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**ORIGINAL**

THE FEDERAL INTERAGENCY  
SHARING NEUTRALS PROGRAM

JUNE 27, 2007

PRESENTER: LEAH MELTZER

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DVD TRANSCRIPTION

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1                   \*       \*       Beginning of DVD       \*       \*

2                   MS. MELTZER:  So I apologize for the  
3 cold and the sound, but it's not my first choice.  
4 We are going to be talking about confidentiality  
5 in federal ADR today.

6                   And I have had the -- the good fortune  
7 to be able to work with a group of federal ADR  
8 people who wrote three documents that may be  
9 relevant to you.

10                  One is the most current, April of  
11 2006; that's focused on program managers.  
12 Another is one that was written in 2000 that you  
13 can also get on the ADR dot gov web site.

14                  And a third was written in conjunction  
15 with the -- well, I don't know about in  
16 conjunction, but with the ADA.  And that can be  
17 found on the section of dispute resolution web  
18 site.

19                  Have any of you participated in a  
20 confidentiality program, a federal  
21 confidentiality program, before?  I just want to  
22 know at what level.

1                   Stephanie, Carol, right. And you  
2 guys, I know, know about it. In fact,  
3 (inaudible) there was on the first -- working on  
4 the first one, and -- and Chris was on the second  
5 one. So (inaudible).

6                   The -- when we think about the  
7 Administrative Dispute Resolution Act, there's --  
8 okay. How do I this? No. How do I get to the  
9 next one?

10                   PARTICIPANT SPEAKER: (Inaudible.)

11                   MS. MELTZER: Okay. Okay. It's  
12 not -- here we go.

13                   PARTICIPANT SPEAKER: (Inaudible.)

14                   MS. MELTZER: We -- we talk about  
15 balancing, because being in the federal  
16 government, we have some different obligations  
17 that we might have had if we were in the private  
18 sector. So we're balancing the need for  
19 confidentiality in ADR with the need for openness  
20 in government.

21                   So you'll see that there's some  
22 provisions in the ADR Act that may not make a

1 whole lot of -- a whole lot of sense if you were  
2 in the private sector.

3           And I have to confess that sometimes  
4 it doesn't make a whole lot of sense even if  
5 you're in the public sector. But that's going to  
6 be one of the prevailing themes.

7           So the first question that we have to  
8 ask under the ADR Act is, who is a  
9 neutral? because if somebody's a neutral, then  
10 they're held to a high level of confidentiality.

11           If they're not -- and one neutral can  
12 disclose to another neutral. But if they're not  
13 a neutral, then we have a rougher time disclosing  
14 information under the ADR Act.

15           So who is a neutral? Someone who  
16 specifically aids the parties in resolving the  
17 dispute, somebody who's acceptable to the  
18 parties, has no conflict of interest unless it's  
19 disclosed and the parties agree.

20           And if you think about it, there can  
21 be more than one neutral in a mediation. Is this  
22 a new concept to people, that there might be more

1 than one neutral?

2 We're not talking being a comediator  
3 here. We're talking about somebody who serves as  
4 a neutral other than the session neutral. So --

5 PARTICIPANT SPEAKER: (Inaudible.)

6 MS. MELTZER: So it could be an intake  
7 person. It could be convening. It could be an  
8 ADR supervisor. But the -- the little thing that  
9 makes life a little more complicated and  
10 interesting is that it's not automatic and it has  
11 to be a case-by-case determination.

12 So, for example, I'm a neutral. I'm a  
13 designated neutral at the Securities and Exchange  
14 Commission. But that doesn't mean necessarily  
15 I'm an ADR neutral under the ADR Act for every  
16 single case.

17 So what do I look to to see whether  
18 I'm a neutral? How do I determine whether, for  
19 that particular case, I'm a neutral or not?  
20 Somebody? It's not a trick question.

21 PARTICIPANT SPEAKER: (Inaudible)  
22 parties to the dispute.

1 MS. MELTZER: Whether I -- whether  
2 that person, or me, has specifically aided the  
3 parties in resolving the dispute and whether I'm  
4 acceptable to the parties. So that's really the  
5 threshold question.

6 And if the person in intake has met  
7 those criteria, if there's somebody's who's  
8 convening who's met those criteria, if an ADR  
9 supervisor has met that criteria, or there may be  
10 other people, then they're considered a neutral.

11 And they are just like me in terms of  
12 their obligations and responsibilities in terms  
13 of confidentiality. But remember the  
14 case-specific determination.

15 Now, what's the scope of the ADR Act?  
16 It applies -- most of us think of it in terms of  
17 mediation. But it also applies, again, on a  
18 case-by-case basis.

19 But it could theoretically apply to  
20 fact-finding, minitrials, arbitration, mediation  
21 (inaudible) facilitation, conciliation. Really  
22 anything that you can think of that involves a

1 neutral is going to have -- the ADR is going to  
2 apply, the ADR Act.

3 Now, the unit that the ADR Act looks  
4 at is something called a dispute resolution  
5 communication. And you'll see a definition of  
6 that in 571 on the first page here, 571-5. And  
7 what that is -- oh, we've got lots of new people  
8 coming in here. I'm going to wait just a minute  
9 for people to come in. There's handouts here and  
10 a sign-in sheet, please.

11 PARTICIPANT SPEAKER: May I ask you a  
12 question on something from the other one?

13 MS. MELTZER: Of course, of course.

14 PARTICIPANT SPEAKER: Under this  
15 definition of a neutral, it says, someone who  
16 specifically (inaudible).

17 MS. MELTZER: Is it on? Oh, it's --  
18 that -- the purpose of these mikes is not to mike  
19 it for this room, but to enable the people who  
20 were participating to hear.

21 PARTICIPANT SPEAKER: It says, someone  
22 who specifically aids the parties in resolving

1 their dispute. Does that mean directly aids the  
2 parties? because I'm thinking of -- and then  
3 acceptable to the parties, does that mean  
4 expressly acceptable to the parties?

5 MS. MELTZER: Well, I -- we don't --  
6 this hasn't been tested.

7 PARTICIPANT SPEAKER: Okay. Just so  
8 I'm clear, then. Okay.

9 MS. MELTZER: So where you exactly  
10 draw that line --

11 PARTICIPANT SPEAKER: Okay.

12 MS. MELTZER: -- I think is unclear.

13 PARTICIPANT SPEAKER: Okay.

14 MS. MELTZER: You know, some are going  
15 to be very clear. Others are not.

16 PARTICIPANT SPEAKER: Okay.

17 MS. MELTZER: And I think that what we  
18 really have to do is use a dose of common sense,  
19 that if somebody's really far removed from the  
20 process, then they probably aren't.

21 So, for example, if an intake person,  
22 all they did was work on setting up a room and

1 scheduling something, they're not really  
2 assisting the parties.

