

# [If you will ..., I will ...]

## Bracketology for mediators

By Douglas J. Witten

During a recent mediation, I knocked on the door of a caucus room where the insurance company's lawyer was sitting. Not hearing an immediate response, I cautiously entered. The defense attorney was intently studying a piece of paper and writing what I assumed to be notes about his negotiation strategy and next moves.

The plaintiff, who had been hurt in a workplace accident, had opened the morning's mediation with a settlement demand of \$400,000, which I think everyone at the table believed was extremely high relative to the value of his case, and the defense had countered with an equally extreme initial counteroffer of \$10,000. For more than two hours, working with the parties and their counsel in the two rooms where the plaintiff and defense had set up separate camps, I had explored interests, probed motivations, objectives, and concerns, reality-tested the parties' positions, and spent considerable effort reflecting and reframing. Negotiations had brought the parties closer but still far apart: The plaintiff was down to \$250,000, and the defense had increased its offer to \$25,000.

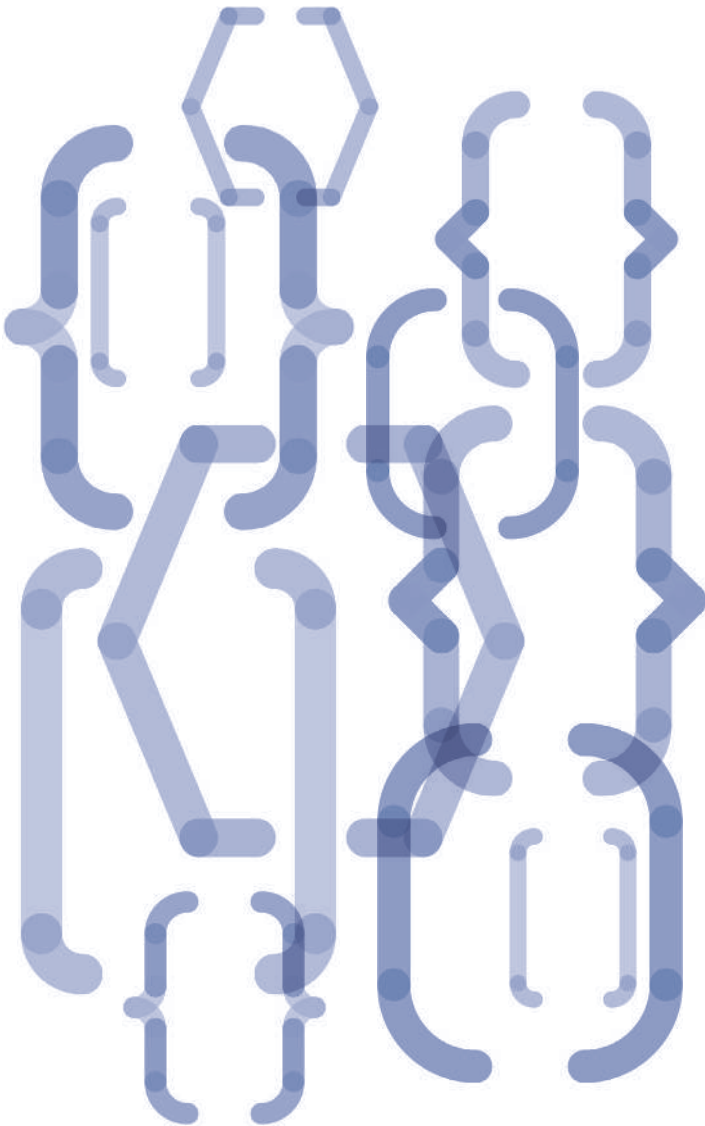
As I approached the insurance company lawyer, I felt that the parties were making progress but the process was taking a long time, and it was clear that both sides needed to move to ensure the case would shift into a reasonable settlement range. Still, even as they exchanged numbers that didn't seem to reflect their true assessment of settlement possibilities, I could sense that both sides had room to maneuver.

"Come in," the defense attorney said, motioning for me to pull up a chair. "Sorry. I am busy working on my bracket."

