Understanding the Dynamics of a Business Dispute Mediation

By JAMES T. SHEARIN

Mediating a business dispute is different in many respects than mediating a personal injury suit. This article discusses some of the more important differences and offers guidance on how they may best be addressed.

Mediation Statements

The two predominate issues in a personal injury action are liability and the extent of damages. In some cases, liability is stipulated to, in others it is fairly obvious, and still in others it is an open question. In business disputes, liability is almost always in dispute. In fact, many times there are counterclaims and in some instances cross-claims. Sorting out who the real injured party or parties are is not necessarily easy. Mediation statements can be very helpful in sorting out the liability questions, but only if they address the issues in an open and honest manner and provide the mediator with the leverage she needs to move the parties. The mediator brings

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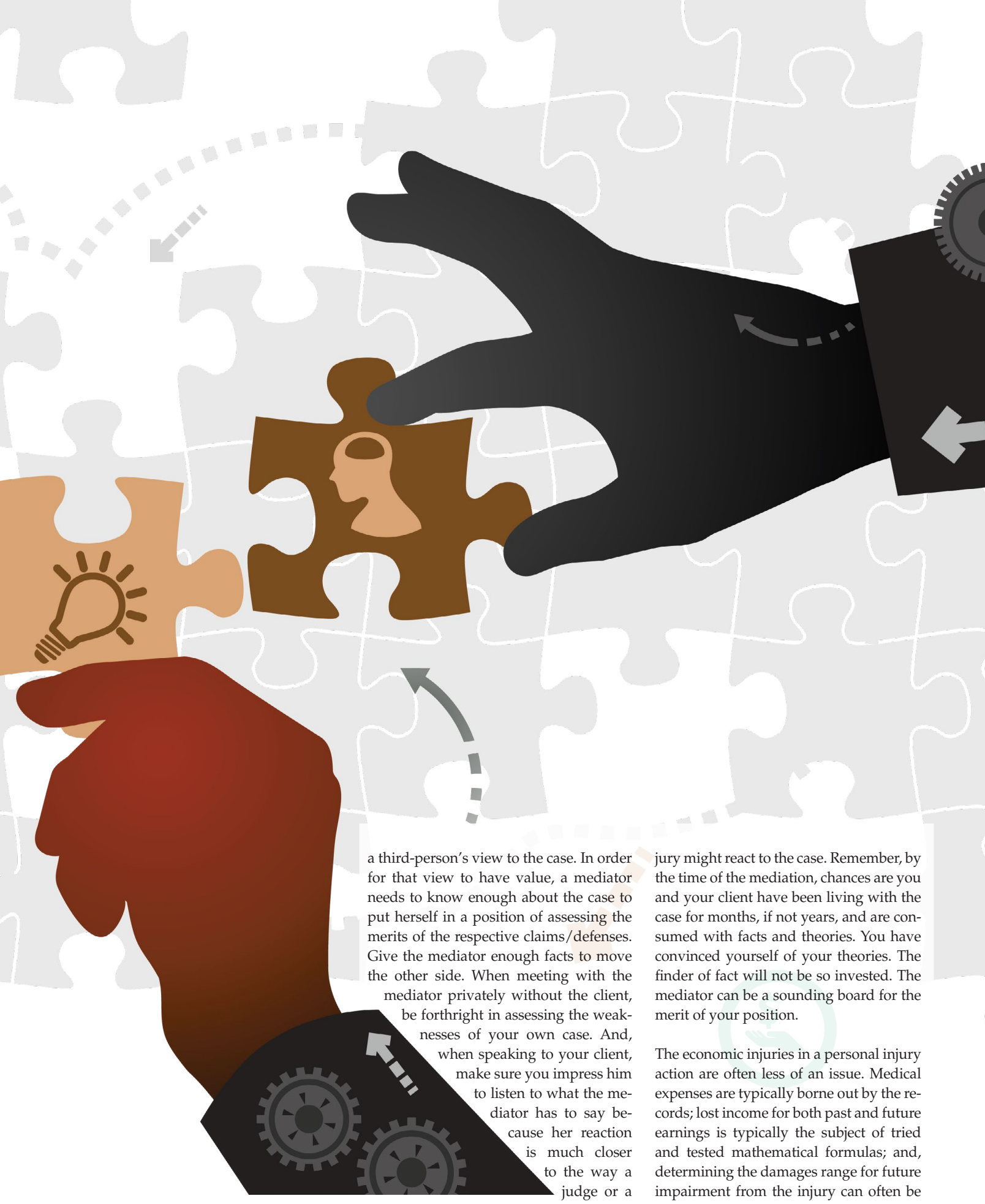

