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Bracketing 101

IS BRACKETED NEGOTIATION MORE TROUBLE THAN IT'S WORTH, OR IS IT A VALUABLE TOOL FOR SETTLEMENT?

There are few tools in the mediator's toolbox that generate as much debate and genuine confusion as bracketed negotiation. Mediators often tell me their clients either love brackets or hate them. Some mediators never use them at all, while others claim to use them in most of their mediations.

Much of the debate surrounding brackets revolves around the perceived efficacy of brackets and whether they are more confusing than helpful. The debate becomes more complicated when people interpret and employ brackets in different ways.

I recently canvassed numerous colleagues in the International Academy of Mediators (IAM) about their experience with brackets. It confirmed my own experience, especially when parties from different jurisdictions are at the table. Folks within California, and more so outside California and the United States may employ brackets in ways that can surprise you. Jumping into brackets without fully understanding how each party is using them can lead to confusion, distrust and outright failure.

This article will focus on bracketed negotiation as most frequently described to me by California mediators, and as how I typically approach brackets myself. Later in the article I will briefly describe a few other approaches advocated by mediators, some of which could lead to strikingly different outcomes in negotiation. All the examples presented in the charts are based closely on actual mediations.

How is bracketed negotiation different from traditional negotiation?

In a traditional settlement negotiation, where the parties are focused primarily on money, negotiators typically exchange demands and offers in a "negotiation dance," moving from opposite poles to a single number in between that will settle the lawsuit. Each demand and offer represents an express and firm commitment to settle the case at the specific number proposed.

Bracketed demands and offers, in contrast, are framed as *contingent or conditional* rather than *firm* offers. One party is saying to the other party, "I will move to X but only if you move to Y." This can be expressed in notation as proposing a bracket of $[X - Y].

Most mediators told me they see two layers of commitment in a single bracketed offer. The first is an express commitment by the party proposing the bracket to move to one end of the proposed bracket if the other party agrees to come to the other end. The second is an additional *implied* commitment to accept a settlement at (or very close to) the midpoint of the bracket. Although a party may try to disclaim any intention to settle at the midpoint of its own bracket, the other party may or may not believe the disclaimer. This is where some of the confusion comes in, and may lead to accusations of deception or bad-faith negotiation. But most of the time both parties will craft their midpoints to signal where they could settle the case.

Chart A.1 illustrates a settlement negotiation that begins with an exchange of firm offers and counter-offers, starting with the plaintiff's $1 million demand and ending with the defendant's second offer of $25K. This particular negotiation bogged down almost immediately. The parties started far apart, then made initially small and successively smaller moves, and ultimately painted themselves into corners. At this point, neither party will be eager to break the impasse by making a large move before the other party makes one.

With impasse looming, a mediator will look for ways to "interrupt" the process and restart negotiations at numbers much closer to each other. Bracketing can do just that by enabling each party to make a large move while reducing its risk of exposure.

In Chart A.2, the plaintiff agrees to interrupt the pattern and proposes a bracket of $[750K - 500K]. This is safer for him than simply lowering his demand to 750K and hoping for a good response from the defendant.

In theory, the defendant could accept the plaintiff's first bracket, but this rarely happens in practice, especially when the parties start as far apart as in Chart A.2. If the defendant is willing to respond to the plaintiff's bracket, she most likely will counter with a bracket of her own. In Chart A.2, she responds with a bracket of $[50K - 150K], signaling her interest in settling at or very close to $100K. This initial exchange of brackets now has transformed the firm-offer negotiation depicted in Chart A.1 into a "meta" negotiation in which the parties are signaling acceptable settlement numbers at $625K and $100K, effectively *narrowing the gap between them by more than $400K*, from $955K (end of Chart A.1) to $525K (end of Chart A.2).

The parties might agree at this point to return to firm numbers, starting at the last two midpoints of $625K and $150K. More likely, however, given the size of the remaining gap, they will exchange at least one more round of brackets here.

Chart A.3 illustrates an exchange of multiple brackets, reducing the gap to $412.5K.

The mediator also can help the parties transition back to firm offers. Many mediators said they would try to float a mediator's bracket of their own with the midpoints of the last two brackets serving as endpoints for a "mediator's proposed bracket."

