

BRACKETOLOGY: THE ART AND SCIENCE OF BRACKET NEGOTIATIONS

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Seasoned civil trial mediators usually have an arsenal of negotiating techniques to facilitate settlements. While some techniques are generically shared by many practitioners, some are reshaped and customized by a mediator's personal experiences in dispute resolution. This paper focuses on the technique known as, "Bracket Negotiations" and explores some of the individual touches mediators have added in utilizing this process.

The following discussion derives from the perspective of civil trial mediation and is presented in the context of mediating the settlement of a typical two-party civil lawsuit. In-preparing this study, an informal survey of experienced civil trial mediators was conducted to explore the various nuances of the process. The full survey results are attached as Exhibit A ("Survey")¹ and are frequently cited in this presentation. As an advocate and constant user of the bracket process in my own 30-year mediation practice, I've also taken the liberty of adding my own thoughts on the art and science of bracket negotiations.

Definition

For purposes of this discussion, "Bracket Negotiations" may be defined as the process of negotiating toward a final, single dollar settlement amount through the exchange of conditional proposals to commence negotiations within an adjusted demand and an adjusted offer that, if accepted, results in a smaller negotiating range.

Example: Plaintiff's initial demand is \$100,000; Defendant's initial offer is \$10,000. (Initial negotiating range is \$90,000).

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Bracket negotiation begins when either party (here the Plaintiff) proposes that both sides agree to a simultaneous movement of the present demand and offer to create a new and smaller negotiating range. The proposal is conditioned upon both parties agreeing to move to the suggested new demand and offer. If the proposal is accepted, the proposing party is obligated to commence negotiations within the new negotiating range.

Example: Plaintiff proposes to drop its demand from \$100,000 to \$80,000 IF Defendant will increase its offer from \$10,000 to \$40,000. The negotiating range is thus reduced from \$90,000 (\$100,000 to \$10,000) to a new proposed range by plaintiff of \$40,000 (\$80,000 to \$40,000).

If accepted, Plaintiff's demand drops, Defendant's offer increases, and Plaintiff, as the proposing party, is obligated to commence single number negotiations by making a move off the new demand, into the new negotiating range and toward the new offer. If the Plaintiff's bracket proposal is not acceptable to the Defendant, the Defendant can reject it and offer a counter proposal suggesting a different simultaneous move of the demand and offer.

Example: Defendant rejects Plaintiff's bracket proposal but responds with a proposal to increase its offer to \$20,000 IF Plaintiff drops its demand to \$50,000. The negotiating range is thus reduced from \$90,000 (\$100,000 to \$10,000) to a new proposed range by Defendant of \$30,000 (\$50,000 to \$20,000).

The process then continues with each side exchanging different conditional proposals to bring demands and offers closer together until, (a) either side accepts a proposed bracket and enters the new settlement range, (b) either side elects to discontinue the negotiations, or (c) a settlement range emerges that is capable of closure with single number negotiations, or simply leads to a mutually agreeable settlement number.

It is not clear who invented this process, but it appears many mediators use it. According to the Survey, 95.5% of those mediators polled have initiated bracket negotiations in their practices and 62.5% use the process "frequently" or "almost always". In my

personal practice, I find myself involved in bracket negotiations in virtually every mediation I undertake.

It is also clear that mediators utilizing bracket negotiations employ several variations on the theme. Those of us who have been doing this awhile tend to get entrenched in our own methods; our own techniques. Noting how others do the same things we do, but differently, can be enlightening. What follows are largely based on my personal variations on the theme; certainly not the last word, but in my mind at least, proven over the years to be reasonably successful. The Survey comments reveal other variations from other mediators as well.

Purpose – Why Use Bracket Negotiations?

Employing any negotiating technique becomes more successful with identifiable goals. Bracket negotiations are no different; there are clear purposes for the process.

Eliminate the “Fear of Flying” in Negotiations - In single number negotiations, as initial offers and demands are asserted, the parties will often react with an emotional distrust for the other side’s position. This response may be manifested in a number of ways. Taken from the point view of a Plaintiff for example, we may hear:

“That is a ridiculous, insulting initial offer by the Defendant! They aren’t taking this case seriously at all. I’m not bidding against myself!”

While the Defendant will often say:

“The Plaintiff is outlandishly high with that demand; it doesn’t warrant a reasonable response! If I make a serious offer, they will just inch down and laugh at me”.

What is really happening here is a lack of trust in the other side’s intention to fairly and reasonably negotiate. I call this, “Fear of Flying” in settlement negotiations; the fear that the opposition will not reciprocate to a reasonable settlement overture in an equally reasonable manner. This concern often inhibits a party from making a meaningful admission or accommodation toward settlement in the

first place. “Tit for tat” minimal moves then ensue that only serve to frustrate and anger the parties more.

In bracket negotiations, however, a party’s proposed move is conditioned upon a pre-determined and simultaneous move by the opposition. The admission and commitment to reach an accommodation that comes with what could be a significant initial move, therefore, also comes with a pre-defined response.

“I will increase my offer to \$XX, if you reduce your demand to \$YY.”
(Defendant) or

“I will reduce my demand to \$AA if you increase your offer to \$BB.”
(Plaintiff)

By pre-defining the response, the bracket proposal eliminates the offeror’s fear of making an un-rewarded commitment that would come with the first step toward reconciliation. One purpose for bracket negotiations, therefore, is to eliminate that fear and distrust, and create a more comfortable environment for negotiating.

Gets the Parties to the Settlement Number – A critical, if not indispensable, function of any civil trial mediation is to provide the parties an informed, fact-driven look at the two alternatives for resolving the conflict: the “adjudication option” (what would happen if we went to court?); and the alternative, “reconciliation option” (what would happen if we settled ourselves?)

