



2022

FACILITATION OF EXPERT WITNESS CONFERENCE for the PREPARATION of a JOINT REPORT TERMS OF RETAINER

Part 1: terms of appointment – taken as accepted unless indicated otherwise

Part 2: professional rates

Introductory comments:

I am retained as in the Facilitator role in medical negligence matters on a regular basis.

Stenographer assistance at conclave: The question of whether it is more cost effective to use a stenographer at the conclave may depend on a number of factors, eg: the number of experts involved; whether they are attending the conclave in person or by telephone; any Court deadlines applicable for the joint report, my own availability and capacity, and the availability of my preferred / recommended stenographer. These issues should be discussed and agreed at the time of booking the conclave.

In Facilitating an expert witness conclave and producing the joint report I appreciate the importance of:

- a thorough understanding of the brief and the legal issues;
- guiding the experts in their obligations pursuant to the relevant legislation, court rules and practice notes;
- ensuring the experts address the questions as put by the parties; and
- working within the various time constraints of the respective experts to bring the joint report to completion as quickly and efficiently as possible whilst facilitating each expert to consider and express their views without undue time pressure.

I ask to be provided with the email contact details of the experts in advance of the conclave so that I can introduce myself, send them a copy of the relevant court rules and the report template. I find the experts really appreciate this and it also helps in establishing a good rapport with them, which is very important.

This also helps me assist the parties to keep the conclave date on track – eg by my being able to identify if any experts have not received any or all of the briefing material in time, and seeing that this is remedied, so that the conclave does not need to be postponed.

Part 1 - Terms of Appointment as Facilitator:

1. I will confirm immediately regarding any previous knowledge or interest, (financial or otherwise) in the subject proceedings.
 2. I undertake to conduct the facilitation of this expert witness conclave and production of a joint report, in accordance with the provisions and requirements of the Uniform Civil Procedure Rules 2005 NSW, namely:
-

- i) Expert Witness Code of Conduct – (set out in Schedule 7 of the UCPR);
 - ii) Division 2 of Part 31 of the UCPR, (regarding expert witnesses and a joint report); and
 - iii) Practice Note No. SC Gen 11 (08/17/2005) regarding Joint Conferences of Expert Witnesses.
3. In view of clauses 6, 10, 14 & 15 of the said Practice Note, I assume that the Parties' legal teams will have agreed on the following matters and have provided the same to the experts sufficiently in advance of the conclave:
 - i) the experts to attend;
 - ii) the questions to be answered; and
 - iii) the materials to be placed before the experts.
4. I ask that the Parties' legal teams please provide me with the same information and documentation referred to at (3) above, at least two calendar weeks ahead.
5. Pursuant to the said Practice Note (clause 10), it is requested that the Parties' legal teams ensure that each of the experts participating in the conclave will have been provided with the same information and documentation relevant to the issues on which they are expected to confer, which I note may include:
 - i) the Expert Witness Code of Conduct;
 - ii) Practice Note No. SC Gen 11 (08/17/2005) regarding Joint Conferences of Expert Witnesses;
 - iii) An agreed chronology, if appropriate;
 - iv) Relevant witness statements or preferably, a joint statement of assumptions to be made by the experts, including any competing assumptions to be made by them in the alternative (which should be clarified as such);
 - v) Copies of all (relevant) expert opinions already exchanged between the parties and all other (relevant) expert opinions and reports upon which a party intends to rely; and
 - vi) Such records and other documents as may be agreed between the parties or ordered by the Court.
6. In my role as facilitator I undertake to assist the Parties' experts as follows:
 - i) To chair and facilitate the joint conclave in a neutral manner and to ensure procedural fairness to all participants;
 - ii) To oversee the process of the joint conclave and preparation of the joint report and NOT to participate in the substantive discussion;
 - iii) To ensure that the joint conclave duly addresses all issues and/or questions identified in the joint list prepared by the Parties' legal teams;
 - iv) To ensure that the joint report specifies the matters agreed and also captures accurately the basis of any difference of opinion or non-agreement of the experts with respect to any of the issues posed;
 - v) To ensure that the joint report specifies other questions which any of the experts believe would be useful for them to consider, (pursuant to clause 17 of the Practice Note);

