

Negotiation Blunders: Allowing yourself to be double-bracketed

If you're a plaintiff's attorney, you have probably participated in a bracketing-based negotiation at some point in your career. Either side of a negotiation may utilize bracketing, one of the oldest and most simplistic negotiation ploys.

The technique is quite simple. The side that wishes to commence bracketing begins by determining the amount of money it wants to use as a target to settle the case. The bracketer then assumes a "counterpunch" strategy, letting the other party take the initiative.

For example, suppose plaintiff's counsel is seeking \$500,000 in settlement of an action, and defense counsel has requested an initial demand to get the negotiation started. With \$500,000 as the target settlement figure (as well as a fair and reasonable one), plaintiff's counsel assesses the defense's position, which at that moment has nothing on the table, and then demands \$1 million. The average of the zero position of the defense and the \$1 million position of the plaintiff is the \$500,000 that plaintiff's counsel seeks. If, in response to the million dollar demand, the defense were to respond with an offer of \$150,000, then plaintiff's "counterpunch" would be to drop the plaintiff's demands to \$850,000, so the sum of the defense position and the plaintiff's position still adds up to \$1 million and the average of the two positions is still \$500,000.

This tactic has nothing whatsoever to do with any of the real issues of liability or damages on the case, nor does it involve any cognitive evaluation process to determine whether the desired \$500,000 is, in fact, a realistic figure.

Nonetheless, plaintiff's counsel, in this hypothetical example, could continue this technique until either the case is settled or the defense tires of playing the game. This is bracketing, and it should be familiar to anyone reading this article.

Double-bracketing, however, is the negotiation counterpart of "double dipping." It can sneak up on either side. In a bracketing-based negotiation, the first party to introduce double-bracketing will successfully preclude the other party's use of the technique.

Take the same example as before: a desired settlement of \$500,000 with the defense responding to the \$1 million demand with an offer of \$150,000, and the plaintiff dropping the demand to \$850,000. Let us assume that the sequence continues with the defense increasing its offer to \$200,000, and the plaintiff reducing its demand to \$800,000, continuing the bracketing. Assume the defense then offers \$300,000. To continue the bracketing, the plaintiff would reduce his or her demand to \$700,000, so that the demand and the offer add up to \$1 million, and still yielding an average of \$500,000. At this point, plaintiff's counsel might notice some irritability creeping into the defense's negotiations. The defense may try one more time to settle the case by making a token increase, perhaps to \$325,000. At this point, the plaintiff can continue the bracketing, abandon it altogether, refuse to go lower, or force the issue by utilizing double bracketing like this: "Mr. Defendant, it is becoming clear to me that you have the figure of \$500,000 in mind; after all, following each round of negotiation I find that the average of our two positions always winds up at \$500,000. Look: I can't settle this case for \$500,000. But my demand is \$700,000, and if \$500,000 is your target, let me suggest that, if you were to offer \$600,000, which would be midway between the \$500,000 and the \$700,000, I would be willing to recommend that figure to my client."

That's really it. That is all there is to double-bracketing. It merely stops the bracketing and allows you to move the settlement point up closer to your figure. Of course, if the defendant takes the initiative on double-bracketing first, then it is going to move the settlement point below the figure you originally targeted.

This technique will either heavily favor the side who is first to use it, or cause a breakdown in the negotiations. Either way, the use of double-bracketing usually leads to the conclusion of the negotiation. It is critical to know when, if ever, you should employ it.

First of all, you can't employ double-bracketing until you find yourself in the midst of a bracketing-type negotiation. At that point you might want to change to double-bracketing in any of three scenarios:

1. When the mid-point of the bracketed negotiation is of their choosing, not yours, and is too low for you to accept;
2. When you feel that they actually have enough money to settle the case but are taking too long in getting around to offering it; or
3. When you feel the need to stop the arbitrary bracketing-type of negotiation and get to real issues.

You must also be prepared when you find that your adversary is attempting to double-bracket you. Your approach? Focus on the technique, not the offer. Feel free to say: "You know, rarely have I been double-bracketed with such skill. However, that's not my figure (the double-bracketed mid-point) and is, in fact, an arbitrary mid-point that seems to have been generated by your responses to my demands. I thought the movements in my position were large enough to show my good faith intent to allow you room to move toward a resolution. You, instead, have presumed that I am involved in bracketing you. That is not the case, so why don't we stop this and get to substantive issues?"

If you deliver this message with a light touch, the negotiation may very well continue. The key here is not to insult your adversary by your recognition of his or her attempt to double-bracket you. There are obvious risks and benefits to the use of double-bracketing. The two primary risks are that you may anger your adversary by appearing to be too "slick," and that you may short circuit the negotiation process. The benefits of appropriate use of the tactic are (1) that it does bring the issues to a head quickly, and (2) that it can help, in some cases, to smoke out the position of your adversary.

As a general principle, however, you should try to find more creative approaches to negotiation than bracketing. Perhaps the biggest benefit to double-bracketing is that it can put a stop to bracketing as a primary negotiation technique.