

# Mediation Technique on Personal Injury

by  
Ms Vivian Chih,  
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Ms Chih has been practicing law since 1986, with a Master degree in International Law, a Diploma in International Arbitration and a Master Degree in Counselling.

Ms Chih is qualified as a HKMAAL general and family mediator in Hong Kong and is a very seasoned mediator having participated in over 500 mediation cases, covering area of personal injury, insurance, commercial, family, land, probate employment and contractual matters, etc.

Ms Chih has received extensive training experience in mediation locally and overseas, including the training by the Australian Accord Group as early as 2004, the HKIAC 2011, the Master of Negotiation programme by CEDR London 2013, the Negotiation training at the University of Oxford 2014, and the Master Negotiation training at the Harvard Law School 2014 and 2015.

Ms Chih is a passionate and dynamic mediator who has attained particularly rich experience in personal injury (PI) mediation. She will share her personal insight in how to achieve successful PI mediation in Hong Kong, bearing mind of the local multi-national background. The talk will include: (i) Ms Chih's sharing of the mediation techniques she has learnt overseas, (ii) discussion on significant PI legal principles and (iii) interesting group exercise on practical mediation technique.

## Golden Rules and Tips on Mediation in Personal Injury Cases

### Common Psychology of Parties

- **Empathy** - Plaintiffs often in want of acknowledgment of the pain and suffering
- **Respect** - Parties require respect for their beliefs, feelings, recollection and understanding (whether credible or not)
- **Trust** - Plaintiff want to be trusted for often having been disrespected or misunderstood by the Defendant employer, doctors, medical experts, lawyers and/or police
- **Suspicion** - mutual against the other side's honesty and sincerity to settle

### Common Flaws in Perception

1. **Mediation for avenging**
  - Anger against ill-treatment by employer
  - Punitive compensation by tortfeasor
2. **Self-assumed value** for injuries, disabilities and loss of amenities
3. **Assessment based on subjective beliefs only**
4. **Failure to see alternative perspective** on liability
5. **Failure to assess quantum** upon alternative medical opinion
6. **Need-based assessment mentality**
  - Calculation is only based on how much is needed for rehabilitation or for sustaining one's future life, rather than along established legal principles for assessment
7. **Wrongful assumption of BANTA**
  - Assumption of increase of offer by Defendant later
  - Assumption of better finding by judge

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8. **Naive assumption** that subjective truth will necessarily be upheld
9. **Naive assumption** that judges will necessarily be compassionate and generous
10. **Failure to appreciate the litigation risks in Court**
  - Reliability of witnesses?
  - Effect of cross-examination?
  - Prejudice of judges?
11. **Failure to appreciate** the dire consequence of failure to beat a **sanctioned offer**

## Five Major Steps in Personal Injury Mediation

### 1. Preparation

- Find out the facts and questions
- Identify legal/factual issues
- Prepare authorities for sharing
  1. Deduction by reason of CN
  2. Comparable authorities on PSLA
  3. Discount for pre-existing medical condition
  4. Multiplier table, government statistics

### 2. Exploration

- Find out from parties:
  1. Relevant facts (which have bearing on liability and calculation of quantum)
  2. Underlying interests/reasons (which affect parties' interest to settle)
- Acknowledge feeling
- Show appreciation
- Respect honesty/integrity
- Respect also mistakes/weakness/difficulties

*(Exercise on technique of fact finding, neutralization, appreciation, acknowledgement, empathy, affiliation, autonomy)*

### 3. Building trust/appreciation/affiliation

- Build up affiliation and trust
  1. Get party to become your friend, and have trust in you
- Eradicate/reduce misunderstanding
  1. Encourage parties to explain inconsistencies, discrepancies; adverse actions
  2. Exchange views and understanding
- Neutralize apparently adverse intention/actions of party
- Cultivate trust in respective party that the other is willing to settle and/or to act reasonably/sensibly
- Help each party to show appreciation for another party
- Help each party to appreciate the views, needs and difficulties of the party

### 4. Reality test

- Assess approximate possibilities of finding by Court
  1. **ZOPA (zone of possible alternatives)**
  2. On liability, CN, PSLA, loss of earning, loss of earning capacity, other special damages
- Check ZOPA against **Sanctioned offer/WP offers**
- Explain adequately the costs **implication in case of failure to beat Sanctioned offer**
- Explain factors involved in **litigation risks**
  1. Evidence of witnesses in court
  2. Possible different interpretation of facts by judges
  3. Judicial culture/judicial prejudice
  4. Weight of various kind of medical reports
- Explain **advantages of early settlement**
  1. In terms of times, costs, hassle and risks

### 5. Negotiation

- Arts of haggling
  1. **Cultural difference** (Western/local Chinese/mainland Chinese/other Asian races)
  2. **Negotiation with parties** (various stakeholders' interests and agenda)
    - Plaintiffs and Defendants
    - Relatives and friends
    - Legal representatives and insurance representatives

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### 3. Management of bias

- Race, gender, class
- Availability bias, temporal myopia, reciprocation bias, commitment bias, over optimism, naïve realism, moralism, fight/flight instinct etc.

### 4. Management of emotion

### 5. Appeal to emotion

### 6. Be patient

- Respect need to try wishful offers, style of negotiation (e.g. dance along ladder)
- Respect autonomy of parties to make decision for themselves

### 7. Be persistent

- Don't take a No as No
- Always persist to find out more underlying interests/reasons/feeling and possible alternative settlement proposals

### ▪ Practical techniques

#### 1. Advantage of anchoring (don't be afraid of the first one to start naming a price)

- Unrealistic anchoring discourage sincerity to settle

#### 2. Golden Bridge method

#### 3. Logrolling, global settlement

#### 4. Nightmare negotiation tactics

#### 5. Breaking wide gap

- By indication of acceptable threshold/possible range of consideration

#### 6. Change the dynamics

#### 7. Half the difference

#### 8. Seeking instruction on a certain acceptable meeting point

#### 9. Impact of Scale of costs

#### 10. Impact of perks e.g. early payment, apology, acknowledgment, etc.

#### 11. Global settlement on damages and legal costs

- To allow internal adjustment by Plaintiff within a total acceptable range of payment by Defendant's insurer

- But be careful of:

- Handle carefully possible embarrassment between solicitors and clients
- Lack of preparation of bills of costs
- Complexity caused by change of Plaintiff's solicitors
- Fiduciary duty owed to Legal Aid (Plaintiff's costs cannot be sacrificed for the stake of increasing the offer on damages, except with the consent of Plaintiff's solicitors and/or consent by Legal Aid)

#### 12. Partial settlement on EC proceedings or on issue of liability first

#### 13. Adjourn mediation to another date (with parties' consent)

- To keep the momentum and sincerity to settle

Scan to Calendar



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|--------|--|--------------------|--|
| Code:  | <b>EVT000000126</b>  | Level:             | <b>Intermediate</b>  |
| Date:  | <b>18 June 2016 (Saturday)</b>   | Language:          | <b>English</b>   |
| Time:  | <b>09:30 - 12:45</b><br>(Reception starts at 09:00)  | Accreditation(s):  | <b>LSHK 3.0 CPD Points</b><br>(LSHK Allocated Number: 20161342)<br><b>HKMAAL 3.0 CPD Points</b><br><b>HKIAAC 3.0 CPD Points</b><br><b>for Accredited Mediators</b><br><b>HKMC 3.0 CPD Points</b> |
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