

Scenario 1

The mediator -- a government employee who has just begun to mediate on a collateral duty basis under an interagency shared neutrals program -- has just successfully helped the parties settle a case involving a novel EEO complaint involving a disabled complainant. The case involved people in a whole different part of the agency, in another city.

VARIANT 1: The mediator's supervisor comes into the mediator's office and says that he/she has heard that the case was settled. He/she says that he wants to avoid similar trouble in his/her office and to keep the entire agency out of future cases of this sort, and asks the mediator to tell him what happened in the mediation, describe how the settlement was arrived at, and provide any advice on how to avoid future problems.

VARIANT 2: The mediator's colleague down the hall -- also a government employee who is his/her mentor under the interagency shared neutrals program -- drops by and the mediator asks for some pointers on how to do better next time. The mentor asks the mediator to describe strategies he/she employed, how he/she dealt with various difficult issues to promote a settlement, and other dispute-specific details.

VARIANT 3: The mediator gets a phone call from the agency's Office of Inspector General informing him/her that that office is now investigating recent settlements under the EEO program for possible waste or fraud. The IG asks when he/she can meet with the mediator to get a complete report as to what happened in this mediation, and others he/she has conducted, and in particular to discuss how the settlement was arrived at.

WHAT WOULD YOU DO?
PRACTICAL ADVICE ON HANDLING ETHICS ISSUES IN MEDIATION

SCENARIO 1 - VARIANT 1

CAST: **MEDIATOR** Susan Kilgore
 SUPERVISOR Daphne Veale

MEDIATOR *sitting at desk working, when SUPERVISOR enters*

SUPERVISOR *sits down*

SUPERVISOR: Good morning Susan. I just heard you were quite successful in settling a case you were mediating under the interagency shared neutrals program. If you don't mind I'd like to take a few minutes to ask you some questions about it.

MEDIATOR: (*hesitating*) Sure ... uh ... I guess so.

SUPER: I'll just run down the questions that I have, then you can answer them. OK. I know it was an EEO complaint involving a disabled complainant.

What position did management take?

What position did the complainant take?

Did the union take a position?

Who made the first offer?

What were the arguments that management made?

MED: You know, I'm not sure I should be discussing the specifics of the case.

SUPER: Look, I am not trying to get you to talk about something you're not supposed to discuss. First of all, this case involved people in a whole different part of the agency, in another city. There shouldn't be any problems. Secondly, this is in the Agency's best interest. I want to avoid similar trouble in this office and to try to help prevent any future cases of this sort in the agency. Now, isn't that what you folks in ADR want anyway?

MED: Yes, but I am still very uncomfortable ... The information you want to know wasn't supposed to leave the

WHAT WOULD YOU DO?
PRACTICAL ADVICE ON HANDLING ETHICS ISSUES IN MEDIATION

mediation.

SUPERVISOR stands

SUPER: Are you telling me that you're not going to give me the information I need? I don't believe this. All right, if your not going to do it for the benefit of this Agency, then tell me because I am your supervisor and I demand this information now!

MED: (*Nervous*) No ... I really can't ...

SUPER: If you are going to continue to refuse, then I am going to our boss. I am sure that she'll agree with me. You realize that this is insubordination!

MED: I am sorry ... I don't know ...

SUPERVISOR exits.

SUPER: Fine, you have until 2 p.m. today to provide me with these answers. If they are not on my desk by that time I am going to have to take some disciplinary action against you.

SCENARIO 1 - VARIANT 2

CAST: **MEDIATOR** Susan Kilgore
 MENTOR Darryl Harper

MEDIATOR sitting at
desk working, when

MENTOR enters

MENTOR: Hi Susan. Hey, How did that EEO mediation go?

MEDIATOR: Well, all in all it went OK. The parties did settle, but there were times when I was a little uncomfortable.

MENTOR: Why is that?

MEDIATOR: There was a lot of anger in the room and it really made me nervous. Would you mind giving me a few pointers on how to deal with that type of situation better next time?

MENTOR: Sure. First of all, how did you approach the mediation?

MEDIATOR: I followed the checklist for mediators you gave me. I started with introductions, explained the process, my role...you know, just like you taught me.

MENTOR: Who did you ask to go first?

MEDIATOR: The Complainant.

MENTOR: Why?

MEDIATOR: I always start with the Complainant. I tell the parties this in my opening remarks. I say it is my rule. It helps them understand that I am not on one side or the other just because I have one of them go first.

MENTOR: Now, What exactly did that person say to make the other person angry?

MEDIATOR: Uh ... I'm not sure ... Is that something I can share with you?

WHAT WOULD YOU DO?
PRACTICAL ADVICE ON HANDLING ETHICS ISSUES IN MEDIATION

WHAT WOULD YOU DO?
PRACTICAL ADVICE ON HANDLING ETHICS ISSUES IN MEDIATION

SCENARIO 1 - VARIANT 3

CAST: **MEDIATOR** Susan Kilgore
 INSPECTOR GENERAL Gwen Wilson

***MEDIATOR** sitting at desk with phone.*

***INSPECTOR** is sitting off to side with phone.*

Phone rings.

