

## THE WHAT, WHEN, WHY & HOW OF BRACKETING

1. WHAT: Brackets are a tool that can be useful in mediation.
  
2. WHEN: Mediator should raise use at an appropriate time. Not appropriate for all cases.
  
3. WHY: A way to deliver a message. Useful to help narrow gap. Object is to establish ZOPA.  
Can help to break impasse.
  
4. HOW:
  - a. Conditional Offer – if you go to “X” I’ll go to “Y”.
  - b. Three possible responses:
    - (1) Decline bracket and respond with a number;
    - (2) Accept bracket and next move is the side that proposed bracket;
    - (3) Decline bracket and offer counter bracket.
  - c. Recommend always give a number response to the last proposal even if proposing bracket.
  - d. Either party can be the first to make a bracket proposal.
  - e. Always consider the mid-point. With counter brackets consider the mid-point of the mid-points.

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Plaintiff's opening demand was \$350,000 and Defendant offered \$10,000. After 3 hours Plaintiff's demand is down to \$300,000 and Defendant offers \$25,000. Not making significant progress. Plaintiff says won't take less than 6 figures and Defendant argues this is not a 6 figure case. ( \$275,00 difference & \$162,500 mid-point)

Example one: Plaintiff demand + bracket:

\$280,000 - If Defendant goes to \$100,000, Plaintiff will go to \$200,000,  
(mid-point \$150,000)

Example two: Defendant rejects bracket, offer + counter-bracket:

\$ 20,000 - If Plaintiff goes \$180,000, Defendant will go to \$50,000,  
(mid-point \$115,000)

What should mediator be looking at? The mid-point of the mid-points,

$$(\$150,000 + \$115,000 = \$265,000/2 = \$132,500)$$