a third-person's view to the case. In order for that view to have value, a mediator needs to know enough about the case to put herself in a position of assessing the merits of the respective claims/defenses. Give the mediator enough facts to move the other side. When meeting with the mediator privately without the client, be forthright in assessing the weaknesses of your own case. And, when speaking to your client, make sure you impress him to listen to what the mediator has to say because her reaction is much closer to the way a judge or a jury might react to the case. Remember, by the time of the mediation, chances are you and your client have been living with the case for months, if not years, and are consumed with facts and theories. You have convinced yourself of your theories. The finder of fact will not be so invested. The mediator can be a sounding board for the merit of your position.

The economic injuries in a personal injury action are often less of an issue. Medical expenses are typically borne out by the records; lost income for both past and future earnings is typically the subject of tried and tested mathematical formulas; and, determining the damages range for future impairment from the injury can often be

found in accessible databases. That is not to say that every broken arm is the same, but it is to say that there is a range of damages for a broken arm one can find from prior successful mediations and jury verdicts. For certain, non-economic damages can be more speculative, but there, too, is a fairly accessible body of knowledge as to how prior cases with similar injuries were resolved.

The damages in a business dispute can be difficult to determine. Determining lost profits, a reasonable royalty, or what a frustrated investment might have yielded are often not easily determined and not nearly something found in public databases. Here again, the mediation statements need to be sufficiently detailed to point out the theories of relief, the weaknesses with those theories, and the range of damages depending on the success of each parties' claims or defenses. Initial demands and offers should be exchanged ahead of time just to set the outside borders for the discussions. Otherwise, the mediator is left with the perennial problem of who goes first. But, those demands and offers should be realistic if the parties want to settle. An unrealistic offer or demand drives people apart. By the time of the mediation, there should be no secrets as to the parties' respective positions on damages. Consider those positions when educating the mediator. Importantly, do not draw lines in the sand or let your clients do so. They are not helpful. Announcing in the first hour that you will not take less than "X" or pay more than "Y" helps no one, and in my experience is rarely true. What it does is drive a wedge between the mediator, lawyer, and client so the mediator is then pitted against the lawyer for drawing the line.

Another factor that often comes into play in the calculation of damages for a business dispute are counsel fees. Unlike in personal injury cases where plaintiff's lawyer is typically being paid on a contingency basis and the defense lawyer is being paid by the insurance company, in business disputes, more often than not, the litigants are paying their own freight as they go. By the time the mediation has been scheduled it is likely both sides have incurred significant fees and will incur many more if the case does not settle. The amount of those fees is often something each side wants to recover as part of the mediation. It is incumbent on counsel to manage the client's expectation with response to this issue and many others. Clients need to be told that recovering their fees will be difficult. If the issue remains a dominant factor for the client, the matter should be addressed with the mediator at the outset on an *ex parte* basis. It is much easier for a mediator to incorporate some component of the fees as part of an overall settlement amount than it is to treat it as a separate line item that simply invites rejection by the other side.

Setting the Setting

For a business mediation to be successful, the parties need to be in the right frame of mind. Advocates need to make sure that their clients understand that what is set forth in their mediation statement is the best case scenario; it does not mean that is where the parties will end up. That is not to say that lawyers should put themselves in an awkward position where they appear to be less than zealous, but it is to say that they should speak frankly to the clients about the pros and cons of the case. Most importantly, to the extent that there is a disconnect between the client's realistic expectations and what can be realistically accomplished in the mediation, share that concern with the mediator privately in an *ex parte* conference, in advance of the mediation so the mediator can deal with it from the outset. The mediator should be used as a buffer with the client if the lawyer's relationship would otherwise be jeopardized in doing it. It has often been said that the best mediation is when both parties walk out unhappy, but the matter is resolved. Most clients don't know that going into the mediation. The sooner they understand it the more likely it is that the case can be resolved.