In chart A.4, the mediator might propose restarting the negotiations with firm numbers at brackets are $550K and $137.5K. Nevertheless, the parties might opt to continue with brackets, especially if the gap is still too large and/or the

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CHART A.1 The firm-offer exchange

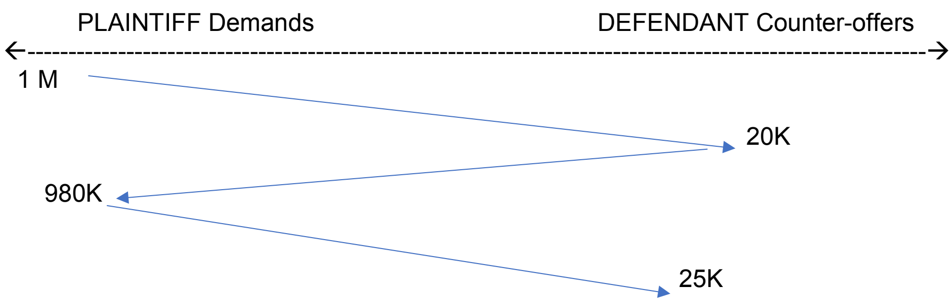
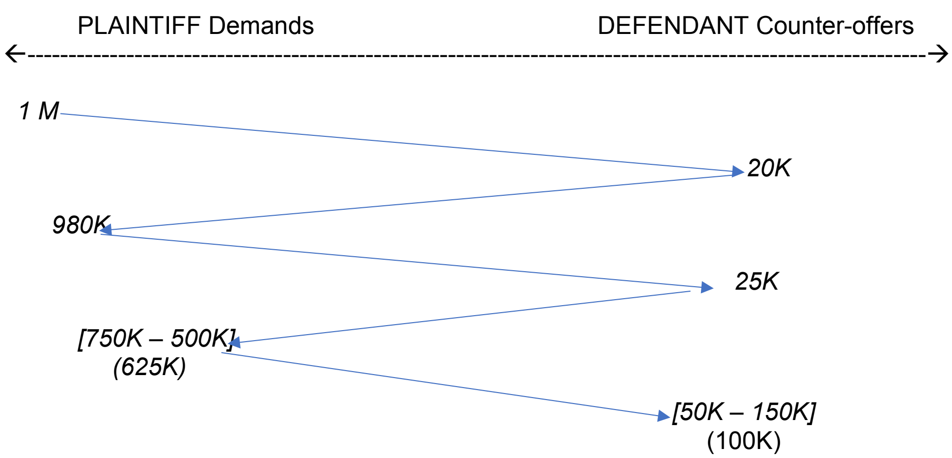


CHART A.2 Firm offers followed by bracket exchange



midpoint of the mediator's proposed bracket will not work for them.

Sometimes the parties will tire of brackets, yet be too far apart to feel comfortable accepting a mediator's bracket defined by the midpoints of the last two brackets on the table. Some mediators might instead float different hypothetical brackets, usually in private caucus with each side, to locate a range with a midpoint more acceptable to both sides. If, for example, the defendant in Chart A.4 will not pay more than $200K to settle her case, she might accept a mediator's bracket at, say, $[300K – 150K] with a midpoint at $225K, and then negotiate to bring a deal in at or below $200K.

In any event, the narrower the mediator's bracket, and the closer its midpoint to a number both sides can accept, the more likely it is the parties will accept it and settle the case shortly after.

Why and when are brackets used?

First, as mentioned above, bracketing can interrupt a negotiation at – or heading toward – impasse, and prevent a "premature" termination of negotiations.

Second, because brackets are contingent and not firm offers, they make it safer for parties to make larger moves to salvage a negotiation. In Chart A.2, it is far safer for the plaintiff to propose a bracket of $[750K – 500K] than to move down to a firm demand of $750K. If the bracket is rejected, the plaintiff is bound to the only firm number on the table – $980K.