3 But if they get involved in initial  
4 counseling and trying to understand the facts of  
5 the case and -- and coordinate it with the  
6 appropriate neutral who's going to be good for  
7 that case, then I would say they are assisting.

8 PARTICIPANT SPEAKER: But I was  
9 thinking of it on two levels. They would be  
10 bound by the confidentiality or if you were  
11 the -- if you've met these definitions, your  
12 disclosure to one of these other people would  
13 violate. That's what I'm wondering, if it would  
14 be --

15 MS. MELTZER: That would be okay,  
16 because they're a neutral.

17 PARTICIPANT SPEAKER: But if they  
18 weren't; say --

19 MS. MELTZER: If they weren't --

20 PARTICIPANT SPEAKER: -- they were the  
21 person just set up the room --

22 MS. MELTZER: Yes.

1 PARTICIPANT SPEAKER: -- and -- and --

2 MS. MELTZER: Then I, as the neutral,  
3 have no business talking to them --

4 PARTICIPANT SPEAKER: Okay.

5 MS. MELTZER: -- about the facts.

6 PARTICIPANT SPEAKER: Or your  
7 supervisor, technically --

8 MS. MELTZER: Or my supervisor.

9 PARTICIPANT SPEAKER: -- if the  
10 supervisor wasn't in the room --

11 MS. MELTZER: -- considered a neutral,  
12 right, exactly right.

13 PARTICIPANT SPEAKER: Okay.

14 MS. MELTZER: Okay. Welcome to the  
15 new people. We are about ready to talk about a  
16 dispute resolution communication that's defined  
17 in 571 -- what did I say? -- 5.

18 PARTICIPANT SPEAKER: Five.

19 MS. MELTZER: And a dispute resolution  
20 communication is something that can be oral or  
21 written, prepared for the purposes of the  
22 proceeding. And interestingly, it excludes --

1 specifically by definition, it excludes an  
2 agreement to mediate and a settlement agreement.

3           So think about that. What does that  
4 mean that maybe we wouldn't normally think is  
5 okay to disclose is okay to disclose? What's on  
6 an agreement to mediate?

7           PARTICIPANT SPEAKER: The names of the  
8 parties.

9           MS. MELTZER: The names of the  
10 parties, exactly. So if we follow this logic, it  
11 would mean that at least under the ADR Act --  
12 now, your -- your agency policy or your practice  
13 may be different, but at least under the ADR Act,  
14 it would be difficult to keep the names of the  
15 parties confidential.

16           Now, the ADR Act itself, in terms of  
17 confidentiality, is basically set up in two  
18 different approaches. One is focusing on the  
19 obligation and rights of neutrals -- and that's  
20 574A -- and the rights and obligations of the  
21 parties -- and that's 574B.

22           Now, in terms of neutrals, it's --

1 it's pretty simple. A neutral shall not  
2 disclose. Now, I've been mediating with the  
3 federal government for about 12 years, give or  
4 take. And I -- there are some exceptions, but I  
5 have never had an exception apply, knock on wood.

6 But we'll go through them. I think  
7 we'll go through them. Here we go. If all  
8 parties and the neutral consent in writing, then  
9 the neutral could disclose. Remember, this is  
10 all in terms of the neutral.

11 If something is already made public --  
12 so if I hear about something in the mediation  
13 that was in the news yesterday -- then I can talk  
14 about that.

15 If it's required by statute to be made  
16 public -- and there are -- there's a lot of  
17 discussion as to what that means -- and no  
18 agreement -- but the likelihood of that coming up  
19 is close to zero.

20 Yes.

21 PARTICIPANT SPEAKER: What if it's  
22 made public incorrectly?

1 MS. MELTZER: Well, that's a -- a very  
2 good question. And one of the hypos that we have  
3 actually deals with that, so I'm going to ask you  
4 to hold that, okay? or if it's court ordered.

5 Yes.

6 PARTICIPANT SPEAKER: Can you disclose  
7 if you have a settlement or (inaudible) can that  
8 be disclosed?

9 MS. MELTZER: Well, a settlement  
10 agreement -- we'll start with the easy answer. A  
11 settlement agreement -- it's interesting. I've  
12 never thought about that. A settlement agreement  
13 can be disclosed under the ADR Act. If there is  
14 no agreement --

15 PARTICIPANT SPEAKER: Or a verbal  
16 agreement.

17 MS. MELTZER: Well, that wouldn't make  
18 any difference.

19 PARTICIPANT SPEAKER: Okay.

20 MS. MELTZER: I mean, that -- that --  
21 well, yeah, it would --

22 PARTICIPANT SPEAKER: It would?

1 MS. MELTZER: -- because it's the  
2 document. I mean, we always have always  
3 disclosed that.

4 You guys, any -- any thoughts on it?  
5 I mean, we always have. I'm not sure where the  
6 justification is.

7 PARTICIPANT SPEAKER: In the private  
8 sector, there are a number of court cases,  
9 particularly in California, where they did allow  
10 them to testify as to whether or not there was or  
11 was not a statement of agreement reached, so that  
12 has been allowed in court already.

13 MS. MELTZER: Right, but that's not  
14 under the ADR Act.

15 PARTICIPANT SPEAKER: Not under the  
16 ADR Act.

17 MS. MELTZER: So I'm trying to think  
18 under -- I mean, for practical purposes and  
19 certainly when you have court-ordered mediation,  
20 it's assumed that the mediator is going to give a  
21 report to the judge as to whether there's been a  
22 settlement or not. But Chris, Gerard, any

1 thoughts?

2 PARTICIPANT SPEAKER: I'm thinking  
3 that if -- if someone asks you, has a settlement  
4 agreement reached? and you say, a settlement  
5 agreement (inaudible) filed, that kind of implies  
6 that no agreement was reached. I -- I don't see  
7 the downside of not allowing the fact that no  
8 settlement was reached. I just don't know  
9 whether that would violate.

10 MS. MELTZER: Yeah. I -- I have never  
11 addressed that. So I will check on that and --

12 PARTICIPANT SPEAKER: But we're  
13 just -- we're always asked, did you reach  
14 settlement?

15 MS. MELTZER: Yeah. I mean, we all  
16 are asked that and we all answer. So I -- I'm  
17 curious.

18 Chris?

19 PARTICIPANT SPEAKER: One of the  
20 issues we find when I look at as separate from  
21 the ADRA is what the agency policy is. If you're  
22 in a workplace program, typically, those

1 programs, we don't want to even acknowledge that  
2 there was a mediation and who the parties are.

3 You had said stated earlier that under  
4 the act, we could disclose who the parties are.  
5 But the agency policies and procedures makes it  
6 just --

7 MS. MELTZER: Uh-huh.

8 PARTICIPANT SPEAKER: -- that we don't  
9 do that.

10 Same -- same way if I don't want to  
11 say who the parties are, I also don't want to say  
12 whether or not there was a settlement reached.  
13 But it would stem to -- it would go back to  
14 agency policy, not necessarily the act.

