



## **Utah Mediation Best Practice Guide** **April 2023**

Broad public confidence in the integrity and fairness of mediation is necessary for the administration of justice and the public’s confidence in mediation as a dispute resolution process. With that goal in mind, a subcommittee of the Utah Judicial Council’s Ad Hoc Committee on Alternative Dispute Resolution (ADR Committee) in 2015 prepared the following document entitled the *Utah Mediation Best Practice Guide*. The *Guide* was approved by the Utah Judicial Council on April 25, 2016.

This *Guide* is a summary of Utah statutes and rules governing mediation, as well as national standards of best practice for mediators. If there is no citation to a statute, rule, or standard of conduct, the best practice is based on the collective wisdom of experienced mediators.

The Utah Judicial Council intends this *Guide* to be used by Utah mediators, lawyers, parties, and administrators, and included in mediator training programs in Utah. The *Guide* does not have the force of law and is not to be used for disciplinary purposes. It also is not mandatory for adoption by Utah dispute resolution organizations or rosters. Because the *Guide* is not mandatory, the word “should” is used throughout, even though the word “shall” is used in many of the cited statutes, rules, and model standards.

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## **Court Rules, Statutes, Case Law, and Model Standards**

### **Abbreviations and Hyperlinks**

*Lyons v. Booker* refers to *Lyons v. Booker*, 982 P.2d 1142 (Ut. App. 1999),  
<http://www.utcourts.gov/opinions/appopin/lyons.htm>.

MS #.# refers to the Model Standards of Conduct for Mediators.  
[https://www.americanbar.org/content/dam/aba/administrative/dispute\\_resolution/dispute\\_resolution/model\\_standards\\_conduct\\_april2007.pdf](https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/model_standards_conduct_april2007.pdf)

MSPFDM # refers to the Model Standards of Practice for Family and Divorce Mediation.  
[https://www.americanbar.org/content/dam/aba/administrative/family\\_law/model-standards-family-divorce-mediation.pdf](https://www.americanbar.org/content/dam/aba/administrative/family_law/model-standards-family-divorce-mediation.pdf)

*Poly Software v. Su* refers to *Poly Software International, Inc. v. Su, et al.*, 880 F. Supp. 1487 (USDC Utah 1995), <http://law.justia.com/cases/federal/district-courts/FSupp/880/1487/1408247/>.

*Reese v. Tingey* refers to *Reese v. Tingey Construction*, 177 P. 3d 605 (Utah 2008),  
<http://www.utcourts.gov/opinions/supopin/Reese2020108.pdf>.

UADRA § 78B-6-# refers to the Utah Alternative Dispute Resolution Act.  
[http://le.utah.gov/xcode/Title78B/Chapter6/78B-6-P2.html?v=C78B-6-P2\\_1800010118000101](http://le.utah.gov/xcode/Title78B/Chapter6/78B-6-P2.html?v=C78B-6-P2_1800010118000101)

UCJA R. 4-510.# refers to the Utah Code of Judicial Administration Rule 4.510.  
<https://www.utcourts.gov/rules/view.php?type=ucja&rule=4-510.01>  
<https://www.utcourts.gov/rules/view.php?type=ucja&rule=4-510.02>  
<https://www.utcourts.gov/rules/view.php?type=ucja&rule=4-510.03>  
<https://www.utcourts.gov/rules/view.php?type=ucja&rule=4-510.04>  
<https://www.utcourts.gov/rules/view.php?type=ucja&rule=4-510.05>  
<https://www.utcourts.gov/rules/view.php?type=ucja&rule=4-510.06>

UMA § 78B-10-# refers to the Utah Uniform Mediation Act.  
[http://le.utah.gov/xcode/Title78B/Chapter10/78B-10.html?v=C78B-10\\_1800010118000101](http://le.utah.gov/xcode/Title78B/Chapter10/78B-10.html?v=C78B-10_1800010118000101)

URCADR R. #, Canon # refers to the Utah Rules of Court-Annexed Alternative Dispute Resolution and Canon of Ethics.  
<https://www.utcourts.gov/rules/view.php?type=adr&rule=101>  
<https://www.utcourts.gov/rules/view.php?type=adr&rule=102>  
<https://www.utcourts.gov/rules/view.php?type=adr&rule=103>  
<https://www.utcourts.gov/rules/view.php?type=adr&rule=104>

URPC # refers to the Utah Rules of Professional Conduct.  
<https://www.utcourts.gov/rules/view.php?type=ucja&rule=14-0301>

## **Standards and Best Practices**

### **I. Integrity and Fairness of Mediation**

A mediator should protect the integrity and fairness of mediation.