Since it is impossible to know exactly how a judge or jury will rule (often on a variety of potentially determinative issues), defining the outcome of the adjudication option can never be accomplished with certainty. While we can talk about some aspects of the adjudication option in relatively absolute terms – the process cost, the time to reach resolution, the collateral consequences of litigation, etc. the ultimate outcome of adjudication can only be described in “probabilities”, “odds” or “chances”. Crystal ball gazing from different viewpoints.

Defining the reconciliation option, however, is far simpler – we just need to know one thing. What is the settlement number? What is the absolute last number the plaintiff will accept, or the

defendant will offer? (Whether either party will ultimately accept or reject the last and best settlement number is another question; a question that cannot be answered, incidentally, until that number is defined).

As will be seen in the discussion below, bracket negotiations can provide the parties a great deal of information about the settlement number, often in a more expeditious manner than single digit negotiations. One purpose for bracket negotiations, therefore, is to define the settlement number.

When Do We Employ Bracket Negotiations?

According to the Survey, 45% of responding mediators use bracket negotiations “anytime” in the mediation process, while 55% prefer to use the technique “late” in the mediation process. Forty-seven percent of those surveyed suggest a bracket negotiation only when standard negotiations stall or approach impasse. Very few mediators regularly employ the process early in the mediation proceedings.

The time to use bracket negotiations might best be determined by whenever the “fear of flying” syndrome appears in single digit negotiations, and progress toward reconciliation is compromised. In my practice, I see this often occurring right out of the box, when the initial demand and offer are made at the beginning of the mediation session. When a Plaintiff chooses to begin negotiations with an aggressive demand, which spurs an equally conservative offer from the Defendant, bracket negotiations can serve as an excellent icebreaker to stimulate the parties into meaningful negotiations very early in the game.

The time to use bracket negotiations is any time it will help move the settlement negotiations.

Explaining the Bracket Negotiation Process – *A Critical First Step*

It is critically important that mediation participants, lawyers and their clients, mutually understand the full context of bracket negotiations before starting the process. While many lawyers will

profess to be familiar with the technique, the mediators surveyed reported that lawyers actually demonstrated varying levels of competence; 10% ranked their competency “poor”. Further, with some exceptions, it might be anticipated very few lay parties in mediations will be familiar with the process at all.

A good mediator must facilitate accurate communications between the parties in settlement negotiations. The last thing any mediator wants to do is to foster an erroneous message from one party to another. Getting everyone on the same page with respect to the overall “rules” for bracket negotiations and, even more importantly, some of the nuances of messages sent in the process is, therefore, essential.

Ninety two percent of the mediators in the Survey reported that they explain the process to both parties and counsel beforehand. Forty percent noted they had their own “special” rules that they specifically discuss in advance as well²

Explain the Process in Detail

In my own practice, I make it a point to very carefully explain the process to both sides before entering into bracket negotiations. In fact, part of my explanation involves actually taking counsel and the parties through a hypothetical bracket negotiation to be absolutely certain the process is understood. Even in the face of assurances from some lawyers that they are entirely familiar with bracket negotiations, I still make it a point to explain the process myself.³ The sample explanation that follows is given separately to both the Plaintiff and the Defendant in their private caucus rooms. The text varies only as necessary to reflect the audience – Plaintiff or Defendant. While it may seem overly detailed to some, my

² See, Survey, Question 5

³ In mediations involving lawyers, adjusters, risk managers, etc. with whom I have mediated before using bracket negotiations, there may not be a need for a detailed explanation of the process in advance of its implementation. Even in those instances, however, if there are client participants who are strangers to mediation involved, the explanation is warranted. While this may cause seasoned dispute resolution participants to listen to explanations they’ve heard several times before, more often than not they will support a detailed explanation for the benefit of their clients.

personal experience has confirmed that a comprehensive understanding of the process is essential. Everyone needs to play from the same rules.

Use Charts

As the sample explanation given below illustrates, I will also use flip charts or dry erase boards to explain the process and graphically display how bracket negotiations might unfold. (After the process is introduced, I continue using flip charts or dry erase boards in each caucus room to track the actual bracket negotiations that occur between the parties).

A Sample Explanation

Let's assume we encounter a Plaintiff's opening demand which generated a defense counter-offer which has been charted as follows:

<u>Plaintiff</u>	<u>Defendant</u>
\$1,000,000	\$10,000

The ball is in the Plaintiff's court to make the next move, but "fear of flying" sets in and the Plaintiff is hesitant to make a meaningful settlement overture in the face of the Defendant's paltry offer. After recording the initial positions taken by each side on the dry erase board, the mediator might begin the explanation of bracket negotiations to the Plaintiff as follows (the mediator's presentation is set forth in italics):

Our \$1,000,000 demand has been met with a \$10,000 offer. The delta on our offer and demand at this point – our negotiating range - is thus \$90,000. We should be able to do better in defining an appropriate negotiating range to seek a settlement in this case. What if we proposed what we feel would be a better range to the Defendant – what if we suggested a simultaneous move by each party to reach a different and smaller negotiating range that we feel is more reasonable for both of us. If they say "yes" to our proposal, we will agree to take the first step off our new demand toward their new offer.

For example, we could tell the Defendant that we will drop our demand from \$1,000,000 to “A” if they agree to increase their offer from \$10,000 to “C”. We might chart that proposal to look like this:

<u>Plaintiff</u> \$1,000,000	A ----- C	<u>Defendant</u> \$10,000
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- *Use Letters, Not Numbers*

It is a good rule to use letters rather than numbers in explaining the process to counsel and the parties. As a neutral, the mediator does not want to be suggesting settlement numbers – certainly not at this early stage of the mediation. Of equal importance, at this point the parties and counsel need to be focused entirely on learning how the bracketing process works, not getting distracted with specific numbers.

