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Précis Paper

Expert Witness Joint Conferences

A discussion of joint conferences of expert witnesses from the perspective of conference facilitators Richard Weinstein SC and Karen Stott, in which they share their knowledge, experience, and advice.

Discussion Includes

- Nomenclature – "conference" or "conclave"?
- The purpose of expert witness joint conferences
- Expert witness joint conference reports and evidence
- The role of a facilitator in an expert witness joint conference
- A tale of two facilitators: Richard Weinstein SC's facilitator method and Karen Stott's facilitator method
- A discussion of the idea of video recording of expert witness joint conferences
- Ambiguity in the UCPR and Practice Note regarding expert witness joint conferences
- Conferral between parties and expert witnesses as to questions to be asked in joint conferences
- Cost of expert witness joint conferences
- Facilitators turned mediators in the same proceedings
- The attributes of a good facilitator
- Takeaways for practitioners

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Expert Witness Joint Conferences

1. In this edition of BenchTV, Richard Weinstein SC (Barrister, Eight Selborne Chambers, Sydney) and Karen Stott (Mediator, Karen Stott - ADR & Mediation Services, Sydney) discuss joint conferences of expert witnesses. They both speak from the perspective of facilitators of such conferences, sharing their knowledge, experience, and advice.

Nomenclature – "conference" or "conclave"?

2. Expert witness conferences and expert witness conclaves are interchangeable terms. The nomenclature is extracted from the *Uniform Civil Procedure Rules 2005* (NSW) ("UCPR") and *Practice Note SC Gen 11* (Supreme Court – Joint Conferences of Expert Witnesses) (17 August 2005) ("Practice Note"). Although it is said that joint conferences of experts are "conclaves" of experts, experts of different sides in fact attend a joint "conference" (and "conference" is the term used in the UCPR), and from this joint conference the experts will produce a joint report. Thereafter, they will give evidence concurrently, but colloquially, it is said that they will give evidence in a "hot tub", or in a "conclave".

3. In general, the nomenclature is of no substantive consequence.

The purpose of expert witness joint conferences

4. The purpose of joint conferences of expert witnesses is to narrow the issues in dispute between the parties. The joint conference, and the joint report produced from the conference, will focus on those narrowed issues, and generally speaking, experts will either agree or disagree with the reasons on those narrowed issues.

5. Joint conferences of expert witnesses also have the effect of shortening the length of a hearing. Take the example of 4 cardiothoracic experts coming to give evidence in a hearing individually, 2 for the plaintiff and 2 for the defendant. In the absence of expert witness joint conferences, arranging the diaries of 4 eminent cardiothoracic surgeons might be difficult, as might getting them to the hearing individually. Further, the cross-examination of each of the surgeons, which was traditionally solely the domain of a barrister without any intervention from a judge, could take a great deal of time.

6. The contemporary situation, with expert witness joint conferences, is that all 4 cardiothoracic surgeons would be gathered together at once, usually for a limited amount of time, for example, a day, and, depending on the judge, cross-examination of the expert witnesses is usually inevitably, much shorter, as the judge will focus on the issues in dispute, because the

judge will have read not only the joint reports produced from the joint conferences, but also the reports leading up to them.

Expert witness joint conference reports and evidence

7. The reports produced from a joint conference of expert witnesses will always be tendered in evidence. Inevitably, the expert witnesses will be cross-examined and examined-in-chief by a judge and counsel in the proceedings on matters that, generally speaking, are both in the joint report produced from the conference of experts, and in the reports prepared prior to the production of the joint report (both of which are evidence in the proceedings).

8. One of the purposes of the expert witness joint conference reports is to bind the expert witnesses to their opinion, and also to give the court some guidance as to what the experts' views are, particularly for the purposes of cross-examination and for the unfolding of court proceedings generally. In complex medical negligence cases, the issues are usually grand from the outset, but inevitably, over time, as facts become known, and as often very difficult medicine becomes understood by the legal representatives involved, the issues will narrow.

The role of the facilitator in an expert witness joint conference

9. The UCPR provides that a facilitator may be appointed. Although there is a difference in terminology between the Practice Note, which uses the term "chairperson", and the UCPR, which uses the term "facilitator", these are both taken to be substantively the same thing.

