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UNITED STATES SECURITIES AND EXCHANGE COMMISSION
SHARING NEUTRALS PROGRAM

JULY 26, 2007

PRESENTER: CATHY BARCHI

* * DVD TRANSCRIPTION * *

1 * * Beginning of DVD * *

2 PARTICIPANT SPEAKER: -- if you have
3 questions, is get on your e-mail and go to
4 SNbrownbag at SEC dot gov; again, SNbrownbag at
5 SEC dot gov.

6 So during our session, if you have
7 questions, feel free to go ahead and send those
8 to us and we will respond here in session in --
9 in our dialogue, basically.

10 The other thing I think is
11 important -- this is just real quick -- is we
12 have evaluations, if we could all please fill
13 those out here in the room.

14 It's not mandatory, but we're going to
15 try to keep getting room -- to get those
16 evaluations, give us feedback and -- and -- so we
17 know what we need to do to improve the sessions
18 or keep doing.

19 For those of you who's on
20 videoconference telephone, we will e-mail the
21 evaluation form out to you-all sometime shortly
22 after the session.

1 And the last thing I want to mention
2 is if you have cell phones here in the room,
3 would you please put those on vibrate or turn
4 them off so it doesn't, you know, disrupt the
5 session. And -- and that's about it.

6 Leah, anything else that I didn't
7 mention?

8 PARTICIPANT SPEAKER: No. Thank you.

9 PARTICIPANT SPEAKER: Okay. The next
10 thing I want to do real quick is just introduce
11 Cathy. One of the things that is great for me is
12 that she's a colleague with -- with me at HHS.

13 We've had a chance to -- to dialogue.
14 And she has a lot of food experience. She's a
15 health insurance specialist for the centers of
16 Medicaid and Medicaid services.

17 She also, besides her federal work, of
18 course, is a -- is a fellow Shared Neutrals
19 member here and lead mediator, and so she's
20 mediated quite a bit and has some -- some
21 experience to be able to share with you today on
22 should a mediator deal with institutional issues.

1 She also has had experience in
2 academics, actually as an adjunct professor at
3 University of Baltimore, the School of Law there,
4 teaching ADR seminars and -- and workshops, but
5 also mediation workshops. She has continued to
6 teach since, I think, 2002 or that range.

7 MS. BARCHI: I started teaching in
8 2003, but mediation skills I've been teaching
9 every semester since 2004.

10 PARTICIPANT SPEAKER: So -- and
11 actually, formerly an administrative judge in
12 Maryland, also, and used these ADR skills in that
13 capacity a while back.

14 So she's been involved with the
15 federal government, the state government, and
16 also academics. And so without further ado, I'm
17 going to turn over to you, Cathy, and thanks for
18 being here.

19 MS. BARCHI: Okay. And thank you very
20 much, Patrick.

21 And I want to -- before I do anything
22 is I want to thank -- I do have a microphone.

1 PARTICIPANT SPEAKER: Oh, you do have
2 a microphone?

3 MS. BARCHI: I think that's okay. I
4 think we're okay. And I'm pretty -- project my
5 voice pretty well. If anybody can't hear, please
6 let me know. If you can't hear, please e-mail us
7 if you're unable to hear and you're unable to --
8 I'm not speaking loud enough. And usually I do.

9 And obviously, those of you who are in
10 the room know that I really like the sound of my
11 own voice, because I started talking when --
12 before I gave Patrick an opportunity to say
13 anything.

14 But in any event, when he was talking
15 about evaluations, it reminded me of a -- of a
16 presentation I gave for a Medicare advantage
17 group for CMS back in -- in San Francisco.

18 And I got up and kind of made some
19 jokes and started out -- because -- because
20 again, for the sixth and seventh time, I was
21 scheduled at 4:00 in the afternoon.

22 So I started to get a complex about

1 the fact that they kept scheduling me at the end
2 of the day, that maybe they didn't expect anybody
3 to show up.

4 But this room had hundreds of people.
5 And they did -- and when they evaluated me, they
6 said it was hilarious. I'm not so sure they --
7 that they got anything out of the presentation,
8 but they thought I was funny, in any event.

9 Patrick told you a little about my
10 background. And I know I talk fast. I'm from
11 New Jersey, you know, right across the river from
12 New York. And this is just how I do things.

13 Sometimes I have to slow down a little
14 bit in order for -- for people can get what I'm
15 saying. So please, if -- if I'm going too fast,
16 just let me know. Just a little hand motion will
17 help me out a little bit.

18 Patrick told you a little bit about my
19 background. I was trained as a mediator in 2000.
20 And that was when I was an administrative law
21 judge with the State of Maryland.

22 As administrative law judge, it is

1 required that we act as mediators and settlement
2 conference judges. So we were trained to mediate
3 as part of our initial training as judges.

4 I worked there five and a half years
5 and then came to the federal government in July
6 of 2000. When I got to the federal government,
7 fortunately, I found out quickly about the
8 Sharing Neutrals program and was accepted as a
9 lead mediator.

10 I do teach a certificate course at the
11 University of Baltimore School of Law, in -- and
12 that is in accordance with the Maryland Rule
13 17-106.

14 So I -- I utilize -- I teach all the
15 skills that are required for a four-year
16 certificate course and -- and all of my students
17 get a certificate at the end of the session.

18 So if you have any, you know,
19 questions about my background or want to know
20 anything further, I'll give you my e-mail address
21 at the end of this and we can always talk some --
22 at -- at another time. We don't have a lot of

1 time today and I want to make sure that we get in
2 as much as we can.

3 I also want to indicate that, you
4 know, I was talking about the fact that I teach,
5 and I teach at night. And my students sometimes
6 are sitting in the back of the room and I see
7 them, that they're really -- that their eyes are
8 glazing over. You know, I'm hoping that they're
9 going to get involved.

10 And I've really got to work hard to
11 get them going, because a lot of times they're
12 tired; they've worked; you know, they're --
13 they're going to school at night, so they're
14 beat. And it's really hard to get them -- get
15 them to get involved in the process.

16 But I hope that you will be. I hope
17 that this will be very interactive. What I'm
18 hoping to do today is really act more as a
19 moderator or facilitator of a discussion.

20 PARTICIPANT SPEAKER: (Inaudible) make
21 sure (inaudible).

22 (Inaudible conversation.)

1 PARTICIPANT SPEAKER: What we need to
2 do is --

3 PARTICIPANT SPEAKER: Well, hold on.
4 (Inaudible conversation.)

5 PARTICIPANT SPEAKER: (Inaudible) come
6 back --

7 (Inaudible conversation.)

8 MS. BARCHI: (Inaudible) sure what
9 they're -- what that's about, but in any event,
10 I'll keep going. We are -- as I said, I want
11 really to -- to act more kind of as a moderator
12 today.

13 And what's going to be a real pleasure
14 for me is normally I'm teaching whatever I teach.
15 And I've -- I've taught at -- at -- a number of
16 different times in different -- in different
17 arenas, but normally I'm teaching people who
18 don't know the basics.

19 So it would be really -- and, you
20 know, I always learn something from my students,
21 but most of the time, it's not about mediation.
22 So it will be really nice to have a number of

1 mediate -- mediation professionals here in the
2 room that I can learn from as well. And I hope
3 we can all learn from each other today.

