Settlement Building: What Are *Effective* Techniques that Work to Advance the Ball and Keep it Rolling Forward?

by

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"Ready for your first lesson in conflict resolution?"

Introduction

Facilitating dialogue about settlement is one of the many important services mediators perform, especially since prior to sitting down at mediation, the disputing parties typically were not talking – at least not constructively!

This article starts midstream in the process – *after* the mediation has been convened, everyone needed is in attendance, the session has been opened, and discussion about the problem has occurred. We are not at impasse. We are starting the negotiation phase and are looking at techniques that might help get the negotiation ball rolling or keep it rolling forward once a negotiation dialogue is started.

Getting the Ball Rolling – Who Goes First?

The purpose of mediation is to explore and hopefully find a negotiated resolution everyone can live with. It stands to reason that regardless of anyone's level of experience with mediation, everyone in the room knows in advance that, if all goes well and everyone stays at the table through the initial stages, there is going to be a negotiation. Still, it is not unusual when the mediation progresses to this point that no one wants to make the first move. The following are some techniques to get the ball rolling:

Reading Tea Leaves

It matters whether parties have engaged in negotiations before turning to mediation. If they have, then it matters where they left off. Who made the last offer? What was the other side's response? If the party receiving the last offer did not respond or rejected the offer without a counter or explanation, that is where I am going to start my work to try to get the first offer on the table at mediation. And I'll probably use the age-old expression, "Looks to me like the ball is in your court, let's talk about why the last offer was unacceptable and how you might want to counter for purposes of getting things started today."

Baby Steps

In more complicated matters where there are a lot of moving parts, it is not entirely unreasonable for either side to be reluctant to put the first offer on the table if their view is that the offer has to address all aspects of the dispute. For aggressive bargainers – and I think most attorneys mediating in the context of the litigated dispute are aggressive bargainers – the risk of giving too much away by going first is simply too great. OK! Let's talk about one or two pieces of the puzzle or let's talk about possible frameworks without specific terms to see if that type of discussion will help the parties get to the point of putting specific proposals on the table. I really like this technique because (a) it works, (b) it leaves the parties and their attorneys in control of both the process and the outcome, and (c) it facilitates parties making in-game adjustments away from the (unrealistic) settlement goals they defined pre-mediation.

Roadmap

In a strictly money negotiation, sometimes people come to mediation with a settlement goal in terms of the settlement amount they are willing to pay or accept, but without a plan on how to get there. *If* they are willing to share that settlement goal with us, we can talk with them about how to develop a multi-step plan to get there. For example, if the demand in the complaint is $100,000, but the plaintiff tells you he / she would settle for half that amount, we can open the door to getting the first demand on the table by helping plaintiff plan on how to negotiate to his or her number. The following illustrates possible "moves" – including an opening demand – dividing the $50,000 delta between $100,000 and $50,000 by eight (resulting in increments of $6,250):

_____	$100,000	_____
_____	$93,750	_____
_____	$87,500	_____
_____	$81,250	_____
_____	$75,000	_____
_____	$68,750	_____
_____	$62,500	_____
_____	$56,250	_____
_____	$50,000	_____

It doesn't matter whether the plaintiff adopts or uses the illustration – most do not. The point is to open the door to getting the plaintiff thinking about how to approach negotiating to his / her settlement number goal. Like "baby steps" – discussed above – this technique takes some time to utilize, but it typically gets the ball rolling in terms of getting that first offer or demand on the table.

Anchoring

We can have a discussion with one or both parties about why they might want to give serious consideration to making the first offer so as to receive the benefits of the "anchoring" effect – namely, the influence the first offer has on the value of that which is under discussion. Significant research has been done that indicates that the first number proposed that is not absurdly high (from a defendant's point of view) or absurdly low (from a plaintiff's point of view), will set the zone of bargaining, and the final number will usually fall mid-way between the two "reasonable" extremes. Stated another way, once an anchor is dropped, subsequent judgments are made by adjusting around that anchor, and there is a natural bias toward interpreting other information through the lens of that original bid or ask. A deliberate (i.e., thought out) starting point can affect the range of possible counter-offers and, thus, define the bargaining zone. Moreover, research shows that in situations of great ambiguity, complexity and/or uncertainty, the anchoring effect is even stronger in terms of the influence it has on the rest of the negotiation. For more information on using anchoring to persuade a party to make the first move, see "The Advantages of Moving First in a Mediation," by the Honorable Jay C. Gandhi (Daily Journal, Sep. 27, 2013) (copy attached).

