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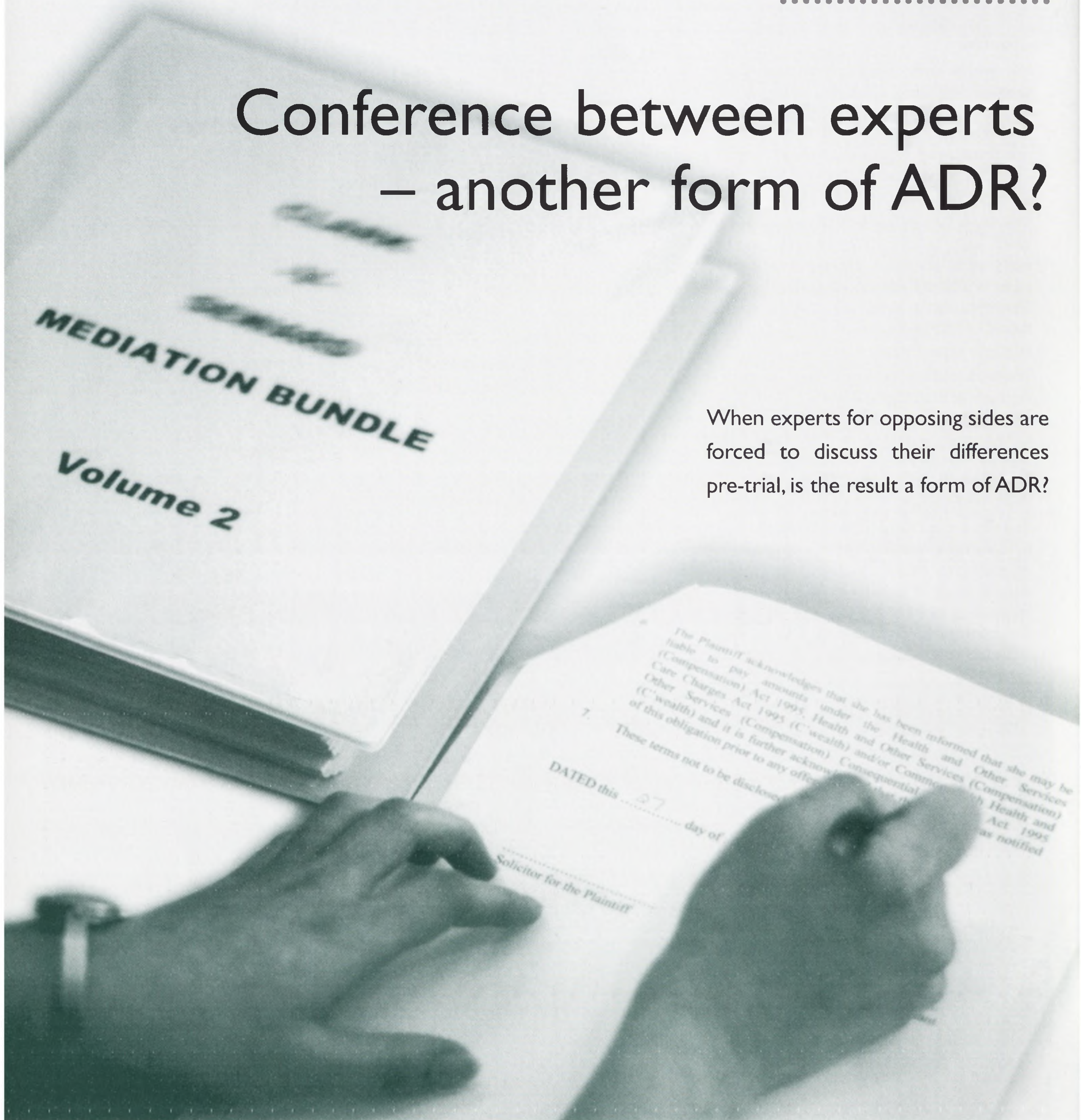
Conference between experts – another form of ADR?