10. The reason behind a facilitator in an expert witness joint conference is because a room full of experts can often use some guidance in a legal situation, when their expertise is other than legal. It is hard to imagine an expert witness joint conference that would not benefit from having a facilitator, as in most cases, it would be very difficult for the experts to work through the questions and come up with a joint report without a facilitator's assistance.

11. Facilitators generally always have a role to play, even in the most collegiate of expert witness joint conferences. This is partly because facilitators are usually legally trained, which is important when dealing with a legal process. For example, if there is a joint conference of neonatologists, there is often a clash between medicine, the neonatologists' area of specialty, and the law. Facilitators know what the court wants them to achieve through the process of having a joint conference and the production of a joint report, something which is not always so obvious to an expert witness medical practitioner, for example, however qualified, erudite, and urbane they might be. There are ongoing clashes between law and medicine, law and architecture, law and actuarial science, law and engineering, etc, and the

presence of facilitators in joint conferences of expert witnesses can help navigate through these conflicts.

12. Facilitators are also a means of providing support to, and showing respect for, the expert witnesses who have put aside their time and come together to meet to work through the relevant questions and come up with a joint report.

13. Further, there may be situations where experts without a facilitator, one of which experts is prepared to act as scribe, may prepare a draft report in advance, something which may not necessarily be desirable, as it allows one expert to, in a way, drive the conference. While this may be very diligent on the part of the scribe expert on the one hand, on the other, it may lead to the creation of a power imbalance and not allow for all of the experts' voices to be heard. A facilitator would be instrumental in managing this power imbalance and enabling all of the experts to feel as though they have had a chance to be heard. This is particularly important in conferences where there is an expert with a powerful, overbearing personality, who, by reason of this, might often get the most "air time", so to speak; though the reasoning and expertise of another expert/s participating in the process may be better considered but expressed with brevity, thereby risking the appearance (*on paper*), of being less persuasive.

<u>A tale of two facilitators: Richard Weinstein SC's method and Karen Stott's method</u>

14. Richard Weinstein SC likes to go into his expert witness joint conferences with a "facilitator script" that reads as follows:

> "I am the independent and neutral person who has been appointed to facilitate this conference. I promise you that if you elect me as your chair, I will see that this conference is conducted collegially, and we will finish in a timely fashion. I now ask that you elect me your chair. The most important person here is the typist, as here he or she will record your answers. You have an opportunity to check those answers for accuracy, and if you want the typist to go "offline", you may ask him or her to do so at any time so that you may have discussions amongst yourselves, and that we can take breaks as are necessary. The purpose of this conference is to narrow the issues in dispute between the parties. Please attempt to set out the matters on which you agree and disagree, but feel free to discuss those matters between yourselves. You have been provided with a set of materials, some assumptions, and some questions. Those are the documents upon which your answers must be based. If, after the report is prepared, the parties wish to ask you additional questions, you will be contacted by them. I have not drafted these

> questions, so please, attempt to answer only the questions that have been provided to you. Some questions may merit an answer yes, or no, or not applicable, as the case may be, and they will be appropriate answers. Until such time as the joint report has been signed by all parties – that is, the participants to the joint conference, please do not contact the legal representatives, as the confidential process continues until that time. I will read you the questions and ask you to answer in turn. Each of you has a right of reply, and you may change your answer at any time after hearing from your colleagues".

Richard then randomly chooses an order in which the participants will answer the questions, and subsequently starts asking the questions.

15. As for Karen Stott, she likes to ask for the brief two weeks in advance, as the Practice Note provides. The brief enables her to obtain the experts' contact details, and Karen likes to send them an email in advance of the conference introducing herself. This is her way of establishing rapport with the witnesses. She also acts as scribe in writing up the report as she feels there would be less lost in translation if this were her responsibility. As part of this responsibility, she prepares a draft template report and emails it to the experts. This template has the relevant assumptions and questions loaded into it and sets out where the information and explanations relevant to the experts' agreement and disagreement must be put. Karen also gives the experts the Practice Note, the relevant court rules, and the Expert Witness Code. Karen feels that this interaction with the experts by default establishes her role in tying the conference together and guiding the whole process, and may avoid the need for her to ask the experts to elect her chair, as per Richard's method outlined above.