4 Now, the other thing that I wanted to
5 indicate is that what I was -- what I thought of
6 doing, rather than -- as you can see, I don't
7 have a PowerPoint presentation.

8 I'm a little bit -- and I'm not the
9 best PowerPoint person there is. And I -- and I
10 have noticed that every time I've given a
11 presentation when I have a PowerPoint, it's
12 usually three -- three screens behind, because I
13 forget to move them forward, because I start
14 talking, as you see, very fast, and the
15 PowerPoint doesn't catch up with me often.

16 So in any event, since mediators, one
17 of our skills or hallmark as a mediator is to
18 listen, hopefully, that's what we'll do. We'll
19 listen to me and to each other today.

20 The other thing I wanted to say is
21 that since I didn't do a PowerPoint, I'd like to
22 have -- to kind of put together maybe a guidance

1 document or something, you know, with some
2 suggestions that come out of this process today.

3 So if there's anything -- you know,
4 I'm going to go back, kind of put this stuff
5 together, send it out to you-all. And please
6 give me your e-mail address before you leave.

7 I know you're going to do evaluations.
8 And I think what I'd like to do, if -- I -- if --
9 Leah, if you have their e-mail addresses, great.

10 Perfect. It looks like we've got
11 them. So I will send this out to you. You can
12 comment on it. And we can kind of make a
13 guidance document out of it, I hope. That's my
14 hope.

15 So -- and I -- and I will appreciate
16 any of your feedback and help in doing that.
17 Okay? And again, thanks to -- to Leah and
18 Patrick for their help today.

19 I want to start by saying that, you
20 know, we know that mediation is and should be a
21 flexible process. So it's really important that,
22 you know, we talk about these -- these particular

1 issues that oftentimes arise.

2 As a judge, when I was presiding over
3 a case, if there was an evidentiary ruling, I
4 knew the rules of evidence; I could make a ruling
5 on that evidence. There were rules and I -- I
6 could follow those rules.

7 But with mediation, there are rules,
8 but there aren't all that many and there aren't
9 many that there -- that deal with all the issues
10 that we end up having to face when we are in the
11 mediate -- within the mediation process.

12 So in this particular type of
13 discussion that we're having today, I -- there
14 really are no absolutes. There's no statute or
15 anything that kind of governs this. I mean,
16 there may be a few things that can give us
17 guidance, but there are no absolutes.

18 So hopefully, we can -- you know,
19 it's -- it's important for us, as mediators,
20 obviously, to role-play, to, you know, bounce
21 suggestions off of one another, to kind of work
22 together to find better ways to handle the

1 situations that may occur.

2 And -- and it's hard to anticipate. I
3 mean, that's the -- that's the joy and challenge
4 of it and the difficulty in being a mediator, as
5 I'm sure that you all know.

6 So I think what -- what I'll do first
7 is kind of try and define what we mean here by
8 institutional issues. And I view these issues in
9 two -- in one of two ways.

10 And the first way would be the way the
11 agency behaves with respect to the ADR setting.
12 For example, they always send a representative,
13 say, to -- a particular agency, maybe it's their
14 policy to always send a representative to the
15 mediation that has no personal knowledge of the
16 dispute, that may have some background or, you
17 know, may be able to settle, but doesn't have any
18 personal knowledge of the -- of the issues.

19 And that may -- and that may or may
20 not hinder the mediation process. It may -- and
21 perhaps in some ways it might help the process.
22 It depends, I think, on the situation.

1 But, you know, when someone doesn't
2 have personal knowledge and the actual supervisor
3 or the person that -- that -- with which the
4 employee actually has the dispute or the problem,
5 that -- that could be an (inaudible), in my point
6 of view.

7 The other way is, you know, agency --
8 you know, agency interest, policies, their
9 decision-making, agreements, things like that,
10 how would they impact the mediation process? In
11 other words, you know, collective bargaining
12 agreement, things like that.

13 So let's look at a couple of things.
14 First of all, I -- I want to ask: How many
15 lawyers do we have in the room here today? Oh,
16 we have a few; not too bad. I just wanted to say
17 that I was trained by the --

18 PARTICIPANT SPEAKER: (Inaudible.)

19 MS. BARCHI: Leah's laughing at me.
20 I'm a lawyer, so -- obviously, and -- and a
21 judge. But in any event, the fact is I was
22 trained by lawyers, even though I'm a lawyer.

1 And I think that's very helpful,
2 because when you're in a situation -- and -- and
3 I remember, because -- especially what I was
4 judge, when I was mediating a case and, you know,
5 I'd sit there -- and a lot of times we mediated
6 special ed cases, special education, IDEA,
7 Individuals with Disability Education Act.

8 So we'd mediate these cases and I'd
9 sit there thinking, they're never going to win
10 this. I don't know why they don't just settle.
11 I mean, I'm thinking it to myself, because I
12 know, because I would be the person who'd be
13 presiding over -- not that particular case, but
14 I'd be the person who'd be presiding over those
15 types of cases.

16 So, you know, and sometimes that can
17 impact how you behave as well in the mediation,
18 you know, the fact that you happen to have a
19 specific institutional knowledge or legal
20 knowledge of what happened.

21 You may -- you may be familiar with
22 a -- with a particular institution or agency and

1 you know that this is the type of case they're
2 going to settle for such and such and such and
3 such. And -- and, you know, maybe these things
4 may impact how you actually behave in the
5 mediation process.

6 And I think these are all things that
7 we really need to think about before we go in and
8 actually have to face these issues in the middle
9 of a session.

10 So what -- what we're going to start
11 with, I think, is talk about who's at the table.
12 So you go to a mediation. Who attends? Anybody.
13 Tell me -- tell me who usually attends employee
14 dispute -- employment dispute. Anybody?

15 PARTICIPANT SPEAKER: Employee.

16 MS. BARCHI: Who usually attends? The
17 employee, okay.

18 PARTICIPANT SPEAKER: Maybe a
19 representative of the person.

20 PARTICIPANT SPEAKER: Either you need
21 to -- you're repeating. Either you need to
22 consistently repeat or you need to wait and

1 (inaudible).

2 MS. BARCHI: Oh, I'm sorry. Oh, I'm
3 sorry. Sorry about that. All right. What she
4 said was the employee and that the employee might
5 have a representative. Okay? Who else?

6 PARTICIPANT SPEAKER: The supervisor.

7 MS. BARCHI: The supervisor? Okay.
8 Maybe the supervisor who had the issue with the
9 employee. Who else might attend mediation? Yes?

10 PARTICIPANT SPEAKER: Could have a
11 subject matter expert on the issues.

12 MS. BARCHI: Could, could. We're
13 still not getting to where I'm trying to get to.
14 What about, who -- okay, (inaudible), yes.

15 PARTICIPANT SPEAKER: (Inaudible) have
16 a -- sometimes agencies have a settling official
17 who's not in the management chain.

18 MS. BARCHI: Absolutely. What you
19 need is somebody who can make a decision about
20 settlement. And it's really important that the
21 people at the table can make a decision about
22 settling.

1 Now, that doesn't always happen. And,
2 you know, you may get situations where, you know,
3 you sit there and you're talking to these
4 participants and you find out that this person
5 really has no authority to do anything.

6 I mean, they may have been involved in
7 the dispute it -- itself, but doesn't really have
8 authority. So what do you do about that?
9 Anybody? How do you handle that?