As mediators, our challenge is to counter long-entrenched beliefs that cause parties to resist making the first offer: (1) the number may be too high, in which case the other side will immediately accept it, (2) the number may be too low, in which case the other side will be insulted and immediately reject without a counter, and (3) they lose the opportunity to assess the other side's first offer (i.e., value of the case).

Our other challenge is to work with the parties / work with what we've learned during the initial phases of the mediation to help the first offeror – whichever side it comes from - find that right (mediator approved) first number so that the offer does not halt the process in its tracks. This may require a bit of acting on our part to derail the "insulting" opening offer or demand. We give the offering party the satisfaction of being insulting without going through the motions of carrying the insult to the other side. For example: "Wow! That's a really [high / low] number! [Pause] What message are you intending to send to the other side? How do you think the other side is going to react to that number? If the other side counters at the opposite extreme – as you anticipate – what's your next move? Should we do a little more work on that first offer number?"

Early Brackets

While bracketing is an impasse breaking technique, among sophisticated negotiators, "early brackets" can be used to get the first offer – or set of offers – on the table.

A bracket is simply a conditional offer that proposes that if the other side starts at "X," the offering party will start at "Y," with neither side agreeing to accept the other's number or even their own. The object of the exercise is to find and agree on a negotiating range at the outset. This type of bargaining takes a little bit of the mystery and suspense out of carrying those initial offers between the two rooms, but it can work to get things started. For example:

"If the other side is willing to start at "X," would you be willing to start at "Y?"

"Will you start at "X," if the other side agrees to start at "Y?"

"What is the range within which you are willing to start the negotiations?"

Brackets can be an effective negotiating tool / technique in the early stages of getting the negotiation started because, by exchanging a round of proposed brackets (negotiation ranges), the parties are able to signal where they are heading without actually saying so. Brackets also communicate helpful information at the start about the parties' respective expectations – again, without them actually expressing those expectations in messages carried between the rooms by the mediator. For more information on using brackets, see "Overcoming Impasse at Mediation: Bargaining with Brackets," by Michael D. Young and Marc E. Isserles (New York Law Journal, Feb. 8, 2016) (copy attached).

Keeping the Ball Rolling – Negotiations in Progress

Frequently, much of what we hear from the parties and their counsel in the pre-mediation briefs and initial discussions at mediation concerns the perceived legal merits of the case – basically, each side arguing to the mediator why it believes it will win if the court is left to decide the outcome. Against this backdrop, it certainly looks like the parties and their counsel want an evaluative opinion from the mediator about who is "right" and who is "wrong," *and* want that "opinion" during the negotiation phase to help move the other side. Any experienced mediator knows that expressing an opinion for one side or the other probably will not advance the ball because, while one side might like the mediator's opinion, the other side won't and that side may then question the mediator's impartiality, the integrity of the process or the value of continuing with the mediation after the mediator has weighed in against them.

That being said, mediators are not potted plants. We typically have decades of litigation and/or subject matter experience. It is thus unrealistic to expect that we will not have some impression about the strengths, weaknesses, merits and demerits of a dispute and its likely outcome. This article suggests some ways in which mediators can coach the negotiation process

along using both analytical and non-analytical input that falls short of expressing an opinion or directive while, at the same time, helping to keep the ball rolling in a way that allows us to be like Switzerland - friend to all / ally of none.

Analytical Techniques

Analytical techniques are techniques used to broaden and direct the settlement discussions without overtly saying "I think X, so you should do / offer / accept "Y." We use these techniques intentionally for the strategic purpose of moving the negotiations in a way that will help the parties succeed in finding a negotiated resolution to their dispute. In the typical mediation, the parties have come to mediation hoping to achieve opposite results: E.g., the other side owes and should voluntarily give me X; the other side is wrong and should walk away from its claim / demand for X.

Many times, parties seek these opposite outcomes against relatively undisputed facts in terms of what happened to cause the problem that led to the litigation. The reality is that in order to get a deal done, *both* sides will have to move and, to achieve sufficient movement, both sides will need to make adjustments off of the positions / settlement goals they defined in advance of the mediation. The following are techniques used to help the parties to take a closer or broader look, and to allow them the opportunity to make their own in-game adjustments.