#### Best Practices:

1. A mediator should observe high standards of ethical conduct, including those found in the applicable statutes, rules, and case law of Utah, in order to protect the integrity and fairness of mediation. A lawyer-mediator is expected to comply with the Utah Standards of Professionalism and Civility. URCADR R. 104, Canon I (a); UCJA R. 4-510.05(4)(A), (B)(ii), and (8). RPC Rule 14-301
2. A mediator's ethical duties begin prior to acceptance of the appointment to a particular case and continue throughout all stages of mediation, even after a case has been resolved. URCADR R. 104, Canon I (g).
3. A mediator should be impartial and unbiased and should avoid even an appearance of partiality or bias. Because a mediator owes equal duties to all parties, a mediator cannot be considered a fiduciary. UMA § 78B-10-109(6); URCADR R. 104, Canon III (a); MS II.A-C.
4. A mediator should guard against partiality based upon the parties' or other participants' personal characteristics, background, or performance in mediation, or any previous or existing relationship with any party or participant, including on social media. URCADR R. 104, Canons I (c) and III (a)(2); MS II.B.
5. Upon acceptance of a case and throughout all stages of mediation, a mediator should avoid entering into any financial, business, professional, family, social or social media relationship, or acquiring any financial or personal interest, which will affect the mediator's impartiality in fact or appearance. URCADR R. 104, Canon I (c); MS II.B.
6. After mediation has concluded, a mediator should avoid entering into any relationship or acquiring any interest, including any relationship on social media, which might reasonably create the appearance that the mediator was influenced during the mediation by anticipation or expectation of the relationship or interest. *Id.*
7. In creating a future relationship with a mediation party or other participant, the mediator should consider factors such as time elapsed following the mediation, the nature of the relationship to be established, and the services to be provided. *Id.*

8. If a mediator determines that the mediator cannot conduct the mediation in an impartial manner, or if the appearance of partiality is too great, or if requested to do so by a party, the mediator should decline to serve or withdraw. URCADR R. 104, Canon II (e) and (f).
9. A mediator should not use confidential information acquired during mediation to gain advantage, personal or otherwise, or to adversely affect the interests of any party or any other individual or entity. URCADR R. 104, Canon IV (a).
10. Mediators should not be swayed by outside pressure, public clamor, fear of criticism, or self-interest. URCADR R. 104, Canon I (d).
11. A mediator should not use involvement in a particular mediation to enhance the mediator's personal or professional position or status. URCADR R. 104, Canon IV (d).
12. A mediator should promote honesty and candor and should conduct mediation in a manner that encourages informal and confidential exchange among the parties and with the mediator. UADRA § 78B-6-208(1); MS VI.A.4; URCADR R. 104, Canon IV (a). *See also* URCADR R. 103.
13. A mediator should not knowingly misrepresent any material fact or circumstance in the course of mediation. MS VI.A.4.
14. A mediator should conduct mediation in a fair and evenhanded manner and treat all parties and other participants with patience, courtesy, equality, and fairness. A mediator should encourage similar conduct by all participants. URCADR R. 104, Canon III (a) and (c).
15. A mediator should not deny any party the opportunity to be represented by counsel. URCADR R. 104, Canon III (e); UMA § 78B-10-110.
16. A mediator should not conduct a dispute resolution procedure other than mediation (e.g., arbitration), and call it "mediation," in an effort to gain the protection of statutes, rules, or other governing authorities pertaining to mediation. MS VI.A.6.
17. A mediator should not undertake another dispute resolution role in the same matter—for example, changing from the role of mediator to arbitrator—without first fully informing the parties of the implications of the change in role and obtaining their written consent to the change. MS VI.A.8; URCADR R. 101(i).

