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Mediation brackets: The ‘money’ tool for resolving intractable disputes

Brackets, whether as conditional offers or mediator-driven ranges, are a powerful but underutilized tool in mediation that can break impasses, streamline negotiations and help attorneys secure mutually agreeable settlements.

By Diana Maier

As March Madness approaches, “brackets” is the word on everyone’s lips. If you follow college hoops, you know what these are, probably have strong opinions about them, and could be hoping to reel in big money if yours pan out.

But “brackets” is also the word on many attorneys’ lips when they represent parties in contentious mediations. Mediators skilled in the use of brackets rely on it as the “money” solution that seals the deal or wins the game. It’s “money,” both figuratively and literally. On the literal level, it represents currency; figuratively, and more importantly, it is a highly effective and stealthy tool to resolve impasse.

What are brackets, how can they help resolve disputes, and why are they a source of anxiety for so many attorneys and mediators?

Brackets 101

Brackets generally take one of two forms: a conditional offer or a bracketed commitment. A conditional offer could be a mediator’s proposal (conditional because both parties have to agree to the number and terms and separately convey that to the mediator before it takes hold) or a more traditional “if, then” situation. An example of the latter conditional offer is when party A agrees to up its offer to \$5,000 if Party B’s de-

mand comes down to \$15,000. By contrast, a bracketed commitment sets a range within which parties agree to negotiate. For example, Party A will go up to the range of \$5,000-15,000 if Party B comes down to the range of \$20,000-\$30,000.

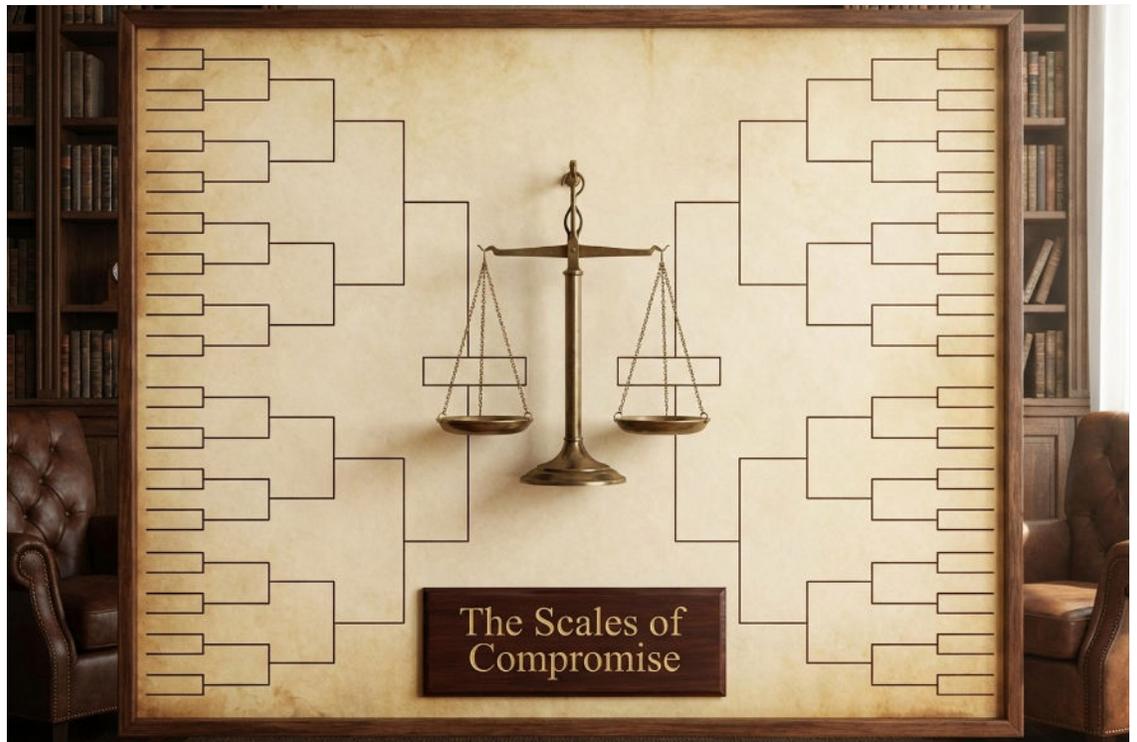
Sometimes the bracketing process is initiated by the parties, sometimes by the mediator. In the latter scenario, the mediator might ask the defendant, “If I can persuade the plaintiff to come down to \$250,000, would you be willing to come up to \$125,000?”

After the defendant responds, the mediator may then shuttle back and forth between the parties, seeking incremental movement on their respective positions.

Ultimately, with considerable patience and careful listening, the mediator or parties should be able to pin down a mutually agreeable bracket, or range, within which the parties can continue to negotiate and move in the direction of settlement. Those moves might take the form of increasingly smaller ranges, or they

could be simple conditional offers and counteroffers.

Despite their benefits, brackets instill anxiety in many mediators and attorneys. They imply the use of math, anathema to many attorneys, and parties often lose track of “who’s on first” when dealing with contingent offers, such as whose turn is next and what numbers are now at play. But knee-jerk resistance to their use is short-sighted, depriving litigants of a powerful negotiation technique. Bracketing can be



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an incredibly effective tool to facilitate and speed up resolution of disputes, effectively eliminating the never-ending back-and-forth so common in challenging negotiations.

