

BRACKETING

UNDERSTANDING ITS ROLE IN MEDIATION

BY MARK ZUKOWSKI

BRACKETING IS A FAVORITE TOOL USED BY MEDIATORS AND NOW MORE FREQUENTLY BY THE PARTIES TO FACILITATE SETTLEMENT DURING MEDIATION.

NOT FAMILIAR WITH BRACKETING? IT IS EXACTLY WHAT THE WORD SUGGESTS. IT IS A TOOL USED TO SUMMARIZE THE PROCESS OF NEGOTIATING THE HIGH AND LOW OF THE ZONE IN WHICH SETTLEMENT NEGOTIATIONS OCCUR. EITHER PARTY MAY, BUT MOST OFTEN THE MEDIATOR WILL, PROPOSE A HIGH AND LOW SETTLEMENT FIGURE (I.E., THE BRACKET) WITHIN WHICH THE PARTIES AGREE TO CONTINUE SETTLEMENT NEGOTIATIONS. UNDERSTANDING HOW AND WHEN TO USE BRACKETING IN MEDIATION CAN ENHANCE YOUR MEDIATION SUCCESS.

A bracket can be proposed at any time during a mediation. I have witnessed mediators propose a bracket at the inception of the negotiation after receiving an initial demand and offer from the parties where the figures are so far from where the case can likely settle that neither side is willing to make another move—or, if they do, the move is so small that it results in a reactive response of equal incremental movement until the dialogue ends in frustration, and stalemate sets in.

Traditionally, bracketing was a tool used only by a mediator after the mediator had meaningful conversations with the parties and their representatives and developed a clear understanding of the claims and defenses, explored the parties' wants and needs, and evaluated the risks of the case not settling. A seasoned mediator would then take the information developed during caucuses with the parties and apply his or her knowledge and experience to present the parties with the mediator's proposal for a bracket within which the parties continue negotiations in earnest.

More often, brackets are now proposed by one party or the mediator to “test the waters” as to where a case may ultimately settle. Here, the proposed bracket is not of-

fered with the expectation that the bracket will be accepted by the party to whom the bracket has been proposed as springboard to further negotiations. Instead, it is used to send a message as to where the proposing party might be willing to go to settle the case (typically the halfway point between

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the high and low bracket figures). Even if the party to whom the bracket is proposed rejects the offered bracket, it often results in the opposing party proposing a new bracket, which can be useful in evaluating where the opposing party may be willing to settle the case (again, typically the midway point between the high and low bracket figures).

It is not uncommon that once a bracket for further negotiations is proposed, the parties continue their negotiations with the exchange of further conditional brackets. Other times, where the proposed bracket is not perceived as a reasonable range within which to continue settlement negotiations, the use of bracketing is rejected, and the parties are left to continue negotiations in a more traditional exchange of settlement demands and offers.

An important lesson to learn when considering a bracket proposal in mediation is to find the sweet spot that will allow both sides room to negotiate within a reasonable but narrowed settlement range. As a practical matter, setting the bracketed figures too far apart accomplishes nothing. Setting them too close or proposing a bracket too soon in the negotiation process can lead to apprehension and stall the negotiation process. Bracketing is best used after the parties have negotiated to the point where one side balks at negotiating further or both parties dig in because the settlement range is still perceived as being too far from the parties' comfort zone for settlement to allow for further meaningful negotiations. As the old adage goes, timing is everything in when to propose a bracket during a mediation.

MARK ZUKOWSKI has been a partner with Jones Skelton & Hochuli since 1988 and has been serving as an arbitrator and mediator for over 20 years. He has received extensive arbitration and mediation training through the American Arbitration Association (AAA) and the Straus School of Dispute Resolution at Pepperdine University. Mark regularly serves as an arbitrator and mediator in a wide variety of cases. He is also a construction and commercial arbitrator and mediator for AAA and has been accepted into the prestigious National Academy of Distinguished Neutrals (NADN). Mark also serves as a settlement conference Judge Pro Tem for the Maricopa County Superior Court and previously served as a Judge Pro Tem for the Arizona Court of Appeals.

Those who favor the use of bracketing during mediation see it as a useful tool to send a message as to where the proposing party is comfortable going to settle the case. Bracketing is also favored as a tool to gauge the other side's likely settlement range by eliciting a response to an initial bracket proposal. Bracketing is also favored by many as a means to more quickly narrow the settlement range, resulting in a faster resolution of the case. Finally, and perhaps most important, bracketing is also a useful tool to jump-start a stalled negotiation.

Opponents of bracketing argue its use eliminates the art of negotiation and results in poorer settlements. They claim that

bracketing, particularly if used too early in the mediation process, results in greater compromise and, hence, poorer settlements.

The reluctance to consider bracketing by some is based on the fear that its use results in a party showing its true hand sooner in the negotiation process and before a party is able to determine the other side's likely settlement range.

Whether you fall in the category of fan or foe of bracketing, it is important to understand what bracketing is and how it is used, as its use has become commonplace in mediation.

It is critical to recognize that once a bracket has been communicated to the oth-

er side, whether ultimately agreed to or not, assumptions and expectations are created. Even if the proposed bracket is quickly rejected, the numbers are never forgotten by the other side. Therefore, careful thought should be given before proposing or responding to a bracket in mediation. Whether intended or not, every bracket tends to anchor the proposing party, but it will also be interpreted as sending a message to the other side.

It takes experience to become proficient in the use of bracketing in mediation. However, once you master the art of bracketing, you are likely to find that your mediation results improve. 