18. A mediator should be aware of party safety and should take appropriate measures to protect vulnerable parties, including conducting detailed intake (e.g., screening for domestic violence), arranging for a secure location, and allowing for separate meetings or caucuses and separate arrival and departure times for the parties. MSPFDM X.
19. A mediator should take appropriate steps including, if necessary, postponing, withdrawing from, or terminating mediation, if it becomes apparent to the mediator that the mediation is being used to further criminal conduct. MS VI.A.9.
20. A mediator should take appropriate steps including, if necessary, postponing, withdrawing from, or terminating mediation, if the mediator believes that party or other participant conduct, including that of the mediator, jeopardizes conducting mediation consistent with ethical practices. MS VI.C.

## **II. Self-Determination**

A mediator should ensure self-determination of the parties, which is a fundamental principle in mediation.

### Best Practices:

1. A mediator should explain to the parties the principle of self-determination, which includes the right to come to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. MS. I. *See also* URCADR R. 104, Canon VIII (a).
2. A mediator should explain to the parties the importance of consulting legal counsel and other professionals to help the parties make informed choices. MS I.A.2; URCADR R. 104, Canon III (e).
3. A mediator should inform parties that mediation is voluntary and that a party has the right to withdraw at any stage of the proceeding and is under no obligation to reach an agreement. URCADR R. 101(b); R. 104, Canon III (h).
4. If mediation is conducted pursuant to a mandatory mediation statute or program, the mediator should inform the parties of the requirements of that statute or program. *Id.*
5. If a mediator becomes aware that a party may not have the present capacity to exercise self-determination, the mediator should explore accommodations that can be made to allow the party to exercise self-determination. MS VI.A.10.
6. A mediator should be aware of and avoid mediator behaviors that impact party self-determination. This includes behaviors or process choices that produce: undue

pressure or otherwise coerce parties to make particular substantive decisions; create the appearance that the mediator can make substantive decisions or adjudicate the parties' dispute; or prevent or reduce the parties' ability to access resources to make informed decisions or choose other dispute resolution processes. MS I.A; URCADR R.104, Canon VIII (b).

7. A mediator should not undermine self-determination by any party for reasons such as higher settlement rates, mediator ego, larger fees, or outside pressures from court personnel, program administrators, provider organizations, the media, or others. MS I.B.
8. A mediator should serve as an impartial facilitator, assisting the parties in defining and narrowing the issues and encouraging each party to examine the dispute from multiple perspectives, without the mediator undertaking to decide any issue, make findings of fact, or impose any agreement. URCADR R. 101(c).
9. A mediator should not attempt to usurp or otherwise assume the role of counsel for any party. URCADR R. 104, Canon VIII (c).
10. A mediator should be cautious when rendering evaluations or opinions and should make it clear that such evaluations or opinions are not binding on the parties. *See generally* URCADR R. 101(c).
11. A mediator should not make substantive decisions for any party that affect the matter at issue. URCADR R. 104, Canon VIII (b).
12. A mediator may make suggestions about settlement and may draft proposals for consideration by the parties, but all decisions are to be made voluntarily by the parties, without duress created by the mediator. *Id.*
13. A mediator should not coerce a settlement or otherwise pressure any party or the attorney for any party into accepting an agreement. URCADR R. 104, Canon VIII (b).

### **III. Competence and Efficiency**

A mediator should have the necessary competence to satisfy the reasonable expectations of the parties to provide a process that is evenhanded and efficient.