Questioning is probably the most powerful tool in our arsenal because when analytical thoughts or comments are phrased n open or non-combative questions, they are received more favorably than direct statements, which means they invite discussion. Examples:

What about …?

May I ask what you are relying on when you say "X"…?

Do you mind pausing for a moment and walking me through your reasoning with regard to "X"….?

Could you walk me through what it is that leads you to conclude "X"…?

How do you think a (judge / jury) might evaluate / understand / react to factor "X"?

What if "X" changes or turns out not to be as projected …?

Have you considered "X" …?

Observations are also powerful tools at this stage of the mediation process because, presumably, we have developed some level of rapport with the parties so that they place a value on hearing our observations or comments. As demonstrated by the examples set forth below, it is important to couple our observations with a question that invites the parties' input – invites them to think about and consider something new or something that was missing from their analysis, *and* to have a discussion about it. Examples:

> One concern I have is "X." What do you think about that?
>
> Based on what we've been discussing, I think it's possible that a (judge / jury) could go in a direction neither party has considered. What do you think about that?
>
> It would appear that what's at the heart of this dispute is "X." What do you think about that?

Brainstorming in the context of possible frameworks and/or options for discussing settlement. This technique uses questioning – open and closed - but the questioning is focused on settlement frameworks and / or terms. Examples:

> What do you think about ….?
>
> What would you like to see as a settlement structure? As settlement terms?
>
> Would you be interested in talking a settlement structure that looked like ….?
>
> Would you be willing to consider a settlement that included ….?
>
> With regard to the other side's proposed settlement / settlement structure, what would need to be included for that to be of interest to you …?

Ask for Reasons behind any proposal, rejection of a proposal, counter-proposal. E.g., objectively verifiable facts, acknowledged facts, binding legal precedent, the parties' circumstances, reality factors that have been put on the table, burdens of proof at trial, prima facie elements to establish a claim or defense, etc. This technique works <u>equally</u> around the table. First time through, it can be somewhat challenging to the party being asked to explain or justify its proposal, rejection of a proposal, counter-proposal, but this is the type of discussion that promotes constructive dialogue *about settlement*. Examples:

> I understand that you find the other side's offer unacceptable, but can you give me some of the reasons why and, in turn, can you tell me what it is you think the other side should be offering? And what are you willing to counter and why?

Before I carry your offer to the other room, can you walk me through the components and how you justify your proposed number / terms? Because I'm sure the other side is going to ask.

In support of its offer, the other side has explained "X," what do you think about that?

Non-Analytical Techniques

It can be challenging to be persistent but not pushy, engaging but not off-putting, forceful but not controlling, etc. Blending *non*-analytical techniques with analytical ones can help.

Visuals. They say that a picture is worth a thousand words. Using pictures, graphs, charts and diagrams are a very effective and efficient means of advancing the discussion from talking about the problem to talking about the solution. Examples:

A jointly created spreadsheet that charts and compares different settlement scenarios based upon the parties' respective proposals and counter-proposals gets everyone working and contributing towards the same thing. It also captures and uses shared information, and facilitates having everyone look at the same thing at the same time. *Handout.*

A chart or diagram can communicate "reality" in a way that might be more easily understood and thus incorporated into the discussion about how to solve "the problem." *Handout*.

Silence. A moment of silence can be effective because, for one thing, it allows parties' brains to catch up. When parties have to make seismic shifts away from their pre-mediation positions and are called upon to do so during the heat of a negotiation, there may come a time when silence or taking a break is what is necessary to keep the negotiations moving forward.

"Yes and." There is a fun little exercise that Jeff Krivis designed to demonstrate how using the words "yes and" keeps the discussion moving down the same path as the speaker's original thought, whereas using the words "yes but" takes the discussion in a different direction. Our tendency is to interject with "yes but." However, if our goal is to help the parties figure the answer out on their own, "yes and" is more facilitative in terms of moving the discussion / speaker's thoughts forward. This is especially important when using "brainstorming" and "ask for reasons," discussed above.

