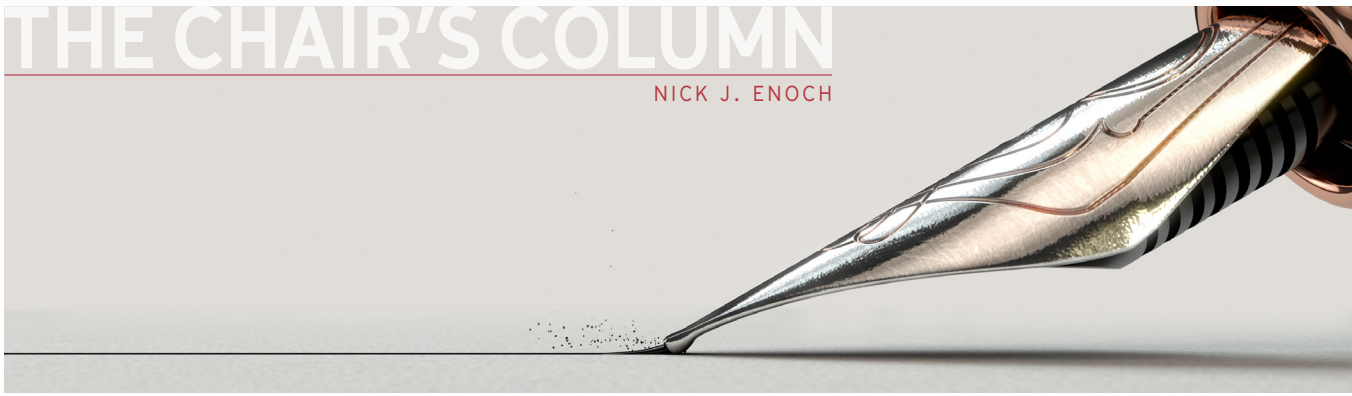
FALL 2025

ARIZONA ADR FORUM

THE CHAIR'S COLUMN

NICK J. ENOCH



NICK ENOCH is the President of Lubin & Enoch, P.C., and his practice focuses on the representation of labor unions and clients in the areas of discrimination, wrongful discharge, and wage and hour litigation. He is admitted to practice in Arizona, Colorado, Texas, and numerous federal courts including, inter alia, the U.S. Supreme Court. Nick previously served on the Executive Council, including as the Chair in 2018-2019, for the 550-member Employment & Labor Law Section of the State Bar of Arizona. In 2022, Mr. Enoch was awarded the Rogers/Hayden Outstanding Achievement (aka Lawyer of the Year) Award by the Employment & Labor Law Section of the State Bar of Arizona.

Dear Colleagues,

My name is Nick Enoch and at the Bar Convention on June 24, 2025, I was elected to serve as the Chair of the Executive Council for your Alternative Dispute Resolution Section for the State Bar of Arizona. During my twelve-month term, I hope and plan to accomplish four (4) things and I am asking for your collective assistance to make it happen.

First, I would like for our Section – of 210-members – to collaborate more with other Sections of our State Bar when it comes to continuing legal education programming.

Second, I would like for our Section to schedule an ADR-related event at both of our state's law schools and invite interested students to attend. Based on my review of law school student applications over the years, I have come to realize that quite a few students are interested in pursuing careers in ADR but, through no fault of their own, they do not fully appreciate, and understand, how one actually goes about becoming an arbitrator or mediator. At the moment, we are looking at dates in late January for just such an event at the Sandra Day O'Conner College of Law.

Third, I would like for our Section to assist our colleagues and neighbors, in New Mexico, to create an ADR Section of their own. While the State Bar of New Mexico has a rather informal ADR Committee, with about three dozen members, its leaders have reached out to me with questions as to how our Section, including non-lawyers, is comprised and governed. On Monday, October 20, 2025, I, and perhaps other Section members, traveled to Albuquerque for a meeting at the State Bar of New Mexico to meet with Judges, including members of their State Supreme Court, and other practitioners to discuss this very topic.