10 PARTICIPANT SPEAKER: I can tell you
11 things I tried unsuccessfully.

12 MS. BARCHI: Okay.

13 PARTICIPANT SPEAKER: One, I tried to
14 get the counsel and her client to contact a
15 higher level person to bring them into the
16 process, and the person declined. And I've tried
17 to offer to talk to the person directly myself,
18 and the person declined to talk to me.

19 I tried to gently nudge a little bit,
20 since the complainant was getting very antsy.
21 And that didn't move it. So those are some
22 things that I tried, but it wasn't -- none of

1 them were successful.

2 MS. BARCHI: So you -- were you able
3 to conduct any -- any part of the mediation
4 process or did you end up not going forward with
5 it?

6 PARTICIPANT SPEAKER: We went forward,
7 but it took a long, long time. And it really
8 required a lot of work with the complainant, who
9 was attributing bad faith.

10 MS. BARCHI: And -- and that's what
11 makes it so difficult, when -- when the agency
12 ends up not sending the people and not being
13 cooperative.

14 You know, I had this situation where
15 you go into, you know, a -- a mediation and
16 there's a mediate -- the agency official will
17 say, well -- you tell them it's a voluntary
18 process and they say, well, it's not voluntary
19 for me, you know.

20 And they get a little upset. And
21 their -- and their participation -- it really
22 affects their ability to participate in the

1 process.

2 So, you know, maybe agencies, what
3 they need to do is -- is talk a little bit more
4 to their -- to their managers, to their people
5 that are going to participate in this process,
6 especially if it's part of the EEO process, that
7 they understand, you know, what's at stake here,
8 what -- what they are doing, how they're
9 representing the agency and what they should be
10 doing and how they should be participating in
11 this process.

12 But sometimes it's very difficult, as
13 Leah pointed out. We don't have the people we
14 need there. You know, we don't know, you know,
15 how to go forward.

16 I mean, I try at all costs -- I mean,
17 I think that obviously, Leah and Patrick will
18 probably agree with me -- to go forward and see
19 if we can at least do something in the session.

20 You know, we're here. You know, the
21 complainant wants -- wants to move forward, wants
22 to talk about this. Let's see what we can do.

1 Let's see if we can move forward.

2 Okay. Obviously, you know, what
3 the -- the mediation maybe even have issues about
4 the agency sending, you know, the same type of
5 people every time.

6 And maybe they have, like you -- you
7 talked about before, a settlement person who they
8 send all the time for all the mediations, and so
9 that, you know, how does -- how does this
10 really -- does this really move forward or are
11 they just saying, you know, we want to find a way
12 to settle this, but, you know, we don't really
13 care about preserving the relationship?

14 And this is another problem. I mean,
15 if there's a relationship at stake here, how do
16 you preserve that relationship if the
17 participants who have the difficulty with the
18 relationship are not there at the table?

19 So, you know, many of these things,
20 you know, become problems and issues that we, as
21 mediators, need to deal with in order to make
22 this successful, to -- you know, to make this

1 process successful.

2 Who -- who will need to sign the
3 settlement agreement? Oftentimes, I have found
4 that a lot of times that even if we write out a
5 settlement agreement in the mediation, it doesn't
6 get signed there -- there and then at the table.

7 You know, there may be someone else
8 who has to -- you know, it may be a
9 recommendation. It may be someone else who has
10 to, you know, go ahead and sign the agreement,
11 see the agreement and agree to, you know, sign
12 the agreement, but at least we can move forward.

13 I mean, I think it's really important
14 to move forward, end the process if we can. I
15 mean, it may not always be possible and it may be
16 difficult, but I think that's the -- the whole
17 challenge of -- of us as mediators, how we can
18 make work this process effective and better for
19 every agency that we come in contact with.

20 Should we discuss these things with
21 the participants before the mediation? Does
22 anybody discuss this beforehand? You -- you're

1 shaking your head.

2 PARTICIPANT SPEAKER: Well, you -- in
3 the -- in the meeting calls, the premediation
4 calls, I like to ask them who they think needs to
5 be at the table, who has the authority to settle,
6 and -- and, you know, emphasize that those people
7 need to be there.

8 MS. BARCHI: And suppose they're not?

9 PARTICIPANT SPEAKER: Then, you know,
10 at the mediation, you do everything that -- that
11 we've been talking about trying to do.

12 MS. BARCHI: And driving that, making
13 your recommendation --

14 PARTICIPANT SPEAKER: Yeah.

15 MS. BARCHI: -- or some way to move
16 forward.

17 PARTICIPANT SPEAKER: Or if the
18 parties do reach agreement, then -- then have
19 them sign the agreement in principle or -- or
20 sort of frame up the agreement and then go back
21 to clear it with the right people.

22 MS. BARCHI: And sometimes you have to

1 work on the agreement. I mean, you know, I've
2 had, you know, certainly situations where we've
3 gone back and forth.

4 They may have representatives that --
5 you know, the complainant or the -- whoever the
6 employee is may have a representative or someone
7 that they want to look at it. So these are all
8 issues. Yes.

9 PARTICIPANT SPEAKER: You can
10 potentially have a very productive mediation
11 without someone there who has authority to
12 settle, depending on what the parties want. You
13 know, it gives them a forum in which to come and
14 talk.

15 MS. BARCHI: I'm going --

16 PARTICIPANT SPEAKER: Cathy, Cathy,
17 it's not working.

18 MS. BARCHI: Oh, it's not working.

19 PARTICIPANT SPEAKER: No.

20 PARTICIPANT SPEAKER: Yeah.

21 PARTICIPANT SPEAKER: So to the extent
22 that you can repeat it --

1 MS. BARCHI: Okay. Well, what you
2 were saying, couldn't you have a very productive
3 mediation without the -- the people who have
4 settlement authority, to the extent that you can?
5 And I think --

6 PARTICIPANT SPEAKER: Well, to the
7 extent, depending on what the parties are there
8 for. The party having a conflict with management
9 often wants to come and talk.

10 MS. BARCHI: Absolutely. And what --
11 what the gentleman said -- I'm sorry. Your name
12 was?

13 PARTICIPANT SPEAKER: Neil Kaufman.

14 MS. BARCHI: Oh, hi, Neil. Neil
15 was -- Neil said that sometimes the person just
16 wants to really talk to their supervisor. It may
17 be a dispute or a conflict with their supervisor.
18 And I think that's absolutely true. And I've had
19 that happens on many occasions.

20 And I really think that, you know,
21 especially in cases like that, you want to go
22 forward. You want to see what you can do to help

1 that this relationship that exists between the
2 two and see if -- if you can come to some
3 resolution. So I think that's very important and
4 I think that is great. Somebody else?

5 Okay. All right. How about EEO
6 officials, when you're dealing with EEO
7 officials? Suppose it's an EEO complaint and you
8 get there and the EEO official says, you know,
9 this is really a high profile case and I really
10 want to settle it. I do not want to end up, you
11 know, having to litigate this.

12 Okay. So they tell you that. What do
13 you, as a mediator, think? Do you feel pressure
14 to settle? Does it change how you -- how you are
15 going to go forward with the mediation process?
16 You're shaking your head. Gentleman -- the
17 gentleman right here, you were shaking your head.

