

Bracketing: An alternative mediation technique

Brackets can elicit faster, more significant moves from the parties, but you must avoid errors and misleading signals

By Denise Madigan

Editor's note: This article was updated from Denise Madigan's August 2017 Advocate article entitled "Bracketing 101."

Few tools in the mediator's toolbox generate as much debate and confusion as brackets in negotiation. Mediators often tell me their clients either love them or hate them. Some view brackets as enabling the parties to make significant moves quickly in a money-oriented negotiation. Others find brackets more confusing than helpful.

Early in my career, I saw more confusion surrounding brackets than I see today. Although counsel and clients still vary in their preference for brackets, they have become more familiar with them and now generally understand them in the same way. Thus, this article focuses on bracketed negotiation as employed in civil litigation mediation. The examples given are based on actual mediations I have conducted.

How is bracketed negotiation different from traditional negotiation?

In a *traditional* settlement negotiation, where the focus is primarily on money, parties typically engage in a "negotiation dance," trading offers back and forth until they can agree on a number that will settle the case. Each party's offer represents an express commitment to settle the case at the number proposed. I call these "firm-number" negotiations.

In *bracketed* negotiation, in contrast, the parties propose "ranges" within which they can agree to negotiate further. These ranges or "brackets" can also be characterized as *contingent* or *conditional* rather than *firm* offers. For example, one party effectively says to the other, "I will move to $X, *but only if* you agree to move to $Y." This can be expressed in notation as a bracket of [$X - $Y].

Most mediation participants see two layers of commitment in a bracketed offer, one express and one implied. The first layer is an *express* commitment by one party to move to one end of the proposed bracket if the other party agrees to come to the other end. Subsequent negotiation can then take place between those two endpoints. The second layer is an *implied* commitment to accept a settlement at (or very close to) the midpoint of the bracket.

How does bracketing play out?

In one recent case, the plaintiff made an opening demand of $1 million, and

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the defendant countered with an offer of $5K. After two more moves, the parties reached an impasse at $850K and $20K, with a gap of $830K.

After discussing the case's merits, the plaintiff agreed to re-engage in negotiation by proposing a bracket of [$750K - $550K]. In doing so, he was sending two signals: first, that he would come down to $750K if the defense came up to $550K, and second, that he would be willing to settle the case at (or near) the midpoint of the bracket ($650K).

In proposing this bracket, the plaintiff knew that the defendant would never agree to negotiate within that range or pay $650K to settle the case. But the bracket was still a constructive move because it allowed the plaintiff to "signal" a move from $850K to $650K without being locked into a firm commitment at $650K when the defendant's last firm offer was only $20K.

The defendant countered with a proposed bracket of [$75K - $125K], conveying an implied offer of $100K. The defendant knew the plaintiff would not negotiate within that bracket or accept only $100K to settle the case. But the defendant's bracket helped reduce the gap further: The parties now were only $550K apart, versus $830K apart before brackets were introduced. After exchanging two more brackets, the parties were close enough that a mediator's proposal of $275K settled the case.

When do you stop bracketing and move back to firm numbers?

When the parties' midpoints are close enough, the parties will be ready to move back to firm numbers. They can do this in a few ways. For example, they might agree to convert the midpoints of the last two brackets to firm numbers and restart the negotiation dance within those two numbers. Or they might ask the mediator to propose a new bracket or a specific number to settle the case.

However, bracketed negotiations can sometimes stall, leaving no clear path forward. At this point, the parties may choose to take a step backward and restart negotiating with firm numbers instead of brackets, usually working from the last two firm-number offers on the table.

When should brackets be used?

There is no rule on how "early" or "late" brackets should be used in a negotiation. Most mediators agree that brackets should not be used until a more traditional exchange of firm offers has failed (or is likely to fail). But this could happen very early, when the parties start exceptionally far apart, make only tiny moves, and paint themselves into corners. Brackets can be especially helpful when the gap at a potential impasse is large.

A few mediators recently proposed using brackets at the outset of a mediation. Variations on this theme are beyond the scope of this article, but in general, initiating negotiation with brackets may be a way to generate significant moves more quickly, thus streamlining the negotiation.

What's not to like about brackets?

Some people find the math troublesome; others find it difficult to explain bracketing to their clients.

In my own experience, I have seen parties become confused by the math and propose brackets in which the midpoints moved in the wrong direction – away from and not toward the other side's number. Similarly, I have seen parties propose brackets where the endpoints changed, but the midpoint did not move. In the first example, the opposing party would have interpreted the backward movement of the midpoint as bad-faith negotiation. In the second example, the opposing party would have viewed the non-moving midpoint as a demand to bid against itself.