Fourth, I would like to see our Section become more diverse with respect to its active members and programming. And by "diverse", I am especially interested in growing our membership outside of Maricopa and Pima Counties and bringing less experienced ADR practitioners into the fold.

If any of you have any interest in working on one or more of these, or if you have other interesting, ideas, please do not hesitate to reach out to me at nick@leblawyers.com or 602-234-0008.

Nick Enoch

Chair – ADR Section

Lubin, Enoch & Bustamante, P.C.

EDITOR | DENNY ESFORD

We welcome comments about this newsletter and invite you to suggest topics or submit an article for consideration.
Contact the Editor, Denny Esford at **denny@windycitytrialgroup.com**.

STATE BAR OF ARIZONA

DEALING WITH OUTRAGEOU OFFERS IN NEGOTIATI

BY LEE BLACKMAN

LEE BLACKMAN, Blackman ADR's Principal, is an experienced litigator, mediator, and arbitrator with a broad and sophisticated background in a wide range of legal areas, including simple and complicated business, regulatory, employment, negligence, civil rights, and environmental disputes. In mediations, his strength are case analysis, thoughtfulness, creativity, persistence, and respectful risk assessment. He searches for ways to protect and advance core interests through effective settlement discussions. For more information, visit www.blackmanadr.com.

"It never hurts to ask", said the senior law firm partner describing the outrageous opening position he had taken in a negotiation. I was the naïve young associate too intimidated by the highly regarded partner to voice my instinctive insecurity about this approach.

As years have gone by, that memory recurs to me. It is a reminder that my visceral reaction was justified. In fact, experience and lots of research teach us that outrageous opening positions frequently set the stage for either impasse or a negotiation that feels like expensive "water torture." But there are tools and approaches that conscientious mediators and negotiators can use to head off outrageous or insulting demands. And there are a number of tips and tools to help the parties recover from the shock and dispiriting consequences of those unavoidable insulting openings. We begin with a short summary of some of the psychology of initial positioning.

Background: Understanding the Psychology of Anchoring

Without getting too wonky, "anchoring" is a bias, usually unconscious. It is a fixation on an initially presented value in an uncertain environment. In a study published in 1974, Tversky and Kahneman demonstrated that people make biased and inaccurate estimates by making incorrect *adjustments* from an initially proposed estimate.[1] Other studies and practical experience teach us that the anchoring effect of an initial number – like a manufacturers' suggested retail price – persists even where the initial position is plainly unreasonable. In sum, an opening position in a negotiation *can*, like gravity or magnetism, create a powerful anchor, or bias toward, that position. But an outrageous demand or offer squanders the opportunity to exploit the power of the anchoring bias.

Tools for Anticipating, Avoiding, Mitigating, and Overcoming the Potential Consequences of Outrageous Opening Positions

Strategies to Anticipate and Mitigate the Obstacles Caused by Outrageous Openings. The effort to head off or moderate incipient outrageous demands requires the negotiator in an unmediated negotiation to have some knowledge of the anchoring bias or at least have an instinctual appreciation for the negative consequences of taking an indefensible opening position. This hypothetical negotiator should also understand that using the

US OPENING DEMANDS AND ONS AND MEDIATIONS

opening offer as the tool to express the emotional turmoil or anger a party to a dispute or negotiation feels about the situation or the other party is both an inadequate way to communicate the underlying emotions and an ineffective way to start the negotiation.

For the mediator, early interaction with the parties in an effort to take the parties' emotional temperature allows the mediator to consider strategies to help parties discover how their emotions, attitudes, and intended approaches to the negotiations could be presented more effectively. The simple act of allowing emotionally driven parties to vent their frustration and pain to the mediator – understanding that the mediator will communicate those feeling to the other side – can be a substitute for using the initial demand or offer as a method to communicate outrage and disdain. Many emotional participants will understand that presenting a strong, but not insulting, offer is a more attractive option than an opening likely to have a repulsive impact. It may also be appropriate for the mediator to describe experiences where outrageous offers caused impasse or a painful delay.

