

Negotiating a Settlement of an Aviation Accident Case

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TIP

Aviation cases present complex choice-of-law and jurisdictional issues because they occur globally. Familiarity with the issues, preparation, and information exchange are vital to meaningful settlement discussions.

The reality today is that the majority of cases will be settled or otherwise disposed of before trial due in large part to the courts encouraging (often insisting) that the parties participate in early settlement discussions and mediation.¹ This settlement trend has become even stronger in recent years with the continued expansion of court dockets.² With approximately 95 percent of cases either settling or being dismissed prior to trial, litigators should be practicing their negotiation skills in addition to fine tuning their trial tactics.³ This article will discuss the issues plaintiffs and defense attorneys face in settlements, as well as how the parties can best prepare and resolve a case through mediation.

Settlement from the Parties' Perspective

In most aviation cases, the plaintiffs have suffered catastrophic injuries or lost a loved one. While settlement can bring finality to a lawsuit more quickly than trial, the goals of the parties play a large role in determining when settlement discussions are appropriate. Some plaintiffs often want answers and accountability, while others do not want to undergo the psychological burden, delay, and expense of trial. On the other side, many insurers may want to settle cases before they incur significant costs; however, they also need enough data to make an accurate assessment of damages prior to settlement.

Plaintiffs and defense attorneys must be cognizant of their clients' desires; however, they must also ensure they have pertinent information to adequately advise their clients as to when settlement discussions are appropriate.

The first step in advising a client on settlement is to ensure that there is enough information to evaluate both liability and damages. Some plaintiffs who have not been involved in a lawsuit think the life of a case is similar to what they see on television. Unfortunately, the process from filing suit until resolution lasts much longer than an episode of *Law & Order*. Plaintiffs counsel should let the plaintiff know at the outset that a case is more inclined to be ripe for resolution when the attorney has obtained all the necessary information, including significant information regarding liability as well as the victim's medical history, earning history, and work history. Plaintiffs counsel may also need to obtain information regarding the victim's hobbies, household duties, and familial relationship in order to evaluate noneconomic damages. While defendants will be more familiar with the litigation process, they still need enough information to make a full assessment of liability and damages in order to properly negotiate a settlement. Settlement negotiations should only begin after enough materials have been obtained to provide counsel with an accurate view of both potential liability and damages.

Settlement negotiations provide an opportunity to show the value of the case to the other side. While it is a goal of both parties to approach settlement discussions from a position of strength, the parties should be realistic about the weaknesses of their case and address them from the outset.

Liability issues. Both parties should have a good grasp of all the liability issues prior to considering engaging in settlement discussions. This may occur early in the litigation process if the evidence indicates that liability is relatively clear. However, in many cases each party will need input from experts prior to initiating settlement discussions with opposing counsel. The ability to refute the opposing party's arguments regarding liability will improve the chances for resolution if and when settlement discussions proceed.

Damages issues. In aviation accident cases, plaintiffs usually seek recovery of economic and noneconomic damages. Catastrophic injuries and wrongful death cases typically require expert testimony and detail to prove economic damages. The credibility of a plaintiff's settlement demand will be bolstered if it is supported by concrete data. Plaintiffs counsel should engage an economist, life care planner if needed, and other experts who will provide a sound basis for the plaintiff's damages model. Likewise, defense counsel should engage experts to rebut the plaintiff's evidence.

While organization and qualified experts can significantly enhance the recovery of economic damages, the plaintiff's personality and story will likely drive the recovery of noneconomic damages. The credibility, likeability, and sincerity of the plaintiff and his or her family during depositions is crucial to having the noneconomic damages factor play a role in a settlement. If the plaintiff comes across as a great witness during deposition, the defense will be apprehensive to have the sympathetic plaintiff tell his or her story in front of a jury. However, if the plaintiff is an unlikeable witness or exaggerates his or her damages at deposition, this will lower any settlement offer from the defendants, who will be more inclined to cross-examine the plaintiff in front of the jury.

Knowledge of the amount of insurance coverage available can also guide plaintiffs counsel in determining settlement strategy. The Federal Rules of Civil Procedure, as well as many state rules, provide for discovery of insurance agreements under which an entity may be liable to satisfy all or part of a judgment.⁴

Legal issues to be considered in settlement. Aviation accidents occur all over the country and throughout the world. Different jurisdictions allow for widely varying compensation schemes for the victims of aviation accidents. When the law is uncertain on a particular issue, or when the standards by which a defendant's conduct will be measured are unclear, it is much more difficult for all parties to evaluate the defendant's potential liability. While uncertainty can promote settlement, the defendants still need to be able to evaluate potential risk to justify settling for a specific amount.