MEDIATOR: Hello, this is Susan Kilgore.

IG: Yes, hello. I am from the Office of Inspector General. I'd like to inform you that we are now investigating recent settlements under the EEO program for possible waste or fraud. Is it correct that you have just begun to mediate on a collateral duty basis under an interagency-shared neutrals program?

MEDIATOR: Yes that's correct.

IG: And you just helped to settle a case involving an EEO complaint, right?

MEDIATOR: Yes.

IG: I would like to know when I can meet with you to get a complete report as to what happened at this mediation, and any others you have conducted. In particular, I'd like to discuss how the settlement was arrived at.

MEDIATOR: Of course, I will cooperate with you completely. At least to the extent I can. You know I am limited in what I can say because the sessions are confidential.

IG: Those confidentiality rules don't apply in an IG investigation. I will need specifics and as an FDIC employee you will, of course, cooperate.

WHAT WOULD YOU DO?
PRACTICAL ADVICE ON HANDLING ETHICS ISSUES IN MEDIATION

Scenario 2

The Mediator is mediating a bitter workplace dispute in which the complainant, and then the respondent, starts to become increasingly agitated. The joint session surfaces great anger on both sides, actually raises the tension level, and then reaches impasse. The Mediator has no success in calming the parties in joint session

VARIANT 1: The Complainant states in a hastily-called caucus, "You know, that guy is really making me mad. I could kill him."

VARIANT 2: The Complainant states in a hastily-called caucus, "That guy is really making me mad. You know, I've got a gun in my car out in the parking lot!" He/she makes no overt threat to get or use the gun.

VARIANT 3: The Complainant states in initial joint session, "You're really making me mad. You know, I may look like a harmless little thing but I know how to deal with people like you." He/she then opens purse/bag, removes a gun, silently sets it on the table in front of him/her, and awaits a reaction.

SCENARIO 2 - VARIANT 1

CAST: **MEDIATOR** Susan Kilgore
 COMPLAINANT Gwen Wilson
 MANAGER Daphne Veale

MEDIATOR *the middle of the table*

COMPLAINANT *and MANAGER are sitting on either side.*

MODERATOR *introduces scene and characters.*

Scene begins

MODERATOR: The mediator in this situation is mediating a bitter "failure to select" workplace dispute in which the complainant/employee and then the respondent/manager, start to become increasingly agitated. The joint session surfaces great tension on both sides, actually raises the tension level, and then reaches impasse.

MANAGER: Listen, I went through the hiring process as fairly as I knew how. There were five people eligible for the job. I interviewed them all and then I made my selection based on the criteria that we have already discussed and which I believe to be more than fair.

COMPLAINANT: That is not true. You knew right from the beginning who you were going to choose. And it had nothing to do with any "criteria." (*mocking*)

MANAGER: How dare you try to mock me. (*yelling*)

COMPLAINANT: See what I mean. You never liked me anyway! I know you had absolutely no intentions whatsoever of even considering me for that position. You were just going through the motions hoping you wouldn't get caught. Well Look at you now!

MANAGER: Don't tell me what I was thinking! Why don't you just get over yourself and admit that you weren't good enough for that job!

MEDIATOR: OK. OK. That's enough right now. Why don't

WHAT WOULD YOU DO?
PRACTICAL ADVICE ON HANDLING ETHICS ISSUES IN MEDIATION

<i>As session is splitting and</i>	we all take a break and go cool off for a few minutes.
<i>MANAGER is leaving,</i>	MEDIATOR: Gwen, do you mind if talk for just a second.
<i>MEDIATOR stops</i>	COMPLAINANT: Sure. You know, that woman is really
<i>COMPLAINANT</i>	making me mad. I could kill her!

WHAT WOULD YOU DO?
PRACTICAL ADVICE ON HANDLING ETHICS ISSUES IN MEDIATION

SCENARIO 2 - VARIANT 2

CAST: **MEDIATOR** Susan Kilgore
 COMPLAINANT Gwen Wilson
 MANAGER Daphne Veale

MEDIATOR *the middle of
the table*

COMPLAINANT *and
MANAGER* *are sitting on
either side.*

MODERATOR *introduces
scene and characters.*

As session is splitting and

MANAGER *is leaving,*

MEDIATOR *stops*

COMPLAINANT

COMPLAINANT: See what I mean. You never liked me anyway! I know you had absolutely no intentions whatsoever of even considering me for that position. You were just going through the motions hoping you wouldn't get caught. Well Look at you now!

MANAGER: Don't tell me what I was thinking! Why don't you just get over yourself and admit that you weren't good enough for that job!

MEDIATOR: OK. OK. That's enough right now. Why don't we all take a break and go cool off for a few minutes.

MEDIATOR: Gwen, could you stay back for a minute. I'd like to talk with you.

