



## The Art of Bracketing

The term “brackets” raises anxiety for many mediators and attorneys because it is susceptible to so many different interpretations. (And, of course, there is the math!) This often leads to a knee-jerk resistance to the use of this powerful negotiation technique. However, “bracketing,” such as conditional offers, public and private ranges, and specific numbers, is an incredibly effective tool to facilitate, and speed up, resolution (no more back and forth endless times!) This article will discuss common assumptions made, benefits and drawbacks of different bracketing methods, timing considerations, best practices for avoiding bracketing pitfalls, and ethical dilemmas. Bracketing in its many forms can add another sophisticated and flexible negotiating tool to resolve difficult disputes.

### WHAT ARE BRACKETS?

In mediation, bracketed negotiation generally takes two forms: a conditional offer or a bracketed commitment. In either case, brackets encapsulate the boundaries of a potential settlement agreement and allow negotiators to move more quickly to common ground. For example, the mediator might begin by asking the defendant, “If I can persuade the plaintiff to come down to \$250K, would you be willing to come up to 125K?” The mediator may need to shuttle a bit back and forth between the parties, but she should be able to pin down a mutually agreeable bracket, or range, in which the parties can continue negotiations and make further moves (consisting of either increasingly smaller ranges, or simple offers and counteroffers).

There are many ways in which brackets facilitate resolution. Mediator Patricia Prince thinks of bracketing as “a method of breaking expectations and moving the parties to a different, and hopefully more realistic, zone of potential settlement.” Mediator Tia Welch Maerz sees bracketing as a great way to avoid “death by a thousand cuts...in the kind of mediation where the Plaintiff drops \$20,000 and the Defendant comes up \$2,500 in a seven-figure case.” Mediator Kari Levine often uses the concept of bracketing (without calling it that) to begin a monetary discussion with the parties in cases where parties have increased/decreased their demand/offer from their pre-mediation position. The opening offer and demand can set the tone for the rest of the day. Ms. Levine says far too often she sees lawyers and their clients forget this fact and fail to step into the shoes of their opponents and analyze the likely effect of their initial number. Ms. Levine uses brackets to get the parties into a starting range that will not send an uncooperative message in the very first move. She finds that the early use of mediator-suggested brackets brings the parties “into the room and out of their heads” in frustration or anger at what they view as the other side’s “tactics.”



## BENEFITS OF BRACKETING

One advantage of bracketing and other conditional offers is that it greatly speeds up the process of reaching a mutually agreeable number, as well as fairly quickly clears up whether settlement is possible. Brackets are particularly effective when there is a significant gap between the initial offers of the parties involved. For those who serve on court panels and sometimes have a half-day to settle a case, it can be particularly effective at moving the parties more quickly into a range of numbers that are no longer hypothetical, but that might actually get the matter settled.

Bracketed negotiations can also have some of the following benefits:

- **Disruption:** Brackets can kickstart stalled negotiations or prevent premature termination of negotiations.
- **Trust:** Brackets can give the parties more confidence that the mediation will lead to resolution by freeing up creativity and building trust between the opposing parties, clients and their attorneys, and all participants and the mediator.
- **Transparency:** Brackets provide a transparent framework that helps parties understand the negotiation range and possibilities.
- **Structured Negotiation:** The structured approach of bracket-based mediation can reduce ambiguity and provide a new path to resolution.
- **Efficiency:** By narrowing down the negotiation range, brackets streamline the negotiation process and prevent excessive back-and-forth exchanges.
- **Safety:** Since a conditional offer or a contingent offer is not a firm offer, parties feel they can be more open and flexible in their negotiations.

Ms. Prince finds one of the biggest benefits of bracketing is the conditional nature of exchanging settlement ranges. “Bracketing can provide important information to move negotiations forward while maintaining strategic ambiguity. Bracketing resets expectations by helping parties and attorneys conditionally consider where they might settle if the opposing side moved to a different settlement range. The parties can send messages to each other about acceptable settlement ranges, which can break a moment of impasse or reset a cycle of frustration. Parties often are willing to move beyond a specific offer/demand, but they don’t disclose this possibility because they fear a sucker punch from the other side.” Ms. Prince noted that often the “barrier to settlement lies in misperceptions about the other side’s bottom line.” Brackets can be a way to move beyond that.