16. In ideal circumstances, when the conference is over, Karen finds she is in a position to have the joint report ready shortly after the end of the conference, and the experts are happy to wait to have the report printed off, after which they read over it, ask Karen to make any amendments they feel necessary, and leave with a signed report. However, this does not occur in the majority of times. Karen says that the ability to complete the joint report at the end of the expert conference is dependent on how much time has been allocated for the conference and how long the questions take. It is also important not to push the report on the experts, as they need time to consider their position. It may be that they would like to read the draft report, wait for the dust to settle, so to speak, think about what they have said, and then come back and amend it. Karen wants to give the experts opportunity for this, particularly if they have not been given the brief, assumptions, and questions in advance, and also because it is often the case that amendments to the questions themselves often happen just up to the time of the conference itself.

17. Richard is of the view that it would be best, if at all possible, to have a signed report at the end of the joint conference, but acknowledges the reality that more often than not, this may not be possible, for a variety of reasons. One of these may be that the typist has taken down the conference in shorthand, and needs time to actually transcribe the conference itself and then provide it to the parties. In such a situation, Richard asks the typist to send him the report of the conference so that he may check that it is accurate, and then sends it from one expert to another so that they may look at it, amend their answers if they wish, and make corrections if there are inaccuracies. Only after every expert has had a chance to correct the report *and* see the other experts' corrections, will Richard put it into PDF format and ask the experts to sign it. This is a fairly lengthy process, on one occasion taking Richard over six weeks, largely due to experts not returning their corrections to him within the timeframe asked, a factor which was outside of his control. Karen also found this a lengthy and laborious process, particularly where, for example, there may be four or five experts and some substantial issues to deal with (such as when there are multiple sets of assumptions and questions).

18. Perceived delay in bringing the joint report to completion is one of the difficult aspects of being a facilitator, as the legal teams in the matter will never know the reasons for the facilitator's delay in providing them with the report, because this is confidential information which the facilitator cannot reveal. Richard has encountered situations where solicitors have queried him about the status of reports from expert witness joint conferences, and the reasons for the delay. Richard is forced to stand mute in such situations as this is information he is not able to provide.

19. Karen's advice is not to underestimate how long the expert witness joint conference, and finalisation of the report, may take, and to allow a sufficient amount of time for both of these, taking into account the date of the hearing.

<u>Video recording expert witness joint conferences</u>

20. Karen asked Richard for his thoughts on the hypothetical scenario of the video recording of expert witness joint conferences, the hope for which would be that the experts would quickly forget that they are being recorded and act naturally, as opposed to the instructing solicitors being there watching them. The idea behind video recording is that before writing up the report, the facilitator will take the footage to the solicitors on both sides (perhaps on a "without prejudice" basis), which would enable the solicitors to see all of the detail lost in translation between what happens in the conference and what is in the report produced from the conference. Karen's view is that the solicitors seeing this footage might be inclined to promote a settlement, without incurring the cost of producing a joint report, as well as the time for that joint report to be brought to completion.

21. In Richard's view, while video recording expert witness joint conferences seems like a good idea, it does have potential problems. Firstly, the consent of all of the participants to the conference being recorded would need to be obtained, and some experts might be reluctant to give this. Secondly, it may detract from the sometimes true and rigorous debate that goes on in joint conferences between real experts who have real, bona fide differences of opinion that are usually based on good science. Richard is not sure that the experts might forget they are being recorded, which would lend an element of artificiality to the process. He also believes that recording conferences may add cost to what is already a very costly exercise. A final problem identified by Richard is that a recording of the conference will now exist, and without further, explicit protections as to confidentiality (in the same way, for example, that mediations are protected pursuant to the UCPR and at common law), it may be that people may subpoena, or ask for, production of the recording, for example, for credibility purposes in cross-examination.

