

**GETTING TO THE TRADING ZONE  
LESSON #10**

**Over Confidence: Tips on Getting the Parties Unstuck as  
Early as Possible in the Mediation**

Before productive negotiation can begin, the parties often spend the first few hours of a mediation "posturing" and explaining to the mediator and their adversary why they are so very confident that they will win the lawsuit entirely.

*You don't have to waste precious time getting stuck in this phase if you do this.*

Randall Kiser published a fascinating study in the Journal of Empirical Legal Studies in 2008. He analyzed 2054 litigated cases and found that 61.2 % of the time, Plaintiffs who turned down a settlement offer in a negotiation or mediation made the wrong choice. More than half would have done better by accepting the highest offer than they achieved at trial.

Defendants, on the other hand, were only wrong 24.3% of the time. They usually did better at trial than the Plaintiff had demanded when they chose to turn it down. But here is the hitch: Plaintiff's were usually only off by an average of \$43,000, whereas Defendant's missed the mark by an astonishing average of \$1.140,000. The cost of making the wrong decision and daring to go to trial became very high.

You can read the study here:

[http://www.blakemcshane.com/Papers/jels\\_settlement.pdf](http://www.blakemcshane.com/Papers/jels_settlement.pdf)

For mediations, sometimes the greatest challenge is getting the parties to admit that they don't know what they don't know. Juries and Judges are not entirely predictable, either in findings on liability or damages. Typically, not all of the evidence has been gathered and the proposed testimony is still somewhat unknown by the time the mediation occurs.

Until you can move the parties from their positional obstinance to an acceptance that they may be wrong, and if they are, the cost of that wrong decision could be anywhere from the tens of thousands to over a million dollars, you can't really get into "the trading zone" in these most challenging cases. Once you can get to that frank and honest re-evaluation, you can more readily move into an earnest negotiation based upon probabilities, not certainties.

Good luck!