Ms. Levine believes that bracketing helps lawyers take a step back from their role as zealous litigators. She sees bracketing free up creativity and pave the way for a discussion around the motivations of the opposition, not simply the numbers being placed on the table, but also the interests influencing the moves.

## PITFALLS OF BRACKETING

But if bracketing is such a great tool, why doesn't every mediator use it, and even start the mediation with it? For one thing, parties sometimes make assumptions in bracketing that aren't particularly helpful. For this reason, Ms. Welch Maerz takes the time to explain how the bracketing process works before the parties engage in any negotiations. "The No. 1 problem with brackets is the expectation that a proposed bracket is signaling a commitment to settle at the mid-point of the bracket" she says. In reality, this is often not the case. For example, non-monetary concessions that one party wants may affect their willingness to move past the mid-point. In addition, sometimes one party is just much more fixated on a final number than another party. The first party may draw a line in the sand after moving significantly, and that number may well not be the mid-point.

For these reasons it can be helpful to encourage the parties to accept a bracket if it is acceptable on its face, even if the midpoint is not a place where one or both parties would settle. A party can ask the mediator to convey that its midpoint should not be seen as the number for final settlement, but instead signal that it is accepting the bracket in a good faith effort to keep the mediation moving. Alternatively, and more frequently, a party might counter with an alternative bracket. Sometimes parties will go back and forth proposing potential brackets several times before a firm bracket is placed on the table by either side. While the brackets may start off as extremely broad, they generally will move parties into a settlement range much more quickly than offer/counteroffer alone. This is particularly true when the parties are stuck in a tit for tat response: one side goes up \$5K, so the other side goes down \$5K – an unnecessarily tedious process that can be demoralizing to both parties (not to mention the mediator).

In addition, bracketing can cut through the process of attorneys giving grossly inflated (or deflated) numbers to establish an "anchor" for the mediation. Oftentimes one party is more realistic than the other in its demand or offer and has a lot less to move to get into a range that is acceptable to the opposing party. Bracketing can help establish what that acceptable range is.

As Ms. Prince noted, "Brackets can be a wonderful way for mediators to jump-start a moribund negotiation by replacing the frustration of meaningless moves with a more productive pattern of offers and demands in a more realistic settlement range. Savvy



attorneys may also want to suggest brackets. Those who do so, often wait for the right moment, trying to disrupt a pattern leading to an unacceptable settlement number by ‘re-anchoring’ the negotiation in a new range to establish a more advantageous conclusion.” Likewise, Ms. Levine said she uses the concept of bracketing—without calling it that—to assist the parties in making initial demands that don’t set a negative and uncooperative tone for the day.

## THE MATH

One of the things that can be intimidating about brackets is having to constantly do the math if parties are particularly focused on their midpoint, as well as simply tracking the numbers being exchanged in a reasonably logical way.

Ms. Prince advises, “Embrace the math and create shortcuts for yourself!” She uses Microsoft Excel to build spreadsheets for each case she mediates. She tracks each demand and offer, automatically calculating the movements made by each side and midpoints. “I find that having my spreadsheet on one legible page that provides a quick mathematical overview of the numbers and brackets negotiated is helpful in seeing patterns and potential settlement end points.”

Ms. Welch Maerz uses a “zipper diagram\*” to keep track of each parties’ communications. “I don’t want the parties to become anxious about the numbers and brackets so I encourage the parties to keep their own ‘zipper diagrams’ as the process unfolds.”

There are also quite a few formal tools that can help with the quantitative process in bracketing. For example:

- **Spreadsheet Software** (e.g., Microsoft Excel, Google Sheets): Create a spreadsheet to input and calculate bracket values, midpoints, and potential settlements. You can easily adjust the range and perform calculations as negotiations progress.
- **Negotiation Software:** There are specialized negotiation platforms that assist in structuring and tracking negotiation processes. These platforms often include features for calculating midpoints and displaying negotiation ranges.
- **Mediation Software:** Mediation-specific software might include tools for documenting negotiation progress, setting brackets, and tracking agreements. They often offer features for confidentiality and secure communication between parties.



## TIMING

How do you know the time is right to offer brackets? Some mediators think of brackets as just another way of exchanging offers and demands (with the brackets being generated by the parties), while other mediators think of brackets akin to a mediator's proposal (with the brackets being generated by the mediator). In the latter case, if a mediator is choosing the bracket, she typically will not do so until she feels reasonably confident the range will be acceptable to the parties.