Third, bracketing can serve as a useful reality check, giving parties more information than they might otherwise get had the negotiations stalled earlier at more extreme numbers. If the negotiation in Chart A.1 ends at the last numbers of $980K against $25K, neither party will have learned much about where the other party is willing to go to settle the case. They can assume the other side has more room to move than its last offer might indicate, but where a settlement might have been possible remains anybody's guess at that point. In contrast, if the parties decide to exchange even just two brackets, they will learn a bit more about where each is heading and whether further negotiation is worth pursuing.

Contrary to much of what appears on the internet, there is no rule about how "early" or "late" in negotiations brackets should emerge. Most mediators agree that if brackets are appropriate, they should not be used until a more traditional exchange of firm offers fails or is likely to fail. But failure can happen early or late in a negotiation. Most mediators rarely propose using brackets at the outset of a mediation, but when they do, it is usually because one or both parties have indicated they will start at numbers so extreme they will derail the negotiations immediately.

What's not to like about brackets?

Misinterpreted signals and bad feelings. As previously discussed, most mediators and negotiators will interpret a party's proposed bracket as signaling a commitment to settle the case at the midpoint of that bracket. "I will move to X if you move to Y" signals the party's willingness to settle at something close or equal to (X + Y)/2.

Many parties, however, will take pains to disavow the midpoints of their

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CHART A.3 An extended exchange of brackets

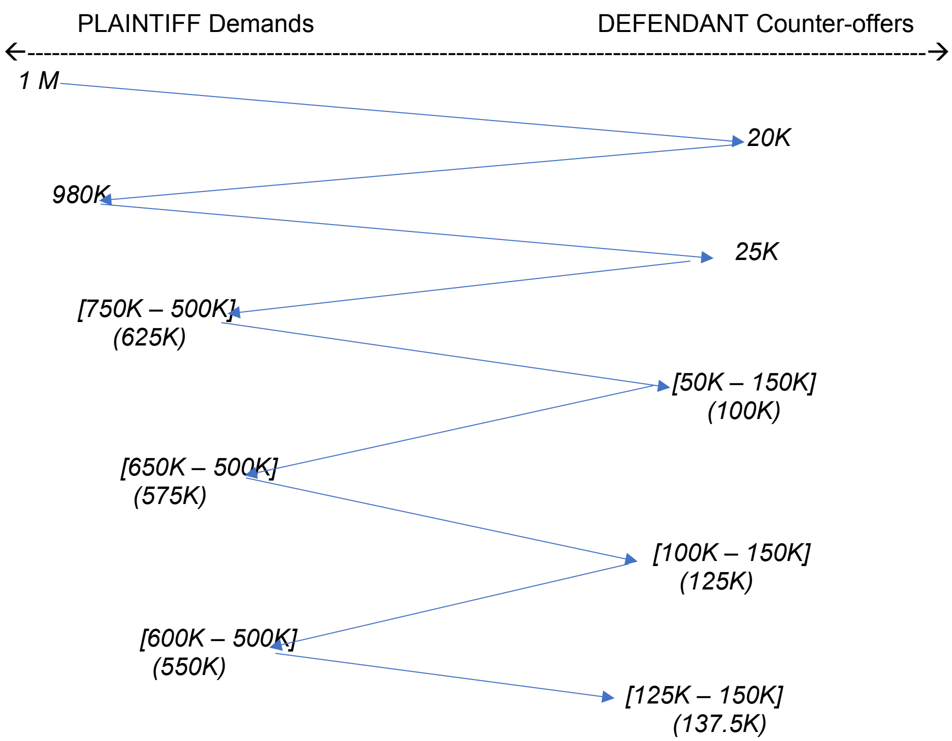
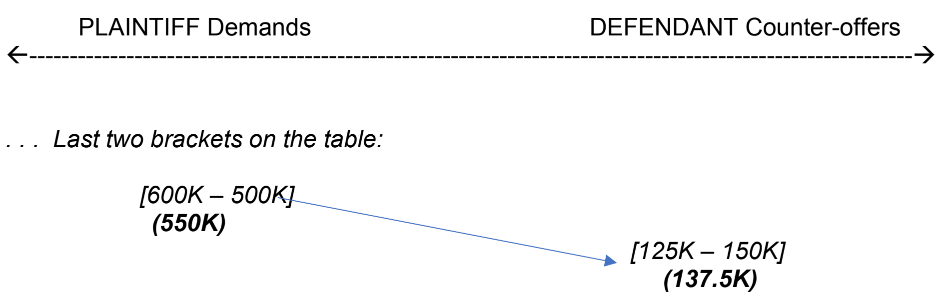


CHART A.4 Mediator's proposed bracket and hypothetical bracket.



