

Mediation: Please don't use the "F" word in my presence

As I always say to parties at the beginning of my mediations, one of the golden rules of mediation is that each side must move towards each other. What happens, however, if you get to a situation where one or both of the parties gives the impression that they are not prepared to move any further? In some mediations, at least, quite a lot of the day is spent trying to avoid anyone uttering the "F" word in relation to any offers they make, i.e. "Final".

In mediations, as with lots of other things in life, the parties should generally say what they mean and mean what they say. The difficulty with either side using the "F" word is that there is potentially no way back without the loss of another "F" word: "Face".

If you make a so-called final offer, and then demonstrate that you are, in fact, prepared to go further, how can the other side take anything you say seriously in relation to your subsequent offer, if that is also said to be "final"?

For the lawyers involved, however, the situation is potentially more fraught. They may well come up against the same lawyers or mediator in a future negotiation/mediation and may find that their credibility has been undermined.

In the early stages of a mediation, one hopes that neither side is minded to use the "F" word. As the day draws on and parties get tired and want to go home, there is perhaps an understandable desire to try to draw a "line in the sand". I always try to encourage parties not to commit to making a final offer for as long as possible. Instead, I suggest that they should keep an open mind because it is always possible that some new information or evidence may come from the other room which gives the recipient of the information a further reason to move.

What happens, however, if, despite the mediator's best endeavours, the air is turned blue with the use of the "F" word? In one mediation, where an initial gap of hundreds of thousands of pounds had been reduced to just £5,000, both counsel had said to me that their last offers were 'final'. Flip I thought. Appreciating that it would be difficult for either party to move from that position without losing face, I asked both counsel to see me together without the parties. Having congratulated them on the progress they had made in terms of bridging the significant gap during the course of the day, I suggested

that they both go back to their respective rooms and say that the mediator was recommending that they both move towards each other by £2,500, which they duly did.

If you are wondering whether I managed to restrain myself from using an expletive in relation to my delight that the parties had been able to settle their differences by mediation, I did, and that is my final word on the subject! Or is it?

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Mediator

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