

EXPERT ADVICE

The Simple Truth About Complex Mediation

A Question and Answer Session with Four JAMS Neutrals

In recent years, alternative forms of dispute resolution such as mediation have become a popular, efficient, and effective way to resolve disputes. Mediation is particularly expedient for resolving complex cases. The 2019 California Rules of Court define a complex case as “an action that requires exceptional judicial management to avoid placing unnecessary burdens on the court or the litigants and to expedite the case, keep costs reasonable, and promote effective decision making by the court, the parties, and the counsel.”

To find out why mediation is so beneficial for complex cases, and how mediators can help all parties in a complex dispute reach the best possible resolution, we spoke with four top mediators from JAMS: **Judge Gail A. Andler**, **Judge Robert B. Freedman**, **Judge Richard Kramer**, and **Judge Nancy Wieben Stock**. All four of these mediators possess extensive experience with complex cases, having served



JUDGE ROBERT B. FREEDMAN

on their county’s Complex Civil Litigation Panel during their time on the bench. These panels are judicial bodies in the state of California that focus exclusively on trying complex cases.

Q: What are the benefits of using a mediator to settle a complex dispute?

Judge Andler: Complex trials are often more expensive than other types of matters due to all of the moving parts, the experts, and the sheer volume of documents, including ESI. The results of the many rulings required in a complex trial are uncertain. And, complex trials are often long. An experienced mediator can help the parties and counsel navigate the complexities to reach a settlement, avoiding years of litigation and all the attendant human and capital costs.

Judge Freedman: Mediation, by definition, requires all parties to agree on the outcome or there is no settlement. This creates a sense of control over one’s destiny, which can have a significant value to parties, whether they are individuals or global corporate entities. And, mediation is a completely confidential process. Indeed, the confidentiality in a mediation is significantly greater than with the courts. And that refers to both internal and external confidentiality. So, for example, in terms of internal confidentiality, the mediator does not communicate to the defense what happens in a caucus with the plaintiff’s counsel unless expressly authorized to do so. With respect to external confidentiality, nothing about the result of the mediation is communicated to the outside world -- even to the court -- other than the fact that the case has been settled.



JUDGE GAIL A. ANDLER

Finally, mediators have more flexibility than judges, particularly with time and follow-up. If you don’t settle on the day of the mediation, it’s not unusual for the mediator to follow up with telephone calls with one or more counsel.

Judge Kramer: Mediation facilitates communication. This is especially true if you have numerous parties with divergent needs and expectations. Having a single person who is in charge of figuring out what everyone is trying to say and do really helps.

Q: What types of complex cases lend themselves to mediation?

Judge Kramer: A complex mediation is a mediation of a dispute characterized by one or more of the following: a) a number (often large) of disputants with different goals, b) a dispute where interpersonal

events have impaired a rational economic resolution, c) a case with complicated and/or novel factual or legal issues that make it difficult to evaluate risks and costs of litigation, d) a case plagued by anything else that significantly interferes with the parties acting in their own economic self-interest.

Judge Andler: Some examples of complex mediations are mass torts, consumer and employment class actions, private attorney general action (PAGA) cases, investment losses and Ponzi schemes, environmental or toxic tort claims, multi-party construction defect claims, pharmaceutical cases or medical device cases, healthcare reimbursement cases where you have a large number of separate claims, and of course complex business matters. Other examples might be entertainment cases, claims against sports organizations, real estate cases involving complex layers of ownership, construction delay and change order cases, or any type of catastrophic injury case or product liability case, as well as multiparty cases, cases presenting extensive expert testimony, and other areas where counsel anticipate a large number of motions or disputes over jury instructions. Ultimately, I think there can always be a benefit to bringing a complex case to mediation. Even if the case is not resolved in total, it can be streamlined, progress can be made, and it can be in a better position for settlement down the line.

Q: What are some attributes of a good complex mediator?



JUDGE NANCY WIEBEN STOCK

Judge Stock: Mediators for complex cases should be highly organized and able to triage over a period of time a series of staged mediation events. This could include extensive contact with parties before the mediation to organize and prepare. And, the attitude that a complex mediator should bring to the table is that it's a journey with an uncertain destination.

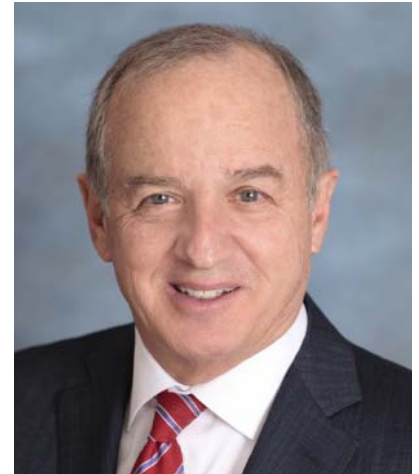
Judge Kramer: Patience. Listening. Avoiding reaching conclusions too early in the process as to who's right and who's wrong. Understanding that it's not about you. A lot of mediators -- especially in tougher cases -- think the whole thing is about keeping their batting average up high, but it's got nothing to do with that. It's about providing a service.

Q: How do you prepare for a complex mediation?

Judge Freedman: I research the lawyers' background and experience. I also research the corporate or business entities involved to get some understanding of the business attitude. I have counsel provide a mediation brief, so I know what the case is about. And I conduct pre-mediation calls, where I learn things that might not be evident from the briefs.

Judge Andler: Sometimes, industry or product research might be helpful, so I might ask counsel to recommend resources. I also ask counsel for their ideas on the case. They've lived with the case a lot longer than I have, they may have made prior attempts at settling, and they may know what worked and what didn't. While I'm at it, I ask if any settlement we reach will need board, committee, agency, regulatory, or bank approval. Finally, I encourage counsel to share their brief, or a version of it, with opposing counsel, so that everyone comes prepared. I find pre-mediation calls very valuable to my preparation.

Judge Stock: Complex mediators do need to encourage parties to share as much information as possible, particularly if it's a pre-litigation case where nobody's been served with a complaint or discovery. In addition to that, I make every effort to understand the industry or company culture that's involved. This includes asking direct questions of the lawyers, but also Googling



JUDGE RICHARD KRAMER

and using other methods to find out about the company history and values. I also try to understand the individual decision-makers who may be at the table. And I research the context of the mediation. That could be economic forces that may be in play. It could also be the #MeToo movement, trends on college campuses, or any number of things that might affect the context or environment of a settlement situation. Finally, I obtain something more than just a thin mediation brief from counsel. I seek out the confidential documents that will be part of the mediation -- reports, graphs, charts, analysis, and so on.

Q: How can mediators assist counsel during a mediation?

Judge Stock: Even though mediators take a neutral stance, they must partner with counsel to try to extricate the parties or the client from some unfortunate outcome that's going to happen if they keep going the way they are. In turn, lawyers should be open to share, and trust the mediator with, their ideas -- to think outside the box and make creative proposals and suggestions.

Judge Kramer: Lawyers have to be heroes for their clients. But a lot of times, the client's view of things isn't the same as the lawyer's view of things. So, sometimes you have to get your feelers out, and you have to talk to the lawyer. You tell them what you think might be helpful to move things along.