- *Provide a Rationale for Each Proposed Move*

At the initial stage of bracket negotiations, it is also important that the plaintiff be encouraged to suggest a rationale for why it might be inclined to drop the demand from \$1,000,000 to “A”. For example, a proposal might signal recognition of the possible validity of a point raised by the defense, or simply suggest an inclination to accommodate a settlement. Hopefully, offering a conciliatory rationale for the drop in the demand by the Plaintiff at this point will serve to foster a reciprocal response from the defense.

“We could tell them they may have a point about the issues with proving damages. In light of that, we could thus see our way clear to drop our demand a bit. But to get us there, we’d need to see an increase in the offer. What if we said, we’ll go to “A” if they go to C”?

The explanation continues:

Now, when I take the Defendant this proposal, they have three options to respond – in fact, there are only three things they can do:

- 1) They could say, “I accept the proposal” In which case, the demand is lowered to “A”, the offer is increased to “B”, and the Plaintiff is obliged to make at least one move off the “A” toward the “B” in continued single digit negotiations. We are then in a range we consider acceptable.*
- 2) They could say, “I reject the proposal and the process” We cannot force them to negotiate in this manner. If they want to negotiate in single digit numbers, so be it. We go back to square one.*
- 3) They could say, “I accept the process, but don’t agree to the proposed bracket – we want to counter the proposal with a bracket of our own”.*

In my experience, the third choice will occur most of the time. More often than not, the opposition will agree to bracket negotiations, but will want to suggest a different bracket.

Let’s say then that the Defendant comes back with a different bracket.

They might say, “We’re not so sure about negotiating in a range of “A to C”, but we see your point supporting a liability finding here. If you would drop your demand to “X”, we could increase our offer to “Z”. Charting that proposal might look like this:

Plaintiff
\$1,000,000

Defendant
\$10,000

A ----- C
X ----- Z

Again, it is helpful to the process if the Defendant also suggests a rationale for its proposed bracket which would also signal a willingness to concede a point to the Plaintiff. The explanation continues:

Now the proposal goes back to the Plaintiff who has the same three options for responding; “We accept”, “We reject the process” or “We will propose another bracket”.

Odds are again that another bracket will be presented. The Plaintiff might thus respond, “We aren’t comfortable with “X to Z”, but how about us dropping the demand to “D” and you increasing your offer to “F”?”

The chart may then look like this:

<u>Plaintiff</u> \$1,000,000	<u>Defendant</u> \$10,000
A -----	C
X -----	Z
D -----	F

“The Defendant might then respond, “no, but maybe we’d go to U if you went to W”.

Which generates another entry on our chart:

<u>Plaintiff</u> \$1,000,000	<u>Defendant</u> \$10,000
A -----	C
X -----	Z
D -----	F
U -----	W

- ***Where Are we – What’s the Point?***

At this stage of the explanation, the purpose of the entire process is unveiled. This is the crux of the “set up” by the mediator to suggest favorable consideration by the parties and counsel for implementing the process. The mediator might thus say:

Let's look at what we've accomplished by taking the bracket negotiations this far.

First - A great deal of information has been exchanged – without necessarily giving ground, without technically leaving our initial single digit original offer and demand. Every move proposed has been conditioned on a corresponding move from the other side. If a bracket is rejected, we are back at our original position – Plaintiff is at \$1,000,000 and Defendant at \$10,000. We've thus been negotiating in a more comfortable zone, with one foot on the base at all times. We haven't lost ground. ("Fear of Flying" has been resolved).

Second – at the same time, however, looking closer at the brackets proposed gives us a great deal of quality information on the settlement option. Let's go back to the first bracket proposed by Plaintiff, and ask, exactly what does that proposal tell us?

<u>Plaintiff</u>		<u>Defendant</u>
\$1,000,000	A ----- C	\$10,000

The Plaintiff said they would be willing to negotiate a final settlement number with them starting a "A" and the Defendant starting at "C".

We thus know the Plaintiff would accept a settlement number of "A." Even better, if Defendant agreed to Plaintiff's bracket and went to "C", Plaintiff would be obliged to take at least one more step in continued single digit negotiations between "A" and "C." We thus know they would accept something less than "A". This is information we did not have before.

Conversely, when the Defendant responds with a bracket proposal of "X to Z",

<u>Plaintiff</u>		<u>Defendant</u>
\$1,000,000	A ----- C	\$10,000
	X ----- Z	

We know the defendant would pay “Z” to settle the case – plus something more because, if that bracket were accepted, they promised to keep negotiating as well.

The potential new negotiating range after one round of bracket negotiations, therefore, is now “A” (Plaintiff’s high) to “Z” (Defendant’s low) rather than \$1,000,000 to \$10,000. As charted below, this logic would continue to apply to the next round of brackets exchanged producing a final potential range of negotiation of “D” to “W”. Typically, with each bracket proposed, the difference between the Plaintiff’s “high” and the Defendant’s “low” is narrowed.

<u>Plaintiff</u>		<u>Defendant</u>
\$1,000,000		\$10,000
A	-----	C
X	-----	Z
D	-----	F
U	-----	W

In most cases, the new ranges established by the Plaintiff’s high and the Defendant’s low in the bracket negotiations will show more movement than classic single digit bargaining from the initial demand and offer.