18 PARTICIPANT SPEAKER: Me?

19 MS. BARCHI: Yeah.

20 PARTICIPANT SPEAKER: Oh, we don't
21 want to go there.

22 MS. BARCHI: Oh, sure, we do. No?

1 Okay. Yes, sir.

2 PARTICIPANT SPEAKER: I mean, I think
3 it would put pressure on it, on the mediator, but
4 it -- it would be pressure they would have to
5 resist --

6 PARTICIPANT SPEAKER: Uh-huh.

7 MS. BARCHI: Exactly.

8 PARTICIPANT SPEAKER: -- because in a
9 sense, it's like having -- it would be having --
10 like having a judge in the room if you go too
11 far.

12 MS. BARCHI: Yeah. And -- and of
13 course, you know, the temptation sometimes, when
14 you are a lawyer or have been judge, is to kind
15 of, you know, be a little more demonstrative.
16 So, you know, I always have to kind of rein
17 myself in when thing like that happen.

18 But again, you know, for me -- and
19 this is just my own particular way of looking at
20 things -- is I am an advocate for the process.
21 And I really want to be out there doing the best
22 I can to help these people speak to one another,

1 to do whatever I can to preserve a relationship,
2 if that's necessary, find out what the interests
3 are, and -- and just be an advocate for the
4 process and not for anyone there, not for the
5 EEO, not for anyone.

6 I know that it's difficult sometimes,
7 but it has worked for me, you know, in my years
8 of doing this. And I've been -- knock wood --
9 relatively successful. And I -- you know, I
10 really feel good about what I've done when I
11 leave. And I think that's the most important
12 part.

13 I mean, if you -- if you have in your
14 head that the only thing -- the only success in
15 mediation is settlement, then you're going to
16 have a hard time, because it's -- because they
17 aren't all going to be successful.

18 But something will come out of that
19 session. Something will happen that will improve
20 the relationship between the participants or at
21 least, you know, move them forward to resolution
22 of the conflict, in most cases. At least that's

1 been my experience, and I'm happy to say that
2 that's been my experience.

3 Now, suppose the mediation occurred
4 through the EEO process, and the participants
5 come in and they want to discuss other things
6 that are not involved in the process. How do
7 we -- what -- what do we think about that?
8 Anybody? Michael, you were looking at me.

9 PARTICIPANT SPEAKER: It happens all
10 the time.

11 MS. BARCHI: Right.

12 PARTICIPANT SPEAKER: I find -- I find
13 that, in my experience, people have used the EEO
14 process to bring up issues because there's no
15 other forum for --

16 MS. BARCHI: Exactly.

17 PARTICIPANT SPEAKER: -- them to do
18 it. And it's not really the alleged
19 discrimination that they want to talk about.
20 It's lots of other things.

21 MS. BARCHI: So what do you do about
22 that?

1 PARTICIPANT SPEAKER: I welcome it. I
2 definitely welcome it.

3 MS. BARCHI: Everybody agree with
4 that, pretty much welcome it and move forward? I
5 mean, I -- I actually did have one where, you
6 know, we did -- part of the settlement agreement
7 had to do with other issues that weren't EEO
8 issues, but they were happy to -- to add that
9 into the settlement agreement and -- and
10 management was ready to agree with that. Yes.

11 PARTICIPANT SPEAKER: I mediated a
12 case for one agency where it was agency policy
13 that you couldn't raise issues in the mediation
14 that weren't raised in the counseling process.

15 MS. BARCHI: Yeah. I -- I actually
16 had -- had a situation like that, where we did
17 talk about the issues, but didn't end up being
18 part of the resolution.

19 But I think it -- I think it was
20 helpful to talk about the issues in any event,
21 even though it didn't end up as part of the
22 settlement agreement and, you know -- and wasn't

1 part of the EEO process.

2 But we still talked about those
3 issues. And I think it was really helpful for
4 the participants to get those out in the open and
5 a catharsis for it.

6 Yes, Neil.

7 PARTICIPANT SPEAKER: Yeah. I think
8 you'll find different institutions with different
9 policies about that. And it can really make it
10 awkward for the mediator when management
11 challenges that; said, oh, no, we can't talk
12 about that --

13 MS. BARCHI: Uh-huh.

14 PARTICIPANT SPEAKER: -- in here; the
15 party says, I want to, and, what do we do,
16 mediator?

17 MS. BARCHI: Well, as Patrick was
18 saying --

19 PARTICIPANT SPEAKER: And then we're
20 left there in this awkward position.

21 MS. BARCHI: Patrick was saying that
22 could put us in a very awkward position and that

1 we, as the mediator, you know, will -- well, how
2 do we handle it when management turns around and
3 says, well, we can't talk about that here,
4 because it's not part of the EEO -- the EEO
5 process?

6 PARTICIPANT SPEAKER: Uh-huh.

7 MS. BARCHI: What we do, as mediator?
8 I -- I can tell you what I do, and -- and it's
9 similar to what Leah did. I mean, I normally
10 will say, well, you know, whether we can resolve
11 it or not, I think that these issues need to be
12 brought out on the table.

13 And, you know, it's a -- and this
14 process is your process, you know. And I tell
15 them that: You know, it's their process, but
16 they need to -- to -- that they really define the
17 process more than I do and more than the policies
18 do, and that what you need -- what you feel you
19 need to discuss here, please feel free to
20 discuss. And I let them discuss it.

21 And then regardless of whether or not
22 it may end up resolving itself at the end, at

1 least the -- the employee will have the
2 opportunity to feel that they've been heard.

3 I've never had management walk away
4 from the table for that reason. I don't know
5 exactly what I might do if that happened.
6 Anybody have any ideas? Yes.

7 PARTICIPANT SPEAKER: It seems to me
8 that in that kind of situation, the managers are
9 best staying and listening to what's being said.
10 Even if they don't address it and they say, we
11 can't address it here as managers, they need to
12 hear the information.

13 In other words, it may be cluing them
14 in to some bigger thing that's going on beyond
15 this dispute. If managers choose to get up and
16 leave, I suppose you would let them leave. But I
17 would talk to them about the fact it's in your
18 best interest in staying and just listen.

19 MS. BARCHI: And --

20 PARTICIPANT SPEAKER: Could you
21 repeat?

22 MS. BARCHI: Yes, I -- I will.

1 What -- I'm sorry. What was your
2 name?

3 PARTICIPANT SPEAKER: Theresa.

4 MS. BARCHI: -- Theresa was saying is
5 that it's important for management to hear what
6 the employee has to say, especially, as we said,
7 if we were going to preserve a relationship; this
8 relationship's going to be ongoing; it's not a
9 termination; it's not someone who's leaving or,
10 you know -- and if they want to be reinstated as
11 an employee, if it is a termination case, but in
12 any event, that it's important for the -- that
13 management to hear what is being said so that
14 they can be clued into what's really going on, so
15 it can help them resolve issues in the future.

16 So -- and as Theresa said, she doesn't
17 know what they -- she would do if they walked
18 away from the table, but she would try and -- and
19 tell them that it was really in their best
20 interest to stay, to listen, and to get as much
21 as they could out of the mediation process.

22 Now, of course, we talked about that

1 voluntariness. We tell them it's a voluntary
2 process and they can leave. There was -- there's
3 just an interesting story I -- I just want to
4 tell about that voluntariness. It's just kind of
5 fun.