OK, I thought. Now we're getting somewhere. He's going to propose a conditional move — a bracket proposal — so that if the plaintiff lowers his demand to something considerably more reasonable, the defense will raise its offer to a number much closer to where the number needs to be to get this done.

"Let me ask you something," he began. "Am I crazy to believe Wisconsin can take Villanova in the second round of the tournament? I mean, if they can get past Nova and UVA, my guys will be in the Final Four. What do you think?"

As exciting as NCAA March Madness basketball can be, this was not the type of bracket I had in mind.



## Making brackets work (with caveats)

During a presentation on mediation techniques not long ago, one of the speakers, a highly experienced mediator, largely dismissed the use of bracketing, a negotiation technique in which one party offers to make a move conditioned on a move by the other.<sup>1</sup> Bracketing is basically an “if, then” proposition: *if* the other party moves his negotiating position to one number, *then* the first party will likewise increase (or decrease, as the case may be) her position consistent with the proposal. Parties typically use conditional bracketing as an alternative to, or in conjunction with, traditional negotiation offers and demands in an effort to kick-start deliberations and converge upon more realistic zones of potential agreement.

In fact, each of the speakers at that recent presentation — including another mediator and a litigator who frequently mediates as an advocate — agreed that brackets are basically a waste of time and never work as mediation tools. Having mediated two cases in the previous week that had resolved in part because of the parties’ skillful use of brackets, I found the speakers’ assessment surprising. I believe brackets can work every time they are used — provided that those employing them understand when and how to use these powerful deal-closing devices.

## The warnings

A couple of caveats: First, by its nature, bracketing is a numbers-focused technique, most effective in cases with parties negotiating toward a monetary settlement. As mediators, we are trained to delve into the interests underlying parties’ stated negotiating positions, even when those positions are expressed in dollar amounts they would be willing to pay or accept to resolve a matter. We all know that money means different things to different people and that sometimes plaintiffs seeking monetary settlements are actually seeking to satisfy a deeper interest (such as security, respect, pride, understanding, a sense of fairness, or justice) for which money is merely a surrogate. However, as distasteful as this may be to acknowledge, frequently resolving a case requires simply finding a dollar amount that satisfies all parties involved. In other words, sometimes it really is about the money.

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Additionally, timing is everything. Given an appropriate, dollar-focused negotiation scenario, I find bracketing to be most useful once parties have clearly staked out their positions. At this point, it can help them relinquish those initial stances that, after effective probing and questioning, I don’t believe reflect their ultimate monetary goals or best efforts to reach settlement. Occasionally, and for various reasons, negotiators get stuck in positions and simply need a nudge to free themselves and negotiate in a manner more reflective of their actual interests. I don’t advocate using bracketing in isolation; I consider it just one of many tools the effective mediator can use to avoid or break impasse. Sometimes the idea of bargaining with brackets comes from the parties themselves (usually ones who are experienced negotiators). Sometimes, when I think brackets could help, I might find out whether the parties understand them and suggest they give bracketing a try.

Finally, brackets are not necessarily evaluative. A facilitative mediator can work with brackets in a given case in a manner completely consistent with the overall philosophical approach. In this sense, bracketing is more about shaking up positional bargaining and helping parties approach their truer “bottom lines” and “top dollars,” whatever those might be, after the mediator has engaged the parties in thorough discussion and applied other tools to assist the parties navigate the mediation process.

## How are brackets best used?

Let’s return to the mediation involving the workplace injury, the one in which after almost three hours the parties were still separated by a gap of \$225,000 and the defense lawyer was more interested in discussing Final Four odds than negotiation tools.

"Listen," I told the lawyer, "I'm all for being a contrarian when you're trying to win a college basketball pool. But I was hoping you'd found a way to bracket these mediation positions so we can get this case settled."

"I think my odds are better pulling for the Badgers," the lawyer said, still clinging to his hopes for Wisconsin. "Brackets never work."

I paused for a second or two. "Do you think what you're doing now is working? We've been at this almost three hours."

Another moment of silence followed. "OK. Fair point," he said. "So, I'm listening. Do you think a bracket proposal is worth a try?"