A plaintiffs attorney often has the ability to choose between several different jurisdictions. This is usually a strategic decision determined by evaluating the available remedies and liability issues in each jurisdiction. Obviously, a plaintiffs attorney will choose the most favorable, proper jurisdiction. However, it should be anticipated that the defense will try either to seek a change of venue or to pursue a motion to dismiss for forum non conveniens if appropriate. The effect of transferring venues can have a significant impact on both parties' evaluation of liability and damages.

Role of punitive damages claim. Plaintiffs in aviation cases typically seek both compensatory and punitive damages. The two main purposes of punitive damages are to punish past conduct and deter similar future conduct. From the perspective of the plaintiff, the chances of settlement are reinforced if the defendant is confronted with the uncertainty of a jury awarding significant punitive damages. However, defendants will be certain to note that plaintiffs face many obstacles to obtaining punitive damages. Many states prohibit punitive damages in wrongful death actions, and some states that permit punitive damages have set caps on those damages. Moreover, punitive damages are prohibited in connection with accidents that occur on international flights (per the Warsaw Convention and its successor, the Montreal Convention) and are also barred in accidents occurring on the high seas per the Death on the High Seas Act (DOHSA).

"In a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law."⁵ The amount of available punitive damages and the factors a court will consider in awarding punitive damages differ from state to state. Additionally, insurability against directly imposed punitive damages is not uniform from state to state.⁶ This lack of uniformity among the states creates complex choice-of-law problems in aviation litigation.

Importance of Settlement Brochure/Video

If prepared correctly, a settlement brochure can set the stage for the settlement discussion. A settlement brochure affords the plaintiff the opportunity to tell the story of the loss sustained and to let the defense and insurance carrier know the seriousness of the plaintiff's injuries. The brochure should accurately provide an account of the accident's impact on the plaintiff's life, thus leaving the defendant with a clear appreciation of the loss the plaintiff has sustained. It should include photographs of

the plaintiff that depict the true impact of the accident on the plaintiff. It should be short and direct but also captivating. A video documentary/chronology of the plaintiff's life is another tool that does all of these things. This is a time when a picture really is worth a thousand words.

Usually, liability arguments are not included in the settlement brochure. The brochure is better used to highlight and personalize the plaintiff. However, if liability seems relatively clear, the brochure can be effective as a warning to the defendant that the plaintiff probably will be victorious on the merits at a trial.

While an emotional settlement brochure or video is a great tool to personalize the plaintiff, it should not be considered as a substitute for providing the defendants with the hard information and documents necessary for the defendants to assess the value of the case.

Settlement Options

There are several different ways to approach settlement. Each case has its own unique factors that may change the settlement approach of the parties. The parties should look at the facts, liability exposure, client, and past dealings with opposing counsel when determining how to best approach engaging in settlement discussions in each particular case when the time is right.

Lawyer to lawyer. The first mention of the word "settlement" typically comes from a reference to the subject during discussions between opposing counsel. Settlement between lawyers is only successful when the lawyers, as well as the clients, have a realistic view of the case and know the strengths and weaknesses. This approach usually starts with the plaintiff's attorney making a written settlement demand after it is agreed that settlement talks should take place. The parties usually exchange offers and counteroffers either verbally or through correspondence. When an offer is made over the telephone, it is usually the best practice to follow up the verbal offer with written correspondence setting forth the terms of the offer. The written correspondence ensures that the parties are on the same page and helps by providing a written record of the offers and demands.

Meeting of attorneys and insurance representative. The defendant or the defendant's insurance representative usually has the last word on the final settlement offer. Thus, it is often helpful to have them be a part of the settlement discussion. This approach is best used when plaintiff's counsel feels the need to speak directly to the decision maker and feels that defense counsel may not be fully relaying the correct evaluation of the case to the insurance representative. The plaintiff may not want to be personally involved in those settlement discussions. However, the plaintiff must be kept in the loop regarding any offers and demands. Proceeding without the plaintiff being present may be effective when plaintiff's counsel is experienced in handling aviation cases and has earned the confidence of his or her client that the attorney will be negotiating in the client's best interest. The downside for the defense is that it will not have had the opportunity to at least meet the plaintiff, which could impact its evaluation; thus, the defense would typically prefer to have the plaintiff attend settlement meetings. Again, for a meeting to be successful, the defense must have available to it all of the pertinent damages information and an agreement on all terms of settlement.