22. Having identified these potential problems, however, the purpose for which a conference recording might be valuable, to promote a settlement, as posed by Karen above, is important. This is because a consequential settlement following expert conclave is one of its purposes, as well as the general duty of all legal practitioners to the Court, to conduct the litigation in a manner that promotes the just, quick and cost efficient resolution of the matter. Practitioners well understand the astronomical costs associated with running a contemporary Supreme Court trial and that every opportunity should be made to minimise costs by attempting to resolve these issues.

<u>Ambiguity in the UCPR and Practice Note regarding expert witness joint conferences</u>

23. Richard is of the view that, as the current relevant Practice Note is fairly outdated, being from 2005, we would benefit from a new practice note and possibly an amendment of the UCPR with respect to joint conferences generally and the role of facilitators in these conferences.

24. One ambiguity identified in the current Practice Note is that, although there appears on the one hand to be some possibility that legal representatives can attend joint conferences, on the other, it seems as though legal representatives are prohibited from attending (ie because they are not allowed to participate); and there is a prohibition on contact between the experts and the legal representatives until such time as a joint report is produced.

25. Another ambiguity is that, although experts can produce further reports after the conclusion of the joint conference with leave, r 31.24(6) of the UCPR states that, unless the parties affected by the conference agree, the content of the conference must not be referred to at any hearing.

26. Richard suggests that we are now in a good position to completely redraft, with a contemporary slant, what ought to happen in relation to expert witness joint conferences, in terms of what is stated in the UCPR and Practice Note, with some protections.

27. Further, Karen has identified some ambiguity in the Practice Notes and UCPR in relation to whether the questions in joint conferences should be open-ended, or yes/no questions. She questions why one would want an expert to be confined to a yes/no answer if what is being sought is a reason for their opinion. This leads to the wider issue that solicitors should think about what information they are seeking from the expert witness and then draft the questions in a manner appropriate to the information they are seeking to obtain.

28. In answer to this, Richard explains that it may sometimes be desirable to counsel to have an escalation of questions. For example, there may be a very good yes/no answer provided by an expert, which leads into the next question, which is, "if no/yes, why?". Richard is of the opinion that these types of questions, which would never be asked during cross-examination, are the best types of questions in a joint conference the purpose of which is to provide a joint report, because they really invite the expert's opinion.

<u>Conferral between parties and expert witnesses as to questions to be asked in joint conferences</u>

29. As facilitator, Karen has often seen experts query why a particular question has been asked of them and express that they should have instead been asked a different question, giving her cause to speculate whether the parties have actually conferred with the experts before the conference as to questions to be asked. Although the experts are free, according to the Practice Note, to volunteer questions and further information that they deem relevant, Karen suggests that it is sensible for parties to confer with their expert witness from the outset about the questions that should be put to them, so that the risk of any unexpected capitulations is minimized. Likewise: the importance of minimizing the risk of the experts volunteering any additional opinions not previously expressed (eg outside the scope of what is pleaded) and which may compromise the claim. Karen also suggests it is important to obtain the experts' input on the particular wording of the question; eg the use of specific terminology, which can be extremely important, especially in medico-legal cases.

30. Richard agrees with this approach. He would like to think that, in a well-prepared case, by the time the joint conference is reached, usually the questions to which answers are sought are questions that have already been asked in one form or another in the primary reports, but which need to be repeated so that other experts in the joint conference can comment on them. While it is true that Richard will draft his questions in such a way that anticipates the answers, due to competing assumptions of fact between the parties, it is not uncommon for

Richard's experts to answer a question that he knows their answer to in a way that is against his case.

Cost of expert witness joint conferences

31. The key question regarding the cost associated with expert witness joint conferences is whether the cost facilitates the just, quick, and cost-effective resolution of the proceedings at hand.

32. Firstly, in any given matter, legal practitioners are bound by the orders of the Supreme and District Courts of NSW concerning cost. Although there is room for an application to be made to dispense with these orders, by and large practitioners are stuck with these orders.

33. Secondly, it is no secret that expert witness joint conferences save court time and taxpayer money, and shift the cost of obtaining this evidence onto the litigants themselves. However, a joint conference of six or seven highly-qualified medical practitioners, for example, some of whom might need to fly in from other parts of the country to attend the conference, and also including the cost of a facilitator, typist, and the time spent preparing for the conference, might be in excess of $50,000.