A mediator's proposed bracket at the "midpoint of midpoints" would be [550K – 137.5K] with a midpoint of 343.75.

A mediator's bracket at [300-150] could probably settle quite quickly around 200K if that is a final number both sides would accept.

brackets, emphasizing only the outer ends of the brackets. They want, "I will move to X, if you move to Y" to signal only that they will continue negotiating to settle *somewhere between* X and Y.

Given the competitive dynamics of money negotiations, one party may think the other party is bluffing when it disavows the midpoint of its own bracket. In that case, the other party's later refusal to settle at the midpoint may open it up to charges of negotiating in bad faith and reduce the chance that subsequent efforts to negotiate a settlement will succeed.

Miscalculation, confusion and strategic errors. Sometimes parties miscalculate the midpoint of their brackets and then are horrified to discover they have signaled a settlement number that is inconsistent with their valuation of a case or outside their settlement authority. Other parties may find the math or concept of moving midpoints and endpoints just too confusing to be useful. This is often mentioned by mediators who practice outside the United States.

In some cases, parties have proposed a bracket in which the midpoint moves in the wrong direction.

In Chart B, for example, one plaintiff considered proposing a bracket of $[650K - 525K] with the midpoint moving backwards from $575K to $587.5K. No defendant would have responded constructively to that.

In a similar negotiation, a plaintiff proposed a bracket of $[625K - 525K] that repeated its previous midpoint of $575K. The defendant viewed this as a request to bid against itself, and refused to respond. One could argue that the bracket of $[625K - 525K] still represents progress since the plaintiff has given up $25K on the top end. But if the defendant is focusing on midpoints, she will see this as a meaningless concession.

Finally, some people struggle to keep track of the movement of both endpoints and midpoints in successive rounds of a bracketed negotiation. A new plaintiff's bracket in Chart B at $[675K - 450K], for example, would move the midpoint from $575K to $562.5K – a move in the right direction. But because that bracket also reflects some backtracking in the upper limit of the bracket, it would likely be a nonstarter for the other side. The plaintiff would accomplish more by proposing a bracket of $[650K – 475K] where the upper endpoint remains in place but the lower endpoint moves down, or a different

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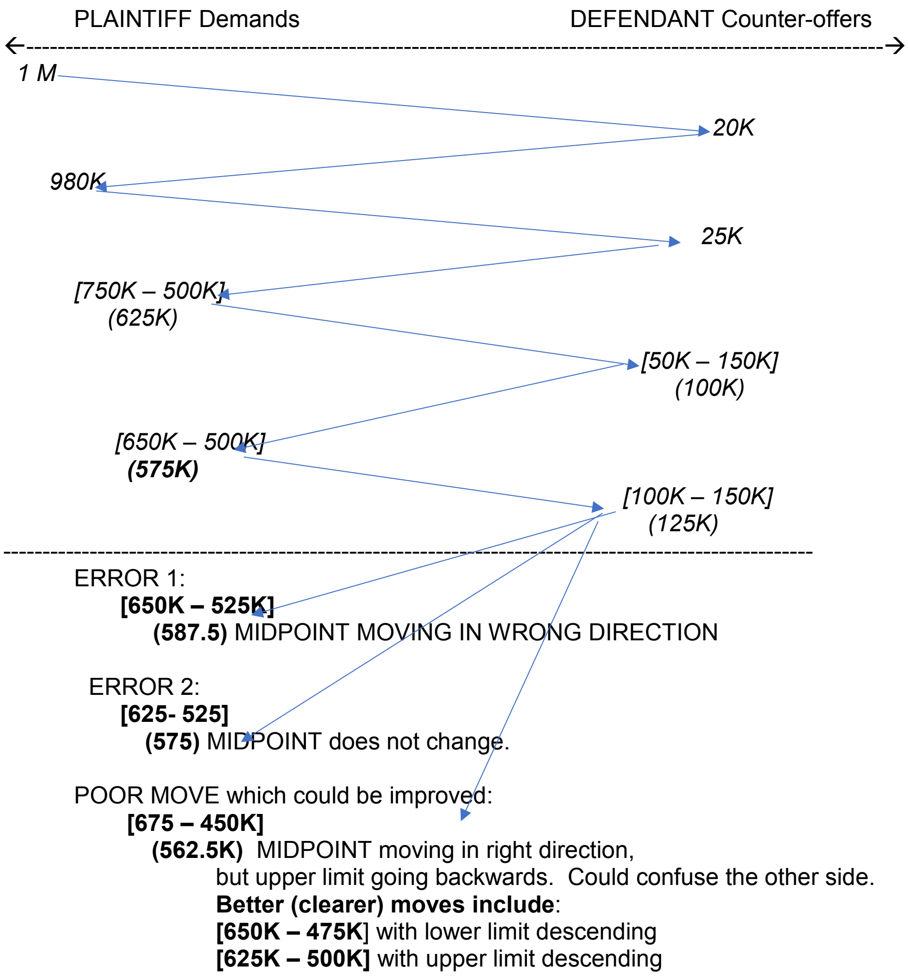
CHART B Errors: Midpoints stalled or do not move in the right direction