Meeting with attorneys and clients present for both sides. Settlement often can be more effective when the final decision makers are in the room. Meeting with all parties can lead to a successful resolution in some instances. However, some counsel may feel that a roundtable negotiation session without an impartial third party can quickly escalate into an unproductive exercise of finger-pointing, and, therefore, is best used when there is not a tremendous amount of emotion and animosity between the parties. There are insurers and defendants who are of the belief that face-to-face meetings without a third party in the room can be valuable and effective when the parties exhibit respect and professional courtesy in negotiations. Other parties may believe that this model usually does not work well in aviation personal injury cases.

Mediation. Mediation is a process during which both sides and a third neutral party are forced to focus on the case with an eye toward coming together to attempt to resolve complex issues without the constraints, costs, and risks of a trial. Parties may be ordered to mediation, or it may be done voluntarily. Unfortunately, there are times when mediations are scheduled before both sides feel that they have sufficient information to mediate. In those cases, the mediations are usually unsuccessful or a subsequent mediation is necessary.

In selecting a mediator, which is generally done by agreement among the parties unless one is selected by the court, questions arise for the parties as to what type of mediator may be best suited for the case. Unless the parties have been using the same mediators, due diligence should be exercised on prospective mediators. Some may prefer a mediator with substantive knowledge of the subject matter, although that is generally hard to find in the aviation arena. Likewise, some may prefer using a retired judge, particularly because there are many out there. The main objective is to find one that the parties feel will increase the chances of getting the case settled.

Preparation is essential to success at the mediation. Most mediators require mediation statements, which usually help a party focus its arguments and assess the evidence for and against its case. While such statements should present the parties' strengths, they should still be factually correct and not calculated to cause any credibility problems with the mediator once the mediator sees the case as presented by both sides. Usually, the mediation statement is for the mediator only; it can contain information that will remain confidential if requested. The parties should want the mediator to be in a position to move forward when the mediation starts and not waste time getting up to speed.

Many mediations provide for opening statements with all parties present, although sometimes parties will agree to go directly into negotiations. If there is an opening session, the parties will have one of the rare opportunities to interact with each other. Both sides must be prepared but at the same time should be adaptable to what is presented by the opposing party. The parties should convey their side of the case without alienating the persons with whom they are trying to settle.

It is not uncommon to go through a 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.

The following are some pointers:

1. Know when to mediate. Mediating too early might be a waste of everyone's time. The parties need to have undergone sufficient discovery or have informally exchanged sufficient information so the theory of the case can be fully presented to the mediator. All parties need to know the strengths of the matter in order to use the information to assess the strength and value of the case.
2. A successful mediation must expose the weaknesses in the case. The parties must fully appreciate their risks before any meaningful settlement discussions can get underway.
3. Most mediators insist that the client be present at the mediation. This demonstrates settlement authority, but it also allows the client to be exposed to the weak parts of his or her case, which the mediator most certainly will convey during the process.
4. For the reasons outlined previously, the plaintiff might find it helpful to create a video for mediation purposes. In what should be no more than a half hour, the video helps the defendants assess the information. In a wrongful death case, those interviewed explain what was taken from them, describing their suffering as well as that of the decedent before his or her death.
5. For highly complex cases or those involving great loss, conducting a focus group or two before mediation can be very beneficial. Premediation focus groups not only assist in organizing the evidence and judging the credibility of the opposing party's theories, they also can expose questions about or weaknesses in the party's own case and give insight on how to better downplay them to the mediator and the opposing party. Focus group jurors often can show which theme of a case will gain the most acceptance. Focus groups also can assist in assessing the realistic dollar range for damages. It may be a good idea to have the client attend a focus group; however, the work product of the focus group should not be shared with the other side.
6. Above all else, the parties must be prepared to take the case to trial if mediation fails. Mediation is not a way to shortcut the system. It is a way to achieve justice without the risk (for all sides) inherent in trial. If mediation allows the attorney to spare his or her client the expense and hardship of a trial and the client is satisfied with the settlement amount, then it is a good resolution. But if counsel feels that the opposing party is merely using the process as a ploy to waste time and try to gain new information, he or she might cut the mediation short and simply move on to trial.