Benefits of bracketing

In my own experience, I've used brackets to speed up the resolution process and help participants complete a negotiation before they hit decision fatigue or emotional exhaustion, as can happen with 12-hour mediations. Brackets can usurp a fruitless tit-for-tat numbers game with tiny incremental moves. The mediator may also shake up an impasse using brackets. He or she can defy both parties' expectations by introducing brackets, hoping to move negotiations onto a completely different plane. Instead of death by a thousand cuts, brackets allow parties to make large jumps without worrying that their moves will go unrewarded.

Bracketing and conditional offers can also speed up the process of reaching a mutually agreeable number by quickly establishing whether settlement is possible. When a significant gap lies between the parties' initial positions, brackets can move them into a range that is no longer hypothetical and that will actually get the matter settled.

Another significant benefit of bracketing is the conditional nature of settlement ranges. Brackets provide information that moves negotiations forward while maintaining strategic ambiguity. Parties and attorneys can conditionally consider where they might settle if the opposing side moves to a different range.

Understanding bracket strategy

If bracketing is such a great tool, why doesn't every mediator use it? For one thing, parties sometimes make bracketing assumptions that aren't true or helpful. Before engaging in negotiations, parties should understand how bracketing works. They may expect, for example, that a proposed bracket signals a commitment from the other side to settle at the bracket midpoint, but that is not always the case. For example, non-monetary concessions desired by one party could affect their willingness to move past the midpoint. In other cases, one party may be more fixated on the final number than the other party, who is simply

considering if the range is acceptable for the moment, even if they know the midpoint will not be acceptable as a final number.

Parties can, however, ask the mediator to convey to the other side that its midpoint is not the number for final settlement but only a signal that the bracket represents a good faith effort to keep the mediation moving. A party might also counter with an alternative bracket, and parties may go back and forth proposing potential brackets several times before a firm bracket is accepted by both sides.

While brackets may start off broad, they will generally move parties into a settlement range more quickly than an offer/counteroffer alone. This is particularly true when the parties are stuck in a tit-for-tat—one side goes up \$5,000, the other side goes down \$5,000—an unnecessarily tedious process that can be demoralizing for both parties, as well as the mediator.

Bracketing can also cut through the process of giving grossly inflated (or deflated) numbers as an "anchor" for the mediation. One party may be willing to be more realistic in its demand or offer, knowing that the other party will be required to do the same.

Savvy attorneys also reap dividends by suggesting brackets. They can wait for the right moment in the mediation and try disrupting a frustrating pattern of unacceptable settlement numbers by re-anchoring the negotiation around a new range. Bracketing can also be used by counsel to help parties craft their initial demands and offers into a narrower range. This allows parties to keep the faith that they will get to a range of mutually agreeable numbers instead of facing such a large uphill battle that they are discouraged from the outset.

Bracket math

It can be intimidating to have to do the math—tracking numbers exchanged between the parties and dealing with parties focused on a midpoint—but it doesn't have to be overwhelming. Shortcuts can help attorneys track demands and offers, calculate movements, and identify midpoints. They can provide an overview of numbers and brackets, underscore patterns, and highlight potential settlement points.

A zipper diagram can be used to keep track of parties' communications. Tools such as Excel and Google spreadsheets can help with the quantitative process, while negotiation and mediation software can help with structuring and tracking the negotiation process.

Bracket timing

Brackets are sometimes a way for parties to exchange offers and demands; other times they are like a mediator's proposal. However they are implemented, brackets work best when there is a reasonable level of confidence that the range will be acceptable to both parties.

At what point those brackets are introduced will affect how the mediation proceeds. Some mediators suggest their use early in the mediation, particularly when the number gap is large and the parties are moving slowly. Others use them only as a "Hail Mary," when an impasse cannot otherwise be broken. In either case, the mediator should introduce the idea to counsel at the outset of the mediation and, as the mediation proceeds, determine if parties are open to this kind of negotiating.

There is no one-size-fits-all rule for when or how to use brackets. The needs of the mediation should determine their timing and whether they are generated by the mediator or the parties. Introducing brackets during mediation can be like taking a walk; brain cells are refreshed and more creative after a bit of exercise and a change in scenery. This can be enough to help everyone re-engage more productively.

Ethical challenges of brackets

An important issue to consider in using brackets is that the mediator could be seen as suggesting his or her perceived value of the case when suggesting a bracket. Arguably, by using brackets the mediator is moving from a facilitative to an evaluative approach.

Bracketing might also move a mediation into a numbers game, away from an approach in which non-financial considerations are a driving force behind resolution, but this doesn't have to be the case. Brackets can be used in a non-monetary context, such as cases in which the need to have a continuing relationship may affect what parties are willing to accept.

The mediator should explain to parties and counsel how brackets will be used, and the proposed process for their use. Will ranges discussed in caucus be disclosed to the other side as a conditional bracket? If so, who moves next if the bracket is accepted? The key to success will be for all parties to have shared understandings and expectations.

Conclusion

While brackets can be a tricky practice for many reasons, they are too valuable a tool to be dismissed outright. Within the concept of bracketing, there is a range of approaches, such as conditional ranges and mediator's proposals, that can be used when a more finely-tuned instrument than traditional brackets is needed to resolve conflict. For these reasons and many more, bracketing is a powerful move to add to the attorney's playbook, one that can result in a slam-dunk resolution of high-level conflict.

Diana Maier is a neutral with *Signature Resolution* who has almost three decades of legal work experience and specializes in resolving employment disputes. She has served as a public defender, employment litigator (both plaintiff and defense), in-house counsel, workplace investigator and currently as an elected official. She also has also served as an empaneled mediator for the Northern and Central District Courts, the Alameda and Contra Costa County Superior Courts, the Riverside Superior Court and the San Mateo Bar Association. Diana is fluent in Spanish and will mediate with Spanish-speaking parties whenever needed.

