.)

*Notes*: Some key issues to address include the venue in which the session will be held (online or in person), how contact with the parties will be handled, how to handle mid-session corrections, presence of co-mediators, how to handle “walk-away” or termination, and how to handle agreements (signatures, etc.).

### *Role of the Mediator and Parties*

C1.4 Using terms of art familiar to mediators (e.g., Facilitative, Directive, Transformative, Evaluative, etc.) is of limited use in disclosure to parties who are not familiar with mediation. Rather, the mediator should clearly describe the role she or he will play in the process using concrete examples of behaviors and actions (e.g., only facilitate conversation, offer suggested possible resolution elements, etc.).

*Optional topics* : Language Skills, Credentials, Insurance or Indemnity, Fees and Costs, Role of Counsel, Code of Conduct or Ethics

*Notes*: According to some estimates, there are at least 50 types of mediation in active use around the world. For those with experience with mediation, it is likely that there will be expectations about process based on that experience. For those with no experience with mediation, there is likely to be more anxiety than expectation. It is incumbent on the mediator to set reasonable expectations about roles, to affirm or address expectations and reduce anxiety. Using terms of art familiar to mediators (e.g., Facilitative, Directive, Transformative, Evaluative, etc.) is of limited use in disclosure to parties who are not familiar with mediation. Rather, the mediator should clearly describe the role she or he will play in the process using concrete examples of behaviors and actions (e.g., only facilitate conversation, offer suggested possible resolution elements, etc.) and, similarly, describe with examples the behavior expected of the parties. The expertise of the mediator can also be an issue related to roles, e.g.: language skills and translation, mediator credentials, insurance or indemnity, fees and costs, and adherence to a Code of Conduct or Ethics.

### *Technology*

C1.5 The mediator should explain and obtain permission to use any information and communication technology.

*Optional topics* : security information, access information, location tracking, and any other elements of the technology that could have an impact on the parties and their information.

*Notes*: Even in face-to-face sessions, it is likely that mediators will use some technology for note-taking, communication between sessions, etc. For online sessions it is likely that more than one technology platform will be used. The parties should be told about, and overtly agree to use, each of the technology platforms suggested for use by the mediator. Some basic issues include: information about the technology platform’s security protocols, how to access information and who will have access, location of online servers, location tracking, and any other elements of the technology that could have an impact on the parties and their information.

### *Impact of Venue*

C1.6 The mediator should disclose any actions or requirements based on the physical location of the mediator or the parties.

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*Optional topics* : Choice of Law, GDPR or other legal requirements

*Notes:* This can be a particularly fraught issue. It is impossible for any individual mediator to know about and understand all of the potential laws and regulations that apply in a given venue. In situations where parties are online and/or scattered across multiple venues, understanding how potentially conflicting local laws or regs may interact is even more difficult. The most common issues related to venue that may affect mediation are the choice of “seat” for online or multi-location sessions, choice of law in the event of post-session disagreements, restrictions on use and sharing of personal information, and legal requirements for privacy and security like the GDPR in the EU. It is prudent for mediators working in multiple venues to inquire from mediators in each of the venues potential requirements or restrictions, and/or to ask the parties to seek information about local laws and restrictions. It is often the case that the parties can enter into an agreement to abide by the laws and restrictions in one of the venues (declaring the “seat”) regardless of laws and restrictions in other venues.

These elements are an essential part of the Protocol. Other items, or specifics regarding sub-topics, may be added by the mediator to accommodate a wide variety of mediation modes and processes. Information about the elements may be provided by the mediator to the parties or may be elicited from the parties by the mediator as part of the acceptance/intake process. The primary elements are listed without regard to order or importance and are followed by optional topics that may or may not be addressed as appropriate.