34. Although expert witness joint conferences are cost prohibitive, it has been Richard's experience that a good joint report produced out of a joint conference will assist settlement to occur. It is also often the case that parties will proceed to a join conference only after having (unsuccessfully) exhausted mediation. In fact, it is almost inevitable that parties are forced to avail themselves of alternative dispute resolution before reaching the point of an expert witness joint conference.

Facilitators turned mediators in the same proceedings

35. Richard wholly endorses this practice, perceiving it as a hybrid form of alternative dispute resolution, recounting two occasions in which he has participated as mediator in the same proceedings in which he was also facilitator. So long as the parties have agreed to it, he does not see a problem with a facilitator also serving as mediator. In the conferences in which Richard has served both as facilitator and as mediator, this has been a natural transition. He thinks it only logical for this transition to occur, as the facilitator is already familiar with most of the relevant material, and further, it is also more cost-effective. Most importantly perhaps, there is no conflict of interest present.

36. Although the transition is usually from mediator to facilitator, given that, chronologically, the mediation normally precedes the facilitation of the joint conference, occasionally, a second

mediation does occur after production of the joint report from the joint conference, where, because of the effect of that joint report, the parties consider it sensible to have a negotiated resolution.

37. How might the information obtained by the facilitator in the expert witness joint conference be used in the facilitator's subsequent mediator role? In Richard's case, he takes his mediator role very strictly – he is the impartial, independent person with only one object, that is, to see if the matter can be settled between the parties. As such, he cannot, in his role as mediator, use any information obtained as facilitator at all. As a mediator, impartiality and neutrality are paramount.

The attributes of a good facilitator

38. In Richard's view, the following are the attributes of a good facilitator:

    (i) modesty;
    (ii) humility;
    (iii) independence;
    (iv) patience; and
    (v) a good sense of humour.

Takeaways for practitioners

39. In Karen's view, so much can turn on the process of expert witness joint conferences that preparation is paramount – in terms of what goes into the brief, the drafting of the questions in consultation with the experts, the amount of time that the experts are allowed to see the joint conclave brief, etc. While the questions are a fundamental aspect of the conference, the underlying theme for Karen is the preparation.

40. According to Richard, over a number of years in practice, competent solicitors and counsel will have developed a basic understanding of the facts contained in the early statements of clients and a chronology, the basis of which ought to form the statement of assumptions that experts would be asked to make at a joint conference. The same can be said of the questions to be asked of experts in a joint conference – the really important, pithy questions are questions that have probably, for the most part, already been asked of the expert, in writing, when they were asked to produce reports for the court at an earlier point in time. In terms of the documents that ought to be provided to the experts at the joint conference, these, like the questions, will narrow over time. In summary, the preparation for the expert witness joint conference is really just a honing in on, and perfecting of, the preparation that the solicitor and counsel in question have already undertaken if they have prepared the matter well.

41. It is important to keep in mind, however, that no practitioner is perfect, and despite best efforts, experts are sometimes provided with further documentation, for the first time, only at the time of the conference, this additional information giving them cause to change their previously held opinion.

BIOGRAPHY

Richard Weinstein SC

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Richard Weinstein was called to the New South Wales Bar on 22 March 1993, and took silk in 2011. Richard's main areas of practice are alternative dispute resolution, disciplinary proceedings, inquests and commissions of inquiry, medical negligence, personal injury, professional negligence, and wills and probate. He holds an LLB from the University of New South Wales, a BA from Concordia University, and an MA from the University of California.

Karen Stott

Solicitor Mediator - ADR & Mediation Services, Sydney

Karen Stott is a lawyer with 20 years of litigation experience, and a nationally accredited mediator. She has practised in a wide range of areas, particularly health law and medical negligence, professional and government liability, personal injury, and workplace relations. She has practised in small- and mid-tier Sydney firms at partnership level, representing individual claimants and their families, as well as corporate and government clients. For the past 3 years, Karen has been engaged full-time in sole practice, comprised of mediations and facilitation of expert witness conclaves.

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