#### Best Practices:

1. A mediator should have specific appropriate mediation training before serving as a mediator. UADRA 78B-6-205(3)(h)(ii); MS IV.A.1 and 2.
2. A mediator should mediate only when the mediator has the necessary subject matter competence to satisfy the reasonable expectations of the parties. MS IV.A.
3. A mediator should be aware of and disclose, if asked to do so, the mediator's qualifications to mediate a dispute, e.g., the mediator's process, style, and methodology of mediation, including whether or not the mediator uses facilitative, analytical, evaluative, and/or directive methodologies in mediation. *See* UMA § 78B-10-109(3); URCADR R. 104, Canon I (j).
4. A mediator should retain a written copy of the mediator's disclosure of qualifications and experience.
5. A mediator should schedule and conduct mediation in a manner that is timely and efficient and respects the needs of the parties. URCADR R. 104, Canon I (b) and (f); URCADR R. 104, Canon III (b); MS VI.A.1 and 2.
6. A mediator should use best efforts to ensure that mediation is not utilized to abuse or harass parties or other participants or to delay or disrupt any proceedings. URCADR R. 104, Canon I (f).
7. If, during the course of a mediation, a mediator determines that he or she cannot conduct the mediation competently for any reason, the mediator should discuss that determination with the parties as soon as is practical and take appropriate steps to address the situation, including, but not limited to, withdrawing or requesting appropriate assistance. MS IV. B.
8. A mediator should not conduct mediation if the mediator is impaired for any reason, e.g., by drugs, alcohol, medication, mental health issues, or otherwise. MS IV.C.
9. A mediator should use best efforts to be aware of cultural issues and differences involved in mediation. URCADR R. 104, Canon V; MS IV.A.1.
10. A mediator should conduct mediation so as to respect the parties' divergent values and negotiation styles. URCADR R.104, Canon V.

11. A mediator should not practice, condone, facilitate, or promote any form of discrimination toward parties or their attorneys. *Id.*
12. If the mediator determines that the parties are unable or unwilling to participate meaningfully in mediation, the mediator should suspend or terminate the mediation and minimize the unnecessary expenditure of fees, time, or emotional stress for the parties. URCADR R. 101(g); MS VI.C.

#### **IV. Confidentiality**

A mediator should maintain the confidentiality of all information obtained in mediation, unless otherwise agreed to by the parties or required by law.

##### Best Practices:

1. A mediator should maintain the confidentiality of mediation communications, which may occur before, during, or after mediation, regardless of whether the mediation communications are verbal, nonverbal, or written, including on social media. UMA § 78B-10-108; UADRA § 78B-6-208; URCADR R. 103; URCADR R. 104, Canon IV; MS V; *Lyons v. Booker*; *Reese v. Tingey*.
2. A mediator should understand the differences between confidentiality and privilege and that confidentiality is broader than privilege. The obligation of confidentiality requires the mediator and, by agreement, the parties and other participants in mediation to protect and preserve the privacy of mediation communications. The requirement of privilege prohibits the admission into evidence of mediation communications in a “proceeding” such as litigation or arbitration. UMA § 78B-10-108.
3. A mediator should discuss with the parties and other mediation participants the extent to which they will maintain the confidentiality or privilege of information they obtain in mediation, including disclosure on social media. URCADR R. 104, Canon IV (b) and (c); MS V.C. and D; UMA § 78B-10-108.
4. If asked, a mediator should discuss with the parties and other mediation participants the mediator’s document retention policies, including about the mediator’s notes and party-supplied documents.
5. In a written agreement to mediate, a mediator should create a duty of confidentiality for the parties and other participants in mediation, including as it relates to social media. UMA § 78B-10-108; UADRA § 78B-6-208(4).



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6. In Utah, it is prohibited for any person to audio or video record a mediation session. With regard to final agreements, please see Section VII 1(a) – (b). See, e.g. UADRA § 78B-6-208(1).
7. A mediator should be aware of the statutory and other exceptions to confidentiality and privilege (e.g., communications evidencing abuse or neglect of a child or vulnerable adult must be disclosed), and should explain these exceptions to the parties and other mediation participants. UMA § 78B-10-104; UADRA § 78B-6-208(4) and (5); UCJA R. 4-510.05; *Reese v. Tingey*.
8. The agreement to mediate should include any relevant exceptions to confidentiality or privilege. UMA § 78B-10-108; UADRA § 78B-6-208(4).
9. A mediator should maintain the confidentiality of parties' ex parte communications, whether provided in pre-mediation briefs and other documents or verbally during caucuses. URCADR R. 104, Canon IV (g).
10. A mediator should refuse to disclose a mediation communication, the mediator's notes, and mediation records, unless ordered by a court to do so. URCADR R. 104, Canon IV (e) and (h); UMA § 78B-10-104(2)(b).
11. If the mediator is subpoenaed to testify or produce documents in a proceeding, and if the mediator believes that compliance with the subpoena would violate the obligation to maintain confidentiality in mediation, the mediator should not testify or produce documents without an order of the court. UMA § 78B-10-104(2)(b); URCADR R. 104, Canon IV (h); UCJA R. 4-510.05(7); MS V.A.2.
12. When required, a mediator should report to the assigned judge or to a mediation organization that mediation has occurred and whether a settlement was reached. UMA § 78B-10-107; UADRA § 78B-6-208(6).
13. When mediation communications are disclosed for research, training, and statistical records, a mediator should render anonymous information about the parties. URCADR R. 101; URCADR R. 104, Canon I (a) and Canon IV (g); MS V and IX.A.

