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## When to Request Non-Financial Terms at Mediation

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By John D. Moore

The initial demand was astronomical. Liability was razor thin. But, after three grueling hours, just as the marshals began to roust the public from the courthouse, counsel finally agreed upon a number. With three simple words, however, the green defense lawyer pulled the wrong building block out of the Jenga tower, and the carefully wrought settlement collapsed into pieces. What were those three fateful words? “We need confidentiality.”

Confidentiality is only one of several possible non-pecuniary deal points. Others include non-disparagement and indemnity for liens and other out-of-pocket expenses. Experienced negotiators generally hold back on requesting such non-financial terms, rightfully concerned about killing a deal before the monetary issues get resolved. However, veteran attorneys also know when non-monetary considerations are as vital to their clients as are financial provisions. If the client insists on non-pecuniary terms, the attorney should not wait too long before demanding such non-financial consideration. Instead, a good rule of thumb is to surface non-financial terms as the financial negotiation rounds the last corner into the homestretch.

Not every case, however, fits this mold. In fact, certain distinctive cases would benefit from counsel broaching non-financial terms earlier in the game privately to the mediator. Here is such a hypothetical.

Assume that the parent of a minor plaintiff, outraged by an alleged tort, had embarked on a screed-filled on-line campaign against the defendant. In such a case, the defendant would have no interest in achieving a monetary deal without muzzling the plaintiff’s parent. However, since the parent is not a party to the action, the defendant could not achieve this goal at trial. If, however, defense counsel were to inform the mediator of this non-pecuniary objective, the mediator could inquire discretely whether the plaintiff were seeking any non-

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financial terms as well. If so, armed with this knowledge, the mediator could embark on a two-track negotiation in which both financial and non-financial provisions were in play for each side. Under these circumstances, informing the mediator privately of the non-financial aims early in the bargaining process would pave the way to success.

To sum up, as a general rule, request non-pecuniary settlement terms no later than the point at which a financial resolution appears likely, but also consider whether a unique case may call for an earlier disclosure of non-monetary goals privately to the mediator.

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