



Mediation and Assessment Program

February 25, 2021

Effective Use of Brackets and Ethical Considerations

The Honorable Jill A. Morris, Magistrate Judge
Laurel Stevenson, MAP Director

WHAT ARE BRACKETS?



Create bookends



Send a signal or midpoint



Break impasse



Reach settlement



Varying rules

How do brackets work?

**I WILL MOVE TO \$50,000 IF PLAINTIFF
WILL GO TO \$100,000**

Add numbers together, divide by two = midpoint
What does midpoint mean; what is signaled? Depends!
Options for responding (effective options...)

General rule: If your bracket is accepted, that constitutes the other side's turn and the next move is yours.

Party or Mediator Bracket?

Bracketing Examples

Mediator Proposed Bracket

Parties at \$25k and
\$950k

Mediator pitches \$125k
to 575k, then specifies
who moves next

Party (Attorney?) Proposed Bracket

Parties at \$25k and
\$950k

Plaintiff 600k if 200k
from Defendant

Defendant responds with
75k if Plaintiff at 325k

To Ponder: Does it matter who proposes bracket?

YOUR EXPERIENCE WITH BRACKETS?

Let's take a Poll ...

Do you serve as Attorney,
Mediator, Both?

As mediator, recommend brackets?

As attorney, recommend brackets?

Love them or
Hate them?



**WHAT RULES, PRINCIPLES
AND/OR GUIDELINES APPLY?**

Attorney Mediator or Attorney Advocate?

Differing Roles

4-2.1 Lawyer as an advisor

“[S]hall exercise independent professional judgment and render candid advice.”

4-2.4 Lawyer Serving as Third-Party Neutral

- “[A]ssists two or more persons who are not clients of the lawyer to reach a resolution of a dispute....”

Self-determination

The fundamental principle of mediation.

The mediation process relies upon the ability of the parties to reach a voluntary uncoerced agreement.

**Whether
Mediator or
Attorney
Advocate**

The Mediator

Preamble

- Impartial third-party who facilitates communications and negotiation....”

Model Standard 2(B)

A mediator must:

- 1) be impartial; and
- 2) appear impartial.

Missouri Rule 17.04

A mediator “**shall** have appropriate training or equivalent experience in conducting the type of alternative dispute resolution service the individual or organization provides.”

Guidance in Kansas

- **Kansas Ethics Handbook**
Distinctions between an attorney who is advising a client in mediation and an attorney who is serving as a mediator.
- **The Dispute Resolution Act, Kansas Supreme Court Rules 905-922.**

Permissive or Mandatory?

Should a lawyer be interested in the well-being, mental and physical health of a client?

Attorney Advocate

Rules of Professional Conduct-4.1-4

Comment 5- “[W]hen a matter is likely to involve litigation, it may be necessary under Rule 4-1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.”

Communication

Rule 4-1.4 Communication

What does it mean that “A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions”?

What is necessary for an effective understanding of brackets?

Essential Ethical Principles

- **Fairness**
 - Respect and dignity without coercion
- **Voluntary**
 - Court-ordered does not prohibit the right to walk away
 - Attorney Advocate's responsibility as an officer of the Court to act in good faith
 - Mediator assistance in one party domination
- **Informed Consent**
 - Mediator should help ensure parties have sufficient data for assessment
 - Attorney Advocate must be the source of essential information for the client

Power Imbalances

Understanding Imbalances

What creates an imbalance?

Ex: Plaintiff brings an employment discrimination case but his lawyer has only handled collection matters. The defense lawyer's practice has involved employment litigation around the country for Fortune 500 companies. The parties use brackets in the mediation.

Ethical implications? For whom? Involving which Rules/Principles? How resolved?

Mid-Points

Mistaken
messaging?

Is it only
about
money?

CONDITIONS

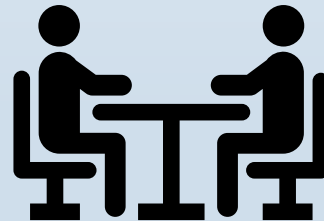
An attorney tells the mediator that the client will entertain the other side's bracket but only if the other side meets that client's demand for answers to discovery that has not been served. Ethical implications? Effective use?

AND MORE CONDITIONS

As a condition of responding to bracket, attorney demands that mediator require other side to show mediator document on other side's computer screen to verify the other side's veracity. Ethical implications? Effective use?

Mediator Derived

- Is it like nailing Jello to a tree as one author suggests?
- Is it only for the under-prepared or over-promised?



Ethical Issues with Brackets

Self-determination vs. Controlling outcome?

Neutrality/Impartiality vs. Evaluative approach?

Monetary only process or outcome vs. Holistic approach?

Competence vs. Quality of process?

Effective Use of Brackets



CONDUCTED WITH CLEAR
UNDERSTANDING



CLIENT DRIVEN OUTCOME
WITHIN RULES



QUESTIONS?