An additional strategy with a party proposing to make an outrageous demand is to inquire into the demanding party's expectations for how the other side will react. Is the offer intended to be offensive? If the answer is yes, explore better options for expressing the party's emotional state. If the answer is not intended to be offensive or insulting, the unreasonableness probably comes either from a fear of being outsmarted, reflects a misunderstanding of the circumstances (factual or legal), is affected by a desire to satisfy a third party or a superior, or is simply driven by an aggressive desire to win. Gaining some insight into these potential motives will suggest options for moderating the initial demand. In any event, a request that the party explain the evidence and logic that supports the opening will often prompt either reconsideration of the position or at least suggest ways to plausibly justify the position. As an aside, studies show that just adding the word "because" and even a weak justification can be enough to trigger a less hostile reaction.[2]

Asking the party being unreasonable to project how they expect the offer or demand will be received invites circumspection. Asking that party how they expect the back and forth of the negotiation to proceed following the overly aggressive opening may also prompt the unreasonable party to recognize that the opening is more likely to foreclose an efficient bargaining process rather than encourage a collaborative effort to find a mutually tenable solution.

If the opening party continues to prefer the outrageous demand, consider asking what potential responses from the other side would allow the offering party to feel that the other party has demonstrated an intent to negotiate seriously. The response could help the mediator explore another opening that is strong enough to avoid a suggestion of weakness or insecurity but still be principled enough to encourage the other side to provide a counter that shows genuine commitment to finding a resolution.[3]

Strategies For Overcoming Emotional Reactions to Insulting Openings. Despite a mediator's best strategies and efforts, parties will still regularly insist on making insulting or outrageous demands and offers at the outset of a negotiation. The options for dealing with the

emotions that are likely to be evoked include either preparing the recipient to receive the offer without overreacting emotionally or suggesting options for framing a counteroffer that at least allows the parties to continue their negotiations without impasse or small and frustratingly small steps. Here are some suggestions:

1 ***Managing Expectations Ahead of the Insult.*** To manage expectations and prepare receiving parties for the expected or potential outrageous opening position, some mediators alert the parties that the initial exchanges of demands and counters is often described by mediators as the "Insult Rounds" or the "silly season" or the "Three Stooges Phase" of the negotiations. Outrageous demands are a common and predictable product of emotions, insecurity, false bravado, aggressive personalities, or an effort to exploit the anchoring bias. Disclosing these phenomena may moderate the receiving parties' inclination to respond in kind. But human nature is human nature. So, in some cases a comparably outrageous counter position is unavoidable. But there are better options to explore that do not threaten either early impasse or unnecessarily contentious and time-consuming negotiations.

2 ***Recognizing the Insult and Postponing a Response Until the Demanding Party has Supplied Additional Information or Provided Justification for the Demand.*** One option to defuse the emotions evoked by an outrageous opening is to declare the position outrageous and insulting and refuse to take it seriously unless the offering party can provide either additional information or a rational explanation of the apparently indefensible opening position. This not a request for the offering party to "bid against themselves." It is a delay in presenting a counter position to show that the responding party is not intimidated or influenced by the aggressive opening and a request for more information before providing a specific counter. The negotiator can ask for such details or the mediator can be the voice of the request for new information and reasoned justification.

3 ***Countering With an Express Expectation for a Response that Would be Constructive.*** If the option to ask for added information is not chosen or if the requested justification does not change any minds about the state of the discussions, a next option is (1) to reiterate the view that the demand is unreasonable, (2) announce that it nevertheless makes sense to try to move the discussions forward, and (3) present a proposal at the edge of reasonable that is expressly conditioned on an expectation that the so-far-unreasonable side will respond with a move that shows that a compromise is possible with patient bargaining. The solicited response should be clearly characterized as a move that would show a good faith effort *toward* compromise, not a move to the proponent's bottom line.