Candid Discussion. This is simply asking the parties – putting aside all the legal mumbo jumbo – what it is that they want or hope to accomplish via a settlement today so as to avoid the risk and expense of litigation tomorrow. For example, "What is it you really want or need?" This is not analytical because there is no substantive content in the question that is interjected by the mediator.

Redirect the Discussion. When parties get stuck in an unhealthy spiral, redirecting the discussion to another place might be what's necessary to keep the discussions going and avoid impasse. This is a close-cousin to "silence" and "take a break," discussed above. For example, "If you don't mind, I'd like to revisit "X" for a moment.

ABA Report on the Quality of Mediation

In 2006, the Dispute Resolution Section of the ABA formed a task force to evaluate issues regarding the quality of mediation and what consumers of mediation want from their mediators. According to the report of that study:

- 80% believed that some analytical input by a mediator was helpful
- 93% rated mediator patience as being important to the process
- 95% believed that mediator suggestions were helpful
- 98% said that mediator persistence was important to them
- 50% agreed that mediator comments such as "I think this is the best offer you're going to get" were inappropriate.
- 50% objected to mediators telling them what to do by saying such things as "You should accept this offer because it's the best offer you're going to see" or "If I were you, I'd offer _____ and be done with it."

www.abanet.org/dispute/documents/FinalTaskForceMediation.pdf.

The results of the ABA Report seem to say that parties want mediators who are engaged in the process and who are willing to work hard to help them resolve the dispute. That being said, it also seems to say that the kind of help parties want from the mediator does not include being told what to do in the form of a mediator opinion or directive; that what they really want is help in navigating the steps necessary for *them* to figure out the solution to the problem; that they do not want to simply be told "the answer." *Translation:* we as mediators need to be mindful about how our audience might perceive our intervention strategies, especially as relates to our analytical (opinion) input. After all, it is not about what *we* want or think is the right / best / fair / appropriate outcome. It's what *they* want because they have to live with the

consequences of their decision to do a deal or not. Our job is to make sure that they fully vet / consider / take advantage of the settlement opportunity as it exists on mediation day.

Conclusion

For me, there are axioms – i.e., self-evident truths – that should guide us when weighing in to influence the parties' negotiations:

Axiom #1: A dispute belongs to the parties who created it.

Axiom #2: The parties most directly affected by a dispute – given the right circumstances – are the ones who are best able to resolve it. Therefore, the best resolution is likely to flow from the parties themselves.

Axiom #3: The two most powerful warriors are patience and time.

Axiom #4: All dispute end sometime.

Axiom #5: Mediation and our approach to mediation is not "one size fits all." We have to customize it for the parties and attorneys and circumstances as they are presented on mediation day.

ATTACHMENTS

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PERSPECTIVE

The advantages of moving first in a mediation

By Hon. Jay C. Gandhi

Often no one wants to make the first move at a mediation. It is a recurrent theme in many mediations and across the legal spectrum — business cases, intellectual property infringement suits, single plaintiff or class actions:

"You go first."

"No, you go first."

Why wait? Most people instinctively believe that they gain insight into the other side's bargaining position. It is a sneak preview, so to speak. But psychological research belies this conventional wisdom. Clinical studies demonstrate that a first-mover gains the following advantages in a negotiation: "anchoring," control and flexibility.

One of the more notable advantages is the "anchoring" effect of a first offer. The first number that enters the negotiation environment dramatically influences our value judgments. People have a tendency to use the value of the first offer to estimate the true value of an item or service up for negotiation and to adjust insufficiently from this anchor. And, a first offer maintains its strong gravitational pull throughout the negotiation process. As Adam Galinsky, a professor of management at Columbia Business School, pointed out in his study, "[e]ven when people know that a particular anchor should not influence their judgments, they are often incapable of resisting its influence" and "[a]s a result, they insufficiently adjust their valuations away from the anchor."

Now, most lawyers think that they would not fall victim to such mental inducement. "These are not the droids that you are looking for," to steal from Obi-Wan Kenobi. Yet, research shows that sophisticated parties are not immune from this human behavioral phenomenon. Let's turn to the research of Greg Northcraft and Margaret Neale. They researched the effects of perception and anchor points in the context of real estate negotiations.

