



Bracketology: Using Conditional Offers To Settle Your Case at Mediation

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It's mid-afternoon. Mediation has been dragging on for hours, and the clients are getting frustrated. Both parties feel as though they have been making good moves, but the other side is being unrealistic and unreasonable. The lawyers are questioning if it is worth continuing. Something needs to change, or this mediation might go off the rails. Often, in this moment, the mediator will suggest, "Have you considered proposing a bracket?"

The suggestion is always met with a decisive response. Lawyers tend to have strong opinions on brackets, pro and con. Some embrace the concept as a tool for communication, while others regard them as a distraction from "real numbers." But most everyone agrees, if you want to settle the case and nothing else is working, bracketology is worth a shot.

Let me be clear: as a mediator, I love brackets. I encourage their use early and often. It's certainly among the first things I suggest when the going gets tough. This article will explore the art of bracketology, including the reasons to use them and some specific techniques to help you settle your cases.

What Are Brackets?

A bracketed proposal is a conditional offer in which a party proposes, "I will move to X, but only if you move to Y." This allows the proposing party to show it is willing to advance the negotiation, perhaps with an uncomfortably large move, without committing to the number unless the gesture is reciprocated. If the bracket is accepted, X and Y become "real numbers" (no

longer conditional) and the party who proposed the bracket makes the next move.

Consider a hypothetical negotiation between Plaintiff and Defendant, using a notation to display bracketed proposals. In this example, the Plaintiff (“P”) proposes, “I will go to 100 if you will move to 40,” and Defendant (“D”) responds, “I don’t like that bracket, but I would be willing to move to 10 if you will be at 50.” This exchange of bracketed proposals between Plaintiff and Defendant is expressed as follows:

$$\begin{array}{l} \text{P} \quad \left[\begin{array}{c} 100 \\ 40 \end{array} \right] \quad M = 70 \\ \text{D} \quad \left[\begin{array}{c} 10 \\ 50 \end{array} \right] \quad M = 30 \end{array}$$

As shown, the party’s proposal is expressed within brackets, with the proposing party’s number on top and the proposal for the other side below. “M” stands for “midpoint,” representing the average of the two numbers in the bracket.

A party receiving a bracketed proposal almost always responds in one of four ways:

1. Accept the bracket. This moves both parties to the bracketed numbers and puts the ball back in the court of the proposing party to make the next move.
2. Reject the concept of brackets and ask the proposing party for a firm offer instead.
3. Reject the concept of brackets and respond with a firm offer.
4. Counter with a different bracket. This often leads to an exchange of several rounds of bracketed proposals, opening up the techniques and benefits of bracketology.

In practice, it is rare for the first bracket to be accepted. Usually, the receiving party responds with a different bracket. It is not unusual for bracketology to last several rounds before the negotiation turns back to real numbers, usually after having made significant progress toward settlement.

Why Use Brackets?

Negotiating money at mediation is often as simple as haggling over the price of a used car. The parties start out far apart and make a series of incremental moves until reaching a point where a “split the difference” proposal is the obvious endpoint. This approach is often frustrating, especially for parties who are unaccustomed to the ritual. They often feel insulted and annoyed by the other side’s early moves. Both sides often feel they are making the bigger moves, either in dollar or percentage terms, while the other side is wasting everyone’s time with moves in an unrealistic range.

In moments of frustration, brackets are useful if for no other reason than to shake up the dynamic, allowing the parties to take a break from the annoying pattern and look at the negotiation in a new way. A change in perspective can invigorate the process like a cup of coffee or a walk around the block.

Brackets are also useful because combining two numbers into a proposal conveys more information than just one. In fact, the two numbers also imply a third: the midpoint. The party receiving a bracketed proposal often assumes, rightly or wrongly, that the offeror is willing to settle at the midpoint. Whether or not this is the intended signal, litigants should at least be mindful of the midpoint and recognize the other side may fixate on it.

By communicating in ranges, and sending specific messages about the midpoint, the parties can send far more nuanced signals than is accomplished with a single number. This is especially true if bracketology extends for several rounds and the parties make use of the techniques described below.