The Mid-Points

Another number emerges from bracket negotiations, which can often become “the number” to watch – the “midpoints” of the negotiating ranges proposed. Our suggested explanation thus continues:

In addition to the information we gain from noting the new ranges established by bracket negotiations, looking more closely at the brackets suggested by each party also reveals a “mid-point” which can also be informative. In the first round, therefore, the plaintiff’s suggested “A to C” bracket produces a mid-point of “B”:

Plaintiff
\$1,000,000

Defendant
\$10,000

A -----(B)----- C

Seventy percent of the mediators polled in our Survey responded that parties engaged in bracket negotiations will focus on the mid-points. As many of the comments to the Survey indicate, any explanation of the process should address the “mid-points” in bracket negotiations. In point of fact, it is very important that all parties derive the same conclusion from the midpoints revealed by the brackets proposed.

Stated simply, the Plaintiff has suggested a negotiating range that would result in a settlement number of “B” if the difference was split.

- *They have not said they would take this number.*
- *But they knew we would see this number.*
- *It is information, but not necessarily conclusive information.*
- *Call it a, “light blinking at the end of the tunnel” or a, “flag raised over the castle wall”; perhaps a “signal” of things to come.*

In more certain terms, given the promise that negotiations would continue if the bracket was accepted, one could certainly assume that the Plaintiff’s desired settlement range is “A” to “B”; the top half of its proposed negotiating range. So now we know the Plaintiff would accept a settlement number of something less than “A” but probably more than “B”.

Starting with the Defendant’s counter proposal for a “X to Z” negotiating range, the same conclusions can then be drawn from the mid-points of the other brackets suggested in our hypothetical. Similarly, the Defendant’s probable settlement would fall in the lower half of its proposed negotiating range.

The chart revealing both rounds of our hypothetical bracket negotiation would this appear as follows:

<u>Plaintiff</u>		<u>Defendant</u>
\$1,000,000		\$10,000
	A -----(B)----- C	
	X -----(Y)----- Z	
	D -----(E)----- F	
	U -----(V)----- W	

Now the data base we have for defining the settlement option, after just two rounds of bracket negotiations, has been substantially expanded. We have a variety of numbers to consider:

The “real numbers” each side has indicated they would pay or receive reflected in the Plaintiff’s high and the Defendant’s low in each bracket. (A to Z to D to W)

The mid points of the “real numbers” in each bracket (Mid-point A to Z; mid-point D to W)

The mid points of the brackets each side has suggested in each round. (B, Y, E and V)

The mid-points of the mid-points established in each round (B to Y and E to V)

Importantly, if the information that has evolved from the bracket negotiations presents an unacceptable settlement program for either side, no unconditional commitments have been made and either side can return to their original demand and offer. We have, however, sufficiently defined the settlement option to provide accurate data upon which to base that decision.

As will be seen from the actual case scenario at the conclusion of this discussion, computing the total body of these data points can present a compelling picture for a single digit settlement amount.

Mediator's Involvement in Bracket Selection

The Survey revealed varied responses to the question of whether the responding mediators typically suggest specific numerical brackets to their mediation participants. Twenty percent responded “Always” or “Frequently” while 40% responded “Rarely” or “Never”. A little over 7% indicated they would suggest brackets, “Only when asked.”

The potential for losing strict neutrality in the process would understandably cause many mediators to resist suggesting or advocating specific offer or demand numbers in a mediation session. While suggesting brackets technically proposes only a “range” of numbers for continued negotiations, mentioning specific numbers at all seems to be uncomfortable for many mediators. All told, 80% of those surveyed said they made specific numerical bracket recommendations: “Infrequently”, “Rarely”, “Never” or “Only when asked.”

In facilitating bracket negotiations, however, helping the parties effectively communicate their “bracket messages” can often be enhanced by the mediator pointing to “illustrative” bracket numbers. In other words, numerical brackets might be proposed by the mediator simply to demonstrate the message those brackets might convey, consistent with the parties’ intentions.

To understand how this might work, it is first necessary to understand the full range of messages that can be sent with bracket negotiations. As will be seen below, there is far more to be said than just, “looking at the mid-points”.

Strategies for Bracket Negotiations

A Numbers Game - The Basic Math of Brackets

In bracket negotiations, there are several moves a participant can make in proposing a new bracket: (1) move the top number only, (2) move the bottom number only, (3) move the top and bottom numbers by the same value, (4) move the top and bottom numbers by different values, (5) move the top and bottom numbers in the same direction (up or down), or (6) move the top and bottom

numbers in opposite directions (top up/bottom down, or top down/bottom up). Each move produces a different message. Care should be taken to make sure that message is clearly understood and confirmed before sending it.

Before addressing those messages, it may be helpful to review some simple mathematical rules that apply in brackets negotiations:

- 1) The mid-point of a bracket can always be calculated by adding the top and bottom numbers and dividing by two. Thus, a bracket of ***\$100 ----- \$50*** produces a midpoint of ***\$75*** ($\$100 + \$50 = \$150 \div 2 = \75).
- 2) Increasing or decreasing the top number alone will increase or decrease the midpoint by $\frac{1}{2}$ of the increase or decrease to the top. Thus, increasing the top of the previous bracket by ***\$50*** to a new bracket of ***\$150 - - - - \$50***, produces a new midpoint of ***\$100***. ***$\frac{1}{2}$ of \$50 increase to top = \$25; added to previous midpoint of \$75 = \$100.***
- 3) Similarly, increasing or decreasing the bottom number alone will increase or decrease the midpoint by $\frac{1}{2}$ of the increase or decrease to the bottom number.
- 4) Increasing the top number and decreasing the bottom number by the same value will freeze the midpoint, i.e., no change in midpoint value. Thus, adjusting the top and bottom numbers of the previous bracket by ***\$10*** (***\$110 ----- \$40***) will produce the same \$75 midpoint.
- 5) Increasing or decreasing both the top and bottom numbers in the same value will simply “slide” the midpoint up or down by that value. Thus, increasing the top and bottom of the previous bracket by \$50 (***\$150 ----- \$100***) serves to increase the midpoint by the same amount to ***\$125***. The same would be true of an equal decrease of the top and bottom numbers.

