

The Universal Disclosure Protocol for Mediation

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Abstract

The presenters discuss the development and application of the UDPM, a standard framework for opening mediation sessions. The elements of the UDPM are presented and their impact on self-determination is discussed.

Keywords: mediation, culture, ODR, disclosure.

1 Daniel Rainey

Good morning everyone and especially a good morning to anybody on the east coast of the United States or South America who joined us at 4 am. So what we're going to try to do today, Maria Gonçalves and I, is just talk a little bit about a project we've been working on for the last 2 years called the Universal Disclosure Protocol for Mediation – the UDPM. This came about not because of the Singapore Convention on Mediation, but the Singapore Convention rollout caused us to begin thinking about an issue that we think is important. We were invited to speak at the rollout of the Convention – Ana was there live and I was online and one of the things that occurred to us is that in an age, especially with COVID giving us the second big bang for ODR, in an age where much of our work is being done online, it's much, much easier to cross national and venue boundaries and cross-cultural boundaries. I guess I would argue that it's really impossible these days to do a mono-cultural mediation, that no matter where you are, you going to find differences of culture, differences of law, etc. When we began talking about this one of the things that seemed obvious to us is that whenever you invite people into a mediation there are at least a couple of categories that you can split people into. If you have someone who's never been in mediation before they don't know what to expect, and so if you don't describe to them what you're going to do they have no reference point for what's going to happen to them in the mediation. If you have people who are repeat players but who are coming together for a particular case it's not unlikely that you will have at least two different perspectives on what should happen. The mediator will have the way the mediator does business and the two parties may very well have two different ways of looking at the way mediation should be done. And so this caused us to think about the notion of a disclosure protocol that would enforce the notion of self-determination. That when a party says yes I'm willing to enter that process with you they know what they're entering and they're saying yes with knowledge. That's where we started. And what Anna

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and I are going to try to do today without stepping on each other's toes too much is just to walk through how we developed the UDPM and some of the recommendations that we've got for going forward.

So the basic question on the front end is what is it? Well there are six areas that we suggest should be part of the universal disclosure:

- Conflict of interest;
- Confidentiality;
- The general process that the mediator is going to use;
- The role the mediator expects of himself or herself and the parties;
- The technology that's going to be used; and
- The impact of the venue where the mediation is being held.

Just as an example of how this applies to some parties, I recently was involved in a mediation between a Canadian company and an American company with a US mediator, with whom I was working. Everyone was at different locations, and we had actually stipulated on the front end in an MOU that the mediation was being 'held' in Canada, so if there were a question about compliance later on it would be a Canadian body that would hear the appeal. And so what we're suggesting with all six of these elements is that there are things that differ across venues, and with different mediators that should be objects of discussion. We'll talk a little bit more about how that works as we go through this.

2 Ana Maria Maia Gonçalves

We realized that mediation is a high-quality product, an affordable service, but which mostly, all over the world, sells very badly. A service which is available in too many variants does not sell and so we discussed how to regularize the product of mediation. How can we find something that streamlines mediation for customers in order for them to improve their buying decision. That's how we arrived at the universal disclosure protocol for mediation.

And so we were at that moment thinking what are the possible explanations for this paradox and of course, you know we discuss in a lot of ways all over the world and depending on who we are talking to, then we conclude there were three main reasons for that. The first one was a lack of enforcement of the settlement agreements and the Singapore Convention has addressed that. The second is a lack of consistency of mediation agreements and a lack of consistency of the mediation practice and we are not covering that today and this is not to address the DPM. The third thing that we heard is the lack of information about what is expected from this third party that is there, that is the mediator, what is going to do, what's going to happen in that room.

So next slide. UDP is the answer for part of the second question and for the third question too. So how can you UDP make the mediation mainstream worldwide? In our opinion the first one is by giving certainty to parties considering mediation and how do we think about that? As *women* we like to know where we go, our brain loves to predict what is going to happen and UDP by explaining these

items that Daniel just mentioned to participants in the mediation just make them relax, make them feel secure, make them know the way they are talking in that room and the main thing is having trust in the process, in the mediation, in the mediator and now also trusting the technology. The second reason I believe is you Daniel that you are going to talk about that one correct?

3 Daniel Rainey

Sure why not.

So one of the things that I mentioned yesterday is that depending upon who you look at in terms of research There are up to 50 different varieties of mediation that you can identify around the world, but you can argue about the number. But the principle basically is that there's a lot more than one way to do mediation. And the norm for how one approaches mediation sessions varies greatly across the world and sometimes even within the same venue depending upon what your practice was, what your training was, what kind of cases you normally have pursued, etc. So there is a sense when you enter the mediation process there isn't a sense that oh you know I can go I can go to Google and they'll tell me what mediation is and that's it because what you always have is an interplay between the mediators' preferences, the mediator style and what the parties are expecting and what you can work out between the parties about how to in fact engage in the session. So one of the things that we wanted to do was find a way to give some certainty to say okay I know what I'm getting into but in the process of doing that respect the diversity of practice. So clearly what we're not arguing is that we should have a universal way to approach mediation. That is a game, not only is it not worth the candle it's a fool's errand and it would never make that happen. But there is a way to think about those issues in a mediation that are universal, that should be understood by the parties as they enter the mediation, so what we're trying to do with the UDPM is say okay we want to give some structure but we also want to respect the flexibility that parties and mediator have.