The Practice of Bracketology

Parties sometimes resist engaging in bracketology, usually out of concern about tipping their hand or driving the negotiation toward a suboptimal

endpoint. But when used effectively, brackets can be a powerful tool for closing the gap without departing from your negotiation strategy. The following are several ways to use bracketology to get your cases resolved.

“The Usual Suspect”

What it is: The most common technique in bracketology, The Usual Suspect embraces the midpoint as a signal and, over a series of bracketed proposals, moves the midpoint toward the desired range for settlement. The midpoint is a clear proxy for an unconditional offer, but the bracket format enables the parties to hint about ranges long before they would get there by trading numbers. A few rounds of The Usual Suspect between Plaintiff and Defendant might look something like this:

D	$\left[\begin{array}{c} 20 \\ 100 \end{array} \right]$	M = 60	The Usual Suspect <ul style="list-style-type: none"> • Defendant is targeting 80 • Plaintiff is targeting 120 • Both parties gradually move their midpoints toward their target range
P	$\left[\begin{array}{c} 200 \\ 80 \end{array} \right]$	M = 140	
D	$\left[\begin{array}{c} 25 \\ 105 \end{array} \right]$	M = 65	
P	$\left[\begin{array}{c} 195 \\ 75 \end{array} \right]$	M = 135	

Why it is useful: The Usual Suspect is a handy approach for those who do not like brackets in general, or in moments when it is unclear what the next move should be. It is hard to go wrong sending a bracket with a midpoint that still leaves you room to keep moving even if it were expressed as a firm offer. Using brackets in this way kicks off a conversation about midpoints in both rooms and accelerates the process of narrowing the gap. Even if the parties abandon brackets and move back to firm offers, let’s face it, they have already hinted at numbers they can get to, so we do not usually waste much time going backward.

“No Bamboozle”

What it is: No Bamboozle is the technique of sending multiple brackets with the same midpoint. The idea is to signal there is no subterfuge or gamesmanship regarding the midpoint, and to emphasize its importance. Here is an example:

D	$\begin{bmatrix} 40 \\ 120 \end{bmatrix}$	M = 80	No Bamboozle <ul style="list-style-type: none">• Defendant is targeting 80• Defendant reinforces the target by repeating the midpoint
P	$\begin{bmatrix} 200 \\ 80 \end{bmatrix}$	M = 140	
D	$\begin{bmatrix} 50 \\ 110 \end{bmatrix}$	M = 80	
P	$\begin{bmatrix} 195 \\ 75 \end{bmatrix}$	M = 135	

Why it is useful: No Bamboozle allows a party to move the numbers in a bracket without moving the midpoint, thus making a form of progress in the negotiation while emphasizing the party’s desired settlement range.

“The Aggregator”

What it is: When the parties have established a consistent pattern of moves, The Aggregator combines several rounds of moves into one, testing the extent to which the other side is willing to continue the pattern. Imagine a series of offers at mediation establishing a pattern in which the Defendant moves up 3 for every 20 the Plaintiff comes down:

Pattern of offers at mediation

P 400	D 11
D 5	P 340
P 380	D 14
D 8	P 320
P 360	D [?]

When the Defendant proposes a bracket using The Aggregator, the question is, “What would the numbers look like if we continued X-number of times exchanging offers following this pattern?” Here are examples of brackets packaging together 3 such moves, or 5 such moves:

D $\left[\begin{array}{l} 23 \\ 260 \end{array} \right]$ Aggregating 3 moves

D $\left[\begin{array}{l} 29 \\ 220 \end{array} \right]$ Aggregating 5 moves

The Aggregator

- Pattern established where Plaintiff moves 20 for each of Defendant's 3
- Defendant proposes a bracket combining multiple moves following the same pattern

Why it is useful: If nothing else, The Aggregator can save time by condensing several rounds of movement into one. It is also a handy framework for thinking about where the negotiation is headed: if the current pattern continues, in what range do the numbers overlap?