## **V. Agreement to Mediate**

A mediator should prepare and provide to the parties and other participants a written agreement to mediate, to be signed by them before mediation begins.

### Best Practices:

1. A mediator should discuss the agreement to mediate with the parties and other participants before mediation begins and require all participants to sign the agreement. URCADR Rule 104, Canon I (k).
2. An agreement to mediate should:
  - a. Describe mediation as a facilitated negotiation process in which the parties make free and informed choices as to the outcome of their dispute. MS 1.
  - b. Inform the parties that they may withdraw from mediation at any time and they are not required to reach an agreement in mediation. URCADR Rule 104, Canon III (h).
  - c. Describe the requirements of confidentiality or privilege (including statutory mandatory disclosure exceptions) that apply to mediation, including social media use. URCADR Rule 104, Canon IV (c).
  - d. Explain that, in Utah, it is prohibited for any person to audio or video record a mediation session. See, e.g. UADRA § 78B-6-208(1).
  - e. Set forth the fee arrangement between the mediator and the parties. URCADR Rule 104, Canon I (l).
  - f. Explain that, if the mediator is an attorney, the mediator will not offer legal advice and is not representing the parties, but rather is serving as a third-party neutral. URPC 2.4(b).
  - g. Explain that, if the mediator is a therapist or counselor, the mediator is not entering into a therapeutic relationship with the parties, but rather is serving as a third-party neutral.
  - h. Explain that, because the mediator is serving as a third-party neutral for all parties, the mediator is not a fiduciary for any party.
  - i. Inform the parties that they can be represented by attorneys and can consult with attorneys, tax advisors, financial advisors, therapists, and other professionals or persons to help them make informed decisions. MS I.B.

3. A written agreement to mediate should be signed by the parties and other participants in mediation. URCADR R. 104, Canon IV (c).
4. The mediator should retain a copy of the signed agreement to mediate.

## **VI. Conflicts of Interest**

A mediator should be impartial with regard to mediation parties and other participants, as well as to the subject matter and outcome of mediation.

### Best Practices:

1. A conflict of interest includes a financial or personal interest in the outcome of the mediation, an interest in the subject matter of the mediation, and an existing or past financial, business, professional, family, or social relationship with a mediation party, attorney, or other participant in the mediation. UMA § 78B-10-109 (1)(a); URCADR R. 104, Canon II (a) and (b); MS III.A and B.
2. A mediator, before mediation, should make reasonable efforts to determine whether any potential conflict of interest might reasonably create an appearance of partiality or bias, including any material social media relationships. UMA § 78B-10-109 (1)(a); URCADR R. 104, Canon II (a) and (b); MS III.A and B.
3. A mediator should avoid a conflict of interest and the appearance of a conflict of interest during and after mediation. MS III.A.
4. A mediator should disclose relevant facts about a potential conflict of interest as soon as practical before mediation, or during mediation if such facts become known later. UMA § 78B-10-109 (1)(b); MS III (C) and (D); URCADR R. 104, Canon II (c) and (d).
5. A mediator should disclose every appearance of a conflict of interest even if, in the judgment of the mediator, it poses no obstacle to the mediator's impartiality. This determination is made by the parties and their attorneys, and not by the mediator. UMA § 78B-10-109 (6); URCADR R. 104, Canon II (d); MS III.D.
6. The disclosure of potential conflicts of interest should be in writing, and the mediator should retain a copy of the disclosure.
7. A mediator, after full disclosure of a potential conflict of interest to the parties, may proceed with mediation if all parties agree. URCADR R. 104, Canon II (d); MS III (D); UMA § 78B-10-109(6).

