The Mediator’s Toolbox: Negotiation Brackets and The Mediator’s Proposal

By Larry Rute

Introduction

Mediators, whether commercial, civil, public policy or domestic, draw on a range of techniques developed through training and experience—reflecting and reframing positions, reality-testing assumptions, managing the parties’ emotions and expectations, negotiation coaching, and providing practical risk analysis. Commercial mediation is unique, however, in that settlement is expressed almost solely as a dollar amount achieved through distributive bargaining. The private caucuses or the joint opening group session will often set the tone for the rest of the process. Either typically begins with a focused discussion between the mediator and the parties to clarify the key facts and timeline that led to the dispute.

The value of money may differ widely between the parties, based in part on risk analysis, coupled with how much one party is able or willing to pay versus what the other party is willing to accept. Monetary settlements may be based on a number of factors, not least of which may be financial security, personal respect and pride, as well as a sense of fairness and justice in the outcome. Therefore, the tools in the mediator’s toolbox must be more surgical and precise. Two of the tools we will discuss below are the availability of monetary brackets and the powerful mediator’s proposal.

Monetary Brackets and The Mediator’s Proposal

Several months ago, I was presented with an employment discrimination case in which the plaintiff had filed a Complaint in Federal District Court charging his employer with Title VII Racial Discrimination, Retaliation, Workers’ Compensation Retaliation, and assorted state law claims. The pre-mediation positions submitted by the parties revealed that the trial court had dismissed several claims, including the workers’ compensation retaliation claim and state statutory claims, through a partially successful Motion for Summary Judgment. The matter was to be scheduled for trial within two months following the mediation, leaving the jury to determine the remaining racial discrimination and retaliation claims.

Shortly before the mediation was scheduled to begin, the plaintiff submitted to the respondent an initial demand of $310,000.00. The panels (below) demonstrate the sequence of moves each side made through their initial distributive bargaining attempts, as follows:

	Plaintiff	**Respondent**
Round 1	**$310,000.00**	
Round 2		**$30,000.00**
Round 3	**$160,000.00**	
Round 4		**$37,500.00**
Round 5	**$155,000.00**	

The reader will note that the plaintiff's Round 1 initial demand of $310,000 resulted in a Round 2 offer by the respondent of $30,000. Round 2 was favorably received by the plaintiff and resulted in a $150,000 drop in the plaintiff's demand to $160,000 in Round 3. What followed, unfortunately, resulted in a momentary loss of trust by both sides. Respondent's move from his original offer of $30,000 to $37,500 in Round 4 produced an angry outburst from the plaintiff. The result was that in Round 5, she reduced her demand "only" by $5,000 to $155,000. Plaintiff claimed that respondent's $37,500 offer was in "bad faith." She threatened to simply match the respondent's moves throughout the remainder of the mediation.

It is not unusual for parties engaged in distributive bargaining to reach a roadblock in which one or both parties come to believe that traditional bargaining will not yield the desired result. In the example above, the plaintiff became upset when her relatively substantial $150,000 downward demand resulted in "only" a $7500 upward response from the respondent. Emotions sometimes boil when one party or the other feels the other side has failed to reciprocate with a favorable countermove. These negative emotions can create a downward spiral of reactivity and negativity, sometimes leading to disruption and even termination of the mediation session.

The respondent, apparently fearful that his distributive bargaining technique had failed, turned to a bracket proposal. In essence, he stated that he would place $50,000 on the table if (and only if) the plaintiff reduced her demand to $100,000. This is a classic monetary bracket proposal.

What are Monetary Brackets and How are Monetary Brackets Used?

The use of "brackets" may be utilized to shift both parties' perspectives. Brackets can assist in closing large monetary gaps without the more time-consuming and emotionally draining traditional distributive bargaining process.

At a certain point during the negotiation process, it may be beneficial for a party (or the mediator) to suggest breaking from traditional bargaining techniques to focus on settlement *ranges* rather than hard numbers. This can be done by a party offering the bracket proposal to convey a good-faith willingness to push toward a "new" middle ground from his or her original position, without formally committing to a fixed offer of settlement, unless both sides agree. Brackets can be particularly helpful to demonstrate revised zones of settlement.

Monetary "bracketology" utilizes a simple mathematical formula. Proponents of brackets generally suggest that the party receiving the bracket calculate the midpoint from the boundaries of the bracketed proposal. To obtain the midpoint, simply add the two bracket boundaries and divide by two.

Under the rules of a conventional bracket proposal, the party offering the bracket suggests that, if accepted, negotiations can resume within the new targeted range. Should the bracket be accepted, the party offering the proposed bracket will make the first hard-number move. In the alternative, the opposing party has the option to submit a counter-bracket, setting out a new proposed settlement range, or rejecting the bracket altogether and responding with a fixed number. If, at this point, the parties negotiate in this manner, the result may be a series of bracket proposals submitted by each party in turn.

Below is the bracketology that occurred in our example case rounds:

	Plaintiff	Respondent
Round 6		**[50,000-100,000]**
Round 7	**[75,000-125,000]**	
Round 8		**[60,000-100,000]**
Round 9	**[75,000-120,000]**	

It should be noted that respondents' $50,000-$100,000 Round 6 bracket yields a $75,000 midpoint. It is the mediator's task or responsibility to determine whether the parties are properly calculating midpoints and whether a party may be ignoring the midpoint.

In our case example, the plaintiff chose not to accept the respondent's bracket but submitted a counter-bracket of her own, suggesting in Round 7 that she would place $125,000 on the table if the respondent increased his offer to $75,000. Accordingly, plaintiff's Round 7 proposal suggested a midpoint of $100,000.

