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Dealing with surprise at mediation

By Phillip K. Cha

I regularly preach that preparation is essential for maximizing the probability of success at mediation. That means getting your ducks in a row in terms of factual investigation, discovery, dispositive motions and trial preparation. But the currency of mediation comes down to facts and information. Important documents should be obtained and critical witnesses should be deposed beforehand. Why? Because surprise information can undermine even the most productive settlement negotiations.

But no matter how prepared one is, sometimes new information still comes out for the first time during the mediation. A common example in an employment case is a declaration from a key witness, such as a former employee who has since moved on, attesting to some fact or event in dispute. The declaration surfaces for the first time at the mediation because it was obtained at the 11th hour, or perhaps because it is a pre-litigation mediation where the parties have not done any formal discovery.

When this happens, the knee-jerk reaction of many attorneys is to pull the plug on the mediation on the ground that they need to depose the witness before they can continue to engage in settlement negotiations.

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In my view, as both a mediator and a former attorney, ending the mediation in this situation is a bit of a cop out. While nobody likes surprises, at least in this context, the better move is for the parties and their counsel to take a breath after venting about sandbagging, evaluate the new information and adjust their settlement posture, if warranted.

After all, at the end of the day, surprise information, like any other information, has a value attached to it. An attorney acting in the best interests of the client should be able to assess the information and assign a value to it at the mediation in the interest of sustaining the momentum of the settlement negotiations.

Moreover, ending the mediation and spending more time and money on discovery to test the new information usually won't change the result: the information is either credible or not. With or without additional discovery, it comes down to assessing the credibility of the source, whether there is any bias and the ultimate impact of the information on the settlement value of the case. Because the amount of information to which the parties have access is never complete, it comes down to assessing probabilities and then playing the odds.

In our example of a surprise declaration by a former employee in an employment dispute, if the witness is credible, then the settlement value of the case may increase to X. If the witness is not credible, then the declaration may have no impact on the settlement value of the case, or it may decrease it. Either way, the result would be the same even if the witness is deposed under oath. Also, because most of the witnesses in an employment dispute are known commodities to the parties, there is no reason why this type of assessment can't be done on the spot at the mediation.

From the mediator's perspective, the mission is to keep the settlement dialogue alive, so he or she has to act quickly to help the parties assess the information and factor its value into the negotiations.

Phillip K. Cha *is a mediator and founder of Cha Mediation Services, where he specializes in mediating employment and business disputes. Prior to launching his mediation practice, Phillip spent 15 years in private practice as a labor and employment attorney. You can reach him at phil@chamediation.com.*


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