8. Although the parties may waive a mediator's conflict of interest, the mediator's impartiality should never be compromised.
9. The parties' waiver of a mediator's conflict of interest should be in writing signed by the parties, and the mediator should retain a copy of the signed waiver.
10. A mediator should withdraw immediately from mediation, if the mediator believes that an interest or relationship might reasonably be viewed by a party as undermining the integrity of the mediation. If the mediator was appointed by the Utah ADR Director, the mediator immediately should notify the Director. URCADR R. 104, Canon I(c); URCADR R. 104, Canon II (e); MS III (E).
11. A mediator should withdraw from mediation if a party requests the mediator to do so. URCADR R. 104, Canon II (f).
12. A mediator, after mediation is concluded, should not represent any mediation party in connection with the same or substantially factually related matter, unless all parties to the mediation consent in writing after full disclosure. *Poly Software International v. Su*.
13. A mediator who holds a professional license should comply with the rules of professional conduct of that profession. A mediator who is an attorney should comply with the applicable rules of professional conduct of every state and federal Bar of which the mediator is a member. A mediator who is an attorney in Utah should comply with the URPC, including URPC R. 1.12 and 2.4.

## **VII. Final Agreement**

The parties' agreement reached in mediation should be reduced to writing and signed by the parties in order to be binding and enforceable in court.

### Best Practices:

1. A mediator should discuss with the parties that verbal agreements in mediation, that are not memorialized in a writing signed by the parties, are generally not admissible or enforceable in court. *Reese v. Tingey*.
  - a. It is considered a best practice in mediation to write down the terms of a final agreement and to have all parties sign the agreement.
  - b. However, when mediating in a court setting, with the permission of a judge or commissioner, a final agreement from mediation may be read into the official record of the court of jurisdiction. Under these circumstances, the

presence of a judicial officer is more likely to ensure the clarity of the final agreement terms.

2. In the event of settlement, a mediator may prepare and should facilitate the preparation of appropriate settlement documents and the prompt and appropriate handling of those documents. URCADR R. 101(e).
3. If attorneys participate in mediation, they should draft the final agreement.
4. If disputes arise in drafting the terms of a final written agreement, the mediator should facilitate further negotiation to help the parties achieve a mutually acceptable final agreement.
5. If attorneys draft the final written agreement, they should sign the agreement to assure they have approved the agreement.
6. With the agreement of the parties, a mediator may prepare a final agreement or memorandum of understanding, if the mediator has the experience or training to do so. In drafting a mediated settlement agreement or memorandum of understanding, the mediator should memorialize only the terms of the parties' agreement. MSPFDM VI E.
7. A mediator should advise a represented party who participates in mediation without the presence of the party's attorney not to sign a final agreement until the party's attorney reviews and approves the agreement. MS I.A.2.
8. A mediator should advise an unrepresented party to seek independent legal advice before signing a final agreement. MS 1.A.2.
9. If possible, the mediator should retain a copy of the signed final agreement.
10. A mediator, who is an attorney in Utah ("attorney-mediator"), in a mediation in which unrepresented parties have fully resolved all issues, may prepare documents that memorialize and implement the parties' agreement, if:
  - a. the attorney-mediator obtains the informed written consent of all parties;
  - b. the attorney-mediator recommends that each party seek independent legal advice before executing the documents; and
  - c. the attorney-mediator informs the court of the attorney-mediator's limited representation of the parties for the sole purpose of obtaining court approval of the documents. URPC 2.4.

## **VIII. Fees and Other Charges**

A mediator should be transparent and clear about fees and other charges so that parties completely understand what they will be paying.

