

Inside Complex Mediation: Tips for Lawyers From JAMS Neutrals

Insights from experienced mediators on preparation, breaking impasses and guiding clients through multifaceted disputes



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Hon. Glenda Sanders (Ret.)



Hon. Rebecca Westerfield (Ret.)

Defining “complex mediation” can be as complex as the disputes themselves. As three experienced JAMS neutrals explain, complex [mediation](#) can mean many different things: multiple parties with overlapping roles, webs of relationships and transactions, layers of insurance or funding that all need to be untangled, or a combination of these factors.

JAMS neutrals Adrienne Publicover, Hon. Glenda Sanders (Ret.) and Hon. Rebecca Westerfield (Ret.) discuss how they define and approach complex mediations and provide tips to help attorneys succeed in the complex mediation process.

Q: What makes a mediation complex?

Publicover: Sometimes it’s just magnitude in terms of dollars involved. More often, it’s multi-

ple parties, such as a plaintiff and an insurance carrier, plus an agent, plus a third-party carrier for the agent. Complexity can come in figuring out who is responsible for paying for different damages, as well as in the relationships and the dynamics—between not just the parties but also their lawyers.

Sanders: Typically, in a complex mediation, even before you reach the legal issues, you have to unravel a complicated set of facts involving numerous parties both individuals and entities with varying levels of liability. As my colleagues point out in this article, however, a matter can be complex for multiple reasons.

Westerfield: A mediation becomes complex for many reasons: coverage issues wrapped into the underlying case, class actions, allocation problems among multiple defendants or

insurers, third-party funders, history between attorneys or the parties, or parallel cases being litigated simultaneously. Managing logistics, creating some structured approach, exploring the interests of the parties, analyzing the core legal issues, asking the right questions: doing all this across multiple lines constitutes a complex mediation.

Q: What are the most important steps for attorneys in preparing for a complex mediation?

Publicover: I want to see a brief—and I really do mean brief. Complex mediations usually come down to three to five key issues. What I also find very helpful is a confidential pre-mediation call with each party. That’s where I get the nuanced picture: the goals, the obstacles, what might stand in the way of settlement, as well as the settlement discussion history. Those con-

versations help me start thinking about what a resolution could look like. Additionally, attorneys should ask to interview the mediator or seek recommendations from their colleagues to make sure the mediator is the right fit in terms of subject-matter experience and temperament.

Sanders: A mediation brief is essential. I ask the parties to provide me with their briefs at least a week before the mediation. I always have pre-mediation conferences with the attorneys. The information garnered at those conferences jumpstarts the mediation and increases the likelihood of successfully mediating the matter on the day of the mediation. After I have read the briefs, I generally ask the attorneys to share them with one another even if in redacted form. It is also very important to provide me with a damages analysis. I should not be using valuable time at the mediation asking questions about how they have calculated their opening demand. Timing of the mediation matters: Mediate early enough to avoid sunk costs, but not before essential evidence is shared. Parties need to have exchanged enough substantive information, especially key documents or valuation analyses, so the other side can fairly assess the case before the mediation.

Westerfield: Submit a written brief and, preferably, exchange it with the other parties. If there's something you're not ready to reveal, send a separate confidential brief. Keep it simple: who is who and what their title is, plus a timeline of the most important events. Sometimes, briefs read as if the attorney is writing for their own client; however, they are more constructive when they are tailored to persuade the other side. Be prepared to answer basic questions about how you got to your damages calculation, provide usable evidence and prepare your client for what to expect regarding both the process and the realistic outcome of the case.

Q: What tools or techniques work best when parties have reached an impasse in a complex mediation?

Publicover: If the parties are very far apart, I'll sometimes propose a mediator's range, commonly known as a "confidential proposed mediator's bracket." Once I can say to each party that the other side has agreed to the range, everything changes. It allows them to trust the process and move in the direction we need.

Sanders: I encourage parties to start with a realistic number. An opening number that seeks compensation in an amount a party could only obtain if he achieved a complete victory on every claim at trial is destined to slow down the progress of the mediation. It causes the other side to respond with a correspondingly unrealistic low number. Start with a realistic number and move meaningfully. My job is to gauge where they truly want to/should land and, when I have a sense of that, I often make a "double blind" mediator's proposal. Mediators' proposals seem to work especially when the parties are far apart and neither side will make a significant move. No one loses face if the other side rejects it, or becomes tethered to a "anchor" number because neither side knows who rejected or accepted the proposal unless both accept it.

Westerfield: I watch out for negotiating tactics disguised as an impasse so I can focus on the genuine stalemates. . Then, I return to where positions hardened and analyze the impasse on three levels. First is to identify if there are non-quantifiable interests like vengeance, accountability or board approval at play. Second is to look at the numbers: Are we really just apart on money, or is it stock, land, interest or time that can be reexamined? Third is to review the real factual or legal disputes. If I can help them reassess, we can move forward.

Q: What do you wish more lawyers understood about their role in mediation?

Publicover: Surprises are great for holidays and birthdays, not litigation. Have your clients well prepared. If everyone comes in with realistic expectations and a settlement range, then there's something for us to work with. I'm a mediator, not a magician.

Sanders: In complex litigation, we're often dealing with bet-the-company/product cases where the financial stakes are very high. I think lawyers generally understand that the advantages of mediation are magnified in complex litigation because the risk of losing is particularly significant.

Westerfield: Identify settlement obstacles and work with the mediator on the best approach to achieve a resolution that will satisfy your client. Just because you experienced a mediator a certain way in one mediation doesn't mean that's the way they always are. A good mediator will adapt to what the situation needs. Look for a mediator who is nimble and astute, with a variety of approaches to mediation.

Adrienne Publicover, Esq., is a mediator and arbitrator at JAMS, handling matters involving [insurance](#), ERISA, employment, health care, personal injury, business/commercial, and related disputes. With 25 years of litigation experience, she is known for a solution-driven, rapport-building style and a knack for navigating sensitive matters with empathy and clarity. Adrienne has mediated nationwide insurance, health care and ERISA claims and has served as a Title IX external adjudicator for colleges.

Hon. Glenda Sanders (Ret.), is an arbitrator, mediator, special master/referee and neutral evaluator at JAMS, following a 42-year legal career that includes 20 years as a judge on the Orange County Superior Court. On the bench, she was a member of the Civil Complex Panel presiding over complex, multi-party business disputes, class actions, environmental and construction defect cases, insurance real estate matters, environmental, health care and intellectual property disputes.

Hon. Rebecca Westerfield (Ret.), is a mediator and arbitrator at JAMS, with a distinguished track record of settling and arbitrating complex domestic and [cross-border](#) disputes.

A JAMS panelist since 1992, she is known as a determined mediator who handles multiparty, multi-issue matters—often involving insurance coverage, business dissolutions, catastrophic personal injury, and emotionally charged family estate disputes.