Settlement with Multiple Plaintiffs

When representing multiple plaintiffs, settlement discussions in each case must be kept independent of the others. There is no "bundling" of settlements. There is no "bundling" of discussions. Each case must be evaluated and discussed separate and apart from the others, with a separate demand being made as to each plaintiff and a separate offer to be taken to each plaintiff. The importance of this cannot be stressed enough.

Settlement with Multiple Defendants

Bringing a suit against multiple defendants has both benefits and drawbacks. Theoretically, adding more defendants will increase the likelihood that a jury will find at least one of the defendants liable. However, including numerous defendants can confuse the jury by adding too many moving parts at trial. In cases where the codefendants have cross-claims against each other, the plaintiff can use one defendant to help build his or her case against the other defendant. However, when it comes to settlement, codefendants may have widely different concerns and evaluations that can slow down the settlement process (i.e., competing indemnity claims among the codefendants).

In multiparty litigation, a defendant has to manage the expectations of both the plaintiff and the other defendants. Differing evaluations of liability among the codefendants will be a major impediment to settlement. Thus, the defendants should attempt to reach an agreement before the mediation as to the amount or percentage each defendant is willing to pay toward a settlement offer.

There are some cases, however, in which the relative culpability of the defendants is the main dispute in the litigation. In such cases, the negotiations with the other defendants can be more contentious than with the plaintiff. It may even make sense in certain situations to agree to a defendants' funding agreement to pay a settlement to the plaintiffs, remove the plaintiffs from the case, and then litigate or further mediate the liability issues among the defendants.

Many jurisdictions will hold defendants jointly and severally liable for a plaintiff's injuries.⁷ Some plaintiffs attorneys believe the threat of joint liability increases a defendant's offer, which makes settlement easier. However, the plaintiff needs to make sure that the threat of joint and several liability does not result in increasing settlement demands to a point that is unrealistic, because defendants have a hard time agreeing to pay for the wrong acts of other defendants. Plaintiffs counsel should adequately advise the defendant of the risks associated with joint and several liability; however, the plaintiff should not oversell the point.

Some jurisdictions allow for a settlement credit based upon a plaintiff's settlement with one of the defendants in a lawsuit.⁸ Under this theory, any settlements will be credited against the amount for which nonsettling defendants are found liable. The nonsettling defendant can claim a credit based only on the damages for which all tortfeasors are jointly liable.⁹ The nonsettling defendant is not usually entitled to offset any amount of separate or punitive damages paid by the settling defendant.

Terms and Conditions of Settlement

Before any offers are made, it is critical that all significant terms and conditions of a settlement be set out in writing to avoid any misunderstandings or future disputes. One possible method is for defense counsel to set out the terms in a letter to plaintiffs counsel and request that a signed copy be returned before the start of any negotiations. Without such understanding, the parties may agree upon a final number only to find themselves unable to agree on something necessary to effectuate the settlement.

The terms and conditions that ought to be agreed upon before making an offer should include the following:

1. Whether all offers are to be treated as confidential.
2. A deadline for accepting an offer or it will be withdrawn.
3. That any settlement will be contingent upon receipt of a release prepared by defense counsel, which will specifically include indemnity and hold harmless provisions protecting the released parties from any additional claims that are or could have been asserted by the plaintiffs, or any other party, arising out of the death or injury to the decedent or injured party. The release must specifically identify who is being released and require dismissal of all proceedings instituted by the claimants. The release should also require satisfaction of all liens. Particular attention should be paid to whether the settlement may be subject to the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA), which is discussed in more detail below.

4. A schedule for funding of the settlement and that no interest shall accrue while awaiting funding.
5. What payments were previously advanced by the defendants or insurers.
6. Who will bear fees, costs, and expenses. If a guardian ad litem may be needed, set out specifically who will be responsible for payment of the guardian ad litem fee.
7. If the plaintiffs are interested in structuring part of the settlement, whether only defendant-approved brokers will be involved, and whether structures will be written only by defendant-approved companies.
8. The timing in which a payment will be made.