Almost all the U.S. mediators I have spoken with over the years now interpret and employ brackets in the same way. But as recently as last year, I worked with sophisticated out-of-state counsel for a multinational corporation whose interpretation of brackets almost derailed the mediation.

In that case, the defendant's last bracket was [$150 - $300K] (midpoint $225K), and the plaintiff countered with a bracket of [$500K - $300K] (midpoint $400K). The defendant concluded the plaintiff would ultimately accept $300K to settle the case, *the number* he pointed out *at which the inner endpoints of the parties' last brackets met*. I had encountered this interpretation of brackets only once before, and that was many years prior. Unfortunately for the defendant in this case, the plaintiff had no intention of ever accepting only $300K to settle. Hearing this, the defendant accused the plaintiff's counsel of bad-faith negotiation and almost walked out of the mediation. The case eventually settled at $350K, but not without hard feelings on both sides.

Admittedly, this was only the second time I encountered this interpretation of bracketing in a mediation career spanning nearly 30 years. But it reminded me always to confirm that everyone is interpreting brackets the same way.

What happens if brackets "fail" to close the gap?

Sometimes, the parties reach a point in a bracketed negotiation where the gap remains too large to bridge that day. In that case, the mediator should clarify what, if anything, will constitute the last "offers" on the table. For example, will it be the final brackets, their midpoints, or the last firm offers made before bracketing began?

Even if the parties cannot settle the case that day, the brackets will have conveyed important information about (a) how each party truly values the case and (b) whether further negotiation that day will likely be productive. And if bracketing has significantly reduced the gap between the parties, there may be enough goodwill and optimism left to make future negotiations more likely to succeed.

Sometimes just one bracket can be enough to break the impasse. In one recent mediation, the parties' negotiation bogged down, with the plaintiff at $895K and the defendant at $275K. The plaintiff signaled she would never go below $800K, but the defendant did not believe her. After a long caucus, the defendant

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made an unexpectedly large move and proposed a bracket with a midpoint of $550K. The plaintiff quickly rejected this bracket and dropped her demand by only $20K to $875K.

This lopsided exchange proved critically revealing. First, it demonstrated the plaintiff's resolve not to go below $800K. Second, it allowed the defendant to "test" that resolve by putting much more money on the table without locking itself into a firm offer of $550K. (In theory, it would be harder for a plaintiff to walk away from $550K than from the defendant's last offer of $275K.) Third, in narrowing the gap, the defendant gave the mediator much more information about what might settle the case that day. In the end, there was no further negotiation between the parties. They worked solely with the mediator and settled at her proposed number of $785K that day.

Psychologically speaking, the defendant's bracket probably made it easier for the defendant to make the large moves necessary to settle the case. Moving from $550K (the bracketed midpoint) to a settlement at $785K was probably easier to swallow than moving to $785K directly from $275K would have been.

Tips for the advocate

With respect to the most common approach to bracketing – signaling midpoints – advocates should consider the following:

- The mediator needs to ensure at the outset that the parties *will interpret brackets the same way.* If you really cannot settle at the midpoint of your bracket, let the mediator know and ask her if there is something other than a bracket that can help the parties move forward.
- *Double-check your arithmetic* to be sure you are calculating the midpoint correctly. Your bracket's midpoint needs to move toward the other party's midpoint with each successive move.
- Be as *conscious of the movement of your midpoints* as you would be of the size of your concessions in a firm-number negotiation. Brackets that move the midpoint in declining increments will signal you are getting close to your bottom line. And if you think you are jeopardizing settlement by conveying too little or too much flexibility, ask the mediator to help you adjust your brackets in a way that will send the signal you want and preserve your credibility with the other side.
- *Leave room to move beyond the midpoint* unless you are at (or very close to) your bottom line. In that case, let the mediator know that you have very little room left to move so you can strategize how to characterize this final – or almost final – bracket to the other side.
- *Do not be afraid to propose the first bracket.* It does not matter who proposes the first bracket. If an impasse looks imminent, whoever is willing to propose the first bracket is doing everyone, including themselves, a favor. As in traditional negotiation, your first bracket may significantly alter (or "correct") the other side's expectations and reset the stage for a more successful negotiation. And if your first bracket is met with too small a response, you can slow down your subsequent moves or end the negotiation at that time.

Conclusion

In the final analysis, brackets in negotiation should not be viewed as inherently good or bad. Like any negotiation or mediation tool, they may or may not be helpful in a given situation. They will, however, be most effective when used by people who share the same view of bracketing and are comfortable with the math. And in the right setting, they can salvage a negotiation that otherwise appears doomed to fail.


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