Guide to Concurrent Evidence in New South Wales

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What is Concurrent Evidence?

Concurrent evidence (or 'hot-tubbing') is the process of hearing evidence from all expert witnesses involved in a matter simultaneously. This process enables experts with shared expertise to collegiately discuss their opinions with each other, with counsel, and with the judge.

The process aims to increase the efficiency of a court case and thereby assist in the overriding purpose of the Civil Procedure Act 2005 (NSW): the 'just, quick and cheap' resolution of disputes.

Indeed, concurrent evidence ensures that all the experts have access to the same facts, reduces the time they waste attacking each other's assumptions, and elucidates any real disagreement between the experts. Similarly, through experts meeting beforehand in an expert conclave and making clear the elements they agree and disagree on, the quality of evidence presented tends to be higher.

As concurrent evidence is now the norm in civil trials in New South Wales, it is important for lawyers to be aware of the process, and how best to manage the expert witnesses involved, to ensure things run smoothly and that the best outcome is achieved.

How does it work?

Once the relevant issues have been identified and the experts have written their individual expert reports, concurrent evidence proceeds in two stages:

1. Pre-Trial Conference ('Conclave')

Before trial, the judge will order the expert witnesses to confer and produce a joint report stating their areas of agreement and disagreement, giving reasons for the latter. Lawyers are usually excluded from the conclave, although they may still provide basic assistance such as helping experts to identify documents. [1]

In order to ensure a conclave goes well, there is a significant amount of preparation required. The basic steps required to prepare for an expert conclave are as follows:

1. Each expert must be provided with the other participants' expert reports for review. Experts must be given enough time to read and the reports of other experts. The amount of time required will depend on the complexity of the issues at hand, and indeed the complexity and length of the report(s) that they are required to read.
2. Following this, the parties will agree on key issues for discussion at the conclave. It can be contentious to agree on the issues to be discussed, so sufficient time must be given for the parties to come to an agreement.

Common problems faced by experts include last minute briefings and muddled questions. This must be avoided whenever possible.

3. It is advisable to enlist the services of an independent facilitator to ensure the expert conclave runs smoothly. This facilitator should ideally be a lawyer experienced in conclaves, who is able to provide independent assistance in identifying areas of agreement and disagreement between the experts. An independent facilitator can also be useful, as either side can approach the facilitator for clarification or updates, without concern that the process is being influenced.
4. It is important to ensure that a sufficient amount of time is allocated for the expert conclave to take place. A conclave should take place well in advance of the joint report filing date.

In spite of the number of considerations that must be gone into to ensure that a conclave runs smoothly, conclaves are spoken of highly by many members of the legal profession. Indeed, Garling J of the Supreme Court of NSW had the following to say about the benefits of expert conclaves:

"Conclaves of experts are, in my view, an essential element in the just, quick and cheap disposition of the real issues in cases such as the present. I am acutely conscious that they are not easy to organise nor are they always cheap. However, the benefit to be obtained from joint opinions arising from conclaves is, in my view, usually significant."[2]

2. Concurrent Oral Evidence ('Hot Tub')

McClellan J has described the concurrent evidence, or 'hot tubbing' process as follows:

"…a discussion chaired by the judge in which the various experts, the parties, the advocates and the judge engage in a cooperative endeavor to identify the issues and arrive where possible at a common resolution of them" [3]

During the trial, usually after the giving of lay evidence, all expert witnesses will be called to sit together in the courtroom (or give evidence via teleconference/video-link if deemed necessary), for a 'structured discussion'.

The experts are free to comment on each other's observations, though only one expert is permitted to speak at a time. The lawyers then sequentially cross-examine the experts, with the judge intervening as necessary.

Lawyers should ensure that the expert that they have engaged is well prepared for the giving of concurrent evidence in that they are aware of the key issues in the dispute, and that they avoid cross-examination that unnecessarily draws out the hearing by questioning on immaterial to the matters at hand.

Disadvantages of Concurrent Evidence

Although concurrent evidence leads to numerous benefits, as outlined above, it is important for an instructing solicitor to be prepared, or risk things going awry.

The absence of legal representation in the pre-trial conclave makes it possible for an expert to lose a party's case from the beginning by making an undesired concession. In-depth preparation is therefore key in order to ensure that an expert witness has a well-developed view of the matter. Indeed, an expert well informed about all the issues and arguments in a case will be less likely to change their mind in a conclave. It is likewise advisable to ensure that the issues to be discussed in a conclave are well defined prior to the meeting, and a structure established, to ensure that the conclave is productive.

Lawyers should ensure that instructions to an expert are set out clearly and concisely, with the aims of the conclave clearly set out. It is a good idea to provide a succinct statement of assumed facts, to help an expert stay focused.

Lawyers should ensure that sufficient discussions have taken place with an expert on matters that are important to clarify, so as to prevent misunderstandings during an expert conclave. Different courts have their own rules in relation to joint expert conclaves, but frequently the court can direct experts to develop a joint report at any time. Practitioners should therefore be aware of the possibility of an expert conclave being ordered at any point and prepare accordingly.

During the presentation of concurrent evidence, the absence of a tightly structured cross-examination diminishes lawyers' control over the direction of inquiry. Nonetheless, attacks on witness credibility are not barred, and lengthy individual cross-examination of opposing experts may still be appropriate with the judge's permission.

Procedure Here to Stay

The enthusiasm of New South Wales judges for concurrent evidence means that the procedure is here to stay. Lawyers should learn to use the process to their advantage, in facilitating the efficient presentation of expert evidence, and assist their expert witnesses to do the same.

It is important that throughout the conclave and concurrent evidence process, expert witnesses remember that their duty is to the court, and that they are not advocates for any party. To learn about the issue of expert witness bias, click here.

References

[1] See e.g. Supreme Court of New South Wales, *Practice Note No. SC Gen 11 – Joint Conferences of Expert Witnesses*, 17 August 2005 [27], [30]–[31].

[2] Tinnock v Murrumbidgee Local Health District [2015] NSWSC 151 at [9]

[3] P McClellan, "New Method with Experts – Concurrent Evidence" (2010) 3 *Journal of Court Innovation* 259 at 264