Demystifying Brackets at Mediation ©E. Scott Douglas 2016

I think of Brackets as the “Plan B” of settlement negotiations. They can be confusing to many, partly because they involve math, but also because brackets can be used in a number of different ways. Used properly, they can be very effective tools in avoiding impasse and keeping the parties negotiating.

Assume the mediation has already progressed through the initial stages and the parties are ready to start trading numbers. Typically, negotiations start with a demand by the Claimant, followed by an offer from the Respondents, followed by counter-demand, followed by a counter-offer. If these negotiations are yielding results there is often no need to change course, and this back and forth may lead to agreed upon settlement terms without interference.

However, the standard back and forth approach often fails and the mediator is called upon to come up with a Plan B.

The path to Impasse often starts with Claimant/plaintiff making an initial demand that the Respondent/defendant believes is too high, compelling the Respondent to respond in like kind. In order to send a message of displeasure, the Respondent opens with an insulting opening offer. If the Claimant makes a meaningful move, order is restored. But often the Claimant does not take kindly to the insult, and responds with a middle finger counter. The negotiations predictably come off the rails.

Here is how it might look in a typical scenario.

1. Opening demand $750,000 Opening Offer $10,000
2. Counter $740,000 Response $15,000
3. Counter $735,000 Response $16,000

Clearly, these negotiations are going nowhere. From his private caucuses, the mediator assesses correctly that both parties are willing to make a meaningful move, but neither will take the first step. Each side fears a substantial move on their part will not be reciprocated. While there are many tools used by mediators to avoid impasse, this article discusses the use of Brackets.

What is a Bracket?

A Bracket, as I would define it, is a *conditional offer to make a move of a defined amount in exchange for the other side making a corresponding move*. The idea is to demonstrate the willingness to make a significant move while avoiding the risk of the other side not reciprocating.

Ignoring the facts and focusing only on the numbers, assume the Claimant’s settlement target is $200,000 -$250,000. Claimant is willing to make a large move but only if he sees significant movement by Respondents. The mediator suggests a Bracket. “If I could get the Respondent to make a significant jump, say to $100,000, would you be willing to make a substantial move as well?”

***Caution!*** *It is critical to the process that the mediator and the parties are all on the same page and using*

*the same methodology. Some parties treat the bottom or top number as the most relevant part of the bracket. Others, including myself, prefer to utilize the midpoint of the bracketed numbers as most meaningful. It is crucial to carefully explain how the brackets are being used and give examples of how the negotiations may play out so no one is surprised.*

After some discussion, the Claimant agrees to move to **$500,000** if the Respondent will come to **$100,000**. The mediator explains that the midpoint (**$300,000**) carries the message of a “soft target” to the opposition. He further explains that the Respondents will rarely accept the bracket being offered, but will typically counter with their own bracket with their own midpoint.

**Opening Bracket [$500,000 -- $100,000]**

**V**

**$300,000**

**Respondents** in this hypothetical are agreeable to come up to **$100,000**, but only if the Claimant comes to **$300,000**. The message they wish to convey is that they are targeting **$200,000**.

**Counter Bracket [$100,000 -- $300,000]**

**V**

**$200,000**

Both sides must understand and anticipate that the message being communicated by the midpoint of their bracket is not likely to be accepted by the other side, but is a step in the negotiation. It will almost invariably be countered by another bracket with a different midpoint. In this simplistic scenario, we have a **$300,000** midpoint presented by the Claimant, and a **$200,000** midpoint shown by the Respondents.

Depending on the parties and the course of the negotiations, further brackets may be helpful in defining a midpoint of midpoints. At some point, the objective is to **formalize the midpoints** so the parties are no longer speaking in hypothetical offers and demands.

In this simplistic example, assume the parties agree to formalize the above midpoints. The negotiations would then resume between $200,000 and $300,000, with no commitment to meet in the middle. One side may stop at $295,000 and the other at $205,000. More often, negotiations move toward a more centralized number and the deal gets done.

A couple of important observations should be made. If the bracket and corresponding midpoint presented by either side is not seen as reasonable, they may not get a counter bracket. If a counter bracket is not seen as reasonable, the opponent may not agree to formalize the midpoints, which means that other impasse breaking tools are required to keep the negotiations moving.

Used properly and strategically, brackets can be powerful negotiating tools. The more often you use brackets, the more effective you will be at knowing when and how best to use them to get the best settlements for your clients.

E. Scott Douglas has been a full-time mediator since 1997, and has successfully mediated more than 2500 cases. Additional information and articles can be found at [www.douglasmediation.com](http://www.douglasmediation.com).