



## **MEDIATION POSITION PAPERS – F.A.Q**

The default position adopted in many mediations of litigated disputes is that the parties' legal representatives prepare 'position papers'. The 'position paper' commonly takes the form of an advocate's statement, sometimes at considerable length. As such, the virtues of the arguments in support of a party's position are stated forcefully, often with disarming simplicity and the perceived arguments of those opposing that position are peremptorily dismissed. Occasionally, a 'low ball' or 'high ball' (but unrealistic) starting offer is conveyed at the end.

Whilst this procedure is recurrent, it takes place generally without any real thought given to what should be, but are not really, 'frequently asked questions' [FAQs] about position papers.

Those questions could usefully include the following:-

- **Should the parties prepare position papers?**
  - The mediation procedure includes, in most instances, an opening joint session. The joint session provides an opportunity for the parties to explain how they see the dispute. How this might be most effectively done is another topic for attention. The opportunity for an oral opening statement, however, ought legitimately raise for

consideration whether a written opening statement can add anything and, if so, what that is and how it might be best realised.

- Written opening statements are usually provided prior to the mediation day. Sometimes, as late as the day or night before. If the receiving party is legally represented, the opposing party will most likely receive whatever message is conveyed in the position paper through the filters applied by the opposing legal representatives. There is nothing inappropriate in that. Indeed, the opposing legal representatives in the proper fulfilment of their retainer should be expected to provide commentary on the position paper to their client.
- If a written opening statement will most likely be received by the opposing party with an opposing legal commentary, what objectives can it fulfil that are not equally or better fulfilled by an oral opening statement?
- To the extent that the written opening statement consists of assertive conclusions, the conclusions are unlikely to be accepted by the opposing legal representatives. Accordingly, they are unlikely to be accepted by the opposing party. That doesn't mean that there is no place for assertive conclusions, just that a realistic appreciation would suggest an understanding that they will be taken only as how the asserting party sees things – or perhaps, just how they say they see things.
- Adding that the assertion is 'confidently made' is generally wasted effort because it is treated as meaningless except as to an asserted state of mind about prospects (taken as such with a 'grain of salt').
- Better then that assertive conclusions are accepted in the position paper for what they really are, just statements about how a party (through their legal representatives) says they see things and that such conclusions are worded so as not to strain unconvincingly towards some more persuasive outcome. If that is all that is being achieved, however, it might be thought to be equally or better achieved through an oral opening statement.
- To the extent that the written opening statement consists of analysed conclusions, supported by detailed analysis of fact or law, the conclusions are also unlikely to be accepted by the opposing legal representatives and are, therefore, also unlikely to be accepted by the opposing party.
- Needless to say, perhaps, but such analysed conclusions to have any prospect of serious attention will usually need to be provided well in advance of the mediation day. Including detail of this nature in a position paper that is served late in the piece will result in it either being ignored or the mediation being adjourned.
- Is there a point to providing analysed conclusions? There can be, but it will usually require a belief that the analysis is necessary, as a persuasive tool in the anticipated negotiations, because the opposing legal representatives are not seeing the risks 'correctly' and that there

is a reasonable prospect that proper explication will alter this (by demonstrating the strength of the presenting party's case or demonstrating the lack of strength of the opposing party's case).

- Generally in any litigated dispute both parties legal representatives will regard the opposing legal representatives as not seeing the risks 'correctly'. Frequently, however, both sides fail to account for the fact that the differences are the outcomes of different competent judgments about facts that might be found or legal principles that might be applied – circumstances that are unlikely to change as a result of an analysed conclusion.
- Accordingly, an analysed conclusion is only likely to have any impact if it relates to something that reasonably appears to be an oversight of something that could be determinative or highly significant. Such oversights are uncommon. That suggests that an analysed conclusion in a position paper is generally unlikely to be effective.
- In the ordinary course then, a position paper will be limited (in terms of its practical utility) to identifying what the issues are and how a party sees those issues. So far as issue identification is concerned, that does not require a position paper; it could be more effectively done by the formulation of a separate/joint statement of issues. So far as a statement of how a party sees those issues, that can be often done as effectively orally – sometimes more persuasively, and with direct communication to the opposing party in joint session.
- The take away conclusion is that position papers are not always necessary and can be a less effective medium for identifying differences than oral opening statements.
- **How long should the position papers be?**
  - It is always preferable for the parties to agree on the maximum length of any position papers. There can often be a perceived imbalance in positions if, for example, as a result of a neglect or failure to agree on length, one party provides 3 pages and the other provides 30 pages. It is best to start the whole mediation process with some agreements, even if only of a procedural kind. If length is in issue, this is something that can usually be sorted out in a pre-mediation conference (a procedural step that is too infrequently taken).
  - Length is often the product of complexity or detail. The provision of complexity or detail is often labour intensive and costly. Length is not an aim in itself. Brevity ought to be preferred, to the extent that it is consistent with the objectives sought to be achieved.
  - The principal objectives ought to be identification of the key areas of dispute and a brief statement of what the party says about those issues and why. Where there is thought to be an oversight issue (of the kind discussed above) an analysed conclusion of fact or law may be appropriate.
  - In many disputes, five pages ought to permit any reasonable objectives to be achieved.

- **Should position papers be exchanged or served sequentially?**
  - The answer to this depends upon a view being reached about content. If the position paper identifies the issues as one party sees them, this does not require sequential delivery; an exchange is appropriate. If the position paper is also a commentary on an opposing position, sequential delivery of some kind would generally be required.
  - Is it helpful to have a commentary on an opposing position in a position paper? Generally not. For a start, it adds to the complexity, detail, length and cost of the mediation process. Whilst commentary of a kind can be useful (because an important step to resolving differences can be the identification of what is disagreed with and why), this can more effectively be dealt with on the mediation day to the extent the parties and the mediator think appropriate. Ofcourse, if the commentary will involve facts or legal principles that may need to be looked at in advance by a party who may have overlooked them, a supplementary position paper can be useful.
  - Usually, an exchange will work best.
- **Should the position papers include offers?**
  - Offers need to be made if the mediation is to proceed (and succeed) and there is an advantage to getting the process underway sooner rather than later. None of this suggests, however, that there is an advantage to including offers in the position papers.
  - Including the offer, means that it is an offer made without the benefit of reflection on the opposing party's position paper, opposing party's oral opening statement and without the benefit of discussion with the mediator. It runs the real risk of sending the wrong message about the way the party is proposing to engage in the mediation process. It suggests only an interest in 'horse trading' using the mediation merely as an opportunity to haggle. This conclusion is often supportable by the fact that offers included within position papers are commonly 'high ball' or 'low ball' offers, that seem to be aimed at sending the message that negotiations with the offeror will be tough.
  - To state something that is obvious, mediated outcomes are much more likely when the parties are actually engaged with the process, which requires a degree of fluidity and openness.
  - It is usually counter-productive to include offers on position papers.
- **What should be included in position papers?**
  - The key issues – of fact or law. Be selective. There is no point in listing issues that will have no or only limited effect on negotiations. Try to state the issues from a neutral perspective.
  - What your party says about the issues. Generally this can just be assertive. The purpose is merely to help identify what the parties

differ about and why; not to bring about a different assessment of risk (something that is unrealistic to hope for in most instances). Settlement will become more achievable not through altering assessments of risk but, rather, through appreciation that there is no uniquely correct assessment of risk; that from the opposing perspective there is a competent, but different assessment of risk.

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