15 MS. MELTZER: Well, the -- the  
16 question -- I mean, yes, agency policy is going  
17 to be important in this, but the -- the bottom  
18 line question is: What is it in the ADR Act that  
19 authorizes that disclosure? So I don't -- yes.

20 PARTICIPANT SPEAKER: Well,  
21 (inaudible) realistic about it, you could say,  
22 I'm not allowed to tell you, but it -- we've got

1 an agreement. We received one.

2 If they say, did you get an agreement?  
3 you say, well, I can't say anything else; pretty  
4 simple.

5 MS. MELTZER: Well, I -- I will check  
6 into it. I mean, I don't think anybody's going  
7 to challenge that disclosure. It's something  
8 that we've been doing for many years now. It's  
9 very much built into the system. But I'm  
10 curious, so -- okay.

11 What about the parties, now? Parties  
12 start out with the same language, thou shalt not  
13 disclose. But it starts getting a little more  
14 complicated.

15 There are basically the same  
16 exceptions as there are in -- for a neutral. But  
17 then there's something that gets a little tricky.  
18 And what I'd like you to do is take out and look  
19 at 574B7. Do a quick reading of it. All right.  
20 Where did 7 go?

21 PARTICIPANT SPEAKER: (Inaudible) this  
22 time.

1 MS. MELTZER: Yeah. (Inaudible.)

2 PARTICIPANT SPEAKER: The first line  
3 is not clearly stated.

4 MS. MELTZER: Oh, that.

5 PARTICIPANT SPEAKER: Yeah. Look  
6 under 6 --

7 MS. MELTZER: All right. What it says  
8 is, except for a dispute resolution communication  
9 generated by the neutral, is what that first line  
10 says. And tell me in a quick reading if that  
11 makes any sense to anybody.

12 I should tell you that the first time  
13 we looked at it and the second time and the third  
14 time and the tenth time, it took a group of us  
15 sitting together and trying to figure out, what  
16 the heck does this mean?

17 PARTICIPANT SPEAKER: Could you say it  
18 one more time, except for?

19 MS. MELTZER: Oh, sure. Except for  
20 communications -- for dispute resolution  
21 communications generated by the neutral, a  
22 dispute resolution communication was provided to

1 me.

2 Well, I will share with you what the  
3 general understanding is right now of what that  
4 means, that a communication from a party --  
5 whoops. How do I go backwards? I guess I'm not  
6 going backwards.

7 Okay. A communication from a party  
8 that's made by the party when all parties are  
9 present, so a joint session, is not confidential.

10 So what that means is if we have a  
11 mediator and Party A and Party B -- oh. Okay?  
12 Now, if Party A wants to disclose what the  
13 mediator said at Starbucks, can he or she do  
14 that?

15 PARTICIPANT SPEAKER: I mean, if  
16 everyone was at Starbucks?

17 MS. MELTZER: Don't know. You can't  
18 disclose what the mediator has said. Can Party B  
19 disclose what the mediator has said?

20 PARTICIPANT SPEAKER: No.

21 MS. MELTZER: Can Party A disclose  
22 what Party B has said?

1 PARTICIPANT SPEAKER: Yes.

2 PARTICIPANT SPEAKER: Yes.

3 MS. MELTZER: Can Party B disclose  
4 what Party A has said?

5 PARTICIPANT SPEAKER: Yes.

6 PARTICIPANT SPEAKER: Yes.

7 MS. MELTZER: Yep. Now, that's --  
8 that's part of that balancing that we talked  
9 about in terms of the difference between a lot of  
10 the -- the statutes that govern private sector  
11 and our ADR Act that governs public sector, where  
12 they're trying to balance between openness in  
13 government and -- and the need for  
14 confidentiality. It makes for some tricky  
15 situations.

16 Now, we can address that in some other  
17 ways that we'll talk about a little bit later.  
18 But I want y'all to remember that unless you take  
19 other action -- and we can talk about that other  
20 action -- that in joint session -- and it may be  
21 multiple parties, so if there's also a Party C or  
22 a Party D who wasn't part of that, who wasn't

1 part of that particular discussion, then you  
2 can't disclose.

3 It's only when all parties are present  
4 that there's no limit on what is disclosed,  
5 except none of them can talk about what the  
6 mediator says. Is everybody confused now?

7 All right. Lots of times, there will  
8 be experts who are brought into the process. So,  
9 for example, the first time that I mediated, it  
10 was a person who had a severe hearing disability  
11 and the subject matter dealt with hearing  
12 disabilities.

13 I was very uncertain about what I was  
14 doing and how to do it best, so I pulled in  
15 somebody to work with me who was an expert in the  
16 area. Now, is that person -- what's the  
17 confidentiality obligation of that person?  
18 Somebody?

19 PARTICIPANT SPEAKER: Same as the  
20 parties'.

21 MS. MELTZER: Same as the parties'?

22 PARTICIPANT SPEAKER: Same as the

1 neutral.

2 MS. MELTZER: Same as the neutral,  
3 because I pulled that person in.

4 PARTICIPANT SPEAKER: Oh, I see.

5 MS. MELTZER: And that person worked  
6 with me. That meant that I could talk to the  
7 person. It meant that the person had the same  
8 confidentiality -- confidentiality obligation  
9 that I did.

10 Now, suppose -- we'll pick on Carol.  
11 Suppose Carol was mediating a case -- I mean,  
12 was -- was a party to a mediation and it dealt  
13 with a technical health issue.

14 And -- and she wanted an expert. She  
15 wanted a doctor to come along in the mediation to  
16 help her out. What's that doctor's obligation in  
17 terms of confidentiality? Does anybody know?

18 PARTICIPANT SPEAKER: Same.

19 PARTICIPANT SPEAKER: She's a party?

20 MS. MELTZER: They have none. They  
21 can talk freely about anything at any time.  
22 They're a nonparty participant and they can talk

1 about whatever they want.

2 So what we talk about doing is making  
3 sure that they sign an agreement to mediate, and  
4 then at least there's some protection. But under  
5 the ADR Act, they have no -- no confidentiality  
6 obligation.

7 Now, suppose Chris's supervisor comes  
8 up to her and says, hey, Chris, I understand that  
9 you were mediating. Tell me about it. What's  
10 your answer going to be, Chris?

11 PARTICIPANT SPEAKER: (Inaudible.)

12 MS. MELTZER: Uh-huh. And suppose  
13 a -- a colleague of Barbara's comes up to her and  
14 says, boy, you were gone for a long time.  
15 What -- what kind of stuff was going on there?  
16 What are you going to say?

17 PARTICIPANT SPEAKER: Was it that  
18 long?

19 MS. MELTZER: Okay. She said, was it  
20 that long? for people who didn't hear. Okay?

21 PARTICIPANT SPEAKER: Okay.

22 MS. MELTZER: But the idea is that you

1 just say no.