Specific Important Settlement Terms

Confidentiality. Confidentiality of settlement agreements has become more and more prevalent. This results in the inability of plaintiffs to utilize settlement numbers from other cases as a comparison. On the other hand, there are defense counsel who take the view that the plaintiffs bar should not be able to use the settlements as a marketing tool. At the same time, plaintiffs counsel feel that the defense bar has all of the data from the cases they have resolved, and has been utilizing the confidentiality of the numbers as a means of trying to pay less on certain claims. Plaintiffs should consider the long-term impact of continuing to agree to confidentiality.

At the end of the day, most plaintiffs are not concerned with adding a confidentiality provision to the settlement agreement because they have no intention of writing an article or book about how their life has been destroyed by the accident. If otherwise satisfied with the settlement, most plaintiffs will not allow a request for a confidentiality provision to prevent them from bringing finality to the lawsuit and moving on with their lives. However, if confidentiality is part of the deal, plaintiffs should make sure that the confidentiality language is not overly restrictive and that they can truly live up to the terms of the provision.

Plaintiffs counsel should also be aware of the potential tax consequences of a confidentiality provision. “Historically speaking, confidentiality provisions in personal injury settlement agreements have not been separately taxed because they were presumed to be part of an exclusion from gross income under Internal Revenue Code § 104(a)(2) for physical personal injury.”¹⁰ However, in *Amos v. Commissioner*, the United States Tax Court approved the notion of taxing the portion of settlement proceeds attributable to the confidentiality provisions of a physical injury settlement agreement.¹¹ Thus, to limit tax exposure, plaintiffs counsel should require that the settlement agreement expressly indicate the amount of settlement proceeds that is consideration for the confidentiality provision. (Alternatively, the agreement might state that confidentiality is something that is part of the bargain for both sides and that both sides are mutually benefiting from it, as opposed to the plaintiff being paid a premium for confidentiality.)

Indemnity. Almost all settlement agreements proposed by the defendant will include an indemnity provision to protect the defendant from future liability and costs. Plaintiffs should fully understand the extent of what they are agreeing to before executing the agreement. Plaintiffs need to limit their exposure of having to defend the defendant on other claims.

Medicare issues. Additional concerns arise when, as a result of the accident, the plaintiff receives, or will receive, treatment that will be covered by Medicare. Plaintiffs counsel must determine whether health care providers have submitted the plaintiff's bills for a Medicare conditional payment. The attorney should contact the Medicare Coordination of Benefits Contractor if the plaintiff is currently a Medicare beneficiary.¹²

Pursuant to the Medicare Secondary Payer Act (MSP), Medicare is prohibited from paying medical expenses to the extent a "primary payer" is responsible for paying the claims. Primary payers include liability plans and self-insured and third-party tortfeasors. If the primary payers do not pay "promptly" (i.e., within 120 days), the health care providers may choose to submit bills to the Centers for Medicare and Medicaid Services (CMS), and CMS may conditionally pay the provider subject to reimbursement by the primary payers. CMS may also conditionally pay the provider while a liability claim is pending, i.e., before resolution of a lawsuit. CMS has both subrogation rights and the right to bring an independent action to recover its conditional payment and double damages plus interest from any primary payer or anyone who receives a payment related to the plaintiff's injuries from a primary payer (e.g., a personal injury plaintiffs attorney).¹³ Therefore, both plaintiffs and defense counsel must ensure that all liens and conditional payments have been or will be satisfied out of the settlement proceeds. For example, defense counsel should not disburse settlement proceeds until the plaintiff provides proof that any Medicare conditional payment lien has been satisfied or after satisfying such a lien directly from the settlement proceeds.

Even if a plaintiff did not receive treatment covered by Medicare, Medicare may have an interest in the plaintiff's future injury-related expenses.¹⁴ To protect Medicare's future interest, a Medicare Set-Aside should be considered if the settlement is expected to be in excess of \$250,000 and the claimant has a "reasonable expectation" of becoming a Medicare beneficiary within 30 months. Examples of a "reasonable expectation" include: (1) the plaintiff has applied for Social Security disability benefits; (2) the plaintiff has been denied Social Security disability benefits but anticipates appealing that decision, has appealed, or refiled; or (3) the plaintiff is 62 years and six months old.¹⁵ Although Medicare set-asides are not required at this point in the liability context, CMS has made clear that the consideration of a Medicare Set-Aside is part of the obligation to protect Medicare's interests under the MSP.¹⁶ The failure to consider Medicare's future interest could result in the denial of future Medicare benefits for services linked to the injury until the entire settlement amount is exhausted.