### Best Practices:

1. The fee arrangement should be stated in a written agreement to mediate. URCADR R. 104, Canon I (l).
2. A mediator should provide each party or each party's representative with accurate and complete information about the mediator's fees, expenses, and any other charges that may be incurred in connection with mediation. MS VIII.A.
3. A mediator should not charge fees in a manner that impairs a mediator's impartiality. MS VIII.B.
4. While a mediator may accept unequal fee payments from the parties, a mediator should not use fee arrangements that impair the mediator's impartiality. MS VIII.B.2.
5. A mediator should not enter into a fee agreement which is contingent upon the outcome of the mediation or the amount of the parties' settlement. MS VIII.B.1.

## **IX. Terminating or Suspending Mediation**

A mediator should suspend or terminate mediation in order to uphold the integrity and fairness of mediation or where required by law.

### Best Practices:

1. A mediator should inform the participants that they may withdraw from and terminate mediation at any time without being required to reach an agreement. URCADR R. 104, Canon III (h).
2. A mediator should exercise reasonable diligence and effort to assure parties their mediation is not terminated prematurely. URCADR R. 104, Cannon III.
3. A mediator should terminate mediation, if the mediator:
  - a. becomes aware of a conflict of interest that might reasonably be viewed as undermining the integrity of mediation, MS III.E;
  - b. is not able to conduct mediation in a competent, fair, or impartial manner, MS I.A;

- c. becomes aware that mediation is being used to further criminal conduct, MS VI.A.9;
  - d. becomes aware of domestic abuse or violence between the parties that could jeopardize the mediation, MS VI.B;
  - e. believes that the conduct of any participant jeopardizes the mediation, MS VI.C;
  - f. has a reasonable belief that a party appears to have difficulty comprehending or participating in mediation, and believes reasonable adjustments and accommodations for that party cannot be made, MS VI.A.10; or
  - g. believes that the parties are no longer able to participate in a meaningful mediation, or that it is unlikely that a reasonable agreement is possible, URCADR R. 101(g).
4. A mediator should not terminate or suspend a mediation and undertake an additional dispute resolution process (e.g., arbitration) in the same matter without the informed written consent of the parties, and then only after the mediator informs the parties of the implication of the change in the dispute resolution process. MS VI.A.8.

## **X. Advertising and Solicitation**

A mediator should be truthful and not misleading when advertising, soliciting, or otherwise communicating the mediator's qualifications, experience, services, and fees. This principle applies to written, oral, and electronic communications.

### Best Practices:

1. A mediator should accurately represent the mediator's qualifications and experience. In an advertisement or other communication, a mediator may make reference to meeting state, national, or private organizational qualifications, only if the entity referred to has a recognized procedure for qualifying mediators and the mediator has been duly granted the requisite status. URCADR R. 104, Canon I (j); MS VII.A.2.
2. A mediator should refrain from making promises or guarantees of results in communications. A mediator should not advertise statistical settlement data or settlement rates. URCADR R. 104, Canon I (i); MS VII.A.1.
3. A mediator should not directly contact a party to solicit selection in a particular case, if the party is represented by an attorney. URCADR R. 104, Canon I (h).

4. A mediator should not solicit in a manner that gives an appearance of partiality for or against a party or otherwise undermines the integrity of mediation. MS VII.B.
5. A mediator should not communicate to others, in promotional materials or through other forms of communication, including on social media, the names of persons served in prior mediations without their permission. MS VII.C.

## **XI. Advancement of Mediation**

A mediator should act in a manner that advances the practice of mediation.

### Best Practices:

1. A mediator should advance the practice of mediation by:
  - a. fostering diversity within the field of mediation, MS IX.A.1;
  - b. striving to make mediation accessible by performing pro bono or reduced-rate mediation services, MS IX.A.2;
  - c. collaborating with the state and federal judiciary, the Utah State Bar, public and private institutions, and other mediators to make mediation accessible and affordable, URCADR R. 104, Canon I (a); MS IX.A.2;
  - d. participating in research, writing articles, and presenting programs designed to improve the skills of those engaged in the practice of mediation, MS IX.A.3;
  - e. participating in outreach and educational efforts to assist the public in understanding and appreciating mediation, including different styles and methodologies of mediation, MS IX.A.4; and
  - f. collaborating with, assisting, and mentoring those who aspire to be mediators or who are new to the field of mediation, MS IX.A.5.
2. A mediator should work with and seek to learn from other mediators to improve the practice of mediation. MS IX.B.



