SCHAU | mediation
Problem Solver. Mediator. Author. Ally.

NEGOTIATION SKILL # 6: CONTROLLING THE FLOW OF INFORMATION BY USING CONFIDENTIALITY TO YOUR ADVANTAGE

More and more frequently, mediation hearings are being conducted before substantial discovery has been completed and even before pleadings have been filed. For this reason, there are often key documents and witness interviews that will sway the opposing party to re-evaluate it's position. Yet these documents are seldom exchanged before or sometimes even during the mediation due to concerns about confidentiality protection.

But you and your clients can strategically let the light into the mediation by doing this.

Unlike the theater of trial, which is conducted under the bright lights and scrutiny of the public eye, a mediation is done largely in the shadows or even in darkness. There is an air of secrecy and privacy associated with it that can be comforting but can also be a source of frustration. By controlling the flow of information, you can determine how much light to let in and when the appropriate moments are to raise or lower the curtains on the important evidence you have developed to get the best settlement possible.

Be prepared with copies of key documents separately paper-clipped for each disputed issue. Alternatively, have the proposed statements on an iPad or laptop which you can send to the mediator to share with the other side as needed and confidentially. As the critical issues are addressed, give your mediator permission to demonstrate the evidence upon which you will rely to substantiate your defenses or claims. This can be an extremely effective way to persuade your opponent that you are completely ready to litigate if necessary and that there is evidence of another side to the story than that which the attorney has heard from her client.

In a recent pre-litigation pregnancy discrimination case, for example, emails between the Human Resource manager and the Supervisor concerning attempts to accommodate the Plaintiff were unknown to

the Plaintiff or her lawyer. In the same case, the employer had taken statements from all of the other "moms" in the Department, substantiating the policy and practice of accommodation afforded to other female, pregnant or post-partum employees.

Both sets of documents, though not permitted to be kept or used by the Plaintiff or her counsel, went a long ways towards assisting them in re-evaluating their position on liability and achieving a settlement long before the expenses of litigation and discovery eclipsed the value of the case. I suspect that had they been provided in a big packet with a formal brief before the mediation, they would not have had the same impact as they did in slow, deliberative drips of information doled out strategically in the confines of this highly confidential mediation.

P.S. I am pleased to have been published this month in The Advocate Magazine on "Critical mistakes lawyers make in mediating employment cases". You may read the article here: Advocate Article: Critical Mistakes Lawyers Make in Mediating Employment Cases