Finally, under federal Medicare law, liability insurers must report any payments to a personal injury plaintiff who is eligible for Medicare, and the onus to determine whether the plaintiff is eligible for Medicare rests with the liability insurer.

Deadlines for closing and payment. The parties usually disagree about when the settlement payment should be due. Of course, the plaintiffs will insist on as short a payment period as possible. Given the complex insurance placement in aviation cases, often the defense will ask for 60 days for payment. Plaintiffs often insist on a shorter timeframe. Where a longer time period may be necessary, the plaintiff should insist that the settlement checks be cut and that authority be given to deposit them into an interest-bearing account while the approval is ultimately obtained. Defendants typically prefer to issue the settlement checks only on approval from the court or to deposit the settlement funds with the court if directed by the court.

Tax Considerations

Plaintiffs counsel should properly advise the plaintiff regarding the potential tax consequences of receiving settlement proceeds. Recovery for personal physical injury damages is not taxable income.¹⁷ The IRS recently published final regulations, effective January 23, 2012, that remove tort-type tests in determining whether certain income that is the result of personal injuries is taxable.¹⁸ The prior rule excluded income arising from “prosecution of a legal suit or action based upon tort or tort-type rights, or through a settlement agreement entered into in lieu of such prosecution.”¹⁹ The new rule is that such income “exclusion may apply to damages recovered for a personal injury or physical sickness under a statute, even if that statute does not provide for a broad range of remedies. The injury need not be defined as a tort under state or common law.”²⁰

The final regulations also clarify the taxability of emotional distress damages. While emotional distress is not considered to be a physical injury or sickness under the final regulations, damages for emotional distress attributable to a physical injury or sickness are excluded from income.²¹ The American Association for Justice continues to work with the IRS to have emotional distress damages entirely excluded as taxable income, recognizing that those damages can be just as traumatic and lasting as physical damages. Punitive damages received on account of personal physical injuries are not excludable from gross income.²²

Guardian Ad Litem

In many jurisdictions, courts require a guardian ad litem to approve any settlement pertaining to a minor. A guardian ad litem is generally defined as a lawyer appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party.²³ Most of the authority regarding the appointment of a guardian ad litem is statutory.²⁴ In the vast majority of personal injury cases in which a guardian ad litem is appointed to protect the interests of a minor plaintiff, the guardian ad litem’s primary responsibility is to review the settlement agreement between the minor and the defendant. The guardian ad litem is required to determine whether the agreed-upon settlement is fair, reasonable, and in the best interests of the minor. The guardian ad litem then reports his or her determination to the court. After evaluating the guardian ad litem’s report, the court will either approve or reject the settlement agreement. Without the court’s approval, the settlement agreement will not be binding on the parties.

The appointment of a guardian ad litem provides an additional expense that plaintiffs may request be paid by defendants, which defendants often pay because it protects them against future claims brought by the minor when he or she becomes an adult. If the defendant’s insurer does not typically pay for guardian ad litem fees, this should be addressed with plaintiffs counsel during settlement discussions and prior to execution of any settlement documents.

Summary: Dos and Don’ts for Plaintiffs Attorneys

Careful consideration must be made before deciding to engage in settlement negotiations. Above all, plaintiffs attorneys must be in tune with the goals of their clients and must never presume that a case is going to settle. Rather, the plaintiffs attorney should diligently prepare the case for trial and assume that the case is going to trial. Absent an aggressive approach and the commitment to go to trial, plaintiffs counsel does a disservice to the individuals he or she represents. There usually comes a point in every case where mediation is either ordered or requested by one of the parties to the case. The plaintiff should always go into mediation with an open mind but should understand that often the defen-

dants and their insurers may not be willing to fully and meaningfully engage in the settlement process until all the pertinent facts are discovered. There are, of course, exceptions to that, and approaching any settlement discussion or mediation appropriately will either result in a resolution of the case or reconfirm the need to be prepared and ready to try the case.

Summary: Dos and Don'ts for Defense Attorneys

Organization is the key to an early settlement from the defense perspective. However, this is usually determined by whether the plaintiff has been forthcoming with all of the pertinent information to accurately assess damages. Defendants should also get experts involved early to address potential liability issues from the outset of the case. While insurers may like to resolve a case early on if possible, diligently preparing a case with the anticipation of going to trial will allow the defendants to better assess risk and potential exposure.