Part of managing expectations is managing emotions. In many personal injury cases there is no possibility of an ongoing relationship. The injured driver will never meet or speak to the negligent driver who hit her. That is not always the case in business disputes. Often times, the parties will remain competitors in an industry, see each other at trade shows, or have employees that move back and forth. Emotions run high and deep. Reputational loss can predominate the discussions. For that reason, I believe it is best to keep the parties separate and make it clear from the beginning that mediating a broken friendship is not one of the agenda items. To that end, refrain from offering opening remarks, they are often counterproductive. Advocates do what they are trained to do and point the finger at the other side demanding millions of dollars or making clear they won't pay a dime. It rarely serves a useful purpose. Rather, it drives the litigants to their respective corners resulting in wasted time trying to get people back.

Business disputes sometimes involve the conduct of a particular individual or individuals who, while perhaps not sued, desire to vindicate their actions and certainly not live with the consequences of an adverse outcome or expensive settlement. These behind-the-scenes internal dynamics are often more consequential than how much money is involved. Which business line is going to be tagged with the expense of the litigation and who will take the internal fall are issues that sometimes motivate people's decision making. If these dynamics exist and the lawyer cannot manage them, he should share that problem with the mediator in advance, not in a mediation statement shared with the client, but in an initial ex parte conference between the lawyer and the mediator directly. Assuaging egos, providing counseling, or even simply positioning the settlement in a way in which fingers are now pointed is something that has to be orchestrated from the outset. The only way that can be accomplished is if the mediator has the knowledge she needs upfront.

Client Attendance

Having clients available in a mediation is important. Having the right client is even more important. Oftentimes, the client representative is an in-house attorney

without authority to bind the business line whose balance sheet may be affected by the settlement. Sometimes the client representative is somebody too low on the totem pole to negotiate. Sometimes the representative is an insurance adjuster whose interests may or may not be aligned with the client itself. It is counsel's obligation to do what they can to make sure the right representative is present. But most mediators know that counsel are in an unenviable position of asking for someone more senior to attend or someone who doesn't have a limit to his authority. That issue is best addressed before the mediation. The mediator can then ask for confirmation upfront that the person has full authority to settle or, she could make sure the client contact who will be present will be able to communicate with the true client with authority on an ongoing basis during the mediation, or she may insist that she talk to the person with authority ahead of time to impress upon that person that his absence cannot be used as a settlement strategy. What doesn't work, however, is to go through the whole process of the mediation only to find out at the end of the day that there is someone behind the scenes who still needs to approve the resolution. Invariably, and often justifiably, the other side is upset because it is showing its hand in good faith believing that all parties are present to resolve the case.

Confidentiality and Non-Disparagement

Confidentiality provisions are standard fair in most settlement agreements for resolving business disputes, but whether such a provision will be included is something that should be addressed early in the day. In both instances, confidentiality and non-disparagement provisions should be raised by the mediator almost as standard terms along with general release language. Otherwise, if it is treated as unique, one party may hold that provision hostage for additional consideration when, in fact, it really should not be a game changer.

Caution has to be exercised with the non-disparagement provisions. Offering that as a part of the settlement agreement can be problematic if it is obvious that one side or the other is destined to breach it. In that event, the settlement can actually get derailed. It is sometimes best to raise that issue once there is a sense that settlement is possible and people are interested in getting the case resolved rather than worrying about what one might say about the other.

Some cases resolve without confidentiality or non-disparagement language because what becomes most critical is the fact of the settlement. In those instances, there is often the necessity of having a jointly written statement by both parties of the fact of the settlement and whatever other information might be agreeable to the parties. If a joint statement is to be issued, it is best to raise that issue later in the day after settlement becomes possible. The mediator should take ownership of the draft in consultation with both counsel alone first, and then with the litigants. That way, it is less of an advocacy piece and more of a neutral statement.

Signed Agreement

Whenever possible, an agreement should be signed before the parties leave the mediation. Ideally, the mediator should be drafting a settlement agreement throughout the course of the day, changing provisions as the settlement develops. Cementing the parties into their position before they leave and have a chance to second-guess themselves is critical. It doesn't mean they are being locked into a bad deal, it means they are being locked out of a deal they think they could renegotiate better. That is a mistake. If a full agreement cannot be reached before people leave, at the very least write down the salient terms and have people initial it. ■

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