Some mediators surveyed stressed the importance of focusing the parties on the midpoints of each bracket as the bracket is proposed. (Survey, Question 5) As noted with several of the samples given above, the midpoints can vary significantly with each bracket move. Clearly, a good overall strategy for mediation participants might be to move the midpoints toward each other with each bracket

proposed. There are, however, other bracket negotiation strategies that don't necessarily emphasize the midpoints yet can be equally effective.

Defendant's Strategy - Freeze the top, move the bottom
("Nothing more than . . .")

In a typical bracket negotiation let's assume the Defendant proposed the first bracket below, followed by a counter proposal from the Plaintiff as follows with the mid-points noted in parentheses.

<u>Plaintiff</u>	<u>Defendant</u>
\$1,000,000	\$10,000
\$50,000	\$10,000 (D)
(P) \$90,000	\$70,000

Based upon the rules of the game as described above, at this juncture it might safely be assumed that the Defendant is proposing a settlement somewhere between the **\$10,000 low point** in its proposed negotiating range and the **\$30,000 midpoint** of its proposed negotiating range, i.e., the lower half of its suggested negotiating range. In the course of caucus discussions, however, it often becomes evident that the Defendant is more concerned with keeping the settlement number below its suggested high of \$50,000 than realistically expecting a settlement in the \$30,000 to \$10,000 range. They might say, "*We've got to convince them a fair evaluation of this case tops out at \$50,000*". The bracket negotiation strategy that could be adopted by the Defendant, therefore, would be to "freeze the top" at \$50,000, no matter what the Plaintiff might suggest. The next two steps from the Defendant would thus look like this:

<u>Plaintiff</u>		<u>Defendant</u>
\$1,000,000		\$10,000
\$50,000	-----(\$30,000)-----	\$10,000 (D)
(P) \$90,000	-----(\$80,000)-----	\$70,000
\$50,000	-----(\$35,000)-----	\$20,000 (D)
(P) \$80,000	-----(\$70,000)-----	\$60,000
\$50,000	-----(\$40,000)-----	\$30,000 (D)

Note, although the Defendant has steadily increased the low and the midpoint with each turn, the “high” (where he expects the Plaintiff to be) has remained at \$50,000. The message should thus be clear that the Defendant expects to settle at or below \$50,000. Perhaps more importantly, however, the steady growth of the defendant’s mid-point toward the \$50,000 high could also convey the additional message that the Defendant’s settlement number will fall within the upper range of the brackets proposed rather than the lower range.

Plaintiff’s Strategy - Freeze the bottom, move the top (“Nothing less than . . .”)

Conversely, to send a message that the settlement number cannot fall below the low end of its proposed brackets, the opposite strategy might be adopted by the Plaintiff. “*They need to understand we cannot accept a settlement number below \$50,000.*” In that event, the bracket exchange might look like this:

<u>Plaintiff</u>		<u>Defendant</u>
\$1,000,000		\$10,000
\$50,000	-----(\$30,000)-----	\$10,000 (D)
(P) \$90,000	-----(\$70,000)-----	\$50,000
\$60,000	-----(\$40,000)-----	\$20,000 (D)
(P) \$80,000	-----(\$65,000)-----	\$50,000
\$65,000	-----(\$45,000)-----	\$25,000 (D)
(P) \$70,000	-----(\$60,000)-----	\$50,000

While the Plaintiff has thus dropped its high-end number as well as its midpoint with each round, the low end of its proposed negotiating range (where it expects the Defendant to be) has remained the same. As with the Defendant's strategy described above, this could also signal that the Plaintiff is expecting a settlement number falling within the low end of its proposed negotiating range.

Freeze the middle

A more direct message can be sent in bracket negotiations when a participant chooses to offer proposed brackets featuring the same midpoint in each turn. This is accomplished by simply decreasing the high and increasing the low in the same amount with each bracket. Since this would be effectively closing any further negotiations, it is rarely employed until very late in the process, if at all.

Carrying an Asterisk – Special Conditions with Each Bracket

In negotiating settlements of civil disputes, it is not uncommon for some collateral terms of a settlement agreement to carry as much weight as the final settlement number. Quite frequently, settlement terms calling for such things as confidentiality, mutual non-disparagement, indemnity against third party claims, limited or general releases, covenants not to compete, or special conditions unique to the dispute, can become a critical and indispensable part of the overall settlement program. Ideally, settlement terms of this nature would be discussed and agreed upon early in the mediation session, if not in pre-mediation session discussions, before a number negotiation begins. When these conditions arise during bracket negotiations, however, they should be noted and charted immediately as the brackets themselves are charted. This can be done on the display board with an asterisk attached to a proposed bracket and a footnote briefly describing the express term.

Bracket Negotiations – An Actual Case Example

The illustrations given above to explain bracket negotiations are neat and tidy. Real life bracket negotiations, however, tend to be

a little more complex. What follows are real numbers that occurred in a real case. This was a simple little \$500,000 dispute that we all recognize can be far more difficult to settle than the multi-million-dollar conflicts. The numbers that follow were actually exchanged.