bracket at $[625K - 500K] with both upper and lower endpoints descending.

Confusion about whose turn is next. Usually the party who accepted the other party's bracket can expect the other party to make the next firm offer.

But if both parties have accepted a mediator's bracket, it may be less clear who will make the next move. For example, if the parties in Chart A.4 have accepted the mediator's bracket of $[550K - 137.5K] one could argue that because the defendant proposed the last bracket just before that, it is the plaintiff's turn to make the next move. But no hard and fast rules apply.

If the mediator proposes a bracket with endpoints other than the midpoints of the last two party-proposed brackets on the table, he either should tell the parties who would make the next firm-offer move if the bracket is accepted, or at least advise them they will need to negotiate who makes the next move.

When brackets "fail" to close the gap. There are times when the parties reach a point in bracketed negotiations where they will not move further and the gap remains too large to bridge that day. This may be the result of excessively competitive bargaining by one or both sides or just genuine disagreement about the value of the case. Although an impasse after bracketing may be frustrating to the parties, it can still provide value to the parties. Even failed bracketing can provide useful information about the true gap between the parties' bottom lines, letting each side know what it will take to bring the other side to an agreement. In addition, if the bracketing has significantly reduced the gap between the parties, there may be enough goodwill and optimism at the end of the day to make subsequent attempts to settle the case more likely to succeed.

What other approaches are there to bracketed negotiation?

While most of the Southern California mediators I canvassed tend to interpret and employ brackets as described above, there are mediators in California and elsewhere who see bracketing quite differently. Although a detailed discussion of these different approaches is beyond the scope of this article, some of the variations include the following, and are illustrated in Charts C and D.

The shared inner endpoint. Under this approach, if the plaintiff proposes a bracket of, say, $[550K-200K], the mediator might urge the defendant to respond with one with an upper end that matches the lower end of plaintiff's bracket, such as $[50K-200K]. Mediators who advocate this approach believe it is easier to monitor and gauge movements when only one endpoint is moving on either side. For this to work, however, the inner endpoint cannot pull one party too far away from a settlement number it could accept. For example, in a case worth only $200K, if the plaintiff starts out at $[750K-550K] the defendant will resist offering any kind of meaningful bracket with $550K at the top end.

Overlapping endpoints. This approach typically works only when the parties are exchanging their brackets with the mediator in confidence. For example, a plaintiff might tell the mediator he could accept a bracket of $[250K-150K] while the defendant might propose a bracket at $[135-200K]. The mediator would then look for a settlement somewhere between $135K and $150K.