Settlement from the Mediator's Perspective

Courts and associations such as the American Bar Association and the Society of Professionals in Dispute Resolution (SPIDR) publish model standards of conduct for mediation.²⁵ These publications provide guides for conduct of mediators with the primary purpose of promoting public confidence in mediation as a process of resolving disputes. These rules of conduct emphasize: voluntary participation, self-determination, confidentiality, fairness, impartiality, and informed consent. At the root are the concepts of integrity, fairness, trust, candor, and sincerity.

Attributes of a competent mediator. Initially, the mediation world emphasized facilitation. Mediators are distinguished as either a facilitative mediator or an evaluative mediator. In the early years of mediation, evaluative mediators were scorned. In its truest form, a facilitator assisted the parties in reaching an amicable joint resolution without offering an opinion. However, after a decade of mediation, studies showed that the majority of disputes were being resolved with evaluative mediators, who do offer their opinions regarding the positions of the respective parties.

Attributes of a mediator should include fundamental fairness and impartiality. He or she should be able to inspire trust and confidence, have good communication skills, and have an ability to identify, focus, and resolve issues. The mediator should have a basic understanding of the law and facts of a dispute—someone with a thick skin who is persistent and optimistic.

Practical approach. Mediation from the standpoint of the litigants has been addressed above. As there set out, the mediator usually will expect from each party a previously submitted mediation statement that will provide the mediator with the pleadings, key evidence, any case law that might be pertinent, and such other information as will enable the mediator to start developing a settlement strategy and identifying key issues that may be the cause of any settlement roadblocks. The more informed the mediator is about the case prior to mediation, the smoother the mediation will go.

It is important to remember that while successful litigation relies, in large part, on the skills and persuasiveness of the attorneys, whether there is resolution at mediation is mainly up to the clients. The attorneys should also focus on preparing their clients for mediation. Most defendants and insurers in aviation cases have attended multiple mediations; however, this may be a new experience for the plaintiffs. The attorney should meet with his or her clients to consider the overall strengths and weak-

nesses of the case and develop a risk/benefit analysis to aid in developing a settlement strategy. For many plaintiffs, this is the first time they will meet a client representative for the defense, whom they may blame for causing them personal injury or the devastating loss of a loved one. While a plaintiff's attorney can never fully ease his or her client's nerves, fully educating the plaintiff on what to expect and who will be in attendance will help prepare the plaintiff for mediation. Additionally, the parties should also notify the mediator if their client's settlement expectation is unreasonable. While this usually becomes apparent during mediation, this information will let the mediator know how to handle the client from the outset of the mediation.

At the onset of the mediation, the mediator will explain the process, emphasizing its confidential nature. The mediator will conduct the process in a fair and impartial manner. The mediator will decide prior to mediation if this is the type of mediation that should have a joint session. The parties providing the mediator with information about the case prior to mediation should allow the mediator to determine if a joint session is appropriate. The last thing the mediator wants to do is to have the parties arguing with each other during a joint session and spend the first half of the day trying to calm the parties down. In determining if a joint session is appropriate, a mediator typically looks to the following: (1) the emotional discourse between the parties; (2) the need for a party to air its grievances; (3) the type of case; (4) the knowledge of each opposing party's position; and (5) the attitude of the parties.

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. Allowing a client to speak during an opening statement is a great time to allow 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 get on his or her soapbox of built up frustration and emotion. A calm presentation of the facts as viewed by each party will help start the mediation off with the best chance for resolution. Defense counsel can use the joint session to try and humanize the corporate defendant.

The mediator's work really starts when the parties break apart into private rooms. The mediator must be perceived as unbiased, reasonable, and fair, but fairness and courtesy should not be confused with lack of firmness. In a wrongful death case, the mediator will want to spend a great deal of time with the plaintiffs. Patience and empathy are essential elements to a wrongful death resolution.

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.

Any resolution or agreement should be memorialized. Some mediators refer to it as a "memorandum of settlement." Different jurisdictions have different rules regarding what should be included in the document to make it binding, enforceable, and admissible. Getting to a dollar amount is only half the battle. Any significant terms to be included in the agreement should be discussed early in the mediation so they do not become problematic at the end of a long and tiring session, especially in multiparty cases.