6 I met -- there was a woman who was
7 doing training, and she does a custody mediation.
8 And this was a court-ordered mediation for
9 custody.

10 And so the -- the parents came. And
11 the -- the wife came in and was ready to -- to
12 participate in the process. And the husband said
13 he didn't want to. It's supposed to be
14 voluntary. It's not voluntary for me. I was
15 ordered to be here. I don't want to participate.

16 She said, fine. She said, why don't
17 you do this. Why don't I leave the door open.
18 I'll put your chair outside the door. You can
19 stay outside. Just listen.

20 Just -- you know, if you want to come
21 in -- just listen. If you want to come in and
22 participate, fine. If not, please feel free to

1 stay out there. Well, it took him about three
2 minutes after his wife got started talking for
3 him to get in the door.

4 So, you know, I think, like Theresa
5 said, it really is in their best interest to --
6 to try and move this along instead of just, you
7 know, walking out and saying, well, I don't
8 really need to be here or, I don't want to be
9 here. Yes.

10 PARTICIPANT SPEAKER: I think I have
11 two concerns: One is if -- if you push too
12 heavily, then there's a -- a perception of your
13 neutrality, and --

14 MS. BARCHI: Uh-huh.

15 PARTICIPANT SPEAKER: -- we have to be
16 careful there. And the other one is that --
17 well, we're going to go into that one.

18 MS. BARCHI: Well, I might -- might
19 just address that a little bit. I'm really --
20 you know, I -- I really try and be really careful
21 about those types of things.

22 And what I normally do, rather than

1 even say something, in a more demonstrative or,
2 you know, absolute fashion is I will actually try
3 to ask questions and say, well, suppose you leave
4 the room. What will happen? Let's talk about
5 that.

6 And I try and get them to talk about
7 what will happen if they leave the room, rather
8 than say, you know, it's in your best interest or
9 whatever. I -- I try to do that.

10 And -- and I think really, the most
11 important thing for me, and I stress this with my
12 students, is that the mediator has to be someone
13 who knows how to ask the right questions. I
14 mean, that is your primary function in the
15 mediation process, is to ask the right questions.

16 And, you know, I teach law students.
17 And, of course, you know, they have to do that as
18 well, when they're questioning witnesses, when
19 they're questioning their clients, to try to find
20 out their interests.

21 I mean, it's the same skill when you
22 sit down with a client and you're trying to

1 figure out what's really going on so that you can
2 assist them, you know, in -- in the best way that
3 you can. So I think it's very important to do
4 that as -- as part of the mediation process.

5 And learning to ask those questions at
6 the right time and how to get a series of
7 questions -- I think maybe the fact that I was a
8 criminal defense attorney and kind of had to do
9 that kind of -- kind of sequential questioning of
10 a witness helps me out a little bit, as a
11 mediator, because I -- I kind of go down that
12 path. I kind to lead them down a path. And I
13 think that's important.

14 In any event, how about attorneys in
15 mediation? Do you find that, you know -- you
16 know, that certain agencies may allow them, not
17 allow them? Is that something that -- that comes
18 up with anyone? No? Yes?

19 PARTICIPANT SPEAKER: Yeah, in the
20 U.S. -- in the U.S. Court of Appeals --

21 MS. BARCHI: They always have
22 attorneys.

1 PARTICIPANT SPEAKER: -- they often
2 had -- certain things, where it's big companies,
3 they always -- almost always have attorneys.

4 MS. BARCHI: Do you find that they
5 hinder or assist the process? I'm just curious.
6 Anybody have any -- yes.

7 PARTICIPANT SPEAKER: Hinder.

8 MS. BARCHI: Hinder. Anybody --
9 anybody on the side of our --

10 PARTICIPANT SPEAKER: Depends on the
11 attorney, depends on the case --

12 PARTICIPANT SPEAKER: Yeah.

13 PARTICIPANT SPEAKER: -- depends on
14 the parties.

15 MS. BARCHI: I think that's true. I
16 think that's true. Sometimes, you know, the
17 attorney can really give their client a reality
18 check, which you may not have if, you know, there
19 isn't somebody there to kind of say, you know,
20 you're not going to get a million dollars out of
21 this; you know, try and understand that this is
22 really what's going to happen.

1 And they can really talk to their
2 client, give them, you know, a -- some indication
3 of what -- you know, what happened, if they
4 actually ended up in litigation.

5 I know that sometimes they can be very
6 difficult, and I think that a problem when --
7 when attorneys are -- are involved in the process
8 is that they -- they may actually want to kind of
9 take over the mediation process and not allow the
10 participants to speak.

11 And I'm very -- I'm very -- I really
12 kind of try and focus on keeping them -- having
13 the participants speak rather than -- I think,
14 Patrick, you had something?

15 PARTICIPANT SPEAKER: (Inaudible.)

16 MS. BARCHI: I -- I really want -- I
17 really -- I'd ask the participant -- I say
18 specifically, can I please hear -- you know,
19 please tell me -- well, my attorney said that --
20 well, and then I start asking them questions.
21 I -- I mean, you've got to get the participant
22 involved in it. Yes.

1 PARTICIPANT SPEAKER: There's some
2 very specific things you can do about seating.

3 MS. BARCHI: Right.

4 PARTICIPANT SPEAKER: Make sure the
5 parties are --

6 MS. BARCHI: Absolutely.

7 PARTICIPANT SPEAKER: -- are more
8 direct than the -- and so forth. So the
9 mediator, I think, has a large role to play in
10 managing the attorneys, for instance.

11 PARTICIPANT SPEAKER: I remember years
12 ago in a case that I dealt with for a federal
13 agency, they did have a requirement. The
14 requirement was that the attorneys could attend
15 the mediation on behalf of their clients on both
16 sides, but yet they couldn't speak in the course
17 of the joint session, but they could participate
18 when it came to caucus. And there was
19 something --

20 MS. BARCHI: That's a great idea.

21 PARTICIPANT SPEAKER: -- where there
22 was discussion ahead of time so that the

1 attorneys were clear. The reason -- the
2 (inaudible) that the agency had, why they made it
3 a policy, because they really wanted to try and
4 prevent a situation where it would become more
5 adversarial and make sure the people -- the
6 parties themselves had the opportunity to speak
7 and share their -- their (inaudible) talk more.

8 So that, for that particular agency,
9 seemed to work. Now, I've not really run across
10 a lot of agencies having that type of a policy,
11 you know, as far as an institutional type of
12 issue.

13 MS. BARCHI: What Patrick was saying
14 is that some agencies had a policy -- this
15 particular agency that he knew of had a policy of
16 allowing attorneys to attend the mediation, but
17 they couldn't participate in joint session. They
18 could only participate in the caucusing, which I
19 think is a great idea.

20 I mean, it certainly shows an
21 appreciation and understanding of the ADR
22 processes and, you know, how they really should

1 work.

2 This way, it would prevent, as Patrick
3 was saying, that turning into more of an
4 adversarial session rather than one that, you
5 know, was more conciliatory, and, you know, more
6 working toward a resolution of a dispute.

7 Just -- you know, I don't -- I -- we
8 only have a couple of more minutes before we're
9 going to break, so I really wanted to talk
10 quickly about -- does -- does -- how about
11 collective bargaining agreements?