Real estate agents, whom were experienced in pricing properties, were given identical information about properties and amenities. Yet, opening offers were selected at random from a group of four offers: $119,000, $129,000, $139,000 and $149,000. Agents studied the listing information and evaluated the properties after touring the homes for 20 minutes. Invariably, the real estate agents denied being influenced by the initial price, but those agents who received a greater initial offer gave the homes higher appraisals.

Most people instinctively believe that they gain insight into the other side's bargaining position. It is a sneak preview, so to speak. But psychological research belies this conventional wisdom.

In short, once an anchor is dropped, subsequent judgments are made by adjusting around that anchor, and there is a natural bias toward interpreting other information through the lens of that original bid or ask. Anecdotally, how many times in a mediation have you referenced where the plaintiff or defendant started? In this way, a deliberate starting point can affect the range of possible counteroffers and, thus, define the bargaining zone and the range of possible agreements.

First-mover advantages do not end there. Another advantage is to set the tone and control the discussion. Numbers send messages. One of the more important messages to communicate in the negotiation process is confidence. Those who lack confidence, due to an insecurity in their own pricing of the case, or unfamiliarity with the facts or the law, or some other reason, are typically disinclined to make a first offer. In so doing, they invite doubt into their positions. Calculating opponents often sense these vulnerabilities and attempt to take advantage of them. Unsurprisingly, the studies indicate that control and credibility ordinarily lead to better results in a negotiation.

A further advantage of moving first is flexibility. Settlement negotiations are dynamic, fluid processes. The first offer and the first counteroffer rarely resolve the matter. It's chess, not checkers. A reasonably aggressive offer from the start may provide leeway down the road for making concessions. And in settlement negotiations, sometimes one argument is the number and size of the concessions you "let"' an opponent extract from you; a sizeable move by one side may typically cause the other side to reciprocate, at least in some measure.

Granted, for every rule, there's an exception, or two or three, and here come a few of them. Not all first offers are created equal. Think Dr. Evil demanding one million dollars, and don't forget the pinky. The worst first offers are those that are far outside the reasonable bargaining zone. They are commonly ignored by the recipient or mirrored "tit for tat" in a counteroffer. Neither is productive. First offers should be carefully calibrated, and designed to draw out a solid counteroffer. Negotiators who aim too high on their optimal price risk regret. Without ever realizing it, they reject even the possibility of a profitable agreement. They do not even discover what could have been. Simple and well known, but too oft forgotten, it is more prudent to focus on a sound and sensible target price and make an aggressive offer, but be willing to compromise and still obtain a gainful deal, or at least learn that some type of deal is available, whether you ultimately accept or not.

Making the first move could be imprudent for other reasons. For instance, the psychological profile of your client may call that you wait for the first offer. Some people develop anxieties if mediations resolve too quickly, even if they get most of what they desired. These people might feel that they have been deceived in some way. In emotionally charged cases, which can include certain commercial litigation, some clients just need a long dance of blustering and bluffing for cathartic purposes. In these instances, the priority lies in keeping the settlement dialogue alive, as opposed to the exchange of specific dollar values.

In the end, and without further movie references, it is axiomatic that each negotiation should be tailored to the particular facts and parties of a case. Trite but true, never say never, and always avoid always. But the tactical benefits of making the first offer are plain indeed. You define the field. You control the process. You exhibit confidence. You proactively take charge of the negotiation. So, at your next mediation, you may want to rethink about shying away from making the first move. Perhaps, you should welcome that opportunity, and strive to capitalize on first-mover advantages.

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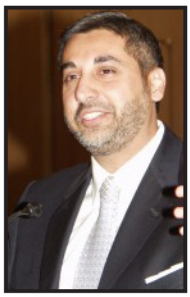

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Expert Analysis

Overcoming Impasse at Mediation: Bargaining with Brackets

By **Michael D. Young**

And **Marc E. Isserles**

Imagine this familiar mediation scenario: Plaintiff makes an initial demand of $2 million. Defendant counters with $50,000, to which plaintiff responds by moving to $1.6 million. Defendant then moves to $95,000, and plaintiff responds with $1.4 million. It is now 3 p.m. After six hours of negotiating, the parties are tired and frustrated and appear to be at an impasse.