- vi) To remind and/or explain to the experts where necessary, their obligations under clause 1.2 of the Code, to exercise their independent, professional judgement;
- vii) To remind and/or explain to the experts where necessary, their obligations to accept as fact the matters stated in witness statements or assumptions submitted to them and that 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 (pursuant to clause 19 of the Practice Note); and

- viii) To impose or keep a discipline in the conclave, or a structure which ensures the completion of the task.
7. I will take the necessary steps (including to liaise with the Parties' administrative staff designated to support the conclave) to ensure that the joint report is finalised and signed by all participating experts immediately at the conclusion of the conclave and otherwise as soon as practicable thereafter – and then provided to the Parties' legal teams. In doing so, I will in no uncertain terms seek to apply undue pressure on the experts to sign their report before they have indicated that they are ready and content to do so.
 8. I will inform the Parties' legal teams if, pursuant to UCPR Rule 31.25(2), an expert directed to confer intends to apply to the Court for further directions.
 9. I will maintain confidentiality in all documents and information to which I am privy in this matter, having regard to Rule 31.24(6) and Rule 31.26(3) & (4) UCPR.
 10. I assume that the Parties' legal teams will provide a signed copy of the joint report to the Court and perform any other role directed by the Court in relation to the conclave.
 11. If just prior to or on the day of the Conclave, any of the experts indicate that they are not prepared to proceed with the Conclave on the scheduled date because of late provision of the brief or any questions or factual assumptions to be considered, a cancellation fee will apply (referred to at Part 2). In this regard, please note that the Supreme Court Practice Note requires the experts to be provided with all material at least 2 calendar weeks prior to the date of the Conclave.
 12. Irrespective of the outcome of the Expert Witness Conclave, (including whether it is cancelled or postponed by any of the experts themselves), the Parties will pay the Facilitator's fees and disbursements as specified at Part 2 (over the page).
 13. In the event of default in payment by a Party within the time frame for payment of the Facilitator's tax invoice, the defaulting Party's solicitor (law firm) on the record at the time of booking and/or their expert participating in the conclave, undertakes to pay the fee outstanding.

FACILITATOR FEE AGREEMENT RE EXPERT WITNESS CONCLAVE

Part 2 - In respect of my professional fees, the following provisions apply:

1. Applicable hourly rate: \$350.00 plus GST, in respect of:
 - i) reading time;
 - ii) facilitation of the conclave where stenographer assistance is also provided;
 - iii) preparation of the joint report; and
 - iv) any follow-up attendance required in respect of an adjourned conclave, confirmation or finalisation of the joint report, signature by the experts and provision to the parties.

2. In the alternative to 1 (ii): Applicable hourly rate for the facilitation time during conclave where stenographer assistance is not provided at the conclave itself: \$500.00 + GST
3. I will not charge for the following:
 - i) administrative time in preparing for the conclave, such as liaising with the parties;
 - ii) travel time to and from the venue (if conducted in the Sydney CBD).
4. Any disbursements incurred over \$50.00 will be charged at cost.
5. **Note re cancellation:** where cancellation occurs less than 14 business days (2-3 calendar weeks) before the conclave date, a cancellation fee of \$3,000 incl GST will apply. The parties will be billed and liable for their respective share, unless the facilitator is instructed that one party shall pay the entire fee. If the cancelled date is subsequently filled by another mediation or conclave, I will notify the parties and the tax invoice will be cancelled if unpaid or the amount will be refunded, if already paid.
6. Costs and any disbursements to be shared equally between the parties unless instructed otherwise and will be billed accordingly. If the billing cycle of your firm and/or your client is beyond 30 days I ask that you please let me know the timeframe to expect.

Please don't hesitate to contact me if you require any additional information or clarification. Unless I hear from you to the contrary, I will assume that you and your clients accept the terms of this retainer.



Karen Stott
BA.LLB, Solicitor and
Nationally Accredited Mediator

DOYLE'S
GUIDE TO THE AUSTRALIAN LEGAL PROFESSION

Leading Mediator - 2018, 2019, 2020 2021 & 2022
(NSW)