## **Section XII – Online Mediation**

This section of the Guide is intended to provide wisdom and experience for mediators regarding the administration of a mediation in a virtual or hybrid (one party in person and one party virtual) setting. All of the additional Guide sections and standards of conduct set forth remain relevant to these sessions, as well.

### **Best Practices:**

#### **1. ONLINE PLATFORM**

1a. The mediator should take reasonable steps to ensure a confidential and secure online platform for hosting virtual/online mediation sessions.

1b. Mediators should give mediation participants instructions about how to use the online platform, as well as inform themselves and their clients about how to resolve technology service interruptions, technology failures, and other IT issues ahead of the mediation session.

1c. The mediator should control access to the mediation room/breakout sessions, just as they would in an in-person, office setting. It is recommended that a mediator use a waiting room format at the outset of the session, to be aware who is accessing the online mediation, to ensure knowledge of how to use the online platform, and to facilitate effective engagement for all participants.

1d. It is recommended that the mediator use breakout rooms to host caucus/individual discussions, and that the mediator practice this feature ahead of time for familiarity with the technology. Caucuses in an online mediation must be secure and confidential, just as they would in an in-person setting.

1e. It is recommended that the chat feature for message exchanging and that the recording feature both be disabled during the online mediation session.

## **2. SECURE WI-FI / ETHERNET / NETWORK CONNECTION**

2a. Mediators should use a private, secure connection. It is recommended that a mediator not administer an online mediation in any public, accessible physical setting where they cannot ensure internet security and confidentiality.

2b. The mediator should be aware of who is present in the virtual mediation setting. The mediator should inform the parties and other participants, as well, not to use a public access system, if at all possible.

2c. If an online platform or internet connection fails, the mediator's readiness and ability to employ a technology failure protocol must be in place prior to opening the mediation session. The mediator should inform the parties ahead of the mediation session about what best next steps are to be taken if technology fails. It is recommended to exchange cell phone numbers ahead of the mediation session in order to communicate in the event of any possible technology failure.

## **3. DOCUMENT EXECUTION**

3a. Exchanging an agreement to mediate form is just as important in a virtual mediation and should not be ignored. Forms can be exchanged and signed ahead of the mediation session. The mediator must ensure a process for either virtually signing or physically signing forms and returning them to the mediator; this process must account for all parties' capabilities, offering an alternative as needed/requested.

3b. It is imperative for a mediator to know who is in the virtual mediation rooms, and/or who is participating on or off camera, especially in the virtual context where the entire physical space may not be visible on screen. All participants must be disclosed and sign the agreement to mediate form.

3c. These recommendations apply also to the drafting and signing of any final agreement in mediation.

#### **4. CONFIDENTIALITY**

4a. It is imperative for a mediator to know who is in the virtual mediation rooms, and/or who is participating on or off camera, especially in the virtual context where the entire physical space may not be visible on screen.

4b. It is encouraged that a mediator and the session participants find private, respectful locations to participate in the online mediation session. This includes being free from noise, intrusion, interruption, and distraction.

4c. All parties to an online mediation session should agree in advance that all mediation communications are considered confidential, including those by video, call, text, email, chat, or other means.

4d. Any recording of online mediation is prohibited. It is a violation of the confidentiality of the parties and of mediation to create or retain a recording.

4e. The terms/recommendations included in this subsection (number 4) are also recommended to be language written into the agreement to mediate used by the mediator.

#### **5. ADDITIONAL CONSIDERATIONS**

5a. Part of hosting an online mediation is to be seen and heard, meaning that the mediator should be visible on camera, with their face well-lit and have adequate sound for communicating.

5b. The mediator in an online session should refrain from checking emails, receiving calls, social media use, search engines, and other online distractions that are not related to and necessary for the mediation. A mediator should encourage all parties to do so also.

5c. Online mediators should arrive at least 10 minutes ahead of the scheduled start time, for preparation for hosting. It is recommended that parties arrive 5 minutes ahead of scheduled start time.