

A Mediator's Recommendation



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ADR Options

Recently, I conducted a mediation in a sexual assault and personal injury case. When the day began, the parties were at vastly different places. After nearly seven hours of discussion, they were a lot closer together, but still very far apart.

At this point, the defendant asked if I would make a non-binding recommendation for a settlement. I said yes, but only if both sides agreed to it.

Mediators are often reluctant to make a settlement recommendation. Many simply refuse to do it. Good reasons can be found for that position. As I like to tell people in the beginning of any mediation, I am not a judge. It is not my role to decide the case, or to say who is liable and who is not, or to determine the damages. I need to remain objective and not take sides.

Nevertheless, I see nothing wrong with making a recommendation if the parties agree that they all want me to do it. My practice is to obtain that agreement privately with each side. That is what I did here, and it worked. Each party's counsel told me privately that they wanted me to make a recommendation. I did so. Less than a day later, both sides told me that they accepted my recommendation, and the case settled for that number.

This arrangement is sometimes referred to as a "double blind" proposal, because neither side knows the other's position until both have answered. I see no particular need for the terminology.

To be sure, dangers are lurking in the practice of a mediator making a settlement recommendation. You can easily lose one or more of the parties if your number is far off from what they are willing to accept or to pay.

The chance of further meaningful negotiation is likely destroyed if the recommendation is accepted by one side and not the other. How is the client of the side that accepted the recommendation ever going to be convinced thereafter to pay more or take less to settle the case?

Still, this tool to achieve a settlement should not be rejected just because it has downsides. There are safety measures that can be employed to mitigate the risk: In my opinion, all parties must agree to receive the mediator's recommendation. If anyone doesn't agree, don't do it.

The recommendation should be confidential. If possible, the parties should agree that the recommended amount will not be disclosed to the court or anyone else thereafter if it didn't settle the case. It is simply part of the legitimate negotiation process.

Finally, I would only make a settlement recommendation if I have a number that I believe both sides will likely accept. In my view, it is counterproductive to recommend a number that I think one party will reject. Remember, the goal is to settle the case. ♦

Editor's Note: *Thomas Wagner has 40 years of experience as a trial lawyer. He has been very successful in resolving cases through the Judge Pro Tempore Program in Philadelphia. Mr. Wagner's expertise lies in casualty and product liability matters as well as all cases related to the transportation industry. You may reach Mr. Wagner at: contact@adroptions.com.*

SAVE THE DATE

PTLA Annual Elections and Awards Luncheon

Thursday, June 11, 2026
12:00 Noon

The Sofitel Hotel, 120 S. 17th Street, Philadelphia