The opening demand by the plaintiff was \$515,000 which was met with a “0” offer by the defendant. After some discussion, the defendant began with a \$300,000 to \$50,000 bracket and the following five rounds ensued as shown below. The Defendant’s “low” (what they would pay), and the plaintiff’s “high” (what they would take) are shown in red.

<u>Plaintiff</u>		<u>Defendant</u>
\$515,000		\$0
\$300,000	-----(\$175,000)-----	\$50,000
\$475,000	-----(\$375,000)-----	\$275,000
\$300,000	-----(\$192,500)-----	\$85,000
\$445,000	-----(\$345,000)-----	\$245,000
\$330,000	-----(\$222,500)-----	\$115,000
\$410,000	-----(\$310,000)-----	\$210,000
\$340,000	-----(\$235,000)-----	\$130,000
\$395,000	-----(\$295,000)-----	\$195,000
\$350,000	-----(\$250,000)-----	\$150,000
\$380,000	-----(\$280,000)-----	\$180,000

At this point, both sides expressed reluctance at moving further—a good time for the mediator to pause and, while still in separate private caucuses with each side, demonstrate where the bracket negotiations have taken us. As the following chart demonstrates, an examination of where the bracket negotiations were centering the parties presented valuable additional information concerning the settlement option. In these calculations, the mid-points of the “real numbers” for each round, Plaintiff’s “high” and Defendant’s “low”, are calculated and shown on the left side of the chart in blue. The mid-points of the mid-points reached in each

bracket exchange are calculated and shown on the right of the chart in gold.

<u>Plaintiff</u>	<u>Defendant</u>
\$515,000	\$0
<u>High/Low</u>	<u>Mid-points of</u>
<u>Mid-points</u>	<u>Mid-Points</u>
\$300,000	-----(\$175,000)----- \$50,000
\$475,000	-----(\$375,000)----- \$275,000
\$262,500	\$275,000
\$300,000	-----(\$192,500)----- \$85,000
\$445,000	-----(\$345,000)----- \$245,000
\$265,000	\$268,750
\$330,000	-----(\$222,500)----- \$115,000
\$410,000	-----(\$310,000)----- \$210,000
\$262,500	\$266,250
\$340,000	-----(\$235,000)----- \$130,000
\$395,000	-----(\$295,000)----- \$195,000
\$262,500	\$265,000
\$350,000	-----(\$250,000)----- \$150,000
\$380,000	-----(\$280,000)----- \$180,000
\$265,000	\$265,000

By the fifth round of bracket negotiations the mid-point of the “real” numbers (again, Plaintiff’s high and the Defendant’s low) as well as the middle of the mid-points (“middle of the middles”), thus worked out to \$265,000 which quickly became the settlement amount. Both parties identified this emerging number as a fair compromise with neither side “winning” or “losing”. The bracket negotiation process significantly closed the gap between the parties and surfaced a settlement range that was relatively neutral to both sides.⁴

⁴ Other numbers could be noted at this juncture by averaging the midpoints of the midpoints (\$268,000) or averaging the midpoints of the “high/lows” (\$263,500) which might be raised and discussed if necessary.

Conclusion – A wealth of information

Consistent with the theme that any mediation should ultimately serve to define the parties' settlement option, bracket negotiations offer an opportunity to communicate a wealth of information about a possible settlement path. The plaintiff's "high" and the defendant's "low" end of a proposed bracket clearly reveal a number that would be offered or accepted with certainty. The mid-points of the ranges proposed offer a signal of what might become an acceptable number for each side. Finally, the numbers proposed for consideration can provide an opportunity to demonstrate a productive accommodation or concession. All the data exchanged becomes helpful to developing and defining the settlement option, and all can be revealed by each party without fear of drawing an unwelcome response.

While it is true that mediation participants can "game the game" if inclined to do so, and while it is true that once a number is mentioned (in whatever context of negotiation), it can become a floor or ceiling, the bracket negotiation technique offers an excellent opportunity to keep the dialogue alive and the parties moving toward resolution. As 97.5% of those mediators surveyed responded, bracket negotiations can be a useful and productive mediation tool.

Survey on Bracket Negotiations 2020 Results

Survey Responses

- 1) Have you ever initiated or participated in, “Bracket Negotiations” in your mediation practice?

YES	97.5%
NO	2.5%

- 2) If “Yes”, how often in your practice are Bracket Negotiations utilized?

Almost always	(90% of the time or more)	5%
Frequently	(50% - 90% of the time)	57.5%
Infrequently	(30% - 50% of the time)	27.5%
Rarely	(10% - 30% of the time)	10%

- 3) When Bracket Negotiations occur in your practice, who initiates or originally suggests the process?

Me – almost always	22.5%
Counsel/parties or me – equally	70%
Counsel/parties – almost always	7.5%

- 4) When Bracket Negotiations are suggested or introduced to the mediation, do you generally explain the process to the parties/counsel beforehand?

YES	92.5%
NO	7.5%

- 5) In implementing or facilitating Bracket Negotiations in your mediation practice, do you have any special “rules” or conditions you apply?

NO 60%

YES 40%

If “Yes” please briefly summarize. (See comments attached)

- 6) When Bracket Negotiations are employed in your mediation sessions, do they most frequently occur;

Always early in negotiations 0

Always late in negotiations 55%

Anytime in negotiations 45%

- 7) Are Bracket Negotiations implemented or suggested in your mediation practice only when conventional negotiations to reach a settlement number stall or approach impasse?

YES 47.5%

NO 52.5%

- 8) On the occasions in your mediation practice that you suggest implementing Bracket Negotiations, how frequently do counsel/parties object and decline to participate?

