MEDIATING AVIATION CLAIMS

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1. Introduction

Mediations, like all counsel work, benefit from preparation. Aviation claims frequently involve highly technical evidence, both as to liability and damages. If the claim is one for personal injury or death, they also frequently contain what is described as “high emotional content”. Both factors figure prominently in preparing to mediate an aviation claim or aviation subrogation matter and should be considered at an early stage.

2. Mediation advocacy

A mediation typically takes place after litigation is commenced. It is perhaps for this reason that counsel often advocate at a mediation in the same way that they might if they were appearing before a court or tribunal: in an adversarial, positional fashion. In my opinion, mediation calls for a different form of advocacy with a knowledgeable mediator as the facilitator

When counsel appear before a judge or tribunal, they are usually trying to persuade the trier of fact that the positions they are advancing on behalf of their client are correct, or that the positions being advanced by the other party are incorrect. Based on my observations, cases never settle at a mediation if one party is focused on convincing the other party they are right, or one party acknowledges they are wrong. Cases settle because one party demonstrates to the other party the risks they face if the claim/court action is decided by a judge or jury.

In my opinion, counsel should adjust their approach at mediation accordingly. This adjustment should inform developing a mediation strategy, drafting the mediation brief, and preparing the client for the mediation.

3. Developing a mediation strategy

Mediations benefit from the use of a strategy. A mediation strategy should focus on both "process" and "content". Process is how we mediate, and content is what we mediate. It is my observation that lawyers tend to be better at dealing with content than they are process. This is likely because of their training. Skilled counsel will consider both process and content when determining the strategy they will employ at the mediation. Process includes:

(a) determining each party's needs, which in turn drives content;

(b) style;

(c) the myriad of steps that take place before the mediation itself;

(d) who will be in attendance at the mediation; and

(e) how to deal with multiple defendants.

I will consider and address each of these in turn.

(a) Needs and content

Needs involve much more than a plaintiff wanting to recover as much as possible, or a defendant wanting to pay as little as possible. The needs of a surviving family member or catastrophically injured plaintiff in an aviation case frequently include a desire to be acknowledged, to be respected during the mediation process, and to ensure long term security. The needs of a defendant or its insurer in an aviation claim frequently include avoiding the risk of a “worst case” judgment, avoiding further or other legal proceedings, maintaining confidentiality, and certainty of outcome.

As I have said, needs drive content. One of the great skill sets of counsel is the ability to obtain and organise information. Any efforts counsel make to determine what a party’s needs are will assist them in determining what is important to the opposing party in a settlement, quite apart from monetary considerations. Insight into the opposing party’s needs is often something the mediator can assist counsel with.

(b) Style

Counsel should consider what their negotiating style is or should be. A collaborative style yields better results and resolves more issues than a competitive approach.

> "Studies show that adversarial negotiators make about half as many deals as do more cooperative, problem solving negotiators. And they get about half as much from the deals they do make. So if you are confrontational, expect about 25% of what's possible."
>
> Stuart Diamond, ***Getting More: How You Can Negotiate to Succeed in Work and Life***, Three Rivers Press, 2012

To work in a collaborative way with opposing counsel does not mean ceasing to vigorously advocate for your client. It simply means advocating in a different way.

(c) Steps before the mediation

Many steps in the mediation process take place before the mediation itself. This is a non-exhaustive list of issues and matters that counsel should consider, and be asking the mediator to assist with, if necessary, prior to the mediation proper:

(i) whether the pleadings are final and complete;

(ii) the issues to be dealt with during the mediation;

(iii) whether there are any issues a party will not consider at the mediation;

(iv) whether there are any issues regarding insurance limits, and whether that necessitates the involvement other than counsel of record at the mediation;

(v) the exchange of information and documents prior to the mediation;

(vi) the exchange of expert reports prior to the mediation;

(vii) scheduling the exchange of briefs and

(viii) whether there should be opening statements from the parties.

(d) Who will be in attendance at the mediation

Counsel should give consideration as to who should be in attendance at the mediation, including "friends and family", experts, or independent advisers. As well, consider whether any of these people need to be available for consultation during the mediation itself, and if so, having arrangements in place prior to the mediation.

As a defendant, be sensitive to the possibility that plaintiffs may need the insured tortfeasor personally in attendance as a show of respect, rather than only the insurance company representative.

(e) How to deal with multiple defendants

Many aviation cases involve multiple defendants. This can result in two separate negotiations: one between the plaintiff and the defendants, and one between the defendants.

It is helpful for the defendants to discuss apportionment as between themselves prior to the mediation. If you think the mediator can assist with that, ask the mediator to do so.

A plaintiff usually doesn't care which defendant contributes what to a settlement. However, when there is disagreement between defendants as to what their respective contributions toward settlement should be, it is often helpful to hear from the plaintiff as to their views on the matter, and why. Once again, this is something that should be discussed with the mediator.

Counsel for both plaintiffs and defendants should consider, if there is no ready agreement as to apportionment, the appropriateness of ***BC Ferries*** or ***Pierringer*** type arrangements. It is useful to have these type of discussions ahead of the mediation as the possibility of them being entered into are frequently an incentive to a defendant to participate to a greater extent in funding a settlement than it otherwise might be without such an arrangement.