Conclusion

While settlement may be approached from different perspectives by plaintiffs and the defense, there is a clear consensus that preparation is the key to a favorable settlement. Neither side will be in a position to settle if it does not have the information available to it to properly evaluate the case. The plaintiffs must provide the damages information necessary for the defense to properly evaluate the case. The defense must set out its terms for settlement so that there is no confusion regarding what is being settled. Legal issues must be identified and understood. The respective clients, particularly those not familiar with the settlement process, must be properly prepared, particularly for a mediation. Finally, any settlement agreement must be documented, either by letter agreement or a memorandum of settlement initially and then by a formal settlement agreement, and in the case of minor plaintiffs, a guardian ad litem and formal approval by a court. Any issues pertaining to closing the settlement must be addressed and agreed to before the settlement can be finalized.

Notes

1. See Magistrate Judge Jeffrey Cole, N.D. Ill., Instructions and Procedures for Early Settlement Conferences, [www.ilnd.uscourts.gov/home/_assets/_documents/webdocs/Cole/Settlement Instructions.pdf](http://www.ilnd.uscourts.gov/home/_assets/_documents/webdocs/Cole/Settlement%20Instructions.pdf) (last revised Aug. 22, 2012).
2. *Id.*
3. John Barkai et al., *A Profile of Settlement*, 42 CT. REV. 34 (2006).
4. FED. R. CIV. P. 26(a)(1)(A)(iv); see TEX. R. CIV. P. 194.2(g); N.Y. C.P.L.R. 3101(f).
5. *White v. Ford Motor Co.*, 312 F.3d 998, 1022 (9th Cir. 2002) (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 278 (1989)).
6. Patrick J. Borchers, *Punitive Damages, Forum Shopping, and the Conflict of Laws*, 70 LA. L. REV. 529, 549 (2010).
7. See *SEC v. J.W. Barclay & Co.*, 442 F.3d 834 (3d Cir. 2006); *Barry v. Quality Steel Prods., Inc.*, 905 A.2d 55, 58 (Conn. 2006); *Shipler v. Gen. Motors Corp.*, 710 N.W.2d 807 (Neb. Ct. App. 2006); Michael T. Raupp, *The Multiplication of Indivisible Injury*, 90 TEX. L. REV. 259 (2011).
8. *Wilson v. John Crane, Inc.*, 97 Cal. Rptr. 2d 240 (Ct. App. 2000); *Utts v. Short*, 81 S.W.3d 822 (Tex. 2002).
9. See TEX. CIV. PRAC. & REM. CODE § 33.012.
10. Randall O. Sorrels & Neel Choudhury, *Plaintiffs' Attorneys Beware: Little Known Tax Consequences Associated with Confidentiality Provisions*, 6 HOUS. BUS. & TAX L.J. 258, 260 (2006).
11. *Id.* (citing *Amos v. Comm'r*, 86 T.C.M. (CCH) 663 (2003)).
12. Caroline C. Pace, *Tort Recovery for Medicare Beneficiaries: Procedures, Pitfalls and Potential Values*, HOUS. LAW. 24, 28, Mar./Apr. 2012.
13. *Id.*
14. 42 U.S.C. § 1395y.
15. Memorandum from Thomas L. Grissom, Dir., Ctr. for Medicare Mgmt., to All Regional Administrators, Medicare Secondary Payer—Workers' Compensation (WC) Frequently Asked Questions (Apr. 22, 2003).
16. CMS was supposed to issue a notice of proposed rulemaking (NPRM) as soon as September 2013 regarding MSP requirements and future medicals (which had not occurred as of September 24). After the NPRM is issued, CMS will collect public comments for 60 days and will move on to the final rule-making stage. Therefore, the issues surrounding the current ambiguity of the MSP should be resolved by the end of 2013.

17. 26 U.S.C. § 104(a)(2).
18. 26 C.F.R. § 1.104-1 (effective Jan. 23, 2012).
19. 26 C.F.R. § 1.104-1(c) (effective to Jan. 22, 2012).
20. 26 C.F.R. § 1.104-1(c) (effective Jan. 23, 2012).
21. *Id.*
22. O’Gilvie v. United States, 66 F.3d 1550 (10th Cir. 1995).
23. Land Rover U.K., Ltd. v. Hinojosa, 210 S.W.3d 604, 607 (Tex. 2006).
24. *See* CONN. GEN. STAT. § 45a-132; FLA. STAT. § 744.3025; WIS. STAT. § 807.10.
25. *See, e.g.*, MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2005).