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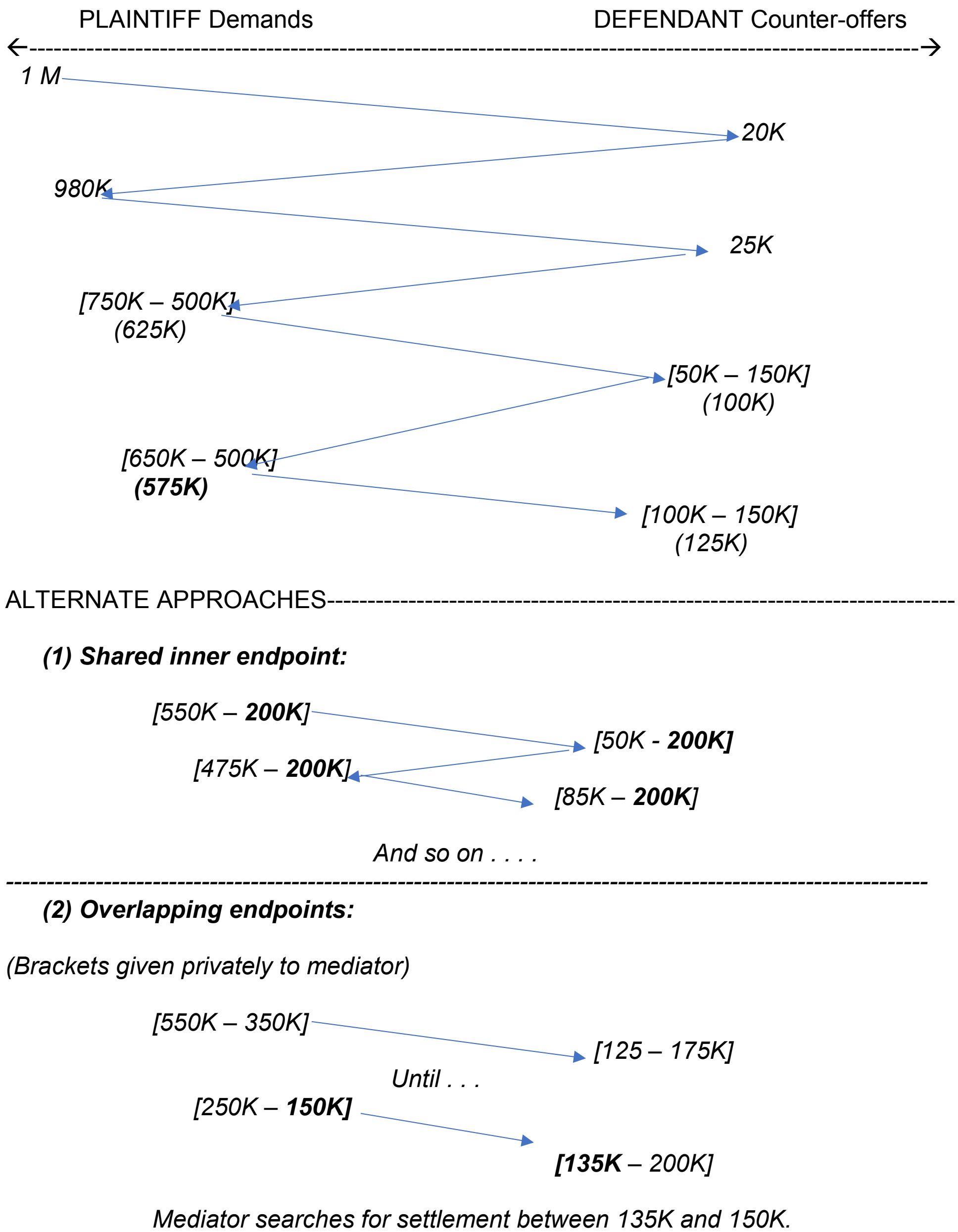
CHART C: Three alternate approaches



Overlapping midpoints. Other mediators will try to draw out brackets from each side, again in confidence, until the midpoints of the brackets meet or even overlap. A mediator employing this approach in Chart C, Example 3, will end up coaching the parties to settle somewhere between $180K and $200K. This approach requires the mediator to do most of the heavy lifting in the negotiation, since she must elicit concessions from each side without revealing concessions the other side has said it is willing to make.

The "two-bracket only" approach. One highly respected mediator in Los Angeles believes that sophisticated negotiators need *only two* brackets on the table to determine whether their case will be able to settle. This is true, but only if each negotiator is persuaded to craft a bracket close enough to the other side that each party will view something at or very close to the "midpoint of the midpoints" of the two brackets as a reasonable settlement outcome.