Almost always (90% of the time or more) 0

Frequently (50% - 90% of the time) 7.5%

Infrequently (30% - 50% of the time) 15%

Rarely (10% - 30% of the time) 77.5%

9) Rank the overall skill independently demonstrated by attorneys/clients in bracket negotiations

Excellent	25%
Good	65%
Poor	10%

10) Do you suggest specific numerical brackets?

Always	(90%+ of the time)	2.5%
Frequently	(50% - 90% of the time)	17.5%
Infrequently	(30% - 50% of the time)	32.5%
Rarely	(10% - 30% of the time)	35%
Never		5%
Only when asked		7.5%

11) How often do parties focus on the midpoints as bracket negotiations proceed?

Almost Always	(90%+ of the time)	70%
Frequently	(50%-90% of the time)	27.5%
Infrequently	(30%-50% of the time)	0
Rarely	(10% - 30% of the time)	2.5%

12) How do you personally regard Bracket Negotiations as a mediation tool?

Always very useful and productive	45%
Sometimes useful and productive	52.5%
Rarely useful or productive	2.5%

13) If you regard Bracket Negotiations as “rarely useful or productive” please briefly describe what you see as the principal shortcomings to the process;

(See Comments below)

14) If you regard Bracket Negotiations as “Always very useful and productive” please briefly describe what you see as the principal benefits of the process:

(See comments below)

Bracket Negotiations Survey – Comments

5) In implementing or facilitating Bracket Negotiations in your mediation practice, do you have any special “rules” or conditions you apply?

If “Yes” please briefly summarize.

Early brackets – areas of relevancy

Closing brackets – and goal identification

Dealing with midpoints

Negotiating brackets

+++

I got burned once by a senior adjuster who I hadn't worked with before. He agreed to a bracket of \$100K --\$200K. Plaintiff agreed, then the adjuster told me he only had \$100K. I told him that was not fair negotiating.

Unless I've done brackets with the parties and know they are familiar. For personal injury plaintiffs I always do a lengthy explanation of how they work, why they are used, and the 3 ways one can respond; (1) No thanks, (2) fixed response (3) counter bracket (which I always encourage).

+++

I remind the parties that they are advising the other side that they are willing to take or offer the top/bottom number depending on the side. Also that the other side generally looks at the mid-points. I also advise that the other side will generally expect them to move from the midpoint.

+++

Always, I use it as an opportunity to speak with the parties. I address with the parties/attys how the other side will view the bracket. What it will mean to them and likely response. Will it accomplish what they hope it will? And what happens if it does not.

+++

- 1) Mid-points matter. Know the other side is using that as a message.*
- 2) Leave yourself room for additional brackets.; A one-time bracket is received as a take it or leave it aggressive move breaking down talks.*
- 3) If we leave brackets, don't go back to your last whole demand or offer – that is counter-productive.*
- 4) Don't keep moving the top and bottom numbers, for a few rounds either initially or after a round or two, consider anchoring the lower number if you are the plaintiff and anchor*

the top number if you are the defendant as this sends a message and then move that number once we are closing the gap if needed.

+++

Don't know if it is special, but if a party proposes a bracket that means the other side may accept the offerors end of it and the offeror is bound.

+++

Tell them midpoints are generally implied.

+++

Don't assume the other side is signaling a willingness to pay/accept the midpoint of his bracket.

+++

Establish desired Phrasing: i.e., "if plaintiff goes to – defendant goes to –"; establish which party will have the move within the bracket if accepted; occasionally ask for hard number as well; usually describe (it) as a process that establishes new numbers from which negotiation if accepted will continue; discuss meaning of midpoints, but also looking at 3rds, plaintiff maybe comfortable in upper 3rd, defendant in lower 3rd; goal to make gap smaller, or explore opportunities created by bracket. I've also done blind brackets, on paper, first establishing under what circumstances I will offer to disclose to the parties and giving parameters to avoid higher offers than demands. Latter is rare; only done a handful of times.

+++

A return to exchanging numbers must respect the signals sent via bracketing; I strongly discourage reverting to something outside the upper (or lower) number in the previously suggested range.

+++

Not exactly rules or conditions, but I explain the importance of the midpoint calculation and the significance of midpoints and their role as proxy numbers in the context of bracket negotiations. I take the time to explain this carefully and will attempt to discourage bracket negotiations if any of the parties is having difficulty grasping this concept.

+++

- 1) I tell parties that if the other side accepted your bracket – you must make the first move in the bracket.*
- 2) I also tell people that when they suggest a bracket they should be willing to go to the midpoint of the bracket they propose.*

+++

I do not have rules; rarely counsel require them before they are used.

+++

I ask the Defendant to confirm to me (confidentially) that they will pay the midpoint.

+++

If I (as opposed to the parties) suggest a bracket, which I would not do early in the process, I make it clear that each side must let me know yes or no, in confidence, and if either side says no, they will not learn if the other side said yes. I also specify which side is to make the first move within the bracket, so as to avoid an argument about who goes first.

+++

The party that suggests it leads the negotiations . . . that is after the bracket is agreed I go back to the originating party if there was one to get the next move, If I initiated it I select the party to first try out a bracket suggestion, and if it works will use them as the lead thereafter. . . or as long as I can.

+++

To clarify that most people will immediately think of the midpoint of the bracket as a possible settlement number and are the parties comfortable with sending that inference.