As can be seen, the plaintiff's Round 9 bracket suggested that if the respondent were to move to $75,000, the plaintiff would move to $120,000. Following this exchange, the respondent expressed to the mediator that he believed that the distributive bargaining process could once again be productive and proposed a defendant's "hard" offer of $75,000. This suggestion was favorably received by the plaintiff, resulting in additional rounds of distributive bargaining, as follows:

	Plaintiff	Respondent
Round 10		**$75,000.00**
Round 11	**$115,000.00**	
Round 12		**$80,000.00**
Round 13	**$110,000.00**	
Round 14		**$82,000.00**
Round 15	**$105,000.00**	
Round 16		**$84,000.00**

At the conclusion of Round 16, which resulted in the respondent's offer of $84,000, the distributive bargaining process presented yet another challenge. The respondent indicated privately to the mediator that his next offer would likely be his "last and final offer." The mediator warned the respondent that a last and final offer at this stage of negotiations could very likely result in an impasse. Rather than assuming that risk, the respondent inquired whether the mediator would consider making a "mediator's proposal."

The Mediator's Proposal

The ground rules for a mediator's proposal are relatively simple. The mediator seeks permission from both parties to submit a proposed monetary settlement recommendation. The proposed monetary settlement may often include mutually agreed-upon non-monetary terms. If these ground rules are accepted by the parties, the mediator will disclose to each party in the private caucus her/his proposed monetary settlement and non-monetary terms.

Each party will later be expected to respond privately to the mediator whether or not the proposal is accepted.

The critical element of the mediator's proposal is that the mediator will not disclose an accepting party's response unless each party has orally or in writing agreed to the mediator's proposal. It is common for the mediator to state that the mediator's proposal does not represent the value that might be established by a judge or jury at trial, but, rather, is based on the mediator's confidential settlement conversations with both parties. Therefore, the mediator's monetary settlement proposal is based on the negotiation positions taken by the parties during the private caucuses. Should one of the parties indicate that he or she does not accept the mediator's proposal, the mediator announces that the attempt to settle was not successful.

In some cases, negotiations may continue. In other situations, the mediator may declare the mediation at impasse and contact both parties privately in the days to come to determine whether there has been a change in position. Nonetheless, the mediator's proposal generally has a strong likelihood of success.

It should be noted that a mediator's proposal is not always provided on the day of mediation. There are occasions when the plaintiff, under the umbrella of mediation, may wish to consult a spouse or a financial advisor. The respondent's insurance adjuster may wish to receive a written strengths-and-weaknesses analysis from the mediator and be given several days to respond. In such a circumstance, the parties will be given a date and time certain in which to respond "yes" or "no" to the mediator's proposal.

In the case at hand, the mediator's proposal was $92,000 with a pre-agreed list of non-monetary terms and conditions. The proposal was accepted on the day of mediation by both parties. Therefore, the matter was resolved.

Mediator's Proposal		
Round 17	**$92,000.00**	

Conclusion

Negotiation is an inherently human process, shaped as much by perception and emotion as by legal analysis. The mediator's role is to manage these dynamics and use tools such as monetary brackets and mediator's proposals as mechanisms for restoring momentum, reframing expectations and guiding parties toward resolution.

During negotiations, it is a very common human trait to feel that we have conferred a benefit to the other party through our generous monetary offer and that the other party has incurred an obligation to reciprocate. It is equally human to consider inflicting harm should we feel our settlement offer has been scorned or rejected. Through deep and active listening, mediators attempt to build trust and manage the emotional dimensions of negotiation.

In situations where negotiations appear to be "stuck" or "derailed" due to a perceived failure to reciprocate, it is common for the parties to ask the mediator, "What do you think we should propose?" Word of warning—should I receive this question; I will often attempt to turn the question back to obtain the party's view. If pressed further, I will often express my opinion through the use of hypotheticals to seek the proper negotiation balance.

The mediator has the advantage of their training and experience to delve into the parties' perceived interests through a close examination of each party's bargaining position. I have found that at key moments during negotiations, mediator coaching can be highly valuable and may make the difference between an impasse and a successful outcome. I encourage the parties to engage with the mediator and seek the mediator's suggestions, particularly when the going gets tough.

Indeed, the recipe for successful negotiations may contain any number of ingredients:

Negotiation Recipe (taste-tested and approved by Larry)

Ingredients to have on hand:

- 2 cups of strategy
- 1 pint of persistence
- 1 dollop of emotion
- 1 TBL of frustration
- 1 ½ cups of patience

Mix, then stir occasionally.

If the recipe is successful, the result may bring with it just a smidgen of exuberance. More often than not, when parties remain patient, persistent, and willing to reach a little further than they initially thought possible, they will retain control over the outcome of the dispute.

About the Author

Larry Rute is an accomplished civil litigator and dispute resolution professional with 27+ years of experience in state and federal courts and over 40 years as an arbitrator and mediator.

Recognized for leadership in civil rights and constitutional litigation, including successful class actions advancing due process and institutional reform. Experienced lead trial counsel in hundreds of cases across consumer protection, corporate liability, real estate, and administrative law. Known for strategic insight, balanced judgment, and delivering efficient, fair resolutions.

Larry has successfully mediated more than 5,000 matters involving commercial law, consumer protection, employment law, family law division of assets, personal injury, probate, workplace disputes, and complex multi-party cases, including class and collective actions. He serves as an arbitrator on behalf of the American Arbitration Association (AAA) and Associates in Dispute Resolution. He is a Due Process Hearing Officer for the Kansas Department of Education