2 Yes, sir.

3 PARTICIPANT SPEAKER: Using the same  
4 scenario, what about the ADR supervisor?

5 MS. MELTZER: You're always one step  
6 ahead of me. Let -- let me -- is that person a  
7 neutral?

8 PARTICIPANT SPEAKER: No.

9 MS. MELTZER: I don't think there's an  
10 automatic yes or no. What would you look at to  
11 decide whether that person was a neutral? If you  
12 flip back to the Power Point, you'll see there  
13 were a couple of different criteria.

14 Is the person assisting and is the  
15 person agreeable to the parties? And if the  
16 person is assisting the process and really  
17 involved in the process, then, yes, you can talk  
18 to that ADR supervisor. But in the situations  
19 with Barbara and Chris, there was no nexus there  
20 at all. So those were easy ones.

21 PARTICIPANT SPEAKER: Full consent?

22 MS. MELTZER: Pardon me?

1 PARTICIPANT SPEAKER: Full consent of  
2 the parties?

3 MS. MELTZER: Right. So now, what  
4 happens if Marcia gets subpoenaed? She mediated  
5 a case. It wasn't successful. And she's now  
6 subpoenaed by plaintiff's counsel saying the --  
7 the agency rep said some things that were really  
8 interesting. I want you to -- to come and  
9 testify. What does she do? Does anybody know  
10 what she does, besides panic and all those other  
11 things?

12 PARTICIPANT SPEAKER: Call agency  
13 counsel.

14 PARTICIPANT SPEAKER: Call agency  
15 counsel.

16 MS. MELTZER: Well, that might be a  
17 first step, or if you're doing it through an  
18 agency program, either through Sharing Neutrals  
19 or with the agency directly, even that -- even  
20 though it's not under the ADR Act, I would  
21 strongly suggest that you call them. But under  
22 the ADR Act, do you know what the process is? Do

1 you know what you do after you panic?

2 PARTICIPANT SPEAKER: No.

3 MS. MELTZER: Okay. Well, let's look  
4 at the slide, then. Under the ADR Act, you are  
5 obligated to make reasonable efforts to notify  
6 the parties. The parties have 15 days to offer a  
7 defense for you to refuse to disclose. If they  
8 don't do that, the neutral is free to disclose.

9 So on that subpoena, if a party --  
10 if -- you, then, would contact the parties. And  
11 the parties, whoever the relevant party is, would  
12 have 15 days to -- to offer to defend you if you  
13 refuse. And if they didn't do that, then under  
14 the ADR Act, you're free to disclose.

15 Now, I think there are lots of other  
16 questions about in terms of the integrity of  
17 mediation whether you would still choose to  
18 disclose or you would fight it. But of course,  
19 if you fight it, then it's on your dime or the  
20 agency's dime to -- to defend it.

21 But at least under the ADR Act, you're  
22 then free to disclose it. But that's in a formal

1 demand as opposed to the supervisor just coming  
2 to say hello.

3 Yes.

4 PARTICIPANT SPEAKER: You know, I know  
5 a lot of times what happens is the different  
6 mediation programs, they put within the agreement  
7 to mediate something saying basically, the  
8 parties agree, in agreeing to mediate, not to  
9 subpoena the mediator into mediation. So it's a  
10 way to -- irrespective of what ADRA says, I know  
11 it's the way agencies deal with that issue --

12 MS. MELTZER: Uh-huh.

13 PARTICIPANT SPEAKER: -- to avoid the  
14 situation and having problems like that  
15 occurring.

16 MS. MELTZER: Of course, that only  
17 impacts the parties who signed it. So if there's  
18 a third party (inaudible) that's -- that's not  
19 going to help you.

20 Okay. So what? So somebody discloses  
21 when they're not supposed to. Well, if a  
22 communication is disclosed in violation of --

1 remember 574A and B are the ones that -- the  
2 confidentiality provisions that talked about a  
3 neutral for A and parties for B -- then no one  
4 may use that communication in a related  
5 proceeding.

6           So if there's a employment  
7 discrimination suit going on here; it's mediated;  
8 it's unsuccessful; and then it goes to court,  
9 nothing can be used in that court setting. And  
10 if anyone discloses it, it -- it's not going to  
11 be considered.

12           Now, an interesting trick is that it  
13 can be used in an unrelated proceeding. So say  
14 there's some -- somebody was accused of doing  
15 something improper -- you know, work place  
16 contacts that involve some of the issues that  
17 were the same, but it wasn't a related  
18 proceeding -- then the information could be used.

19           Now, what we're talking about here is  
20 just the ADR Act. And there may be other causes  
21 of action other than the ADR Act if a  
22 communication is disclosed in violation of the

1 ADR Act.

2 PARTICIPANT SPEAKER: Is there a  
3 definition of related litigation?

4 MS. MELTZER: I -- you're out of my  
5 sphere, but I would -- Joanna, you probably know  
6 that.

7 PARTICIPANT SPEAKER: I didn't hear  
8 the question.

9 MS. MELTZER: Oh, I'm sorry.

10 PARTICIPANT SPEAKER: Is there a  
11 definition of unrelated or related proceeding?

12 MS. MELTZER: I am not a litigator,  
13 so --

14 PARTICIPANT SPEAKER: I'm not aware of  
15 a definition. I -- I guess it would be the same  
16 sort of definition as an issue already decided in  
17 a case.

18 PARTICIPANT SPEAKER: Okay.

19 MS. MELTZER: Okay. Thank you.

20 Now, there's some options. The  
21 parties can contract for alternative  
22 confidentiality procedures. And you've probably

1 seen that a lot.

2 You've seen in agency agreements to  
3 mediate where they say, everything's  
4 confidential, right? which, of course, is not the  
5 case under the ADR Act, because everything is not  
6 confidential. Party A can talk and Party B can  
7 talk, right?

8 So there are contra-agreements to  
9 mediate that are different, where maybe they  
10 require some disclosure that aren't in the ADR  
11 Act.

12 So, for example, I'm in a mediation  
13 and I pull out my gun and put it right there.  
14 Can I disclose that? I mean, can I -- can I go  
15 do something?

16 I've got the wrong people. You pull  
17 out your gun. And can I, as mediator, do  
18 anything? Are there any -- any exceptions under  
19 the ADR Act?

20 (Inaudible conversation.)

21 MS. MELTZER: Huh? Are there? What?

22 (Inaudible conversation.)