Plaintiff thinks it has shown flexibility and a willingness to compromise, and is disappointed that defendant will not put "real money" on the table. Defendant, however, sees the negotiation quite differently. It thinks the $2 million demand was "completely unrealistic," and that plaintiff's movement to $1.4 million, which is still "way too high," shows only that plaintiff is "unwilling to accept reality." Defendant, after much prodding from the mediator, reluctantly agrees to move to $125,000 but says that, if plaintiff does not respond with a "legitimate number," the mediation is over. Upon hearing defendant's last move, plaintiff tells the mediator it is time to call it quits.

What can be done? The parties have told the mediator privately that they have significant room to negotiate; however, neither side is willing to make a significant move because of the perception that the other side has not moved far enough. And because the gap is so large, both sides believe it would be pointless to continue making small moves. The parties find themselves with a sizable gap yet seemingly no way to bridge it.

In this situation, the mediator might suggest a number of tools to help break the impasse. One of the most effective negotiation tools available to the mediator and the parties is a "bracket." A "bracket" 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.

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In the scenario laid out above, plaintiff could respond to defendant's last offer by saying, just by way of example: "We will come down to $800,000, if defendant agrees to go to $350,000." Defendant may choose to accept the proposed bracket, in which case the parties would negotiate within that range. More likely, defendant would offer a "counter-bracket" proposing a different negotiation range. For example, defendant might say: "We reject your bracket. But we will come up to $250,000 if you will come down to $400,000." Typically, when parties agree to bargain with brackets, they will trade proposed brackets and counter-brackets for at least several rounds of negotiation with the aim of moving closer to a mutually agreeable negotiation range.

> Brackets can help parties shift attention from disappointment with the other side's proposals and toward their own negotiating objectives.

Effective Tool

There are five reasons why bracketing is such an effective tool for breaking impasse.

1. Communicating Signals About Where a Party Is Heading. Proposals that take the form of an unconditional number typically provide very little information beyond the number itself. Limited to such proposals, the parties in our scenario lack a tool for communicating signals about where they might be heading and how far apart they actually are from each other. A bracket provides that tool.

By exchanging one round of brackets, our hypothetical parties have communicated, at a minimum, that plaintiff would accept $800,000 and defendant would pay $250,000. That might not be enough information to settle the case. But it is valuable information—which the parties might never have received without bracketing—that could break the logjam.

A bracket also communicates helpful information about the parties' expectations. Bargaining without brackets can involve a fair amount of guesswork. A party may think it is making a significant move but then learn its counterpart was expecting much more, leading to frustration and disappointment on both sides. However, when our plaintiff offers a bracket with a lower end of $350,000, it is clearly communicating: "We think $350,000, although not enough to settle the case, is a reasonable next move for defendant to make." That information helps defendant formulate an offer that will have predictable consequences—the closer defendant is to $350,000 on its next move, the more likely plaintiff will react positively. The same holds true for defendant's counter-bracket: it sends the message that plaintiff must come below $400,000 to be in what defendant regards as a "reasonable" settlement range. In this way, brackets help reduce the guesswork and resulting misunderstandings that can derail a mediation.

Finally, a bracket communicates useful data about the potential significance of a party's "midpoint." In our hypothetical, the midpoint of plaintiff's $800,000-$350,000 bracket is $575,000; the midpoint of defendant's $250,000-$400,000 bracket is $325,000. The party offering a bracket might be signaling a potential settlement at the midpoint. Sometimes parties say that expressly, for example: "The midpoint of our bracket is

meaningful." But the party offering a bracket may not be willing (at least not yet) to go to the midpoint, and so might deliver a very different message with the bracket: "Do not interpret this bracket as a signal that we will take (or offer) the midpoint; we won't!"

As with any message in a negotiation, statements about the midpoint should be taken with a grain of salt. Indeed, because bracketing is typically a multi-round process, the midpoints of the parties' brackets tend to move closer together over time. And regardless of what a party says about the midpoint's significance, it ultimately may be willing to go past the midpoint of an early bracket to get a deal done. At the same time, the midpoint of any given bracketed proposal remains a useful data point because it gives the recipient some idea of where the offering party might be prepared to go.

2. Shifting Focus. Brackets can help parties shift attention from disappointment with the other side's proposals and toward their own negotiating objectives. When parties fixate on the size of the other side's movement, they tend to get trapped in a vicious cycle of "tit for tat," reactive bidding in which the moves, and the chances for resolution, get increasingly smaller.

