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Writing an Effective Mediation Position Paper (Personal Injury Focus)

A succinct yet comprehensive and well thought out position paper can achieve a number of things:

- Inspire the client's confidence and trust in the legal team (vital for obtaining instructions in accordance with legal advice in challenging circumstances)
- Respect from your opponents, regarding your level of preparation and understanding of the claim and your capability to take it further if necessary (vital for your opponents in recommending and obtaining/providing instructions that enable the best settlement outcome for your client on the day).

Here are some things to think about when preparing a position paper that can be a powerful tool rather than a "ticking the box" exercise. This includes a "checklist" of items that, from my viewpoint as the mediator, can make for a stand-out paper.

Overall:

It is really effective when a party highlights in their position paper, the **key issues in dispute** and where the real focus of discussions should lie, rather than simply re-stating the pleadings without any further commentary.

The Position Paper – can be succinct or lengthy as the case permits but please consider concluding always with a statement to the effect that the party ***is attending the mediation in the spirit of compromise with the goal and intention of achieving a settlement of the case.***

I find it very telling when a statement about this sentiment is absent from a party's position paper. It usually means that the party attends and is not prepared to compromise. At all. It makes me wonder why they are participating in the process at all. (The obligation to attend in good faith is a subject for another day).

I really like this comment from US mediator Michael Carbone:

“Express Your Interest in Settling the Case. When you read the other side’s position paper you will probably find numerous statements with which you disagree. Reading them is apt to be discouraging. If however, you find at the end of their paper a statement that they are interested in settling you are apt to be more optimistic that the case can be resolved. So follow the golden rule and put such a statement in your own paper.”¹

Length: It’s a matter of “horses for courses” in terms of whether a position statement should be a comprehensive overview of the factual and expert evidence relied on, or punchy and concise.

A four-paragraph position paper that I once read, which acknowledged the stressful nature of the case on the plaintiff and expressed that the party was attending with the genuine intention of trying to settle the matter – I thought struck precisely the right note. In this particular case, it would have been counter-productive to respond in the same chapter-and-verse manner that comprised the plaintiff’s position paper.

At the same time, I do appreciate a lengthy position paper because it often serves as a useful summary of the issues particularly if there is a complex argument on the facts, a detailed factual history relevant to the issues in dispute or to set the context, a complex debate between the experts on a matter of duty or causation, a lengthy interlocutory history, etc.

A lengthy position paper may obviate the need to otherwise include copious source documentation in the mediation brief. It may also serve the additional purposes of:

- setting out the full legal position of the case for the benefit and satisfaction of the party you are representing – to see how their case is understood by you and represented to the other side in this context; and
- setting out the full legal position and the client’s case at its strongest, to the other side – enabling a more congenial approach to be taken when delivering a verbal address to the other side during the initial joint opening at Mediation; to demonstrate the spirit of compromise.

My Recommended Position Paper Checklist

Introduction:

- The fact that the statement is privileged and prepared & used for the purposes of mediation only
- Brief summary of what the claim is about
- Relevant dates – P’s date of birth, incident dates, etc

¹ “Mediation Strategies: A Lawyer’s Guide to Successful Negotiation”, by Michael P Carbone was published in May 2017 on an American mediation website (here): <https://www.mediate.com/pfriendly.cfm?id=1546>

- Litigation status: any hearing dates
- Previous settlement attempts
- Who will be appearing at the mediation with your client (support, sols, counsel)
- Whether liability is accepted or denied

Liability:

- Summary of the cause/s of action – eg negligence, breach of contract, and reference to relevant legislation

Alleged facts

- Whether any facts in dispute
- Why your client's version of the facts is more likely
- Particulars of breach alleged
- Particulars of causal connection established
- Any relevant / specific case law relied on – why case law relied on by your opponent is distinguishable

Expert Evidence

- Expert evidence relied on and brief summary
- Evidence relied on by opponent and brief summary
- Critique of opponent's evidence / why your client's evidence should be preferred

Damages:

- Set out injuries, disabilities and heads of damages claimed
- Whether the claimant has received treatment
- Claimant's work history – the basis for any economic loss claim or buffer sought

Expert Evidence

- Expert evidence relied on and brief summary
- Evidence relied on by opponent and brief summary
- Critique of opponent's evidence / why your client's evidence should be preferred
- Reference to comparable case law re assessment of non economic loss and the amount/percentage being claimed, can be very persuasive

A schedule of damages should be included with the position paper which should also include:

- the party/party legal costs being claimed and a breakdown of costs (to maximise recovery)
- Any statutory reimbursements applicable should also be set out – eg workers comp, HIC, NDIS, private health, Centrelink payback applicability

Closing:

A statement that your client comes to the mediation in good faith, conscious of the risks of litigation and desirous of settling the claim and prepared to compromise.

So much more important than the position paper:

Crucial to mediation preparation is the management of your client's expectations regarding what is a suitable settlement position and strategy, having regard to the strengths and weaknesses of the case.

This includes:

- Provision of a comprehensive written advice to the client far enough in advance of the mediation to enable them to ask any questions they need;
- Advising in advance of all of the take-out sums before they can know their net / "in-pocket" figure applicable in relation to any offer,
- Explaining important strategy issues to the client - including that the position paper and schedule of damages are putting the claim in its best light and where concessions and compromise need to be made.

It is the lawyers who cover off on all of these issues as a matter of routine who get the best settlement outcomes, costs recovery and grateful client, in my observation.