

## **Position Papers**

### Introduction

Position Statements should be seen as the first serious step in the mediation process towards persuading the other side that they should think again about the strengths and weaknesses of their position. Mediation is all about changing an adversary's view, such that they consider it to be more in their interests to settle than fight. But disputants rarely move their position unless they consider it to be in their interests so to do. So they must be encouraged and persuaded to think again about the merits, about how their true interests can best be served by way of settlement rather than litigation, about their views on risk, and about their ability and willingness to endure conflict. Position Statements lay the groundwork, provide an introduction to the dispute for the mediator and can set the agenda for the mediation in terms of the issues that need to be discussed.

A Position Statement should be short and in summary or "skeleton" format. As a rough guide, it should be between 5 and 10 pages in length. Position Statements should be provided by each party to every other party, and the mediator. The parties should endeavour to exchange Position Statements.

In advance of the mediation, parties will often want to share more information about their position with the mediator than their adversaries, and should therefore consider whether a 'for mediator's

eyes only' Position Statement should be provided, as well as the version that is to be exchanged. In fact, these confidential Position Statements often turn out to be an early draft of the Position Statement that is eventually exchanged with the other party or parties.

### What a Position Statement should do

A Position Statement should briefly explain a party's position, as well as their position on their adversary's case. A Position Statement should not be designed to try and 'prove' any particular point, but rather explain arguments and provoke thought on the other side of the fence. Misunderstandings should be cleared up.

Brevity is important. It is the one document lead negotiators on the other side will read on their way to the mediation. It should be a forceful, 'punchy' and very clear document.

A Position Statement should also act as a 'road map' for the mediation bundle, describing important documents or referring to key paragraphs of contracts or statements of case.

### What a Position Statement might contain

A Position Statement might be structured as follows:

#### *Introduction*

At the outset the party on whose behalf the Position Statement is prepared should be 'introduced', contain a description of their business and how the relationship with other party (if any) came about. References to corporate website addresses can be useful for

background, should the mediator want to get a better idea of the nature of the party's business.

It should be made clear that the document is without prejudice, confidential and to be used for the purposes of mediation only.

### *The Dispute*

A summary of how the dispute arose, including details of any relevant contracts, the nature of the claims and the defences against them, should be given.

A chronology of relevant dates can be helpful.

### *Issues Involved*

There should be a brief summary of the factual issues a court would have to resolve in order to decide the matter and the parties' position on each. If the issues have been rehearsed at length in correspondence between the parties or their advisors, references to key letters should be provided (and copies included in the mediation bundle).

The parties should also set out a brief summary of the issues of law or construction a court would have to consider in order to resolve the matter, and their position on each.

It can sometimes be helpful for each party to set out the issues on which they consider agreement to have been reached, or in relation to which they think there is no dispute.

### *Quantum*

There is usually a far more diverse range of views on quantum, than on the facts or law. There will often be a range of approaches to the calculation of quantum and a variety of assumptions that under-pin them. It is useful if parties before the mediation think about their chances, before a judge or arbitrator, of recovering/paying everything claimed or just a proportion thereof, on the basis that liability goes in the claimant's favour. It can be useful if the parties say something about their views on quantum but in any event, they should at least consider quantum in the run up to the mediation.

### *Proceedings*

A very brief outline of the current position in any proceedings that have been commenced is helpful. The Position Statement might summarise the position on disclosure, witness statements, expert reports, trial dates, preliminary determinations, etc. Any significant orders for costs might also be mentioned.

### *Costs*

It is helpful for the numbers to be set out, both for costs incurred and to be incurred. Some parties prefer not to do this. At the least, parties should be in no doubt going into a mediation what the bill is to date, as well as what is likely to be run up if the matter does not settle.

### *Attendees at the mediation*

It is helpful if a list of attendees (and the positions they hold) is provided. If there is to be a change in the attendee list, this should be notified in advance.

### *Previous negotiations*

The history of any without prejudice negotiations can be useful, even if a party feels that they also need to make clear that it should not be assumed that they are happy to pick up where they left off.

### What not to put in a position paper

Parties should think carefully about including statements that might be seen as offensive. A Position Statement is a permanent record of a party's position, ever present throughout the mediation. If it contains unhelpful comments, this may prove to be a barrier to effective dialogue. If a party wants the mediator to understand at the outset their depth of feeling without running the risk of inflaming an already volatile situation, a separate document can be prepared in advance of the mediation, 'for mediator's eyes only'. Or of course the party can speak to the mediator in advance of the day set for mediation, or at the initial private meeting prior to the opening joint session.

### Exchanging position papers

Position Statements should be provided by each party to every other party, and the mediator. Often a date for simultaneous exchange is suggested by the mediator or agreed between the parties. In some

cases a party will simply send their Position Statement to the other party as soon as it is ready, without requiring a formal exchange.

For more general guidance on preparation for mediation, please refer to **Guidance notes on Mediation Preparation.**

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