

# Mediation Advocacy

## The Practitioner's Perspective

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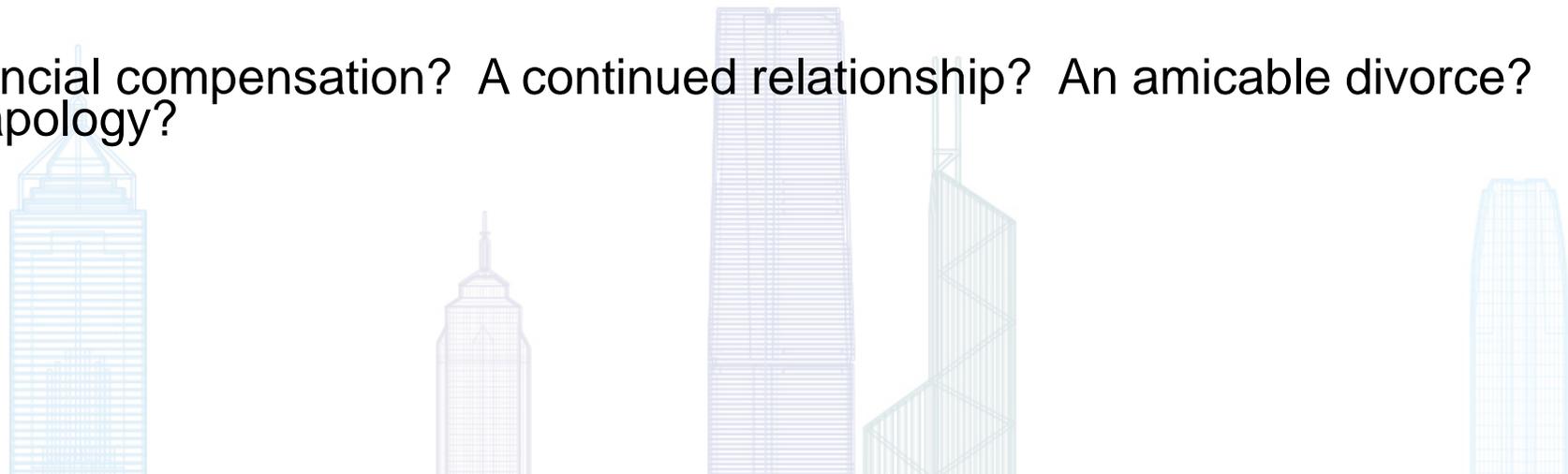
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# Laying the groundwork

## What are your objectives?

- Mediation is not about scoring points, obtaining justice or winning the legal argument.
- What is the client ultimately looking for?
- Financial compensation? A continued relationship? An amicable divorce? An apology?



# Advance planning

## Preparing ahead of the mediation

- **Speak to the mediator** – what style are they likely to approach and what information is helpful to share with them in advance?
- Undertake a **risk assessment** of your client's position – not only the strengths and weaknesses, but identify the **bottom line**
- Plan a **negotiation strategy** - for example:
  - Who will make the first offer and when?
  - How much will you put on the table at first?
  - What non-financial terms might you consider?
  - When should you walk away?

## Position Papers

- Important document which **sets the tone** for the mediation
- Your opportunity to **speak to the key decision-makers** at your opponent – it is not a submission to a judge or tribunal
- Keep it **short and easy to digest** – it has to be read in one sitting by senior management on the other side
- **Tell a story** and try to sow seeds of doubt in your opponent's mind
- **Focus on the risk assessment** not the merits – why does the risk/reward analysis point to a favourable settlement?

## Opening and Plenary Sessions

- **Is it necessary** to have opening statements? Should you proceed first to a caucus session with the mediator?
- Who should do the speaking – is the advocate the **lawyer or the client?**
- Don't simply repeat the position paper – focus on **commercial outcomes** and the **willingness to explore a settlement**
- Emphasise any key points that you think are important for both sides to keep in mind as the mediation progresses
- **Keep emotion out of the equation**

## Caucus Sessions

- **Plan ahead** for private conversations with the mediator – what do you feel comfortable sharing, how do you win trust and confidence?
- How you can assist the mediator: **define the issues** and **focus on the key points**
- Ensure the mediator understands your client's position and your opponent's weaknesses; **be creative and proactive**
- Recognise that the mediator's objective is to achieve a settlement, not determine rights and wrongs
- **Don't get bogged down** – be prepared to move on from sticking points, or put them to one side

# Key takeaways

## Practical tips

- Understand your client's bottom line
- Invest time in the risk assessment
- Use the position paper to persuade your opponent, not the mediator
- Develop a negotiation strategy
- Enable the mediator to win your client's trust
- Be flexible and creative