The exercise of constructing a bracket helps parties break free from that counterproductive dynamic and strike a positive, constructive tone. By offering a bracket, a party in effect says: "What really matters is not the size of the moves so far, but the number that can settle this case. Here is a bracket defining what we think is a reasonable negotiation range."

3. Encouraging Significant Moves. Because a bracket is a conditional ("if, then") proposal, it provides a kind of protection that tends to encourage "significant" moves. A party contemplating a significant, unconditional move will typically worry about what happens if the other side refuses to reciprocate with a significant move. It might be concerned about "running out of room," "signaling weakness," or having the number used against it (setting a "floor" or "ceiling") in future negotiations. These concerns, while valid, tend to eclipse all other considerations and limit a party to making small moves, which may not be the most effective strategy.

The conditional nature of a bracket allows parties to "test" or signal a significant move without actually making one. If a proposed bracket is rejected, the numbers in that bracket, at least formally, cannot later be used against the offering party. This provides a kind of "protection" that helps spur significant movement. By bracketing $800,000 with a demand that defendant come up to $350,000, plaintiff can signal a dramatic movement—dropping from $1.4 million to $800,000 in one move—without jeopardizing its bargaining position. The same holds true for defendant's counter-bracket: It allows defendant to signal a substantial move (doubling its offer from $125,000 to $250,000) without making a firm commitment to settle at that amount.

4. Generating Momentum. By encouraging significant moves, bracketing tends to create a positive negotiating atmosphere and the possibility of a "domino effect" of significant movement. Because brackets tend to represent significant movement, they tend to be interpreted as a signal that the offering party is "serious" about settlement. And although parties worry about making large moves that go unreciprocated, large moves frequently induce large moves by one's counterpart.

The conditional nature of a bracket allows parties to "test" or signal a significant move without actually making one. If a proposed bracket is rejected, the numbers in that bracket, at least formally, cannot later be used against the offering party. This provides a kind of "protection" that helps spur significant movement.

When our plaintiff proposes a bracket in which it offers to move all the way to $800,000 (albeit with a condition), defendant is likely to interpret that proposal as significant movement. That can trigger a reciprocal response from defendant, which is likely to be interpreted as significant by plaintiff. For example, even though our defendant rejected plaintiff's bracket, plaintiff is nonetheless likely to respond positively to a counter-bracket in which the bottom number is twice the amount of, and $125,000 more than, defendant's last unconditional offer. After trading a series of significant, bracketed moves like these, the parties would likely experience a sense of real progress and negotiating momentum that could be instrumental in settling the case.

5. Keeping Negotiators at the Table. Brackets work because they often keep parties negotiating until they are ready to signal or reveal their true bottom lines. Parties typically will not (and indeed should not) reveal their best numbers when a settlement seems out of reach. By the time our hypothetical mediation threatens to fall apart, it is probably too late in the day to continue to exchange unconditional numbers productively, yet far too early in the day for the parties to reveal to each other "best and final" numbers.

Bracketing works as a kind of bridge that helps carry negotiators far enough toward the other side, and far enough into the negotiating process, that they are prepared to reveal their cards and see whether resolution is possible. It serves the very practical function of keeping parties at the table when further bargaining seems, but is not in fact, hopeless.

Timing

A final word about timing. Parties sometimes express reluctance to use brackets "too soon." Because a bracket is neither a firm commitment from plaintiff to settle, nor "real money" from defendant, parties may not experience a sense of actual progress until they exchange a few rounds of unconditional numbers. However, we have also seen brackets used effectively during the early stages of negotiations that could not have otherwise gotten off the ground. In our view, it is never "too soon" to consider brackets—at least if the negotiation might end without them.

When is the right time to stop using brackets? After a certain point, an exchange of "if, then" brackets and counter-brackets can take on a kind of surreal quality, and one or both of the parties, or the mediator, might propose reverting to actual dollars. This usually happens when the parties have made enough progress narrowing the gap with brackets, and moving the midpoints of those brackets closer together, that they are optimistic about getting a deal done. Indeed, the very idea of shifting from brackets back to unconditional numbers is often a signal that brackets have done their job and carried the parties far enough along that they are prepared to make the final push toward settlement.