4. The mediation brief

It is the usual practise for the parties to exchange briefs prior to the mediation. A good mediation brief will explain the case to the client, opposing counsel, the other party, and the mediator. A well drafted mediation brief will enhance the prospects of settlement.

Based on my experience, here is what I think makes an effective mediation brief.

(a) It talks about risk

Cases settle because the parties recognise at least some risk in proceeding to trial. Litigation costs also factor into many settlements, but I would include future expenditures on legal fees and disbursements as a component of risk. An effective mediation brief will both acknowledge and assess risk, which will in turn prompt discussion and consideration of same.

(b) It is concise and tries to narrow the issues down to those that really matter

The mediation brief should not be clogged up with discussion about peripheral matters, or advance arguments that are not central to what the case is really about. "If you can't explain it simply, you don't understand it well", Albert Einstein. Settlements are more likely to be achieved if the parties focus on what is important, as opposed to dwelling on matters that are not.

(c) It tries to minimise or eliminate issues that might otherwise impede settlement discussions

A good example of this is where there is a claim for non-compensatory damages. I have never seen a defendant agree to pay them as part of a settlement, although I am sure that has occurred. In spite of this, such claims are often outlined in great detail in the mediation brief. If there is a real risk of such damages being awarded, the issue should of course be addressed in the brief. However, a detailed analysis of such claims will seldom assist in driving a discussion about resolving the main issues between the parties.

(d) It is as much written for the opposing party as it is for the opposing counsel

My experience is that the parties to a mediation have usually read the other party's brief. If a brief is written in a form that a lay person can read and understand, it will be more effective, as it will prompt a discussion between opposing counsel and their client about the case being advanced against them. Indeed, this is the benefit of the mediation process: the opportunity to meet and persuade the opposing party of their risk. The opposing party is your audience: not their lawyer.

(e) It includes basic information regarding the case

It is helpful to the mediator to include basic information regarding the status of the litigation, and the details of any settlement discussions to date.

(f) It is delivered in a timely manner

"Timely manner" means when it was agreed that it would be delivered. There are of course always circumstances that may make that impossible. If those arise, let the other parties know about them as soon as possible.

5. Preparing your client for mediation

Here are my thoughts about preparing your client for a mediation, based on my experience as a mediator, and as counsel.

(a) The client should understand the brief you have prepared on their behalf

Make sure your client reads and understands the brief you have prepared on their behalf. In many cases, they will have insights into the dispute that you will not.

As well, use your client as a resource when drafting the brief. This is particularly important in any case where there is important technical evidence that your client is often more knowledgeable about than you might be.

(b) The client should understand the opposing party's brief

The client should also be provided with, and asked to review, the other party's brief. In my view, it is helpful for a party to hear, unvarnished, what the opposing party says about the various issues in the case. This will also avoid the client hearing about an issue for the first time at the mediation itself, which is seldom helpful.

(c) The client's expectations need to be realistic and flexible

Prior to the mediation, the client should be encouraged to remain open to possibility. I think one of the roles of counsel and the mediator is to get the best positions possible out of the parties. It is then up to the client, with counsel's assistance, to determine whether they wish to settle the case on that basis.
Many things go into determining what is an acceptable outcome to the case, and the amount of money involved is only one of them. The client will only be open to possibility if they don't have fixed expectations. Expectations are resentments waiting to happen, and never more so than at a mediation. If your client has unrealistic expectations, advise the mediator of this, and seek their assistance.

(d) The client should be prepared to take an active role at the mediation

If you are acting for a plaintiff, it is sometimes helpful to have your client answer questions, or to talk about their case. It is likely that the mediation will be the first opportunity for the people involved in the defendant's decision-making to meet your client and put a face to the information they have been provided with in stacks of paper. If there are gaps in the evidence, it may be helpful for your client to fill in the gaps, if possible.

If you are acting for a defendant, use the decision maker as a resource at the mediation to assist in explaining why certain positions are being taken. In my experience, it is often more compelling to hear from the decision maker, as opposed to the lawyer.

If you are acting for a plaintiff, give consideration as to whether your client should give an impact statement. If you think it is appropriate, prepare them to do that. If you are acting for a defendant, consider whether your client should provide an apology, consider who best to give that, and prepare them accordingly.

I would encourage you to discuss impact statements and apologies with your mediator. They may well have insights into what would be effective, and how they are best delivered.

(e) The representative of the client in attendance at the mediation should have the necessary authority to settle the case

If the representative of your client present at the mediation needs the authority of someone else to settle the case, make sure you know that before the mediation starts, and how to deal with it. If the issue is problematic, involve the mediator

before the mediation. You should also involve the mediator if you think that there may be authority issues with the other party or parties to the mediation.

Keep in mind, too, there are often legal obligations for a party to attend the mediation in person, with the requisite authority. It is counsel's responsibility to explain to their client their legal obligations. You do not want to find yourself defending a mediation default application, where the opposing party may seek a draconian remedy, such as the striking of a defence.

5. Conclusion

Preparing for a mediation is very different than preparing for a trial or hearing, but involves much the same skill set: obtaining and organising information. The end purpose however is different: it is to assist the other party in assessing risk, as opposed to persuading the trier of fact to reach a particular outcome. Involving your mediator in this process will only enhance the likelihood of a successful resolution.

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