

Expedite your Settlement Using Bracketing

By Shirish Gupta & Paulina Torres

Give brackets a chance. No seriously, what have you got to lose? Lawyers often groan when the idea of bracketing comes up in mediation. But brackets can fast forward negotiations and avoid energy sucking baby steps when parties are still orders of magnitude apart.

Whether they know it or not, parties are always bracketing—they're moving and expecting the other side to move a certain amount in response. And if the other side doesn't, they feel wronged and question everything—the process, the parties, their strategy and, yes, even the mediator using phrases like, “we're getting nowhere,” or “they're not being serious.”

So, rather than negotiating within an implicit bracket, consider making your expectations known, if not to the other side, then at least to the mediator, who can help you craft an effective bracketing strategy.

1. Bracketing Defined

Bracketing is offering to negotiate in an explicitly stated range, ideally substantially narrower than the last bid/offer. A proposed bracket can be phrased as “if you move to X, I'll move to Y.” It shows



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how much you're willing to reciprocate the other side's big move. They are an offer to settle for an undisclosed amount anywhere within a range.

For example, if the last offer was \$100K and the demand was \$1M, the parties are implicitly negotiating in a [\$100K-\$1M] bracket. From there, either side can expressly propose a smaller bracket within that set, such as [\$250K-\$750K], [\$400K-\$550K] or [\$800K-\$900K]. In practice, a bracket where only

one endpoint is moved is likely to be rejected.

Typically, the first party-proposed bracket is rarely accepted. Instead, it invites a counter-bracket and then another round of bracket/counter-bracket. At some point, bracket fatigue sets in and parties either accept a bracket or resume traditional negotiating from their last bid/ask but with a better understanding of how far each side is willing to go.

If a bracket is accepted, the parties return to turn-by-turn negotiating, but

in a smaller range. Emboldened by reaching agreement on a bracket, some parties propose even narrower brackets.

Brackets are a meta-step to settlement—a way for parties to signal moves without commitment if the bracket is rejected. And if no bracket is accepted, negotiations resume from the last bid/offer but now with a roadmap of the other side's expectations.

By contrast, brackets proposed by the mediator are usually accepted in the first round because mediators implicitly vet brackets before we propose them. Also, some parties are wary of accepting anything that the other side proposes, so having a neutral propose it is seen as less risky (aka Reactive Devaluation). The downside is that parties, knowing that a bracket is coming, often try to sway the mediator into proposing a bracket in their favor.

2. Benefits of Bracketing

The biggest benefit is fast-forwarding negotiations—skipping the little moves that dampen the hopes of ever reaching a settlement. Another benefit is ensuring that a “big” move will be adequately reciprocated. Parties are justifiably cautious to make big concessions if they suspect the other side will barely move in response.

Brackets also allow for richer communications. In traditional monetary negotiations, parties convey one number at a time. With brackets, however, they convey:

- four numbers (the endpoints, the midpoint and the spread),
- an offer of who goes next,
- frustration with traditional negotiation,
- impatience with the speed the process,
- an attempted anchor, and
- optimism in getting a deal done.

3. Problems with Bracketing

Bracketing can feel like a detour, especially if no bracket is accepted and the parties resume turn-by-turn bargaining from their last positions. Attorneys complain that bracketing wastes precious hours and energy. What this criticism misses is the parties now have richer information than if they had continued with turn-by-turn negotiation. They also now know monetarily how the other side sees the claim—ambiguous words like “reasonable,” “real,” “serious” and “fair” have been translated into dollars.

Another problem is parties might also feel offended by proposed brackets, just as they are by offers, leading to recriminations about intent to settle. This kind of situation, while resolvable, creates a negative atmosphere between the parties at the outset of the negotiation.

The biggest tactical problem is if the recipient focuses only on the midpoint of the proposed bracket. And in those instances, if the negotiations deviate materially from that midpoint target, the party may feel misled.

While brackets are used to narrow the negotiating range, it is a mistake to presume that the midpoint of the range is both parties' goal.

4. Bracketing and the Mediator

A good mediator will add value to your bracketing moves in three ways. First, the mediator will help you craft a bracket that materially moves the parties closer to settlement. Second, the mediator will effectively message your bracket in the other room. And third, the mediator will help the other side craft a counter-bracket that hopefully overlaps with your negotiation strategy, thereby leading to settlement.

In sum, because parties are implicitly bracketing, we encourage them to do it in the open, if not with the opposing party then at least with the mediator. Used effectively, brackets can speed up negotiations and increase party satisfaction with the process.

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