"Absolutely. Let's talk about it," I replied, with more than a little optimism.

### How, exactly, does bracketing work?

At certain points during negotiations, a bracket can serve as a useful alternative to a "straight" upward or downward positional move. In the workplace injury case, with negotiation positions at \$250,000 and \$25,000 and based on the pattern that had emerged over the previous hours, suppose the next likely moves were \$240,000 and \$30,000, respectively. That would represent some — but not much — progress.

Let's say the defense instead proposed a bracket — essentially, a conditional proposal — by which the defense would increase its offer to \$50,000 if the plaintiff would decrease her demand from \$250,000 to \$175,000 (i.e., a \$175,000/\$50,000 bracket). In the alternative, the defense might also propose that if the plaintiff chose to reject the bracket proposal, the defense would simply increase its offer to \$30,000.

The mere existence of this first bracketed defense proposal indicates that the defense would be willing to settle the case for some figure between \$175,000

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and \$50,000. That range would still leave a \$125,000 gap to close before the parties could achieve any ultimate settlement, but as a mediator I would begin highlighting to the parties that the midpoint of the proposed range — \$112,500 — shows significantly more promise than the parties' erstwhile respective negotiating postures at \$250,000 and \$25,000. Then, once the proverbial lightbulb switches on and the parties realize that they're actually much closer to success than they had perceived, everyone might be more optimistic and motivated to continue working toward a settlement that suddenly seems possible.

### Why use brackets?

As I hope this anecdote illustrates, bracket proposals can help close gaps between negotiating parties that would otherwise be time-consuming, draining, or even insurmountable obstacles to settlement. Though brackets are not appropriate or necessary for every mediation, I am a strong proponent for a number of reasons. Brackets can:

- **Help negotiating parties focus on ranges rather than hard numbers**

My advice to parties is to focus on a target range instead of a specific number when setting monetary mediation goals. I believe this is the best approach for many reasons, but the basic rationale is that in most cases there is no objectively "correct" number. Just as there is no winner and no loser in mediation, in most every case there is no absolutely right number that solves a mediation. A more productive approach is to consider reasonable ranges on each side, taking into account uncertainties and risks that simply cannot be known or foreseen and looking for where the ranges might overlap. This exercise is akin to using a Venn diagram, seeking the zone of intersection among the parties' different perspectives, and identifying a range that represents something reasonable to all. Brackets, of course, themselves represent ranges, and they tend to help negotiating parties look at their case value as a range of potential numbers instead of a single number. If the parties view their case through the lens of bracket ranges and consider the visual of a Venn diagram, they should find it

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easier to see that where brackets overlap lies the possibility of settlement.

- **Be viewed as a symbol of good faith and a willingness to compromise**

At the beginning of every mediation, I remind the parties that a successful process requires compromise on each side. Participants typically nod knowingly, implicitly agreeing and acknowledging that they will need to give and take if an agreement is to be possible. Some percentage of the time, though, the parties then proceed to dig in at a “bottom line” or “top dollar” and refuse to budge. Bracket proposals can be used to help illustrate, in a tangible manner, the very concept of compromise. By nature, a bracket proposal invites one party to make a move in exchange for the offering party also making a move (i.e., “If you will, I will.”). The party offering the bracket is directly conveying a good-faith willingness to push toward a middle ground and budge from his or her position. The other side receives the olive branch sent from the proposer and, even if he or she does not accept the bracket, the bracket has served various constructive purposes and presents a clear opportunity for a motivated party to compromise in return.

- **Help people take calculated risks and see the benefit of closing negotiation gaps**

A curious set of insights frequently dawns on the parties once they expand their bargaining process to incorporate brackets. First, bracket proposals allow parties to step out of their negotiating comfort zones in a controlled, relatively cautious manner. Again, this is attributable to the contingent nature of these “if, then” proposals, which let the proposer suggest that she’ll move in conjunction with a move from the other side. By inviting the opposing party to move

if that side would like to see a corresponding move by the proposer, the proposer at once shows a willingness to compromise and protects herself against a reluctant opposition. Particularly when a bracket proposal is made alongside a corresponding, less attractive “hard” move, this technique often makes self-evident what all of this article is here to say: bracket proposals frequently are preferable to the alternative, straight-number steps along the negotiation process. They can be persuasive tools on their own but, especially when viewed in direct comparison to the postures where the parties would otherwise find themselves, they are especially attractive.