1 PARTICIPANT SPEAKER: What about  
2 (inaudible)?

3 MS. MELTZER: No, I'm talking about  
4 the ADR Act. Are there any exceptions?

5 PARTICIPANT SPEAKER: Our agency  
6 policy, yes, but not the act.

7 MS. MELTZER: No, I'm talking in the  
8 ADR Act.

9 PARTICIPANT SPEAKER: (Inaudible.)

10 MS. MELTZER: (Inaudible) maybe,  
11 but -- could be, but that's not in the ADR Act.

12 PARTICIPANT SPEAKER: Given the fact  
13 that (inaudible).

14 MS. MELTZER: No.

15 PARTICIPANT SPEAKER: No. Okay.

16 MS. MELTZER: So if you-all have in  
17 your agreement to mediate that there's disclosure  
18 out of fear for bodily harm or something, you're  
19 now contracting outside of the ADR Act.

20 I'll take my gun back.

21 Uh-oh. Go away.

22 But when you agree to alternate

1 confidentiality that requires more -- more  
2 confidentiality than is set out in the ADR Act,  
3 then there's no protection for disclosure under  
4 FOIA, which there is under the ADR Act if you  
5 follow the ADR Act process.

6           There's no protection or remedies  
7 under the ADR Act, because you're now working  
8 under contract law, not under the ADR Act.

9 There's no protection from third parties, what we  
10 were talking about before, where it's just the  
11 signatories who are going to be bound by it. And  
12 it's never been tested in the courts.

13           Now, if you want my personal view, I  
14 still think it makes a whole lot of sense to do  
15 it. But I would make the parties aware of the  
16 fact that there are some consequences,  
17 potentially, to doing this.

18           But I think giving people some -- some  
19 guidance as to how they're going to end up in  
20 mediation I think is helpful in the long run.

21           Yes, Joanna?

22           PARTICIPANT SPEAKER: Has there been

1 any litigation regarding the balance between FOIA  
2 responsibilities and an independent agreement not  
3 to disclose?

4 MS. MELTZER: Not that I'm aware of.  
5 That's not to say it hasn't happened, but I'm not  
6 aware of it.

7 PARTICIPANT SPEAKER: Anybody else  
8 aware of it?

9 (No audible response.)

10 MS. MELTZER: Yes.

11 PARTICIPANT SPEAKER: There's a FOIA  
12 under address, so if -- if you've made -- if  
13 somebody made a FOIA request for all mediations  
14 that happened at the agency or tried something  
15 like that, then you would notify the parties to  
16 say, I've gotten this formal request, within 15  
17 days, to ask them or what?

18 MS. MELTZER: No, because if it's  
19 under the ADR Act -- if it's strictly under the  
20 ADR Act, there is an exemption.

21 PARTICIPANT SPEAKER: Oh, for FOIA?

22 MS. MELTZER: For FOIA.

1 PARTICIPANT SPEAKER: Oh, okay.

2 Sorry. I wasn't --

3 MS. MELTZER: J, 574J: A dispute  
4 resolution communication between a neutral and a  
5 party which may not be disclosed under this  
6 section -- this section, not any additional stuff  
7 by contract.

8 PARTICIPANT SPEAKER: Isn't a  
9 settlement (inaudible) to mediations (inaudible)?  
10 Wouldn't that include their names?

11 MS. MELTZER: Yes.

12 PARTICIPANT SPEAKER: And isn't that  
13 okay to be given?

14 MS. MELTZER: That can be given,  
15 because it's not a dispute resolution  
16 communication.

17 PARTICIPANT SPEAKER: Okay. So --

18 MS. MELTZER: -- shall also be exempt  
19 from disclosure under Section 552B3, which is  
20 FOIA.

21 PARTICIPANT SPEAKER: Okay.

22 PARTICIPANT SPEAKER: I (inaudible)

1 missed this. I'm wondering what happens if -- if  
2 you're a -- a private sector mediator; you're  
3 serving an agency; and say, the State of  
4 Virginia, the state has a much higher bar for  
5 confidentiality and the private mediator is very  
6 concerned about repeating anything that is heard  
7 in that mediation (inaudible) then settlement  
8 agreement and the mediator is asked, did you get  
9 a settlement? Did any -- what happened or what  
10 were the contents of it?

11 In Virginia, you can't can say  
12 anything, you know. Should that private mediator  
13 be concerned about breaching Virginia's  
14 requirement of -- for confidentiality when  
15 they're asked something that would be okay to  
16 repeat in the federal sector?

17 MS. MELTZER: I -- I think you've  
18 identified a problem and a -- a tension there.  
19 And I don't feel that I can give you a definitive  
20 answer on that.

21 I think it's going to depend in part  
22 on how the different states look at it. And

1 you -- you have a conflict, because you're held  
2 to two different standards.

3 PARTICIPANT SPEAKER: Yeah.

4 MS. MELTZER: And -- and I can't -- on  
5 that one, I can't help you resolve it.

6 PARTICIPANT SPEAKER: Okay.

7 MS. MELTZER: Okay? which is a great  
8 segue into our next slide here, which is  
9 tensions.

10 Now, we know that under the ADR Act --  
11 oh -- that sometimes there are other ways of  
12 dealing with it. Maybe there are other parties  
13 that might be available to disclose the  
14 information so that you, as mediator, don't have  
15 to. There are lots of practical ways.

16 So I'd like you to read about it, both  
17 in terms of legally and practically. Okay? So  
18 who's the first group (inaudible)? Okay.

19 (Inaudible discussion.)

20 MS. MELTZER: Okay, guys.

21 (Inaudible discussion.)

22 MS. MELTZER: Are we ready to get back

1 into this?

2 (Inaudible discussion.)

3 MS. MELTZER: Who had Number 1?

4 (Inaudible discussion.)

5 MS. MELTZER: You guys did. Okay.  
6 Tell us about it.

7 PARTICIPANT SPEAKER: Okay.

8 (Inaudible discussion.)

9 PARTICIPANT SPEAKER: Okay. We had  
10 (inaudible) mediate (inaudible) employees. And  
11 he -- we put collaborative duties (inaudible)  
12 and, you know, doing his regular government job  
13 with that all here in the EEO office.

14 But anyway, their supervisor heard  
15 that Sam mediated a case. So she comes in under  
16 aids and says, oh, I heard you got a possible  
17 settlement. Tell me what happened in that case  
18 so (inaudible) in case something (inaudible) you  
19 know, just wanted to find out what happened.

20 And we decided that under USC-5 --  
21 USC-574, he's not -- as a mediator, he's not  
22 legally obligated to disclose that to her.

1 MS. MELTZER: In -- in fact, he can't.

2 PARTICIPANT SPEAKER: He can't. But  
3 putting on a real world government hat, this is  
4 my boss and I'm a government employee.

5 MS. MELTZER: Yeah. And this really  
6 happens.

7 PARTICIPANT SPEAKER: And if she  
8 were -- if she tells me to -- which I probably  
9 do, as the mediator, is help to mediate -- and  
10 comes to me and says, you know, I heard you did a  
11 great job in there and you did this and that, and  
12 tell me what happened so we can do this in the  
13 future, maybe make some kind of outline or  
14 whatever, I probably would say, you know,  
15 legally, I'm not supposed to say anything, but  
16 let's do like attorneys do and do a hypo, like,  
17 let's say Employee A walked into my office and  
18 this and that. And I'd probably do a hypo in  
19 that situation and wouldn't actually give her the  
20 names of the parties involved.