Conclusion

Mediation negotiations tend to bog down in familiar ways when limited to a traditional exchange of unconditional numbers. Bracketing is a highly effective negotiating tool for breaking that impasse. Brackets are not for everyone, and negotiators may have strategic reasons for deciding not to use them in a particular mediation. But we would encourage negotiators to consider the many upsides to bracketing before rejecting what is, in our view, an indispensable tool in the negotiator's, as well as the mediator's, toolbox.

VISUAL AID EXAMPLE NO. 1

This case involved a dispute between the Assignment-for-Benefit-of-Creditors Estate and Newco, the entity that purchased substantially all assets of Oldco, concerning ownership of an unscheduled asset: namely, a class action recovery that was potentially worth as much as $15 million.

The parties had spent a fair amount of money on the litigation and both agreed that the class action recovery was probably worth at least $1.5 million. And both were willing to split that recovery 50/50 to reimburse themselves for their out-of-pocket legal expenses.

Where they got stuck was on how to divide any recovery in excess of $1.5 million. And they had traded various proposals based simply on how to divide up anything over $1.5 million.

What helped them work through impasse was division of the potential recovery into tranches. They then exchanged a first round of proposals – set forth below – and that helped them see that they weren't that far apart.

The then put an Excel sheet up on a screen and fiddled with percentages and additional tranches and worked everything out, but it was the first visual that got them going.

	NEWCO PROPOSAL				**OLDCO ESTATE PROPOSAL**			
	Newco		**Estate**		**Newco**		**Estate**	
	%	Amount	%	Amount	%	Amount	%	Amount
$0 to $1.5 Million	50%	750,000	50%	750,000	50%	750,000	50%	750,000
$1.5 to $4.5 Million	70%	2,100,000	30%	900,000	25%	750,000	75%	2,250,000
$4.5 to $7.5 Million	60%	1,800,000	40%	1,200,000	45%	1,350,000	55%	1,650,000
$7.5 to $10.5 Million	50%	1,500,000	50%	1,500,000	60%	1,500,000	40%	1,500,000
$10.5 to $15 Million	60%	2,700,000	40%	1,800,000	70%	3,150,000	30%	1,350,000
		8,850,000		6,150,000		7,500,000		7,500,000

VISUAL AID EXAMPLE NO. 2

This case involved a dispute between three siblings over the division of Mom's estate after she died. With the exception of sentimental objects, the only asset with any value was Mom's house. The eldest daughter had been Mom's caretaker for the last 5 years of her life and had lived in the house with her. She of course wanted to continue living there, but did not have the financial means to cash out her brother or sister. The brother was a man of means. The youngest sister was semi-retired and living on a fixed income. Much of the mediation involved a lot of venting about what the other had or had not done to take care of the house, to take care of Mom, etc. Ultimately, their collective reality was that they needed to move to the present and talk about how to divide an asset that was not easily divisible into three equal parts, as provided in Mom's will.

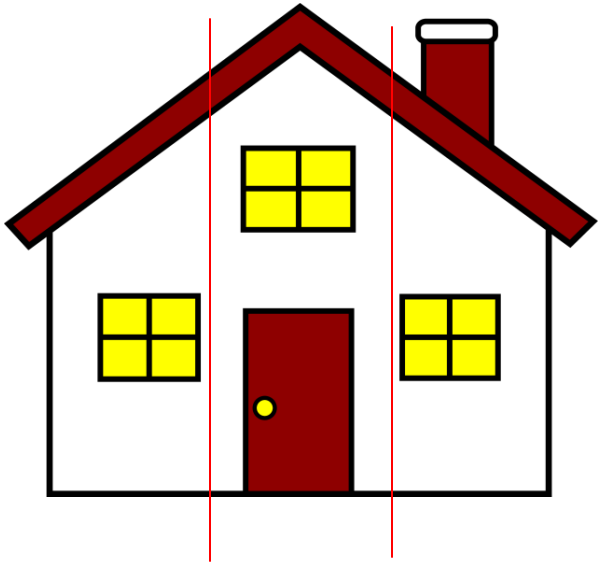
Bank Account w/$600,000

Sister #1 / $200K

Sister #2 / $200K

Brother / $200K

House Worth $600,000



How do you divide a house into 3 equal parts in a way that makes any sense?