

TUESDAY JULY 8, 2025

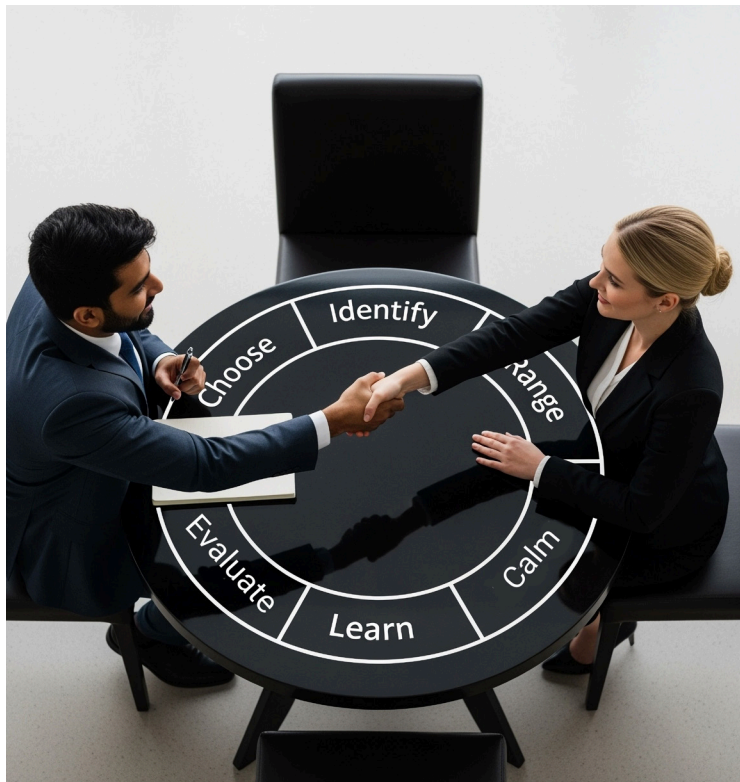
Complex case mediation: 6 essential tips for attorneys to succeed

Court-ordered mediation in complex cases can feel like a detour, but by applying the six CIRCLE strategies, attorneys can turn it into a powerful advantage for resolution and insight.

By Jill M. Manning

You are representing a client in a complex case that is making its way through the court system when – boom – the judge orders the parties to mediation. It may not feel like welcome news. Mediation can seem like an unexpected detour, one that delays litigation and pulls focus from trial preparation. But in truth, it presents a powerful opportunity. First, mediation allows your client to explore resolution without signaling any weakness – your client did not initiate the process, beyond checking a box on the mandatory ADR form. Second, by approaching the session strategically and applying the six key tips that follow, you will leave the mediation in a stronger position than when you started. Whether or not a settlement is reached, you will walk away with valuable insights into the opposing party's strategy, a fresh perspective on your case from a neutral, and a clearer path forward. CIRCLE up your team and apply these six tips to conquer complex case mediation.

Choose
Identify
Range
Calm
Learn
Evaluate



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Choose

It may seem straightforward, but selecting the mediator is one of the most important decisions you will make in the entire process, particularly in complex cases. A successful mediation often hinges on the mediator's neutrality, experience, subject matter knowledge and style. Take the time to evaluate each candidate's background and approach in light of the specific dynamics of your case, your client's priorities and your strategic goals. A well-matched mediator can build trust, manage conflict effectively and significantly increase the chances of reaching a meaningful resolution. Factors to consider are:

- **Neutrality:** Neutrality means that the mediator has no stake in the outcome, holds no predetermined opinions about the case and demonstrates no favoritism toward any party. Carefully vet proposed mediators by asking specific, targeted questions designed to identify potential biases.

- **Subject matter knowledge:** Consider whether it would be helpful to select a mediator with experience or knowledge in the area of law or industry relevant to the dispute, particularly in complex or technical cases (e.g., antitrust, intellectual property).

• Experience in complex cases:

In high-stakes or multiparty cases, it is essential to select a mediator with proven experience managing complex disputes. A mediator familiar with the dynamics of large-scale or multifaceted conflicts will be better equipped to navigate the legal, logistical and interpersonal challenges these cases present.

- **Style:** Is the mediator facilitative (guiding parties to find their own solutions), evaluative (offering opinions on strengths and weaknesses) or transformative (focused on relationship repair)? The effectiveness of the process often depends on choosing a mediator whose approach aligns with the nature of the dispute, the parties' dynamics, and the goals of the mediation.