21 MS. MELTZER: Wouldn't she know the  
22 names of the parties involved?

1                   PARTICIPANT SPEAKER: I -- I don't  
2 know. I -- I really don't know. But what I'm  
3 saying is that I couldn't have to tell her what  
4 happened in that mediation, but I can say, I  
5 can't tell you what happened in that mediation,  
6 but let me give you an example of a hypo what I  
7 think should be done in a situation like that.  
8 That's all we could think of.

9                   MS. MELTZER: What -- what do you guys  
10 think of that approach?

11                   PARTICIPANT SPEAKER: It's like a  
12 (inaudible). I mean --

13                   PARTICIPANT SPEAKER: I -- I think she  
14 probably knows the people that are involved.

15                   MS. MELTZER: Carol?

16                   PARTICIPANT SPEAKER: You're revealing  
17 a dispute resolution communication made in  
18 private to you, as a mediator, and not -- you  
19 know, then -- then you have an obligation not to  
20 reveal it.

21                   PARTICIPANT SPEAKER: That's true.  
22 And I wouldn't reveal it. But I'm saying, if she

1 wants to know the process of what happened for  
2 that type of mediation, what I'm saying is, a lot  
3 of -- sometimes attorneys will say -- if they  
4 can't answer a question, they'll say, well, I  
5 can't tell you what happened with John and Mary,  
6 but let me give you a hypo of some similar  
7 situation.

8           And that's how I would approach that.  
9 It's not disclosing what actually happened in  
10 there and they won't really know, but it's  
11 basically saying the facts, but we're not really,  
12 actually talking about those parties. We're  
13 talking about settlement.

14           MS. MELTZER: Well, let me -- let me  
15 ask you this so that I'm clear on what you're  
16 saying here. How close is the hypo going to  
17 track the facts of the mediation?

18           PARTICIPANT SPEAKER: Enough not to  
19 legally give you any (inaudible).

20           PARTICIPANT SPEAKER: Good answer.

21           MS. MELTZER: So -- so you wouldn't  
22 (inaudible).

1                   PARTICIPANT SPEAKER: I understand  
2 what you're saying, but I would be careful. But  
3 there are times when a person will come to an  
4 attorney, ask them for advice and things like  
5 that.

6                   PARTICIPANT SPEAKER: Uh-huh.

7                   PARTICIPANT SPEAKER: And, you know,  
8 an attorney would say, you know, legally, I can't  
9 do this and that, but let me give you an example  
10 of what could happen to you if you were in that  
11 particular situation. And I think under the --  
12 the rules that you can do that, as a lawyer.  
13 So --

14                   MS. MELTZER: Well, my concern, I  
15 think, is whether that's being used as just a --  
16 a --

17                   PARTICIPANT SPEAKER: A screen.

18                   MS. MELTZER: -- a -- yeah, kind of a  
19 screen as opposed, you -- just a kind of a CYA,  
20 as opposed to really following the intent of the  
21 statute.

22                   And I think it depends on how far

1 apart -- how -- how you could -- whether you  
2 could sufficiently hide the identity and the  
3 facts to do that, because I think just the fact  
4 of calling it a hypo really doesn't do what we  
5 need it to do.

6 PARTICIPANT SPEAKER: If the  
7 supervisor -- if you know that they're not trying  
8 to be nosy; they just have, you know, some  
9 problems within their office and they just want  
10 to find out, well, what can I do to, you know,  
11 neutralize these problems? then if you were to  
12 give a hypo, I mean, why would that be, like a --  
13 why would that be, like, you know, a conflict?

14 MS. MELTZER: Sidney?

15 PARTICIPANT SPEAKER: Well, I happen  
16 to be -- I know there's quite a few lawyers here.  
17 I happen to be a lawyer, too. I would not use  
18 that approach myself. I'm not saying some of us  
19 wouldn't.

20 PARTICIPANT SPEAKER: Uh-huh. What  
21 would you do?

22 PARTICIPANT SPEAKER: I -- I would

1 maybe discuss some procedural aspects, but I  
2 wouldn't deal with the facts at all.

3 MS. MELTZER: So how would you deal  
4 with that?

5 PARTICIPANT SPEAKER: I would just  
6 say -- you know, basically, discuss the  
7 procedure: We did this. Then we did that. You  
8 know, we gave this person the opportunity to say  
9 something, this person the opportunity to say  
10 something.

11 I would, like -- I would discuss maybe  
12 procedure, but I wouldn't discuss the factual  
13 situation. And I certainly wouldn't raise a  
14 hypothetical situation, which really would be  
15 tantamount to the facts of that mediation. I  
16 certainly wouldn't do that. So --

17 MS. MELTZER: Yeah. I -- I mean, I --  
18 I'm hearing you say that you would be very  
19 careful. I'm not --

20 PARTICIPANT SPEAKER: (Inaudible.)

21 MS. MELTZER: (Inaudible) not to  
22 disclose enough of -- of facts that would make it

1 identifiable. I think -- I think another  
2 question is -- or another thought might be, you  
3 want to understand, supervisor, about how to deal  
4 with this issue in the future.

5 I can't -- I can't tell you what  
6 happened in this mediation, but I would be happy  
7 to just brainstorm with you about ways that if a  
8 situation where X, Y, Z happens that we might be  
9 able to deal with that.

10 And that really takes it away from the  
11 facts of that and the people particularly there.  
12 But I think that you're -- I -- I appreciate your  
13 candidness. It is a problem when your supervisor  
14 comes to you.

15 PARTICIPANT SPEAKER: I'm not a  
16 federal employee, but just thinking about this, I  
17 suppose the mediator could direct their  
18 supervisor to speak with the agency rep.

19 MS. MELTZER: That's a good point,  
20 also, unless there's a confidentiality agreement.

21 PARTICIPANT SPEAKER: Right.

22 MS. MELTZER: But yeah, I think that's

1 a good idea, also.

2 PARTICIPANT SPEAKER: Wait. I  
3 wasn't -- what I can say as to your question  
4 about whether or not the supervisor would know  
5 the parties is (inaudible) the way it's  
6 structured.

7 MS. MELTZER: Sure.

8 PARTICIPANT SPEAKER: You have a  
9 mediation group and a processing group.  
10 Certainly the supervisor might want to know in  
11 these circumstances, and the people might want  
12 to -- but your supervisor might not even know the  
13 parties in that structure, where if it's a small  
14 office with a small team, likely she might know,  
15 or he might know, the parties.

16 MS. MELTZER: Well, I think what  
17 you're pointing out is that, again, it's this  
18 case-by-case assessment. And it's just important  
19 to remember that whatever you talk about, whether  
20 it's to your supervisor or your significant  
21 other, that any type of discussion that's going  
22 to relate back to the people or the facts or in

1 any way be identifiable really is improper.

