

PRACTICE NOTE SC Gen 11

Supreme Court - Joint Conferences of Expert Witnesses

Commencement

1. This Practice Note commences 17 August 2005.

Application

2. This Practice Note applies to all civil appeals and proceedings before the Court. This Practice Note does not apply to proceedings in the Court of Criminal Appeal or criminal proceedings in the Common Law Division.

Definitions

3. In this Practice Note:

Code means Schedule 7 to the *Uniform Civil Procedure Rules 2005*

SCR means the *Supreme Court Rules 1970*

UCPR means the *Uniform Civil Procedure Rules 2005*

Introduction

4. The objective of this Practice Note is to facilitate compliance with any directions of the Court given pursuant to Division 2 of Part 31 of the UCPR.

Objectives of joint conferences

5. The objectives of such directions for a joint conference of experts include the following:
 - the just, quick and cost effective disposal of the proceedings;
 - the identification and narrowing of issues in the proceedings during preparation for such a conference and by discussion between the experts at the conference. The joint report may be tendered by consent as evidence of matters agreed and/or to identify and limit the issues on which contested expert evidence will be called;
 - the consequential shortening of the trial and enhanced prospects of settlement;
 - apprising the Court of the issues for determination;
 - binding experts to their position on issues, thereby enhancing certainty as to how the expert evidence will come out at the trial. (The joint report may, if necessary, be used in cross-examination of a participating expert called at the trial who seeks to depart from what was agreed); and
 - avoiding or reducing the need for experts to attend court to give evidence.

Preparing for a conference

6. The parties should agree on the following matters:
 - the experts to attend;
 - the questions to be answered; and
 - the materials to be placed before the experts.
7. The experts to attend should be those specified in the Court's order. If none are so specified, the parties should arrange for experts to attend who have expertise pertinent to the questions to be asked. Separate conferences may be required between experts in different specialities in relation to different issues arising in the case.
8. The questions to be answered should be those specified by the Court or those agreed by the parties as relevant and any other question which any party wishes to submit for consideration.
9. The questions to be answered should be framed to resolve an issue or issues in the proceedings. If possible, questions should be capable of being answered Yes or No, or (if not) by a very brief response.
10. The materials to be provided to each of the participating experts should include:
 - the Code;

- this Practice Note;
 - an agreed chronology, if appropriate;
 - relevant witness statements or, preferably, a joint statement of the assumptions to be made by the experts, including any competing assumptions to be made by them in the alternative (which should be specified clearly as such);
 - copies of all expert opinions already exchanged between the parties and all other expert opinions and reports upon which a party intends to rely; and
 - such records and other documents as may be agreed between the parties or ordered by the Court.
11. The participating experts should each be provided, in advance, with the questions and materials referred to in paragraphs 8, 9 and 10.

Convening a conference

12. Subject to any directions given by the Court concerning the range of dates for the convening of the conference, the parties should communicate amongst themselves to fix a mutually convenient date, time and place for the conference.
13. The conference should take the form of a personal meeting. Alternatively the participants may choose to hold the conference by teleconference, videolink or similar means if a personal meeting is not practicable.
14. The experts should be given a reasonable opportunity to prepare for the conference by ensuring that before the conference the experts have:
- an opportunity to seek clarification from the instructing lawyers or the Court concerning any question put to them, and
 - access to any additional materials which the parties are able to provide and which the experts consider to be relevant.
15. In order to enable the experts to have a reasonable opportunity to prepare for the occasion, the conference should not take place until the expiration of at least 14 days following the provision of the materials referred to in paragraph 11.