“The Rounder”

What it is: The Rounder is where a party includes a meaningful round number or threshold in a bracket. This may suggest an ability to move past the round number, or a requirement that the other side do so.

$$D \quad \begin{bmatrix} 100 \\ 130 \end{bmatrix} \quad M = 115$$

$$P \quad \begin{bmatrix} 120 \\ 150 \end{bmatrix} \quad M = 135$$

The Rounder

- Can energize the process, or...
- Begin reckoning in the other room

Why it is useful: Humans have evolved to recognize patterns. In negotiations over money, we are naturally drawn to round numbers. Incremental offers are often expressed in round numbers, and we notice when certain numerical thresholds are crossed. Accordingly, the parties frequently send messages about round numbers such as, “The plaintiff needs to understand this is not a six-figure case,” or, “If the defendant can’t get into the 300s, we are just wasting our time.” The Rounder enables the parties to communicate about auspicious thresholds in the negotiation and creates opportunities to mark the passage of milestones along the path to settlement.

“Partial Credit”

What it is: A party gives Partial Credit to a bracket from the other side by adopting either of the proposed numbers, but not both. The party sends back its own bracket with one different number, thus signaling a different settlement range. The message is either, “If you want me to be at X, as you proposed, you’re going to need to get to Y,” or, “If you’re going to be stuck at Y, as you proposed, I’m only willing to go to X.”

$$\begin{array}{l}
 \text{D} \quad \left[\begin{array}{c} 30 \\ 80 \end{array} \right] \quad M = 55 \\
 \text{P} \quad \left[\begin{array}{c} 160 \\ 60 \end{array} \right] \quad M = 110 \\
 \text{D} \quad \left[\begin{array}{c} 60 \\ 65 \end{array} \right] \quad M = 62.5 \\
 \text{P} \quad \left[\begin{array}{c} 150 \\ 60 \end{array} \right] \quad M = 105
 \end{array}$$

Partial Credit

- Parties pick up one number from each others' brackets
- They can give partial credit and they choose to do so

Why it is useful: Partial Credit carries the psychological benefit of acceptance as to one half of a proposed bracket. It signals greater engagement with the other side's proposal than rejecting both numbers would convey, even if the signaled settlement range is the same.

"The Rainbow"

What it is: This is where a party adopts the midpoint of an opponent's bracket as one of the numbers in its own bracket.

$$\begin{array}{l}
 \text{D} \quad \left[\begin{array}{c} 50 \\ 110 \end{array} \right] \quad M = 80 \\
 \text{P} \quad \left[\begin{array}{c} 130 \\ 80 \end{array} \right] \quad M = 105
 \end{array}$$

The Rainbow

- Using your own previous midpoint signals ability to get past it
- Using opponent's signals inability to get to it

Why it is useful: We know the parties in mediation are always looking at midpoints, so The Rainbow presents an opportunity to communicate about numbers that have already been a focus of attention. A party who sends a bracket incorporating its own previous midpoint is saying, "You may have thought I was targeting this number before, but here you can see I am willing to go past it." A party using The Rainbow on its opponent's prior midpoint as its

own number may be saying, “If you are targeting that midpoint, you should know I’m not going to get there.”

“Double Rainbow”

What does it mean? The Double Rainbow is a bracket comprising the midpoints of the most recent brackets proposed by each side.

D	$\begin{bmatrix} 30 \\ 100 \end{bmatrix}$	M = 65
P	$\begin{bmatrix} 150 \\ 70 \end{bmatrix}$	M = 110
D	$\begin{bmatrix} 35 \\ 115 \end{bmatrix}$	M = 75
P	$\begin{bmatrix} 110 \\ 75 \end{bmatrix}$	M = 92.5

Double Rainbow

- Plaintiff’s bracket comprises the midpoints of the two most recent brackets



Why it is useful: The Double Rainbow is so named because, like The Gauntlet, it usually represents a significant positive step toward settlement, often signaling the “midpoint of the midpoints” as an acceptable settlement range.

“Getting Real”

What it is: Getting Real means extending as a firm offer a number that was previously proposed only within in a bracket.

D	$\begin{bmatrix} 60 \\ 100 \end{bmatrix}$	M = 80
P	$\begin{bmatrix} 150 \\ 90 \end{bmatrix}$	M = 120
D	$\begin{bmatrix} 70 \\ 140 \end{bmatrix}$	M = 105
P	150	

Getting Real

- Plaintiff makes a firm offer previously proposed within a bracket
- Parties have communicated about range
- Changes dynamic

Why it is useful: Parties sometimes grow frustrated with a prolonged exchange of brackets, perceiving it as an exercise in hypotheticals. Although genuine progress has been made, this progress is not reflected in the last firm offers on the table. In these moments, it can be helpful if a party “gets real” with a number that was previously discussed only within a bracket. This brings the parties back into firm offers with the benefit of the insights gleaned through bracketology.