2 I'm going to move along here. Joanna,  
3 is it important?

4 PARTICIPANT SPEAKER: One quick  
5 question, and that is: It's communication which  
6 are considered confidential, so would it be  
7 appropriate, for example, to just say, the  
8 parties went into caucus four times? It seems to  
9 me that that's not a communication and that's --  
10 so that if you talked about the process --

11 PARTICIPANT SPEAKER: Process.

12 PARTICIPANT SPEAKER: -- and even, if  
13 you want to push it, the facts, it's the  
14 communications in that mediation which are  
15 confidential.

16 PARTICIPANT SPEAKER: I think you can  
17 talk about the issues, but not the facts.

18 PARTICIPANT SPEAKER: Why not the  
19 facts?

20 PARTICIPANT SPEAKER: Well, because  
21 the law prohibits it.

22 PARTICIPANT SPEAKER: The law

1 prohibits communications. And if, for example,  
2 there's an intake sheet that describes the facts,  
3 doesn't seem to me that that's communications.

4 MS. MELTZER: Well, I think -- I think  
5 that may be an option, but I think it wouldn't  
6 address the situation here, because the  
7 supervisor -- excuse me -- wanted a little  
8 substantive information and didn't want to know  
9 that we went into caucus four times.

10 I'd like to move along, because we  
11 have a bunch of them and we're running out of  
12 time. I know you had another piece to yours, but  
13 I'm going to skip over it.

14 Who had two, please? Okay. Would one  
15 of you like to -- to say something?

16 PARTICIPANT SPEAKER: Okay. Joan and  
17 Tania went into mediation. Joan is the  
18 supervisor -- I'm sorry. Tania is the supervisor  
19 and Joan is the employee.

20 Joan asked Tania, why did you -- why  
21 did you give Jim an assignment? And basically,  
22 the supervisor, Tania, said, well, I think he

1 would have done -- you know, I think he did a  
2 good job and also, I think he's cute.

3 So afterwards, the mediator asked me  
4 if Tania (inaudible) caucus, and the mediator and  
5 Tania did some reality (inaudible) with respect  
6 to the witness.

7 The case didn't settle and Joan  
8 requested a hearing at EEOC. In the hearing,  
9 Joan wants to testify that Tania said that Jim  
10 was cute. Can she? We said yes.

11 MS. MELTZER: Because?

12 PARTICIPANT SPEAKER: Because it was  
13 communications between Joan and Tania.

14 MS. MELTZER: So all parties were  
15 present.

16 PARTICIPANT SPEAKER: Yeah. That was  
17 our point --

18 MS. MELTZER: Right. So --

19 PARTICIPANT SPEAKER: -- discussion.

20 MS. MELTZER: -- that's disclosable.

21 Any way that the parties could have protected the  
22 confidentiality?

1 PARTICIPANT SPEAKER: We said yes.  
2 They could agree to more confidentiality.

3 MS. MELTZER: Right, right. I -- I'm  
4 going to skip over some of the other ones, just  
5 because I want to address everybody else.

6 Three. Who had three? Yes.

7 PARTICIPANT SPEAKER: There's this  
8 case where the parties unsuccessfully tried to  
9 mediate and then the employee decided to pursue  
10 it through EEO process.

11 And the EEO conducted an  
12 investigation, went to hearing. And as the  
13 hearing progresses, the neutral receives a letter  
14 from both parties stating that they have  
15 consented in writing to allow disclosure of some  
16 specific facts discussed in the mediation.

17 So we thought that this would be  
18 permitted by the ADR Act under A2, all parties to  
19 the dispute resolution proceeding consent in  
20 writing.

21 MS. MELTZER: Uh-huh.

22 PARTICIPANT SPEAKER: And we also

1 thought that -- that where the discovery is  
2 permitted, it would allow it as well and that it  
3 wouldn't necessarily have to be the mediator who  
4 was providing these facts.

5 MS. MELTZER: Okay. Let -- let me go  
6 back to your first one, though. As -- the  
7 disclosure requested is of the mediator, right?

8 PARTICIPANT SPEAKER: Right.

9 MS. MELTZER: So it's an exception  
10 under A rather than under B that would have to  
11 pertain, right? So what would the exception be?

12 PARTICIPANT SPEAKER: We also talked  
13 about (inaudible) why all parties --

14 MS. MELTZER: Uh-huh.

15 PARTICIPANT SPEAKER: -- and the need  
16 for consent. But it is my -- (inaudible) I was  
17 the one who brought it up, because it seems to me  
18 that the most appropriate response is to say, you  
19 don't need my consent (inaudible) the facts to  
20 disclose.

21 MS. MELTZER: Well, I -- I think  
22 that's a good approach. I think that's an

1 alternative approach, and one that I --

2 PARTICIPANT SPEAKER: (Inaudible.)

3 MS. MELTZER: -- I would encourage,  
4 because to the extent the parties can talk about  
5 it, rather than you as a neutral, I think that  
6 just works to maintain the integrity of the  
7 mediation process.

8 PARTICIPANT SPEAKER: Particularly if  
9 you don't know exactly what they want to  
10 disclose. And based on what we saw, we don't  
11 know exactly what they're -- what they knew as  
12 facts.

13 MS. MELTZER: Number 4?

14 PARTICIPANT SPEAKER: Could I ask you  
15 a question about -- on Number 3?

16 MS. MELTZER: Sure.

17 PARTICIPANT SPEAKER: If -- if, from  
18 an organization standpoint, you had an outside  
19 neutral in this -- in that case and the neutral  
20 said, I don't want to testify; I don't -- I don't  
21 want to agree; I understand the parties have --

22 MS. MELTZER: Uh-huh.

1 PARTICIPANT SPEAKER: -- agreed, but  
2 I'm not -- I'm not going to do that, because I  
3 have -- I see risks and all for myself, what  
4 would the reaction be from federal agency? How  
5 would you -- what might you say to -- to deal  
6 with that situation?

7 MS. MELTZER: I would commend that  
8 neutral for saying that, because I think it goes  
9 to supporting their reputation and their sense of  
10 integrity. I think they're opening themselves up  
11 to a huge whatever the metaphor is that you'd  
12 like to choose.

13 If they decide to push it, then I  
14 assume we could get into some nasty stuff. But I  
15 would commend the person for doing that, because  
16 I think that that thwarts the whole concept of  
17 mediation.

18 PARTICIPANT SPEAKER: If mediator is  
19 subpoenaed and actually testified in federal  
20 proceeding, then I can see it as a huge harm --

21 MS. MELTZER: Uh-huh.

22 PARTICIPANT SPEAKER: -- to dispute

1 resolution generally.