- **Bring hope and vision to the negotiation process**

Perseverance is a critical trait of successful negotiators, and sometimes parties are challenged to remain steadfast during negotiations that seem hopelessly at impasse. Bracket proposals can show opposing sides that they are actually much closer to settlement than either would otherwise think based on their bargaining positions. Hope, along with a vision of a possible resolution in the face of a stalemate, can help parties gather the strength to continue negotiating and break through process barriers that hinder their success.

- **Represent accurate, useful descriptions of the parties’ true positions**

Bracket proposals help all of the parties — and the mediator — appreciate more accurately where the true potential settlement zone lies. Often, when parties are straining to see each other across the familiar negotiating playing field, they feel hopelessly apart in their case evaluations and have no idea whether they’ll ultimately find each other in the same ballpark or even the same ZIP code. As we well know, some parties come to mediation with a “litigation mindset” rather than truly embracing the bedrock principals of good-faith cooperation and mutual compromise, and they can tend to be more stubborn and argumentative, preferring stealth and subterfuge to frankness and openness about their bargaining strategies

and settlement ranges. Brackets, strategically employed, can help answer this most basic question and ferret out where settlement might (and might not) be a realistic possibility.

Fortunately, brackets are built to allow for ongoing mystery, if not misdirection, within the negotiation zones they create. Unlike hard-number negotiation, brackets must embody the flexibility required to manage less collaborative parties or those who simply need more time to work through the negotiation process.

For a mediation to end in agreement, at some point the parties must reveal enough about their actual bargaining positions to let the other side (and the mediator) know whether the settlement ranges of the opposing sides overlap. Polished negotiators can use bracket proposals to flush out true settlement intentions, enhance engagement and cooperation, and effectively reach agreements.

- **Make negotiations more interesting**

Don't overlook this benefit. I can think of countless mediations during which I entered a room, presented a bracket proposal, and saw a party's mood lift. During hours of small moves from each side, attorneys and their clients can become numb to the negotiation process, wearily watching distant numbers ping-pong between caucus rooms. Sometimes attorneys and clients wind up disengaged, unfocused, and bored. Injecting a bracket proposal can be an instant cure for mediation fatigue.

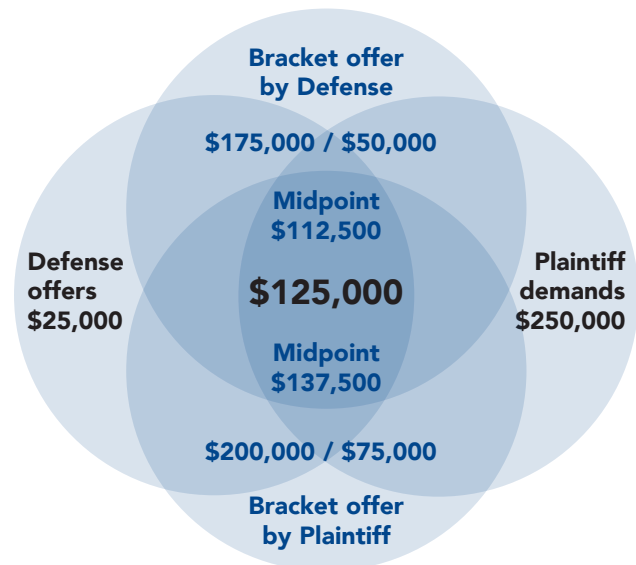
- **Spark creativity**

Utilizing brackets encourages negotiating parties, along with the facilitating neutrals, to tap into their creative minds. Bracket proposals require a deeper examination of the underlying numbers of a case, the respective bargaining positions of the opposing sides, and possible solutions to what might otherwise seem like hopeless back-and-forth negotiations.

- **Leverage the strength of the parties' negotiating positions**

This point, at first tricky to grasp, describes perhaps the most powerful effect of brackets.

