


# Kluwer Mediation Blog

## Changed Your Mind Lately? A Lesson from the Mediation Table

Diane Levin (Diane Levin LLC) · Tuesday, September 27th, 2011

Plastered onto the rear fender of my next-door neighbor's Honda is a bumper sticker that asks,  "If you can't change your mind, are you sure you still have one?"

It's a cheeky question perhaps, but nonetheless a relevant one. With an election year coming up in 2012, the American presidential campaign season is in full swing. The two leading contenders in one political party have been busy lobbing at each other that gravest of charges: each accuses the other of "flip-flopping." Each insists that he is a candidate of unswerving convictions, in contrast with his opponent who changes his opinions as often as he changes his socks. In the current political climate, changing one's mind in the face of new evidence constitutes not a mark of character but a sign of moral failing.

As a mediator I have to ask, where's the virtue in constancy anyway? If you're going in the wrong direction, what's the problem with heading in a better one? After all, we mediators are in the business of changing minds. We routinely witness the transformation that takes place when individuals gather new data, test their assumptions against that data, and reach very different conclusions from the ones they arrived with. We see our clients admit or address mistakes and make necessary course corrections to open the way to greater gains and new possibilities.

All this talk about changing minds got me thinking about a case I mediated several years ago — one of those cases that sticks with you. It began unremarkably. On one side, an employee terminated from his position with the company that had employed him for many years, alleging discrimination and seeking a sum of money as compensation. On the other side, a senior manager asserting, in the company's defense, a non-discriminatory reason for the termination and objecting to the payment of any sum of money at all.

At the insistence of the manager, most of the mediation unfolded through caucusing after the initial joint session. Although it is not my preferred mode of working with clients, for much of the mediation I shuttled proposals back and forth and helped each side respond to and develop offers and counteroffers.

For the former employee, money was an issue. It had taken him more time than he had anticipated to find a new position, and his savings were running low. His lawyer had done his job calibrating his expectations, so the former employee was aware of the difficulties of proof in his case and understood that even if the defendants were in a generous mood, the resulting settlement would not

make him rich.

But what he wanted, as much if not more than a check in hand, was an apology. I explored what that apology meant to him. He said, “I don’t expect my former boss to come out and say he’s sorry for firing me. I know he’ll think I’m asking for an admission of liability. I’m not. But I just want to know that he has some remorse, some sense of conscience. I was a good employee, I took pride in my work, I did my job reliably for many years, and I’ve been fired unfairly. He discarded me like a worn-out shoe. It would make me feel better to hear that he regrets what happened.”

I also asked the former employee about what would happen if the senior manager was unwilling to do that – whether there was any other way for him to have the closure he wanted. The former employee thought for a moment and said, “To be candid, settling this today with a check. My life’s on hold right now. But if it’s at all possible, I’d still like him to say he regrets what happened.”

I met next with the manager and the company’s attorney. Laying out the most recent monetary proposal from the plaintiff, I talked to the manager about his former employee’s specific request and what it represented; I drew his attention to the low cost to him but the high value to the former employee. The manager shook his head and said, “There’s no way I’ll tell him I’m sorry or that I feel bad about what happened. I’ll accept his latest offer and write him a check right now. But no apology. The money talks, not me.” He crossed his arms tightly across his chest for emphasis.

I went back to the former employee, told him and his lawyer what happened, and asked him what he wished to do. The former employee thought for a moment, then shook his head and shrugged, “That’s disappointing, that he can’t bring himself to do what’s right. If our positions had been reversed, I surely would do that for him. His loss. But they’re cutting me a check today, and I can move forward with my life. Let’s get this in writing and go home.”

Both sides came together to draft the settlement agreement, and then it was done. The lawyers gathered up the papers strewn across the table, closed file folders, and snapped their briefcases shut. Everyone stood, pulling on coats, ready to depart.

The former employee took several steps toward the manager and extended his hand. “Thank you for coming today to talk things out,” he said, “I appreciated it.” The manager hesitated just a fraction of a second, staring hard at the hand held out to him. Then he accepted the hand, grasped it firmly, and shook it, then stepped away and turned to go.

But on some impulse he halted. Turning back to face his former employee, the manager stood for a moment or two in silence, his face reddening as he looked down at the floor. Clearing his throat the manager said at last, “You know, I’m really sorry that things turned out like this.” He paused, looking up now. “I truly wish things could have been different. And I’m glad we could work it out today.”

He cleared his throat once more, and added, “Thank you, and best of luck to you,” addressing the former employee by name for the first time that day. With that, he headed out the door with his lawyer.

The former employee, smiling broadly, clapped his lawyer on the back. “See that? I got my apology,” he said.

In my work, I am often wowed by moments such as these. Something happened in the waning

moments of the mediation to move the manager to reconsider. Face to face, one human being to another, he changed his mind.

So...have you changed yours lately?

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