The pre-negotiated ratio (or "zipper"). Sometimes even sophisticated negotiators will distrust each other so much that neither will make a significant move towards the other in the negotiation. Here a mediator may coach the parties to a temporary agreement on a ratio of moves that, step-by-step, will close the distance between them. In one mediation, illustrated in Chart D, the parties agreed to make a series of small back and forth moves in a ratio of 2:5, with the defendant agreeing to increase her offer by $20K in successive moves as long as the plaintiff matched each of her moves by reducing his demand by $50K. Neither party told the mediator or the other party how many moves it ultimately would make, and the mediator asked them to commit to only one move at a time.

The defendant started by moving from $20K to make a new offer at $45K; the plaintiff responded by reducing his demand by $50K, to $925K. These parties were eventually able to close the gap by a significant margin, and settled the case that day.

Why did the zipper work? Because neither party got too far ahead of the other at any point in the zipper negotiation. In addition, they had to commit only to one small move at a time, and were free to stop the dance – unilaterally – at any point along the way, usually when they began to feel uncomfortable with how far and fast they had moved.

There are other variations on bracket-oriented negotiation, but all are aimed with one goal in mind: to prevent or address an impasse and motivate the parties to make larger moves towards each other in an environment that reduces the risk of exploitation.

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(3) Overlapping midpoints:

(Brackets given privately to mediator)

[550K – 350K] *(292.5K)* → *[125 – 175K]* *(150K)*

Until . . .

[225K – 135K] ***(180K)*** → *[150K – 250K]* ***(200K)***

Mediator searches for settlement between 180K and 200K.

CHART D: Alternate Approach: The Ratio (or Zipper) Approach

PLAINTIFF Demands DEFENDANT Counter-offers

←---→

1 M → *20K*

980K ← *20K*

980K → *25K*

975K ← *25K*

975K → *(Gap is $950K)*
"I will agree to move up $20K for every $50K you come down. For a while."

"Agreed."

ZIPPER STARTS--

45K → *925K*

925K → *65K*

875K ← *65K*

And so on . . . until

125K → ***725K***

If plaintiff is the first to stop, the gap is now $600K and the midpoint is $850K/2 = $425K.

145K

675K ← *145K*

675K → *165K*

And so on . . . until

525K → ***225K***

If defendant stops at $225K, . . . the gap has been reduced to $300K, with a midpoint of $750K/2 = $375K.

475K → *245K*

425K ← *245K*

425K → *285K*

375K ← *285K*

375K → *305K*

325K ← *305K*

325K → *Settles around 315* *if ratio holds up until the end*

What's a negotiator to do?

With respect to the most common approach to bracketing – signaling midpoints – negotiators should consider the following:

- When working with brackets, be sure you are *clear about how each side is interpreting and using brackets*. Do you intend to signal implied commitments at or near midpoints or do you wish the focus on the endpoints of brackets only? Is your mediator looking for inner endpoints to meet or overlap? If you and the mediator or the other side are playing by different rules, bracketing will lead you astray and potentially damage all trust and any future chance at settlement.
- Be as *conscious of the size of the movement of your midpoints* as you would be of the size of your concessions in a firm-offer negotiation. Brackets that move the midpoint in declining increments will be viewed as signaling you are getting close to your bottom line. If you think you are jeopardizing settlement by conveying too little or too much flexibility, ask the mediator to help you adjust your subsequent brackets in a way that will preserve your credibility with the other side.
- *Keep track of whose turn it will be* if a particular bracket is accepted. Confirm this with the mediator and/or the other side throughout the day.
- *Do not be afraid to propose the first bracket.* In my experience, it doesn't seem to matter who makes the first move. If impasse is imminent, whoever is willing to propose the first bracket is doing himself a great favor. As in traditional negotiations, your first move may significantly alter the expectations of the other side and thus be an opportunity worth taking. And if your first bracket is met with too small a response, you can slow down your movement in subsequent brackets.