As the case of the workplace injury illustrates, parties stuck at negotiating postures of \$250,000 and \$25,000 can quickly see that they are much closer to possible settlement than their numbers would otherwise suggest.



**Leveraging Brackets:**

- The defense is "officially" offering \$25,000.
- The plaintiff is demanding \$250,000.
- The defense offers a bracket of \$175,000/\$50,000 (midpoint = \$112,500).
- The plaintiff counters with a \$200,000/\$75,000 bracket (midpoint = \$137,500).
- The "midpoint of the midpoints" is \$125,000 (the midpoint of \$112,500 and \$137,500).
- The negotiation zone is between \$137,500 and \$112,500.

### Why do some negotiators resist brackets?

One of the more common rationales negotiators propound for not utilizing brackets is the refrain from the presentation echoed by the Final Four-fixated lawyer and others: they never work.

Another, more concrete, concern is that the other side will receive a bracket proposal, calculate the

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bracket’s midpoint, and assume that the proposer would like to settle the case at the midpoint figure. Well, shouldn’t we assume that the other side was already looking at midpoints, based on the parties’ pre-bracket numbers? That is, every numbers-based negotiation will have a midpoint at any given time, with the parties’ stated bargaining positions creating boundaries between which further negotiations will proceed. Midpoints can be used and interpreted in many ways, and they exist between opposing numbers whether or not a party has explicitly proposed a bracket.

Now, do I expect a party to accept a proposed bracket? No. In my experience, bracket proposals are rarely accepted outright by the party receiving the proposal; it happens, but far more brackets are rejected than accepted.

In the workplace injury case, assuming the plaintiff doesn’t accept the bracket proposal, among other options she might respond with a counter and: (a) propose a counter-bracket of, say, \$200,000/\$75,000 (i.e., “we’ll drop to \$200,000 if you come up to \$75,000); (b) reduce her demand to \$240,000; or (c) respond with a hybrid proposal (we’ll drop to \$200,000 if you come up to \$75,000, or otherwise we’re at \$240,000).

So why might brackets be rejected more often than they are accepted? Depending on what stage in negotiating a bracket is employed, a party might reject the bracket for the same reason she would reject any other offer: “accepting” feels too much like a concession, and negotiators typically hesitate to concede during a mediation session. More likely, the recipient will choose to reject the bracket and respond with a counteroffer.

But a rejected bracket is not a failed bracket. Even if the plaintiff responds with a “thanks, but no, thanks” that’s OK. The bracket remains a useful negotiation tool and serves as an effective, incremental step toward eventual settlement. A savvy negotiator can communicate a great deal to the other side by carefully choosing her bracket proposals. Likewise, an experienced recipient of a bracket proposal, even as

she rejects such a proposal, can gain critical information relating to ultimate settlement ranges, the other side’s appetite for settlement, and how to proceed with her negotiation strategy.

## Conclusion

Bracket proposals, though not useful in every mediation, can make the difference between impasse and successful negotiation results. Not every bracket is accepted outright, and that’s OK. For the savvy negotiator who understands not just how to use bracket proposals but how to interpret the responses they engender, brackets really do work — as opportunities to share information, provide insights, invite compromise, and generally move the parties closer to resolution. ■

## Endnotes

1 Throughout this article, I use “bracket(s),” “bracketing,” and “bracket proposal(s)” interchangeably to refer to the technique by which a negotiating party or mediator suggests a conditional proposal that would shift the endpoints of the monetary range within which parties negotiate toward agreement. I recognize that some readers might attach nuance to these various terms and that others could be familiar with a different vernacular, but my focus here is on the technique itself and not its particular label.

Thus, for our purposes: “A ‘bracket’[or bracketing, or bracket proposal] is a conditional proposal in which a negotiator says: ‘We will go to X if you will go to Y.’ X and Y create a ‘bracket’ between which the offering party proposes to limit negotiations.” Michael D. Young & Marc E. Isserles, *Overcoming Impasse at Mediation: Bargaining with Brackets*, *New York Law Journal*, vol. 255, no. 25 (February 8, 2016).



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