Some mediators think of brackets only at certain times during the mediation process. For example, a mediator may suggest brackets early in the mediation, particularly when there are large numbers to bridge to get to settlement and the parties are moving slowly. Others consider brackets more useful as a "Hail Mary Pass," when impasse cannot otherwise be broken. "I may suggest how brackets work at the outset of a mediation just to introduce the idea, and then later, through private discussions, determine if a particular party is open to that kind of negotiating," says Ms. Welch Maerz.

Ms. Prince said that for her, "The needs of the mediation drive both the timing and whether I suggest party-generated or mediator-generated numbers." Ms. Prince said that earlier in a negotiation, she likes brackets as a "vehicle for overcoming a bout of increasingly punitive reactive negotiation moves. Brackets are also a favorite of mine when the parties reach an impasse because the opposing sides don't see any hope of getting to an acceptable settlement. I frequently find that broadening the lens and adding conditional thinking by means of brackets is akin to taking a walk—the little grey cells are refreshed and more creative after a bit of exercise and a change in scenery. Often this change allows everyone to re-engage more productively."

Ms. Levine uses the concept of bracketing at any point in the negotiation to help parties think innovatively about the potential options for resolution. For example, in a dispute between neighbors involving the removal of trees, she might have the parties explore an agreement to remove a certain number of the trees in exchange for an agreement to plant something in their place, or provide something the objecting neighbor finds agreeable. This use of bracketing around concepts other than money can help the parties brainstorm a problem creatively together.

## ETHICAL DILEMMAS

Finally, something to consider with bracketing is that it may pose an ethical dilemma for mediators in certain circumstances.



For one thing, mediators pride themselves on facilitating an agreement between the parties wherein the parties retain the right to self-determination. Bracketing can give the mediator a lot more control of the movement of the mediation process, especially if the mediator-proposed numbers are unconsciously taken as an anchor by the parties. In addition, in simply proposing the bracket, the mediator may be suggesting something about their perception of the value of the case. Arguably by using brackets, the mediator is moving from a solely facilitative to an evaluative approach in the mediation.

Another thing to consider is that bracketing can quickly move a mediation into a numbers game, as opposed to a more holistic approach wherein non-financial considerations are a driving force behind resolution. It's important to remember, however, that brackets can be used in a non-monetary context, such as in neighborhood disputes or divorce mediation, where issues of custody, property, and the need to have a continuing relationship may very much affect what one party is willing to accept.

To avoid ethical pitfalls, Ms. Prince believes it is important for the mediator to explain what brackets are, how the mediator will be using them, and the process being proposed for their use. For example, are ranges discussed in caucus intended to increase the mediator's understanding or to be disclosed to the other side as a conditional bracket? If used as a conditional bracket to disclose to the other side, who moves next if the bracket is accepted? (Typically, the party who proposed the bracket, but this is best to establish up front.) The key is for everyone to have shared understandings and expectations.

Ms. Prince noted, "Different needs may influence the way I propose and utilize brackets, but I prefer developing brackets to be disclosed to the other side. This gives attorneys and their clients more control over the messages they are sending. A skilled mediator can use a well-designed bracket to emphasize different components, as needed in the moment, such as the explicit endpoints, the width of the range, the midpoint, and movement. There are many creative ways of using brackets and ranges, as well as messaging important caveats (e.g., 'we accept the range, but don't expect us to reach the midpoint'). The mediator can help parties fine-tune the messages they intend to convey with the numbers in their brackets."

Likewise brackets as a practice might not align with certain cultural negotiation practices, potentially leading to misunderstandings or offense. This is another thing to consider in terms of timing—establishing rapport with the parties first might bridge issues of possible miscommunication or seeming rudeness.



## DON'T SHY AWAY FROM USING BRACKETS

While brackets can be a tricky practice for the many reasons articulated above, they are too valuable a tool to be dismissed outright. In addition, within the brackets concept there are sub concepts, 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 more, the bracketing concept is a powerful arrow to add to your quiver and can be the turning point toward successful resolution of a conflict.

Write to [diana@maierlawgroup.com](mailto:diana@maierlawgroup.com) with your stories of how brackets worked (or tanked) a mediation you conducted!

*\* A zipper diagram depicts plaintiffs on one side and defendants on the other, indicating the numbers that each side proposed and what the response was.*

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