“Throwing Down The Gauntlet”

What it is: Accepting a bracket proposed by the other side.

D	$\left[\begin{array}{c} 60 \\ 100 \end{array} \right]$	M = 80	The Gauntlet <ul style="list-style-type: none"> • Plaintiff accepts Defendant’s bracket • Defendant makes the next move • Parties need to address the midpoint
P	$\left[\begin{array}{c} 150 \\ 90 \end{array} \right]$	M = 120	
D	$\left[\begin{array}{c} 70 \\ 140 \end{array} \right]$	M = 105	
P	$\left[\begin{array}{c} 140 \\ 70 \end{array} \right]$	M = 105	

Why it is useful: Accepting a bracket is a signal of progress in the negotiation, representing a significant milestone and positive development. It generates momentum whether or not the midpoint is meant as a signal of the settlement range. Accepting the other side’s bracket usually also puts the ball back in their court to make the next move. The Gauntlet should often be accompanied by a comment about the midpoint, especially if the party’s final range is not in the ballpark of the midpoint.

Bracketology Tips and Mistakes to Avoid

It should go without saying that parties using brackets must always be mindful of the midpoint and consider how it is likely to be perceived. It is generally accepted that if a party remains silent about the midpoint, that party understands its adversary will likely interpret the midpoint as a number that would settle the case. For this reason, it is common to disclaim the midpoint to avoid sending the wrong signal. For example, a party throwing down The

Gauntlet might say, “We will accept the bracket, but it needs to be clear we are not targeting the midpoint. The final number needs to be closer to our number than their number.”

Similarly, according to conventional bracketology etiquette, one always moves the midpoint toward the adversary’s number, allowing the direction of the moves represent progress even if the size of the moves is met with frustration. It is generally regarded as bad form to propose a bracket with a midpoint moving in the other direction. Parties sometimes do this by mistake, which is to be avoided, and those who intend to send a signal with such a move are usually better served by emphasizing the previous midpoint with a round of No Bamboozle.

Bracketology’s Dark Arts

It is often said there is an exception to every rule. Or that rules are made to be broken. As a firm believer that there are many “right ways” to negotiate about money and settle cases, I must admit I have seen brackets used in ways I considered unhelpful at the time, but somehow actually worked.

A lawyer recently suggested to me that he sometimes likes to propose brackets including random numbers that make no sense, just to throw off his opponents and make them wonder what is going on. I reflexively disagreed with this approach, but I can envision situations in which a baffling interlude may create a sense of accomplishment and progress when the negotiation returns to normal and gets back on track.

In one memorable negotiation, I had a defendant use brackets to consistently message a certain settlement range for several hours. The plaintiff reluctantly got into that range, at which point the defendant revealed its true range was significantly lower than the range it had projected all along. I expected the mediation to blow up because of what I considered to be the defendant’s error. However, to my surprise, the plaintiff adjusted, and the case eventually settled in the defendant’s range. In retrospect, I wondered if the defendant had projected its true range early, whether the mediation would have impressed before the plaintiff had an opportunity to adjust her expectations.

I cannot say I specifically endorse any of bracketology's dark arts, but it is undeniable that brackets open all sorts of possibilities, including taking the negotiation in unexpected directions. Changing the dynamic can have salutary effects even if they are unintentional or even detrimental in the moment.

Conclusion

In practice, a negotiation in which many rounds of brackets are exchanged almost never follows a simple path. Usually, several of the above techniques, and more, will come into play, each one representing an opportunity to shape the negotiation's direction and tone. Ideally there will be phases during which the parties narrow the gap in a pattern of corresponding moves. Alternating between firm offers and bracketed proposals, or trying different techniques from the above examples, keeps the conversation going, provides milestones to celebrate, and forces new perspectives on what otherwise could be a dry discussion of numbers. This is why brackets so often factor into the successful resolution of difficult cases.