12 How does -- how does that impact?
13 Does that have any impact on -- on how you
14 participate in the process or does it impact the
15 particular participants? Anybody have any war
16 stories about collective bargaining agreements?
17 No?

18 PARTICIPANT SPEAKER: Yes. I think
19 one of the questions there is confidentiality,
20 because it's not clear that -- that -- there's
21 potentially a conflict that -- that the
22 collective bargaining unit, Fair Labor Act,

1 and -- and the -- the ADR Act as to what the role
2 is of that union representative who's not there
3 as a steward, but is there representing the --
4 the union, and whether they have any obligations
5 to maintain confidentiality, at least in terms of
6 discussions that (inaudible). So there's been
7 some issues there.

8 MS. BARCHI: And -- yes, Neil?

9 PARTICIPANT SPEAKER: (Inaudible.)

10 PARTICIPANT SPEAKER: Go ahead.

11 MS. BARCHI: Well, go ahead.

12 PARTICIPANT SPEAKER: Oh, okay. As --
13 at HSS, where we work, the union has now begun to
14 assert a right to be present, to be notified and
15 be present at every mediation, not as a parties,
16 but for that reason, to protect their interest.

17 MS. BARCHI: Uh-huh.

18 PARTICIPANT SPEAKER: I think
19 confidentiality is handled just by getting them
20 to sign the agreement, the -- the agreement to
21 mediate. I mean, they're there. If they're
22 going to be present, we're going to make them

1 sign.

2 However, I think it's really pushing
3 it that this -- I think it's intrusive into the
4 process for them to assert this as a right. They
5 want to be notified and to be present at every
6 mediation that involves an employee or their
7 supervisor.

8 MS. BARCHI: Now, I haven't had that
9 happen, where the employee didn't want their
10 representative there. Has anyone had that occur,
11 where the -- the employee didn't want the
12 representative?

13 PARTICIPANT SPEAKER: Well, very
14 often, the union --

15 MS. BARCHI: Oh, I'm sorry. I didn't
16 know you --

17 PARTICIPANT SPEAKER: -- not even
18 involved or notified.

19 MS. BARCHI: Okay.

20 PARTICIPANT SPEAKER: You know,
21 sometimes the employees go through their union.

22 MS. BARCHI: Now --

1 PARTICIPANT SPEAKER: But I do have a
2 lot of cases where the -- this is sort of the new
3 thing, that the union wants to separately be
4 advised that there's going to be a mediation
5 session, and they want to be given the right to
6 be there --

7 MS. BARCHI: Have any --

8 PARTICIPANT SPEAKER: -- independent
9 right to do that.

10 MS. BARCHI: Neil was talking -- let
11 me just repeat what Neil said. Neil was talking
12 about the fact that at HHS, they now have --
13 union representatives now have the -- have the
14 right --

15 PARTICIPANT SPEAKER: No, I think it's
16 assert the right.

17 MS. BARCHI: Assert the right.

18 PARTICIPANT SPEAKER: I don't think
19 it's that they have the right.

20 MS. BARCHI: Okay.

21 (Inaudible conversation.)

22 PARTICIPANT SPEAKER: They do have the

1 right. They do have the right to be there.

2 There's a labor relation --

3 PARTICIPANT SPEAKER: (Inaudible.)

4 PARTICIPANT SPEAKER: They do.

5 There's a Labor Relations Act policy which gives
6 them the right to be there. But they have a
7 chilling impact on any mediation.

8 MS. BARCHI: Well, and -- and as
9 Patrick was saying, if they -- I'm sorry, -- Neil
10 was saying, if they actually -- you know, if they
11 actually assert that right and they come in, you
12 know, how does that -- does that impact the --
13 the mediation.

14 And -- and with respect to
15 confidentiality, -- and -- and I agree with Neil:
16 I -- I thought about the confidentiality
17 agreement, the agreement to mediate, that was
18 signed in the beginning. Hopefully, that would
19 take care of it. But, you know, we can always
20 hope that.

21 You know, it -- it may or may not, if
22 the union representative is there and really

1 isn't, you know, invested in the process in the
2 same way that the employee is, the employee
3 participant --

4 PARTICIPANT SPEAKER: (Inaudible.)

5 MS. BARCHI: -- and -- and are
6 actually there for their own self-interest, as --
7 as Neil was pointing out, rather than, you know,
8 the actual participants that the dispute is
9 self-interest. Yeah.

10 PARTICIPANT SPEAKER: Well, actually,
11 the confidentiality document that we have them
12 sign has no impact on anybody at the table unless
13 they want it to. So we should be very clear
14 about that.

15 MS. BARCHI: About --

16 PARTICIPANT SPEAKER: The employees --

17 MS. BARCHI: -- the ADR.

18 PARTICIPANT SPEAKER: -- regularly --
19 regularly violate it. Even some managers violate
20 it. And so I don't think we should believe that
21 that has any impact on the process, because they
22 always go out and tell what they got, the

1 employees, I mean.

2 MS. BARCHI: Uh-huh.

3 PARTICIPANT SPEAKER: I have not had
4 an employee that has not let everybody know, to a
5 penny, what they got. We had one employee to
6 post her agreement on the bathroom wall.

7 MS. BARCHI: Oh, no.

8 PARTICIPANT SPEAKER: Okay? So yeah,
9 it is not --

10 MS. BARCHI: That can really -- that
11 can really --

12 PARTICIPANT SPEAKER: -- have a
13 chilling impact.

14 PARTICIPANT SPEAKER: What agency do
15 you work for?

16 PARTICIPANT SPEAKER: USDA.

17 MS. BARCHI: Yeah.

18 PARTICIPANT SPEAKER: I just have a
19 question. I have a mediation coming up where a
20 union rep is going to be there, supposedly
21 representing this complainant. In the
22 premediation calls, is there -- would you

1 recommend me asking him, you know, what his role
2 will be in the mediation?

3 MS. BARCHI: Not -- I can't see why
4 you wouldn't ask him what his role would be. I
5 mean, I -- I would.

6 Patrick or Leah, you have --

7 PARTICIPANT SPEAKER: Yeah. I was --
8 I was just trying to think here. I actually had
9 a case where at first, the complainant was okay
10 with the union representative participating,
11 and -- but then later on in the course of
12 mediation, after the first session, the
13 complainant did not want the union representative
14 anymore. And the union representative at that
15 point asserted the right to participate.

16 I think starting out, it's very
17 important to -- to make sure you're clear about
18 who's coming and why so there's no
19 misunderstanding up front, or at least you try to
20 address those issues before you actually get into
21 the session itself.

22 And it -- it didn't continue. It

1 wasn't because the representative -- she had
2 an -- complainant issue representative continue,
3 but complainant wanted somebody in her family
4 to -- to participate.

5 And -- and there was some objection on
6 the part of the union for her -- for her bringing
7 somebody else besides that union rep being there.
8 So that was a very murky type of situation that
9 occurred.

10 But again, it -- it plays back into
11 what are agreements of the agency might be a part
12 of that complainant here looked at agency policy
13 and who was it impacting in the room, since she
14 has a quorum.

15 In this case, the agency was kind of
16 like, you know, we're -- we're not in this,
17 really. You know, they need to work this out
18 between the union and -- and the employee.

19 But yet, they were still being
20 impacted and the mediation process itself was
21 being impacted by these different -- by this
22 collective bargaining agreement.