Identify

Once the parties have selected a mediator, begin preparing your case thoughtfully. Identify the strengths and weaknesses of your position. A clear understanding of both allows you to set realistic expectations for settlement. This balanced perspective helps you avoid the pitfalls of overconfidence or unnecessary pessimism, enabling you to negotiate from a well-informed, strategic position. Leverage your case's strengths by emphasizing key arguments and supporting evidence. At the same time, acknowledging weaknesses enables you to anticipate likely counterarguments and plan measured responses. It also helps you distinguish between core issues and

those that are more flexible. With this clarity, you can make targeted compromises that protect your client's essential interests while giving ground on less critical points. Being prepared to negotiate from this foundation increases the chances of reaching a resolution that meets your client's goals.

Range

Develop a range of potential settlement options. Prepare multiple solutions that could meet both your client's needs and those of the opposing party. Consider creative and non-monetary terms – such as payment plans, changes to policies or practices, confidentiality or non disparagement clauses, or future business arrangements. Based on your assessment of the case's strengths and weaknesses, establish a realistic settlement range. Identify both your client's ideal outcome and the minimum acceptable terms. Have an honest conversation with your client about likely outcomes and the risks of continued litigation. Set practical expectations for what mediation can achieve, including the possibility that the parties may not reach an agreement. Finally, make sure that all necessary decision-makers are available and authorized to contribute to discussions and approve any proposed terms.

Calm

Mediation can be emotionally charged, especially if the dispute involves personal animosities or high stakes. Prepare yourself and your client to stay calm, focused and open-minded

during the mediation. Be prepared to address emotional responses without letting them derail the mediation process. When tensions flare, don't get furious; get curious. Ask the mediator "W" questions: Why is this person acting this way? What are they really trying to say? What is underneath their position or emotion? Who is driving the process? In the context of mediation, anger can shut down communication, but curiosity opens it up. When attorneys get curious, they are more likely to uncover hidden interests, misunderstandings and opportunities for compromise. Maintaining a solution-focused mindset, not an emotional one, is key.

Learn

Consider asking for a joint session with the mediator. While joint sessions have become less common, they still provide a valuable chance to observe opposing counsel firsthand and gain important insights. During a joint session, you can learn important information from opposing counsel about their view of the important facts and applicable law. Pay close attention to opposing counsel and their client, and evaluate their strengths and weaknesses: How effective and persuasive is opposing counsel? Is the client credible, sympathetic or likeable? A joint session can offer a preview of what opening statements at trial might look like and how a jury could perceive the case. Take detailed notes and think critically about how these dynamics might influence the courtroom. Use these observations to

refine your negotiation strategy and develop a more informed, targeted settlement offer.

Evaluate

After a joint session, the mediation will proceed to separate caucus sessions, and the mediator will shuttle between parties to communicate offers, explore concerns, and facilitate negotiation. When your client receives a settlement offer, evaluate it carefully. Consider if the proposed outcome is better than what the client is likely to achieve at trial by analyzing the strength of the case, the likelihood of success and the potential costs of continued litigation – including attorneys' fees, expert costs, delays and appeals. Assess the quality of the evidence, key witnesses, factual disputes, and any procedural or judicial factors that may influence the outcome.

Consider your client's broader goals and values. Does the offer align with what truly matters to them – whether that's financial recovery, confidentiality, speed, or closure? Help the client understand not just the legal implications but also the emotional and practical trade-offs of settling versus litigating. Ask for the mediator's neutral perspective. They may provide insight into how the offer compares to similar cases or suggest creative options for bridging gaps. If the negotiation stalls, consider asking the mediator to make a settlement proposal. Because they're engaging privately with both sides, they may have a unique vantage point to craft a solution that meets the core interests of both parties.

Armed with these six tips for mediating complex cases, you are well positioned to make the most of the mediation process. Depending on the complexity of the issues involved, the case may be resolved in a single session or require multiple meetings. Some outcomes may feel like true win-win resolutions; others may simply represent a practical compromise – acceptable to both sides and far preferable to the uncertainty, expense, and time demands of continued litigation. Most importantly, mediation allows you to shape the outcome rather than leaving it in the hands of a judge or jury.

Jill M. Manning is a mediator, arbitrator, special master, neutral evaluator and discovery referee at JAMS. She handles antitrust and competition, business and commercial, class action and mass torts, cybersecurity and privacy, education, employment, entertainment and sports, health care and securities matters.

