New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 255—NO. 25
MONDAY, FEBRUARY 8, 2016

Outside Counsel

Expert Analysis

Overcoming Impasse at Mediation: Bargaining with Brackets

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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.

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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.

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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.