4 ***Limiting the Number of Remaining Moves.*** If the proposer of the original outrageous offer does not respond to option 3 constructively, an alternative to buying into a "tit-for-tat" phase of negotiating is for the mediator or the responding party to insist that the parties agree to limit the number of remaining back and forth moves – for example, three or four. This option, if agreed (or imposed by the mediator) will force the parties to bring their positions substantially closer together promptly if the mediation is to proceed. A failure to move far enough quickly enough will reveal that one or both parties lack the ability or inclination to compromise enough to achieve an acceptable resolution unless circumstances change.

5 ***Using Bracketing.*** Another alternative to drawn out negotiations or a recognition of insuperable impasse is for one of the parties, often at the suggestion of the mediator, to offer a "bracket." Bracketing involves suggesting, as a hypothetical, that one party will make a specific offer or demand, but the offer or demand will be effective only if the other side will respond with a specific counteroffer. The bracket only narrows the range of dispute. It does not constitute a commitment to settle at any particular number between the demand and offer sides of bracket, but the midpoint is suggestive of the party's next concrete move.[4] The opposing party may accept the bracket or offer a counter bracket with a midpoint higher or lower than the initial bracket. In this way the gap between the parties' positions begins to be reduced more meaningfully than in a tit-for-tat process of small moves. The discussion of alternative brackets and the trading of implied mid-points can create a sort of shadow negotiation over assumed mid-points that creates the appearance of momentum toward an acceptable resolution.

These options for dealing with outrageous opening demands and offers can allow the responding party to avoid being, or at least appearing to be, unduly influenced by the outrageous opening. They supply structural approaches that can allow the parties to send signals of acceptable outcomes that, if nothing else, narrow the range of differences. Of equal import, these approaches allow the parties to overcome the bad feelings engendered by an insulting opening demand, fostering momentum toward resolution. Momentum, of course, has its own powerful influence in the effort to resolve challenging disputes. ADR

ENDNOTES

1. Judgment Under Uncertainty: Heuristics and Biases, by Amos Tversky and Daniel Kahneman, Science, New Series, Vol. 185, No. 4157, (Sep. 27, 1974), pp. 1124-1131. Available at https://sites.socsci.uci.edu/~bskyrms/bio/readings/tversky_k_heuristics_biases.pdf.
2. See *Influence* by Robert Cialdini, Chapter 1 (Levers of Influence), available at Amazon.
3. Knowing what the opening party thinks would be a serious response may also give the mediator a hint of the offering party's actual sense of the value of the matter. That information may assist the mediator in suggesting to the other side, without disclosing any specific information about the opening parties' actual expectations, what sort of counter offer might advance the negotiation without giving up too much ground too quickly.
4. Bracketing and "bracketology" are subjects unto themselves that are worthy of much attention. For our purposes, one example may be helpful: Assume a plaintiff makes a demand for $1,000,000 in a case where the "best day" verdict (from the defense perspective) is $500,000 and the plaintiff's case has issues that reduce its chances of success to no better than 60 percent. The defense could respond to the $1,000,000 demand with a bracket by which the defense would agree to offer $100,000 but conditioned on the plaintiff reducing its demand to $300,000. The midpoint would be $200,000. The plaintiff may reject the bracket or, recognizing that the defense will pay $100,000, bring its demand down to $750,000 or $800,000. Alternatively, the plaintiff could propose a different bracket, with the plaintiff willing to reduce its demand to $600,000 if the defense would offer $300,000. The midpoint is $450,000. This exchange suggests that the parties now $250,000 apart. But the discussions are just starting. In any event, being $250,000 apart is better than being $1,000,000 apart, and suggests – given the costs, risks, and burdens of litigating – that that the parties are best advised to find a solution.