

**GETTING TO THE TRADING ZONE
LESSON #9**

**Negotiation 101: Don't Negotiate with an Adversary
Who is in the NOPA**

It seems counter-intuitive, but there are certain times when your client or your adversary are in a zone we describe as NOPA: the Zone of No Possible Agreement. At those times, I suggest you walk out of the negotiation. If it is truly impossible for them to get within a zone that you and your client would consider, further negotiation on that day will be utterly futile.

You don't have to waste the opportunity to negotiate if you do this.

Many lawyers will exaggerate their client's claims or the destitute financial situation (or principled defenses) of the defendant in briefs or initial meetings at mediation. They will say something like: "This case is 100% clear liability and punitive damages are a certainty" or "The Defendant will not be found liable for any of the alleged misconduct and therefore has authorized me to proceed to trial unless this case can be settled for under \$500.00" or "My client has no money and could not afford to pay more than \$1,000.00 at any time".

This is usually hyperbolic, of course, and usually somewhat of a bluff. But if you receive that brief or message from the other side, before you invest the time and expense of attending a mediation, you may want to pick up the phone and ask whether there is any room for negotiation. In other words, if they really mean what they say, and there is never going to be an offer higher than \$500.00, you would always be better off cancelling the mediation and deciding whether to accept that or continue to negotiate by making a counter-offer at your client's "bottom line" to see if there is any movement. If there is simply no possibility of agreement within each party's zone, there is no reason to attempt to negotiate.

To the other extreme, where there is a clear message from Plaintiff's counsel that "my client will not authorize any settlement below 7 figures" (which, hypothetically can only be determined as a punitive measure where actual damages are below \$100,000.), a prudent defense counsel will also pick up the phone and inquire whether there is any room for movement between, for example, \$50,000 and \$999,999.

Where there are absolutes that prohibit either side from getting into a zone of possible agreement (ZOPA), you can make the decision not to negotiate. There is no

SCHAU | mediation

Problem Solver. Mediator. Author. Ally.

utility in negotiating when there are clear barriers between the parties that are impermeable.

The better way to approach mediation when such exaggerated positions are articulated is to get buy in to the idea of movement or flexibility before you engage in negotiation. If there is room for flexibility, then the boundaries of that NOPA have already been breached and you will be on your way to a ZOPA (Zone of Possible Agreement) soon.

Good luck!