Most of the time the plaintiff gives a bracket understanding that the rules are that it is bound to the midpoint of its bracket if the defendant gives a counter bracket with a mid-point satisfactory to the plaintiff. Thereafter the parties continue the mediation with the plaintiffs going down from its midpoint and the defendant going up from its midpoint. E.g. Plaintiff bracket 1 to 5 dollars with 3 midpoint, defendant counters with 1 to 2 dollars with midpoint of 1.50. The parties proceed with plaintiff moving down from 3 dollars and defendant up from 1.50 dollars if the defendant responds with a frivolous bracket in response to the plaintiff's bracket, then plaintiff rejects the defendant bracket and the parties return to their position prior to the plaintiff proposing a bracket.

+++

- 1) I inform the parties that no party is committing to the midline.*
- 2) Further, I inform the parties that if a bracket of counter-bracket is rejected, we revert to the former standard negotiation numbers.*

+++

Most often, if a bracket is used, the party needs to be able to pay the mid-point (defense) or accept the mid-point (Plaintiff).

+++

I ask people to be cognizant that many people will immediately look to the mid-point of the bracketed numbers. While a mid-point is not being offered or guaranteed, it is generally understood to be possible. So, at the very least, it will only frustrate expectations and the negotiations to offer a bracket, with no intention of moving from your side of the bracket.

+++

The only rules I have are (1) there is no agreement that the parties are agreeing to settle at the midpoint of the bracket and (2) how the parties negotiate once the bracket is agreed to is up to the parties.

+++

Sometimes I'll encourage an alternate offer number so we don't get bogged down by whose turn it is if a bracket (is) rejected etc.

13) If you regard Bracket Negotiations as “rarely useful or productive” please briefly describe what you see as the principal shortcomings to the process;

I don't like them in significant cases. I believe they are abused by the defense. (The process) is used to find out where the plaintiffs sweet spot is and then to defense uses that as a demand. Often the defense hears the bracket then they want to abandon and go back to negotiating.

14) If you regard Bracket Negotiations as “Always very useful and productive” please briefly describe what you see as the principal benefits of the process:

Establishing relevant areas for each side to describe their “goals”.

+++

They can narrow the gap, but not always. They are just a “tool”.

+++

Parties begin to focus on a range and therefore become more interested in movement rather than sending messages (usually overly aggressive) with single number proposals. Often, I think, the change of pace is itself quite useful. I’ve only had one party refuse to participate. Must have had a bad experience.

+++

The parties aren’t locked into a fixed number. They have a little wiggle room. It can usually speed up the process. Often eliminates question of who will make the first big move. Gives both sides an idea of where the other party is. Often times once brackets are given, the real negotiating starts.

+++

I am in the middle between the two (“never” and “always” useful and productive) but I will respond. I find brackets to be useful when either the plaintiff or defendant (or both) are simply not in a range where negotiation at the existing pace would be as successful. So, I view brackets as sending a signal where the negotiations must go (with some leeway, or course). I find that brackets proposed to just speed up negotiations are usually not successful in doing so.

+++

1. *Brackets send messages.*
2. *They can help close initial gaps*
3. *They help parties focus on their true range to negotiate.*
4. *They help the mediator in assessing the real negotiation ground to as to better guide the process.*

+++

*When there is mistrust or reluctance to make the first big move it allows face saving and productive progress.
It allows me and the parties to get a better feel of the negotiations.
It allows real exchange of information, “I’ll do the bracket, but I won’t go to the middle”, “I won’t do the bracket because I won’t even go to my end of it”, etc.*

+++

1. *Moves things along*
2. *Generally, a more honest approach.*

+++

It can sometimes get a party to “cross the Rubicon” where negotiations are stalling, i.e., a Plaintiff says he will never take less than \$100K, but he may be willing to offer a \$80K/\$120K bracket – he’s softened his position by saying a number below \$100K. (PS – that one settled for about \$85K).

+++

The process permits one who started too high (or too low) to reorient without losing face. Helps avoid the early impasse that strict positional bargaining can cause.

+++

Narrows the negotiation range between parties without too much risk in the negotiation. In other words, parties aren't really "giving anything away" in the negotiations.

+++

People can often get a better sense of where the other side may be headed and can extend through the hypothetical something that may encourage continued efforts or clarify that there may be no reconciling on that day as a better sense of what it will come into view.

+++

It communicates useful information and almost always signals that you will know within an hour or so whether or not you can settle.

+++

Brackets can revive a near-dead negotiation in which one or both parties are bidding way high/low and waiting for the other party to move into a realistic range before getting there themselves, i.e., mutual discouragement. A bracket allows a party to signal a more encouraging range conditioned on the other party's willingness to get into that range. Even when a bracket is declined, it will often result in a better movement.

+++

Like a mediator's proposal, brackets can allow parties to make a significant move, with the assurance that it will be reciprocated.

+++

It can move things along nicely and applies equally to both sides and is a way of making larger moves than usual because the anticipation is that the adversary will do the same.

+++

Brackets give the parties a faster glimpse in the possible settlement values of the cases instead of wasting time and emotion in unrealistic numbers on both sides.

+++

Cuts to the chase to get unreasonable parties to "get real or go home".

+++

Brackets are a useful tool to move away from frustrating positional negotiating. Getting out of brackets once we are in "bracket land" can be difficult, but in my opinion the benefits greatly outweigh the shortcomings.

+++

I use it to get the plaintiff to remove the "fluff" from its original demand and to get defendant to give a non-positional response if plaintiff's bracket shows a substantial move.

+++

Brackets provide information when it is most needed.

+++

It is a very useful technique to bridge large gaps, particularly when the parties start moving in increasingly smaller and smaller increments. It is also a useful tool to send signals between parties. I probably end up using brackets to some greater or lesser extent in approximately 75-80% of the mediations I conduct.

+++

Brackets are worthwhile because parties will talk to you about numbers and ranges that might be acceptable indirectly through brackets that they would never discuss with you directly.