The next item on our list here is supporting self-determination. When we started talking to mediators around the world, one of the things that we determined very quickly was that there are no universals. Things are different depending on where you go. One of the things that we found was as close to being a universal as we found for mediation is the idea of self-determination and even that's not universal. We have a United Airlines pilot here and you know that if you're doing labour negotiation you have to go to mediation, you don't have a choice. And you're there until the board tells you that you're done and so that's mediation where self-determination is sort of a secondary issue. It's legally binding. But in most places, in most situations, the parties have self-determination. You can choose to enter and you can choose to leave and so you have the parties with power and authority. And so what we wanted to do was to first of all appreciate self-determination as a new universal and say okay if we're going to honour self-determination how do we do that? How do we inform the parties in a way that

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allows them to say yes knowingly when they enter the process. Anna I believe you're up next.

4 Ana Maria Maia Gonçalves

Yes and the next is by acknowledging cultural influences. And we have this study that has done by *Mano ???* and *Jeremy Lock* and they conclude after doing a research with more than 16 countries and I just got because it says a lot, they say it is difficult to extract any clear standards or process for mediation when two parties come from different jurisdictions, especially when the expectation styles and approaches to mediation vary greatly from country to country. So what we want with UDPM and what the groups around the world told us is that we are going to acknowledge these differences and to make participants in mediation feel welcome wherever they come to that table. The next one is to promoting transparency and I think it has already been covered but by planning, by informing we give transparency to the process, to the technology, to everything that is going to happen in that room.

5 Daniel Rainey

So the last point on this slide is that this one is simple framework. We didn't want to make it complicated, we didn't want to make it something that you have to really pore over and think about a lot with just a very straightforward simple approach that encourages self-determination and encourages the parties to engage in mediation.

6 Ana Maria Maia Gonçalves

What is clear is that UDPM is not an *ODR* group. We agree on that. It is not a set of behaviours or a process that is imposed. That's not what this is about. That it is not a set of rules, it is best practice guidance and it's not a one-way process. It means something that is the communication between the mediator and the parties and the other stakeholders that will decide what's going to happen. What is going to change between what we decide at the beginning and what we think that flexibility of the process needs at any time of the mediation process until the mediation agreement. So this is an important message about this and that we keep with Daniel saying it because it's really the aim. It's not a set of behaviours imposed by any of this. It's not like you endorse the UDPM that you need to do any behaviour. You only need to say I will go through all these points at the beginning of my mediation.

7 Daniel Rainey

So in terms of how we developed this. As I said, Anna and I had a conversation around the Singapore Convention about the fact that this might be a good idea but

what I found in my career anyway is that I always like to ask people whether my good idea actually seems like a good idea to somebody other than me. And so we went around to every continent, except Antarctica and said okay let's find some professional mediators on that continent who are willing to get together as a group and tell us two things. One, is this worth doing and second, if it's worth doing what should it include.. Essentially two very simple questions. Should we do it? And what should we do if we should do it? And they came back with some recommendations. First of all, the mediators themselves that we talked to said this would be good, we need something like this. They think it will help the parties understand. It doesn't compromise flexibility. The most important thing is to keep it simple, don't make it complicated. So essentially what we're saying is that, for example, under conflict of interest or confidentiality, take confidentiality just as an example. In your venue, if you're operating in the EU for example, the idea of confidentiality is at least a semi-legal concept and you have responsibilities for maintaining confidentiality and parties' information. In some venues that's not the case. And so if I'm a mediator who comes from the United States where confidentiality is a described practice but not necessarily covered by a legal standard, then I need to reveal that to the parties because it may very well be that one of the parties expects a different sense of confidentiality. Also technology is on the list and sort of covers all of these and again we started thinking about this as a result of thinking about what does ODR do to international cross-border mediation. So if I'm using technology, it may affect conflict of interest. If I'm an investor in Colin's platform and I'm pushing it out onto the parties, do I need to reveal my interest? Is that a conflict, a potential conflict of interest because I'm bringing in a platform that I have an interest in. In terms of confidentiality, look at the information that we're going to be dealing with in the mediation and ask two questions. First of all, what is the damage that would occur if this information was seen by somebody who shouldn't see it? If I don't care if it winds up on the front page of the Washington Post tomorrow morning then the risk factor is rather irrelevant because the information is harmless. If the information is potentially very damaging and I'm also using a technology where the risk of accidentally revealing that information is high that's unethical and I should reveal what I'm doing and why I'm doing it in terms of the technology that is going to protect the parties' information. And this is all part of what we're suggesting as an initial conversation, a disclosure conversation at the beginning of a process.

Yesterday Leah and I rolled out the standards developed by the NCTDR and ICODR. If you use the protocol guidelines as a discussion point before mediation, you essentially in one way or another cover all of the elements of the standards that we talked about yesterday, and so it doesn't matter so much what you say, but if you talk about each of these six things in a way that directly reflects what will happen in the mediation you're about to do, then you will have operated in what we think is at least a baseline responsible ethical manner in terms of the standards.