1 MS. BARCHI: Let me just clear this --
2 let me just say -- repeat what Patrick said.
3 Patrick was talking about a situation where he
4 had a union rep that was going to participate.

5 And at first, the dispute of the
6 employee wanted the union rep to and then decided
7 against it, didn't want the union rep there, and
8 actually wanted a family member to be involved
9 in -- in the mediation process and -- and -- for
10 moral support or whatever, rather than have, you
11 know, the union representative, and that that
12 became very murky. And I think that -- and --
13 and after a while, I think you -- you ended up
14 not having the union issue. Is that right?

15 PARTICIPANT SPEAKER: That's correct.
16 They terminated the process.

17 MS. BARCHI: Because she was -- I
18 think the -- the employee was told not to
19 bring -- or agreed that she wouldn't bring the
20 family member, then brought the family member in
21 any event. I mean, things can get really --
22 obviously, things can get really complicated. I

1 saw a couple of hands. Yeah.

2 PARTICIPANT SPEAKER: My name is Sue.
3 I have two points. One is that more and more,
4 the mediation process is a creature negotiated
5 agreement with the union. It just comes into
6 being, because it's a process that's negotiated
7 between an agency or company and the union.

8 And the second point is -- is a
9 question of whether you could speak a little bit
10 to the use of ground rules, and -- and
11 specifically written ground rules, in the
12 mediations that you conduct?

13 MS. BARCHI: And this is just me: I
14 never use them, unless it's absolutely necessary.
15 I never use ground rules. In fact, I teach my
16 students -- it's funny, because so many of them
17 want to set ground rules at the beginning and,
18 you know, we won't interrupt one another and
19 things like that.

20 And I think, you know what? This is
21 really their process. And if they want to
22 interrupt one another for a while, that's okay,

1 you know?

2 And -- and if that happens -- because,
3 you know, people are heated. They're angry.
4 They're upset. You know, they don't behave the
5 way they would behave in a situation where
6 they're having a disagreement, obviously.

7 So I never set them. Whether -- I
8 only do that if the participants are just
9 behaving in such a manner that it's -- it's
10 disruptive to the process and we -- and we aren't
11 moving forward, then I might say, can't we agree
12 to not interrupt or something, or, you know -- I
13 mean, I've had racial slurs, cursing, you know,
14 the entire gamut of stuff that, you know, got
15 really nasty, where, you know, I'm at, this one
16 called me this, so I'm not going to talk to her
17 anymore and just really -- so, you know, you may
18 have to address it if -- if -- you know, when you
19 get to that point. I, fortunately, don't often
20 do it, and hopefully you won't have to do it in
21 too many future sessions. Yeah.

22 PARTICIPANT SPEAKER: I have a

1 question. How do you handle an employee who
2 becomes gravely insubordinate in the mediation
3 process, especially in a situation where they
4 will have to return to the workplace to work?

5 MS. BARCHI: I had exactly that --
6 that happen.

7 PARTICIPANT SPEAKER: You want to
8 repeat the question?

9 MS. BARCHI: Huh?

10 PARTICIPANT SPEAKER: Repeat the
11 question.

12 PARTICIPANT SPEAKER: No, they can
13 hear it from the table.

14 PARTICIPANT SPEAKER: Oh.

15 PARTICIPANT SPEAKER: See these
16 things? These are mikes.

17 MS. BARCHI: Hopefully, everybody
18 could hear, but what she was talking about was
19 what if an employee gets completely insubordinate
20 in the mediation, in the mediation session, and
21 behaved in a real belligerent manner.

22 And I actually had that happen. And

1 the employer was very angry and very upset and
2 didn't want to go through with the process. What
3 we ended up doing, is I still -- I -- I tried to
4 divert -- you know, I -- I tried to use
5 questioning to divert the employee and -- out of
6 her -- this kind of tirade that she had gotten
7 into.

8 I talked to the -- the supervisor a
9 little bit. I tried to kind of, you know, smooth
10 things over by questioning. I mean, we actually
11 had, like, a five-hour mediation that -- that
12 ended up in a resolution.

13 But it was difficult. It was slow and
14 difficult. We had to take a break. Sometimes
15 you need to take a break or do a caucus or say,
16 why don't we take, you know, ten minutes, come
17 back, and then we'll caucus.

18 And I've done that, you know, when the
19 participants are getting to a point where it's
20 getting -- they're getting kind of agitated; they
21 need to get separated, but maybe they're not
22 ready for a caucus --

1 PARTICIPANT SPEAKER: That's --

2 MS. BARCHI: -- take a break, come
3 back, and then caucus after that, and then bring
4 them back together when the whole situation has
5 calmed down.

6 PARTICIPANT SPEAKER: That's exactly
7 what I did when that happened in a mediation.
8 And the manager applauded me for -- I actually
9 stopped the mediation, took the employee out of
10 the room, and -- and gave them some reality
11 testing.

12 And -- and then we went back in,
13 everything was better, because I believe that if
14 I had not stopped it at that point that the
15 manager would have got up and walked out, because
16 I know I would. I'm a manager and I wouldn't
17 take that.

18 MS. BARCHI: Well, she didn't walk
19 out, fortunately, but -- you know, and -- and
20 they ended up in tears at the end and (inaudible)
21 you know, sometimes it just takes all that anger
22 on the table before, you know, you can really get

1 to that point where there's a catharsis and
2 there's a resolution. Very quickly.

3 PARTICIPANT SPEAKER: I ask you a
4 favor?

5 MS. BARCHI: Sure.

6 PARTICIPANT SPEAKER: Would you remind
7 everybody that (inaudible) phone that they can
8 send in questions --

9 MS. BARCHI: Sure.

10 PARTICIPANT SPEAKER: -- (inaudible)
11 because we haven't gotten any.

12 MS. BARCHI: Leah asked me to remind
13 you, if you're on the telephone or on video and
14 you'd like to participate via e-mail and send in
15 some questions, it's SN, S, as in Sam, N, as in
16 Nancy, brownbag at HHS --

17 PARTICIPANT SPEAKER: No, SEC.

18 MS. BARCHI: -- SEC -- sorry -- SEC --
19 that's SEV dot gov. That's S, as in Sam, E, as
20 in every, V, as in very.

21 PARTICIPANT SPEAKER: No, no, SEC --

22 MS. BARCHI: Oh, I'm sorry, SEC.

1 I'm -- I'm awake here.

2 PARTICIPANT SPEAKER: -- as in
3 Securities and Exchange Commission.

4 MS. BARCHI: As in Securities and
5 Exchange Commission. Sorry about that. I can't
6 hear today.

7 PARTICIPANT SPEAKER: Thank you.

8 MS. BARCHI: I -- I very quickly want
9 to do a -- a little scenario before we break into
10 our other -- and -- and look at our other
11 scenario. Let me read this to you.

12 An employee on probation is terminated
13 from her position in the federal government
14 agency and files an EEO complaint claiming
15 discrimination based on race.

16 The parties agree to mediation. You
17 are an in-house mediator and have previously
18 mediated with this supervisor. You learned in
19 previous mediations all discrimination claims
20 based on race -- these were -- that this
21 manager's insensitive, abrupt style would make
22 Henry Higgins in "My Fair Lady" ill at ease.