2 MS. MELTZER: Uh-huh.

3 PARTICIPANT SPEAKER: And -- and I  
4 would do more than commend, but, you know, try to  
5 make sure that mediator would be protected. I  
6 think it almost argues for using outside  
7 neutrals, because they can say no, whereas a  
8 federal employee may say, well, gee, I've been  
9 subpoenaed. And, you know, I don't want this --  
10 you know, I -- I want my job, whether or not I'm  
11 subpoenaed.

12 Outside neutrals can say, no, I want  
13 to -- I want to protect the integrity of the  
14 process. I just can't imagine mediators running  
15 around testifying in any subsequent proceedings.  
16 (Inaudible) say yes.

17 (Inaudible conversation.)

18 MS. MELTZER: Well --

19 PARTICIPANT SPEAKER: There's no way.

20 MS. MELTZER: -- good for you, Carol.

21 PARTICIPANT SPEAKER: (Inaudible.)

22 MS. MELTZER: Five? Who handled 5?

1 PARTICIPANT SPEAKER: We did.

2 MS. MELTZER: Okay.

3 PARTICIPANT SPEAKER: Actually, we're  
4 miked here at the table.

5 Does my group want me to do it?

6 PARTICIPANT SPEAKER: Sure.

7 PARTICIPANT SPEAKER: Sure.

8 PARTICIPANT SPEAKER: Okay. We had a  
9 situation --

10 MS. MELTZER: Can we have the mike up  
11 here, please?

12 PARTICIPANT SPEAKER: Well, this is --  
13 this is miked right here at the table.

14 MS. MELTZER: Oh, that's right.

15 PARTICIPANT SPEAKER: Yeah.

16 MS. MELTZER: You're right. You're  
17 right.

18 PARTICIPANT SPEAKER: We've got a  
19 separate caucus going on as mediators. An  
20 employee states that the plaintiff sabotaged  
21 agency computer system.

22 Basically, agency dismisses him for

1 poor performance; didn't have any proof, a  
2 suspicion, with -- but they were suspicious of  
3 the activity going on between this -- with this  
4 employee.

5           Then that employee appeals it.  
6 Basically, that agency then wants to subpoena the  
7 mediator, the neutral, to testify in court,  
8 and -- because they think there's some additional  
9 information the neutral might know about.

10           We -- we looked at this, in -- and  
11 under ADRA, pretty much looked at 574E, which  
12 talks about the ban for disclosure based on these  
13 types of -- of requests. In this case, it's a  
14 subpoena. And we said basically that we would  
15 not disclose it.

16           Of course, we can go back to both  
17 parties and -- and ask permission to disclose,  
18 but reality is, employee's not going to want this  
19 coming out and would -- I'm sure would -- would  
20 challenge it.

21           Then we got into discussion regarding  
22 ethics. We said, you know, confidentiality is --

1 is very important, but also, the question  
2 becomes, is this a situation where we are, in  
3 some shape or form -- you know, we have an  
4 obligation to protect the integrity and the  
5 quality of the mediation process itself.

6 So that began a dialogue of thinking  
7 more about that. And what we came up with is --  
8 is we're not 100 percent sure, based on these  
9 facts, if this person might be blowing off steam  
10 or if they were -- you know, what context were  
11 they saying this, basically.

12 And so we more so went towards  
13 confidentiality as being the standard to uphold  
14 here and practicality, even beyond ADRA. But the  
15 way we thought about dealing with this to prevent  
16 this situation is -- is talking about it at the  
17 very beginning of mediation when we have them  
18 sign agreement to mediate form, explain to them  
19 maybe under different programs that you have to  
20 make sure that if you say something to me,  
21 recognize that not everything is 100 percent  
22 confidentiality; even beyond ADRA based on our

1 agreement to mediate, what the standards are  
2 under our program, as a way to try to address  
3 this before you get into the content of the case.  
4 So it's how we looked at it.

5 MS. MELTZER: Okay. Thank you.

6 Each of these could allow for at least  
7 a 15-minute discussion. And I'm very mindful of  
8 the time, so I'm going not to get into that.

9 PARTICIPANT SPEAKER: Yeah.

10 MS. MELTZER: I think that -- didn't I  
11 skip you guys?

12 PARTICIPANT SPEAKER: Number 4?

13 MS. MELTZER: You actually ended up  
14 with one of the easiest ones.

15 PARTICIPANT SPEAKER: Yeah. We  
16 basically said for A, not a good idea; and B, not  
17 a good idea. This -- the "Washington Post"  
18 article itself is a public document.

19 But when it starts taking on the --  
20 the slant of the person who summarizes it, it's  
21 now a communication, because the neutral has  
22 prepared it in the context of her mediation or

1 his mediation. And so we took a just say no  
2 approach.

3 PARTICIPANT SPEAKER: To both A and B?

4 PARTICIPANT SPEAKER: Yeah, uh-huh.

5 MS. MELTZER: I -- I think there  
6 probably is an argument that you could disclose  
7 that. I think, again, in terms of this mediation  
8 integrity, it's always wiser to just say no,  
9 unless you're really pushed, and then I think you  
10 have to start weighing things.

11 And also -- let's see. Five. I just  
12 wanted to add that what could happen is if the  
13 parties decided that one was going to defend, if  
14 we went through the notice process, then it may  
15 go to the court under A -- what is it? -- 4, 5.

16 PARTICIPANT SPEAKER: Right, 4, yeah.

17 MS. MELTZER: Four?

18 PARTICIPANT SPEAKER: We might be  
19 compelled to --

20 PARTICIPANT SPEAKER: -- to testify --

21 MS. MELTZER: Yeah.

22 PARTICIPANT SPEAKER: -- according to

1 the court's requirement, yeah.

2 MS. MELTZER: Right. But as I said,  
3 I'm not aware of that happening. So -- okay. We  
4 have about three, four minutes, and we've got  
5 one, two, three different hypos.

6 Do you-all want to -- shall we go for  
7 about another ten minutes or shall I cut it off  
8 at exactly 1:30? What do you want me to do?

9 PARTICIPANT SPEAKER: Cut it.

10 MS. MELTZER: Cut it. Okay. Then  
11 what I'm going to do is I -- I think we'll just  
12 cut it at this point. And I'm sorry. You guys  
13 got a tricky one. And if you want to discuss it  
14 afterwards, (inaudible) me and everybody, I'm  
15 happy to do that, and if anybody else wants to.  
16 I'd like to thank everyone.

17 (Inaudible conversation.)

18 MS. MELTZER: And if you have any  
19 questions, please feel free to either drop me an  
20 e-mail or call me or talk to me now. And I don't  
21 claim to have all the answers; a lot of this is  
22 unclear; but (inaudible) talk about it, we'll try

1 and figure it out.

2 (Inaudible conversation.)

3 \* \* 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*

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Caren Benge  
Notary Public in and for  
THE STATE OF TEXAS

My commission expires:  
October 28, 2009