The role of experts at a conference

16. The experts should provide their respective opinions in response to the questions asked based on the witness statements or assumptions provided. Where alternative assumptions are provided the experts should provide their respective opinions on the alternative assumptions.
17. The experts may specify in their report other questions which they believe it would be useful for them to consider.
18. Pursuant to paragraph 4(2) of the Code, an expert witness must exercise his or her independent, professional judgment in relation to such a conference and joint report, and must not act on any instruction or request to withhold or avoid agreement. An expert should not assume the role of advocate for any party during the course of discussions at the joint conference. If, for whatever reason, an expert is unable to reach agreement with the other experts on any matter, that expert should be free to express his or her disagreement with the other experts on that matter.
19. The experts should accept as fact the matters stated in witness statements or assumptions submitted to them. It is not their role to decide any disputed question of fact or the credibility of any witness. Where there are competing assumptions to be made in the alternative, alternative answers may have to be provided to a question or questions, specifying which of the assumptions are adopted for each answer.

Conduct of the conference

20. The conference should be conducted in a manner which is flexible, free from undue complexity (so far as is practicable) and fair to all parties.
21. The participating experts may appoint one of their number as a chairperson. If one of them so requests and the parties agree or the court orders, some other person may be appointed to act as chairperson.

22. Secretarial or administrative assistance should be provided by the parties if so requested by the experts.
23. If the participating experts agree, one of them or a secretarial assistant may be appointed to make a note at the conference of matters agreed, matters not agreed and reasons for disagreement.
24. The conference may be adjourned and reconvened as may be thought necessary by those participating.

Joint report

25. Pursuant to UCPR Rule 31.25 and paragraph 4 of the Code, the report should specify matters agreed and matters not agreed and the reasons for non agreement.
26. The joint report should, if possible, be signed by all participating experts immediately at the conclusion of the conference and, otherwise, as soon as practicable thereafter.
27. Prior to signing of a joint report, the participating experts should not seek advice or guidance from the parties or their legal representatives except as provided for in this Practice Note. Thereafter, the experts may provide a copy of the report to a party or his or her legal representative and may communicate what transpired at the meeting in detail if they wish.
28. The report of the joint conference should be composed by the experts and not the representatives of the parties. The report should be set out in numbered paragraphs and should be divided into the following sections:
 - statement of agreed opinion in respect of each matter calling for report;
 - statement of matters not agreed between experts with short reasons why agreement has not been reached;
 - statement in respect of which no opinions could be given e.g. issues involving credibility of testimony;
 - any suggestion by the participating experts as to any other matter which they believe could usefully be submitted to them for their opinion; and
 - disclosure of any circumstances by reason of which an expert may be unable to give impartial consideration to the matter.
29. The joint report, when signed by all participating experts, should be forwarded to the Court.

Role of legal representatives

30. Legal representatives who attend a conference pursuant to an order of the Court or who are approached for advice or guidance by a participating expert should respond jointly and not individually, unless authorised to do so by the legal representatives for all other parties with an interest in the conference.
31. Such advice or guidance may be provided by:
 - responding to any questions in relation to the legal process applicable to the case;
 - identifying relevant documents;
 - providing further materials on request; and
 - correcting any misapprehensions of fact or any misunderstanding concerning the conference process.
32. The legal representatives of the parties should perform any other role the Court may direct.

Provision of information

33. The legal representatives of the parties should inform the associate of the judge who directed the conference of the date of a conference when arranged, the names of the participating experts and the questions submitted.
34. It is not intended that the joint report provided to the Court or that information provided to the Court concerning a conference will be evidence in the proceedings unless admitted into evidence in the ordinary way (that is, by consent or by tender subject to the SCR and the rules of evidence).

Further directions

35. Pursuant to UCPR Rule 31.25(2), an expert directed to confer may apply to the Court for further directions. That may be done, at the expert's election, by arrangement with the associate of the judge who directed the conference. A party may also apply for further directions in relation to a directed conference.

J J Spigelman AC
Chief Justice of New South Wales
17 August 2005.

Related information

Practice Note SC Gen 11 was issued and commenced on 17 August 2005.
This Practice Note replaced Former Practice Note No. 121 on 17 August 2005.

See also:

Practice Note SC Gen 1 Supreme Court – Application of Practice Notes
Practice Note SC Gen 3 Supreme Court – Use of technology
Supreme Court Rules 1970
Uniform Civil Procedure Rules 2005