Article 5. Cleared for Resolution: ADR in Aviation Disputes

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Cleared for Resolution: ADR in Aviation Disputes

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Aviation cases present complex choice of law and jurisdictional issues because crashes can occur anywhere on the planet. Depending on the jurisdiction, elements of damages can vary wildly. It is more difficult to evaluate potential liability and determine a settlement when the applicable law is uncertain. For this reason, potential settlement amounts can range from thousands to many millions of dollars. In aviation crashes, plaintiffs usually seek recovery of both economic and noneconomic damages. While the claim for economic damages is best supported by concrete data such as earnings and medical history, plaintiff's counsel should also provide information about the victim's hobbies, household duties, and familial relationships to fairly evaluate both noneconomic and economic damages. The plaintiff's life story will likely drive the value of the noneconomic claim. The credibility and jury appeal of the plaintiff and other loved ones shown during depositions are critical in valuing the noneconomic damages. Commonly, the noneconomic damages will dwarf any economic claims. Just because it is difficult to put a value on something does not mean it is useless. Both counsel must remember that settlement negotiations provide an opportunity to illustrate the value of the case to the opposing side.

The Settlement Process

Most cases will settle or otherwise resolve without going to trial because the courts strongly encourage parties to participate in settlement discussions and mediation. With most cases either settling or being dismissed prior to trial, litigators must hone their negotiation skills in addition to their trial strategies.

Typically, the first mention of settlement is during discussions between opposing counsel. Plaintiff's attorney will make a written demand once it is agreed that the talks should begin. Offers and counteroffers will be exchanged. It is best practice to follow up on all offers, especially verbal ones, with written correspondence setting forth the terms of the offer to keep an accurate written record of negotiations.

Counsel should have clear authority from their client on an acceptable settlement amount. The best practice is to retain a written authorization in which the amount is clearly stated and approved by the client. While clients likely will not want to be personally involved in each step of negotiations, they must be informed of offers and demands. One of the first steps to advising a client about settlement is to explain that resolution is more likely when all the necessary information to evaluate the claim has been provided to the other side. Defendants cannot be expected to properly negotiate until they have enough information to fully assess liability and damages.

Mediating The Case

Parties may be ordered to mediation, or it may be done voluntarily. While the court cannot force you to settle, they can force you to discuss settlement.

Choosing a mediator is generally done by agreement among the parties unless one is selected by the court. Due diligence should be exercised on prospective mediators. Some may prefer a mediator with substantive knowledge of the subject matter. Others may prefer using a retired judge. The main objective is to find one that the parties feel will increase the chances of getting the case settled.

Most mediators require mediation memos, which usually help a party focus its arguments and assess the evidence. While memos should present the strengths of your case, they should still be factually correct and not cause any credibility issues with the mediator. The more informed the mediator is about the case prior to mediation, the better the mediation will go.

The attorneys should prepare their clients for mediation as this is likely a new experience for the plaintiffs. The attorney should meet with his or her clients to consider the overall strengths and weaknesses of the case. While a plaintiff's attorney can never fully ease his or her client's nerves, fully educating the client on what to expect will best prepare them for mediation. Additionally, the parties should also notify the mediator if their client's settlement expectation is unreasonable as this information will let the mediator know how to handle the client from the outset.

The mediator will conduct the process in a fair and impartial manner. The mediator will decide if this is the type of mediation that should have a joint session. If a joint session is appropriate, it can be a great opportunity for the parties to present their positions and let the clients hear, maybe for the first time, potential weaknesses with their case.

At the onset of the mediation, the mediator will explain the process, emphasizing its confidential nature. Allowing a client to speak during an opening statement is a great time for the client to tell his or her side of the story and can be invaluable if the client is well spoken. However, there is always the potential danger that the client could blow up and release their built-up frustration and emotion. The best chance for a resolution is to have a calm presentation of the facts as viewed by each party.

The mediator's work really starts when the parties break apart into private rooms. Some aviation cases will require the mediator to allocate their time unevenly. In a wrongful death case, for instance, the mediator will want to spend a great deal of time with the plaintiffs and will need to exercise patience and empathy. A mediator's focus should be to understand and determine the underlying issues and interests of the parties. In cases with questionable liability, the mediator must communicate the likely outcome of the case in a pragmatic and common-sense manner. Often, the mediator's role is to emphasize the realities of the probable outcome of the case if it is not settled amicably.

Preparation is essential to success at the mediation. It is not uncommon to go through mediation without a settlement. Indeed, it might become clear that the parties are so far apart they will never reach an agreement. Quite often, however, even an unsuccessful mediation will either help narrow the issues or make it possible to get the case settled through a follow-up mediation or phone calls with the mediator. Mediation is a process, not a result. The following points are important to remember:

- 1.

  Mediating too early might be a waste of everyone's time. All parties need to be able to assess the strength and value of the case. Sufficient

discovery must have taken place, or an informal exchange of sufficient information, so the theory of the case can be fully presented to the mediator.

- 2.

  A successful mediation will show the weaknesses in the case. The parties must fully appreciate their risks before any meaningful settlement discussions can occur.

- 3.

  The plaintiff might find it helpful to create a video for mediation purposes. In what should be no more than a half hour, those interviewed explain what was taken from them, describing their suffering as well as the type of person their loved one was.

- 4.

  For complex cases or those involving great loss, conducting a focus group or two before mediation can be very helpful. They can expose weaknesses in the party's own case and show which theme of a case will gain the most acceptance. Focus groups also can assist in assessing the credibility of the opposing party's theories and giving a realistic range for damages.

- 5.

  Above all else, the parties must be prepared to take the case to trial if mediation fails. If counsel feels that the opposing party is merely using the process as a ploy, they must be prepared to cut the mediation short and simply move on to trial.

Careful consideration must be made before deciding to engage in settlement negotiations. Above all, attorneys must be in tune with the goals of their clients and must never assume that a case is going to settle. Rather, the attorney must prepare as if the case is going to trial. Absent an aggressive approach and the commitment to go to trial, counsel does a disservice to the client. Attorneys should get experts involved early to address potential liability issues from the outset of the case. While insurers may like to resolve a case early, diligently preparing a case with the anticipation of going to trial will allow the parties to better assess risk and potential exposure. The plaintiff should always go into mediation with an open mind but should understand that often the defendants and their insurers may not be willing to fully and meaningfully engage in the settlement process at that time.

John Kalantzis earned degrees from Northwestern (B.A.) and Notre Dame Law (J.D.). A member of multiple bar associations, John focuses on aviation law, wrongful death, and serious injury cases. He is currently representing families affected by the Ethiopian Airlines Flight 302 crash. Known for his compassion and tenacity, John advocates fiercely for victims of negligence, treating every client like family and challenging corporations to secure just compensation.

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