When experts for opposing sides are forced to discuss their differences pre-trial, is the result a form of ADR?



Background

The New South Wales Supreme Court recently[1] established rules addressing the role of expert witnesses, and in particular enabling conferences to take place between experts for opposing parties.

The relevant rule[2] provides:

1 *The Court may, on application by a party or of its own Motion, direct expert witnesses to:*

a) confer and may specify the matters on which they are to confer;

b) endeavour to reach agreement on outstanding matters; and

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c) *provide the Court with a joint report specifying matters agreed and matters not agreed and the reasons for any non agreement.*

Similar rules now exist in the NSW District Court and no doubt will be repeated to varying extents in other jurisdictions.

ADR

Speaking shortly after the introduction of the new rules, the then Justice Alan Abadee said

In a loose sense a joint meeting is perhaps a form of ADR because I believe such meetings and joint report will also contribute in its own way to resolution of matters.[3]

Justice Abadee's observation may in fact identify what will prove to be the greater benefit of the joint conference: enhanced ADR rather than some forensic use of a joint report at trial.

Indeed, the rules and practice concerning such conferences make limited comment on the use of the joint report at trial. And what comment there is seems to limit the use of the report rather than extend it.

For example, the Rules provide that the content of the conference between the expert witnesses shall not be referred to at the hearing or trial unless the affected parties agree to it.[4] Further, any agreement reached during the conference shall not bind the affected parties except in so far as they expressly agree.[5]

These rules can be contrasted with those concerning Court appointed experts, which provide that the report shall be deemed to have been admitted into evidence in the proceedings unless the Court otherwise orders.[6]

Why then might the conference enhance the possibility of resolution of the dispute ?

Firstly, the mere preparation for the expert conference may assist. Although the rules are silent on the preparatory steps, a draft guideline is under preparation by a working group under the chairmanship of Justice Abadee.

The draft envisages supply to the experts[7] of :

- An agreed chronology, if appropriate.
- Relevant statements or assumptions highlighting any areas in dispute *including relevant facts or counter assumptions omitted from the assumptions prepared by the opposing parties.*
- Copies of all expert opinions already exchanged between the parties and all other expert opinions and reports upon which a party intends to rely.
- Relevant medical records.

Although these may seem obvious matters, their effect is that the scheduling of an expert conference may, at an earlier stage, expose documents, background facts and relevant assumptions which might otherwise remain unavailable until a late stage or until the hearing itself.

Secondly, the conference may of course result in a narrowing of the issues that remain in dispute, should the experts who previously expressed different views come to an agreed view as a result of the conference process. This may relate to the primary issues or some subsidiary but important element such as projected lifespan.

Thirdly, the conference process may prompt scrutiny of the parties' own materials and opinions, thereby creating an opportunity to re-assess the merits of the litigation.

Fourthly, and perhaps a less palatable factor, is that the cost of the process may cause a party to find it more attractive or even necessary to settle the litigation.

Conclusion

The rules themselves focus upon the role of the expert, the scheduling of a conference and the preparation of a report. They are mostly silent as to what use might be made of that report at the hearing and we have little if any precedent to guide us in that regard.

Accordingly, for the moment at least, the greatest value in the expert conference process may be to provide another forensic opportunity, prior to the hearing, for the parties' representatives to obtain materials, scrutinise opinions and critically appraise the merits of the parties' positions.

As has proved to be the case with formal mediation, the prospects of a negotiated resolution of the matter will therefore be enhanced. That may be the most valuable outcome of an expert's conference. PL

Footnotes:

1. Amendment 337, 1 March 2000
2. Part 36, Rule 13CA
3. APLA NSW Conference 3 March 2000 Sydney
4. Rule 13CA (4)
5. Rule 13CA (5)
6. Part 39, Rule 3(3)
7. Draft Guideline

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