In the final analysis, brackets in negotiation should not be viewed as inherently good or bad. Like any negotiation or mediation tool, they are appropriate in some circumstances and less so in others. They are most effective when used by people who share the same view of bracketing, are familiar with the

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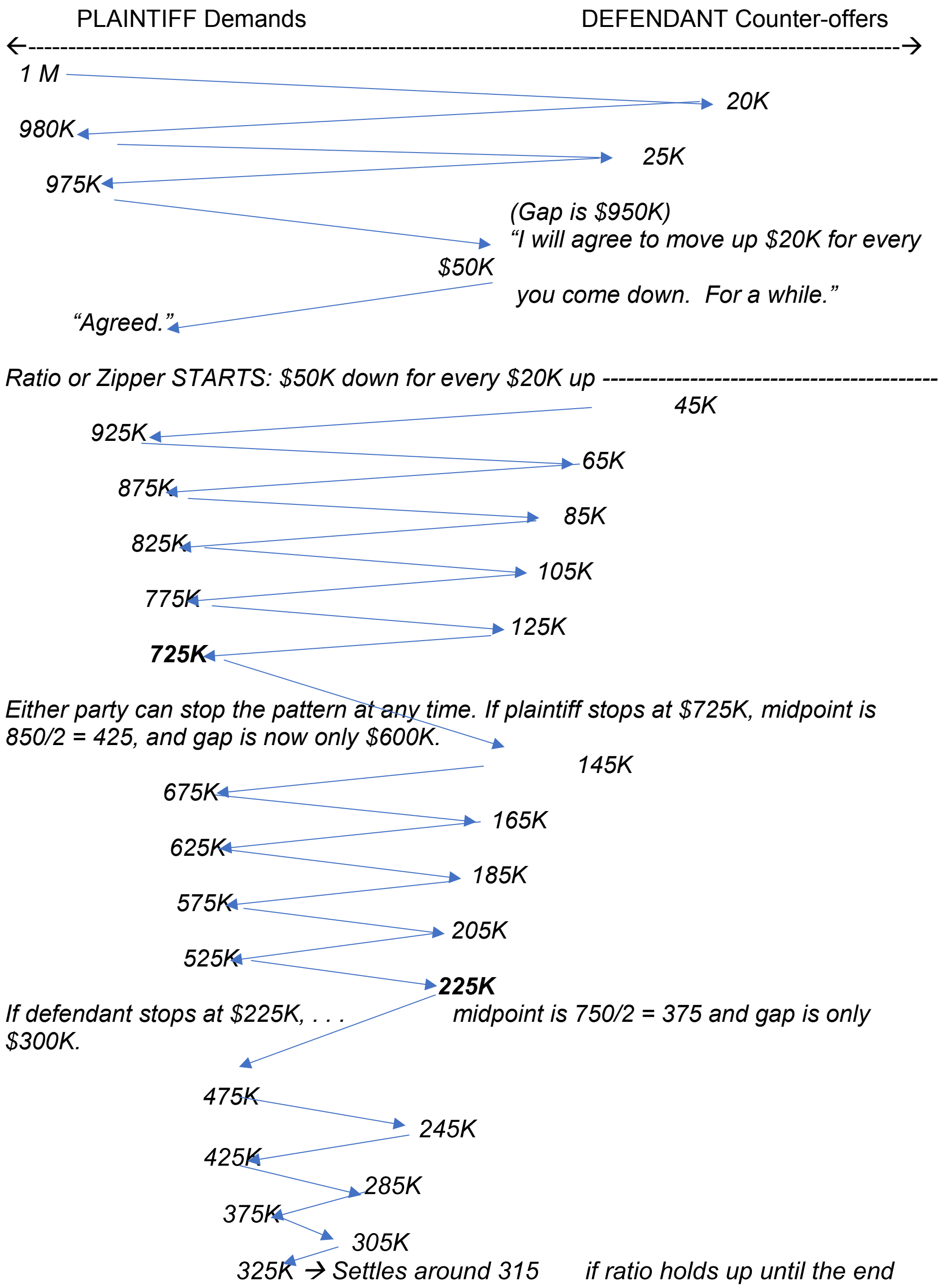

process and are comfortable with the math. And in the right setting, they can salvage negotiations that appear otherwise doomed to fail.

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