

**GETTING TO THE TRADING ZONE  
LESSON #8**

**How to move from the liability to the damages  
phase in negotiation**

In court, you have to prove your client's claims (or defenses) before you can ask the Judge or jury for damages arising from the wrongs you've alleged. In mediation, both parties have come poised to accept that there are good points and bad points on each side. The challenge is how to get from a discussion of the liability aspect to the settlement for money.

*You don't have to get bogged down in proving your client's position if you do this.*

It is important to "surface the dispute" by arguing the facts, the evidence and the law at a mediation, but at a certain point, the parties will need to take a leap of faith that the case could go either way in the hands of a judge or jury, and they will then begin to discuss damages.

By showing up at a mediation, the parties and their lawyers are implicitly signaling to one another that they recognize that the Plaintiff may not win (or win as much as he/she thinks or hopes to) and the Defendant may lose (and wind up paying more than they can settle for on the day of mediation). It is therefore foolhardy to get stuck debating the merits and flaws in your case in the mediation endlessly. Yes, they are important, but if you haven't begun addressing the damage question by lunch time, I'd recommend you urge everyone to suspend the debate and do a "pivot" to explore what this all means in terms of the evaluation of damages and ability to pay. (You can always temper the negotiation by your earlier evaluation on liability as you go).

It is tempting to engage in the intellectual debate of the strong and the weak points in one another's claims, but if your client wants to settle the case, he/she will be ever grateful to you as lawyer or mediator to turn from the facts, law and evidence to the money.

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Problem Solver. Mediator. Author. Ally.

In mediation, we are taught that conflict is never "just about the money", it is always driven by some underlying interest or need. But in settling litigated disputes, there is a time to ignore all of the legal contentions and wrangling and turn to the money it will take to achieve an end to the dispute. Your clients will thank you. Trust me.

***P.S.** I am pleased to have published another article in the August 7, 2015 edition of the California Daily Journal, "Every Litigated Case Needs Optimists". If you'd like a copy, please send me an email.*