1 All the previous mediations with this
2 supervisor have settled, so it is likely that the
3 supervisor's manager is unaware of this
4 supervisor's communication style with
5 subordinates.

6 You are aware that this supervisor
7 sees no reason why he should change his abrasive
8 behavior and that this -- and his manager's
9 unaware of it.

10 You know that several really competent
11 people in the section are actively seeking other
12 jobs because of him and will leave the agency
13 unless something can be done with this
14 supervisor. Remember, you're the in-house
15 mediator. What do you do? And thanks to Leah
16 for that scenario.

17 PARTICIPANT SPEAKER: Thanks to some
18 other people around the table for that scenario,
19 because this is based on real life.

20 MS. BARCHI: Anybody have any ideas?
21 Well, who's your -- go ahead.

22 PARTICIPANT SPEAKER: Well, if you're

1 an in-house mediator, you probably have a
2 training role as well, and you could work that
3 into the training role, targeting the area or the
4 office that the supervisor is in for some
5 proactive work on -- on the proper way to deal
6 with people.

7 MS. BARCHI: Good idea. Well, of
8 course, you know, we have the confidentiality --

9 PARTICIPANT SPEAKER: Yes.

10 MS. BARCHI: -- as the mediator --

11 PARTICIPANT SPEAKER: Right.

12 MS. BARCHI: -- (inaudible)

13 confidential, so --

14 PARTICIPANT SPEAKER: That's the issue
15 that I -- this scenario is similar to something
16 that I just went through, and I -- I was acting
17 as in-house neutral and the question of
18 confidentiality came up, and, you know, how much
19 can I reveal to the people that could potentially
20 make some changes.

21 And I'm -- I'm also in an office, in
22 our ADR office, that's trying to establish a

1 integrated conflict management system, which is
2 more than just mediation. It's making our
3 agency --

4 MS. BARCHI: Right.

5 PARTICIPANT SPEAKER: -- trying to
6 make our agency work, competent handling conflict
7 and just in general, you know, better managers.
8 And -- and so I wasn't quite sure how to
9 handle -- so that's just a little bit more of the
10 background on this type of scenario.

11 MS. BARCHI: Well, I mean, there are
12 certain things you could probably say that
13 wouldn't be confidential. And you can tell me
14 agree with me or not.

15 But -- and was it -- if it's an EEO
16 complaint, obviously, since it's a
17 discrimination -- we're talking about
18 discrimination -- can you say to the, you know,
19 EEO official, this is the fifth, you know,
20 mediation I've done with this official? You
21 know, I mean, that should clue them in right
22 there.

1 You know -- and I would think that,
2 you know, EEO would be tracking that, you know,
3 so there'd be ways to, you know, not say anything
4 that, you know, would breach your
5 confidentiality, but say, oh, this is the best
6 mediation I've had with so and so, with Henry
7 Higgins whoever.

8 PARTICIPANT SPEAKER: Uh-huh.

9 MS. BARCHI: And so, I mean, that
10 right there should trigger them to look into, you
11 know, this and -- and move forward and then maybe
12 do some more investigation, without you saying
13 anything specific about what happened in the
14 mediation process.

15 Anybody else have any ideas? Okay.
16 Great. Well, we're going to break. And we have
17 the scenario that I hope that everybody has a
18 copy of. If you don't, I have probably a couple
19 of copies. And I'll put it up on the screen here
20 so that you can see it.

21 I guess we'll take 15-ish, maybe 20
22 minutes (inaudible). I mean, we've got to get

1 out of here at 1:30. As you see, I can really
2 talk for a long time. I like the sound of my own
3 voice.

4 And, of course, I like being on
5 television, and that's why I wore my pink today,
6 so -- looks like it got all wrinkled on the
7 train, but anyway; so we're going to put that up
8 on the screen and --

9 PARTICIPANT SPEAKER: We hope.

10 MS. BARCHI: Hopefully.

11 (Inaudible conversation.)

12 PARTICIPANT SPEAKER: They -- they
13 have their (inaudible).

14 MS. BARCHI: Okay. You have your
15 scenarios? It -- and it probably would be best
16 to -- to break out into groups of six, maybe.

17 (Whereupon, a brief recess was taken.)

18 MS. BARCHI: -- no information about
19 why. They were never told, you know -- you know,
20 you're not doing a good job. You know, what's
21 happening here? Some issues? Anybody? Well,
22 there are obviously issues.

1 But what, obviously, I think you need
2 to look at in -- in a situation like this is, do
3 you -- again, it's sort of like your situation
4 before.

5 Is there anything that you can do
6 about that, if this is a management policy where
7 they just have absolutely no, you know,
8 communication with employees? Is there anything
9 that you can do?

10 I think, you know, if you don't have a
11 relationship with that agency and you're just in
12 that particular mediation session, it might be
13 very difficult for you to effect any kind of
14 change or -- or make any kind of difference.

15 You know, you might, you know -- you
16 know, encourage people to talk to EEO officials,
17 but I -- I think it's difficult in a situation
18 like that, with the confidentiality.

19 We really just have one more minute,
20 and I know that we didn't get to everything here
21 today. And I -- I tried to. I was hoping to
22 be -- not go too over.

1 But I hope that you got something out
2 of it. I hope the discussion was good. I hope
3 it stimulated some -- you know, some things to
4 think about.

5 And please feel free to e-mail me. I
6 will -- I can write my e-mail here on the board
7 so everyone can see it. And I'd like to hear
8 from you.

9 And that is Cathy, C-A-T-H-Y, dot
10 Barchi, B-A-R-C-H-I, at CMS dot HHS dot gov. I
11 also have a home e-mail address, which is CBarchi
12 at Verizon dot net, which I check regularly as
13 well. So please feel free.

14 And I want to thank you all for your
15 attention. Nobody fell asleep, and that really
16 makes me feel good. But I -- normally, I offer
17 to tap dance at the end, but we don't have any
18 more time, so maybe next time.

19 PARTICIPANT SPEAKER: I'd like to --
20 to thank Cathy and Patrick, who had a big hand
21 in -- in working this session through, and Brenda
22 as well, who has been helping with the technology

1 part of it.

2 And I'm going to embarrass two people
3 right now that I -- I don't know how many of you
4 know that Neil Kaufman over here was the person
5 or one of the people who actually had the idea
6 for and started the whole Sharing Neutrals trend
7 in this country.

8 So -- and also, I assume that by now,
9 most of you -- most of you know Martha Flores,
10 who is the person on the other end of all those
11 e-mails that you always get.

12 I'd like to thank you all for coming,
13 number one. Please, we really welcome your
14 evaluations. They're very helpful. Secondly, if
15 you have any ideas for future topics, please feel
16 free to either contact Patrick or myself or just
17 send them to SNbrownbag at SEC dot gov -- dot
18 gov. Thank you very much.

19 (Inaudible conversation.)

20 * * End of DVD * *

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CERTIFICATE OF COURT REPORTER

I, Caren Benge, a Notary Public in and for the State of Texas, before whom the above-entitled cause was taken, do hereby certify that the proceedings were taken by me and thereafter reduced to typewriting under my supervision; that said proceedings is a true record; that I am neither counsel for, related to, nor employed by any of the parties to the action in which the proceedings were taken; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of the action.

Caren Benge

Caren Benge
Notary Public in and for
THE STATE OF TEXAS

My commission expires:
October 28, 2009