COMPLAINANT: That woman is really making me mad. You know, I've got a gun in my car out in the parking lot!

SCENARIO 2 - VARIANT 3

CAST: **MEDIATOR** Susan Kilgore
 COMPLAINANT Gwen Wilson
 MANAGER Daphne Veale

MEDIATOR *the middle of
the table*

COMPLAINANT *and
MANAGER are sitting on
either side.*

MODERATOR *introduces
scene and characters.*

COMPLAINANT: See what I mean. You never liked me anyway! I know you had absolutely no intentions whatsoever of even considering me for that position. You were just going through the motions hoping you wouldn't get caught. Well Look at you now!

MANAGER: Don't tell me what I was thinking! Why don't you just get over yourself and admit that you weren't good enough for that job!

COMPLAINANT (to **MANAGER**): You're really making me mad. You know, I may look like a harmless little thing but I know how to deal with people like you, and I've got a gun out in my car.

Scenario 3

Co-mediators are mediating an EEO lawsuit. In joint session the employee/plaintiff lays out a very strong case (prior excellent performance evaluations, good attendance record for 15 years, clearly discriminatory personnel actions by supervisor, demonstrable economic harm (well over \$500,000), repeated slurs based on employee's [age/sex/race/religion/whatever] that have made the workplace hostile, failure of management to address the employee's repeated informal complaints). Defendant/corporation's counsel -- a white male -- is openly antagonistic to employee in joint session, states that standard procedures were followed at all times, and makes some vague threats about the employee's future at the firm. He offers little hope of any flexibility in settling.

In caucus with defendant/corporation, the client -- another white male -- grouches that "some people" just don't fit in and can't ever be counted on. He/she says that plaintiff just wants to "hit the jackpot" and then take it easy. Defendant/corporation offers a small amount to settle all claims -- \$25,000.

In next caucus, employee/plaintiff hears offer and agrees to accept it in the interest of getting things resolved.

Co-mediators call a break, and one confesses that he really doesn't like the defendants' attitude, questions whether they are acting in good faith, and states a belief that plaintiff could do a lot better than \$25,000 if he went to trial. Second co-mediator says that, while he/she doesn't know the law or the likely outcome, he/she is repulsed by both defendants, thinks both are racist/sexist/whatever, wonders whether he/she can carry on impartially, and asks whether he/she should bow out and let the other co-mediator continue.

WHAT WOULD YOU DO?
PRACTICAL ADVICE ON HANDLING ETHICS ISSUES IN MEDIATION

SCENARIO 3

CAST: **MEDIATOR 1** Susan Kilgore
 MEDIATOR 2 Darryl Harper
 PLAINTIFF Gwen Wilson
 DEFENDANT Daphne Veale

MODERATOR introduces scene and parties.

Scene begins in caucus with the **DEFENDANT** and **CO-MEDIATORS**

MODERATOR: Co-mediators are mediating an EEO lawsuit. In joint session the employee/plaintiff lays out a very strong case (prior excellent performance evaluations, good attendance record for 15 years, clearly discriminatory personnel actions by supervisor, demonstrable economic harm (well over \$500,000), repeated slurs based on employee's race that have made the workplace hostile, failure of management to address the employee's repeated informal complaints). The Defendant/corporation's counsel -- a white female -- is openly antagonistic to employee in joint session, states that standard procedures were followed at all times, and makes some vague threats about the employee's future at the agency. She offers little hope of any flexibility in settling.

MEDIATOR 1: Are you willing to make any offers at this point?

DEFENDANT: (*Grumbles*) You know, I am just sick of this whole mess. If you ask me "some people" just don't fit in and to tell the truth I don't think they can ever be counted on. That bum just wants to hit the jackpot and then take it easy.

MEDIATOR 2: Ma'am, are you going to offer anything at all to settle this or not?
DEFENDANT: I'll tell you what, I'll

WHAT WOULD YOU DO?
PRACTICAL ADVICE ON HANDLING ETHICS ISSUES IN MEDIATION

DEFENDANT exits.

PLAINTIFF enters.

settle all the claims for \$25,000. That is my last and final offer.

PLAINTIFF: So, did they budge?

MEDIATOR 1: Well, they are offering \$25,000 to settle all the claims.

(pause while PLAINTIFF thinks)

MEDIATOR 2: So, what do you want to do?

PLAINTIFF: I guess I'll just take it so we can get this thing over.

MEDIATOR 2: Are you sure?

PLAINTIFF: Yes, I guess.

PLAINTIFF exits

MEDIATOR 1: I'd like to call for a break. Come back in five minutes.

MEDIATOR 1: I must confess, I really don't like the defendants' attitude. I also wonder if we are acting in good faith. I for one believe that the plaintiff could do a lot better than \$25,000 if she went to trial.

MEDIATOR 2: I don't know the law or the likely outcome, but I am repulsed by the defendant. I think she has it in for the Plaintiff and I really question whether I can carry on impartially. Do you think I should bow out and let you continue?