Is There Room In American Courts For An Australian Hot Tub?

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An evidentiary practice, novel to U.S. courts, has been in operation in Australia for at least 20 years. “Concurrent expert evidence,” which is also colloquially referred to as “hot tubbing,” refers to a practice where competing experts are sworn and presented as witnesses at one time and remain on the stand together throughout the course of their testimony. Concurrent expert evidence has its origins in the Australian Trade Practices Tribunal, where it has been commonly used to receive evidence from economics experts, in the Land and Environment Court in New South Wales and the Commercial List of the Supreme Court of New South Wales. This practice has been employed in non-jury cases in many other Australian courts. Recently, concurrent expert evidence was used in two high-profile Federal Court of Australia cases involving collateralized debt obligations, one against Lehman Brothers and another against ABN AMRO and Standard & Poor’s.

Australian Law Reform Commissions in 2000 and in 2005 have treated concurrent expert evidence as an established practice and endorsed its use in appropriate cases. The procedure is now recognized in court rules and practice notes in a number of Australian jurisdictions. The procedure is not free of critics. It has not been tested in Australian appellate courts. Australia’s favorable experience with concurrent expert evidence has been based upon a conviction that bias in expert testimony should be eliminated. Even though retained by a party, experts testifying in Australian courts are required by applicable rules to acknowledge that they have an overriding duty to the court and that they are not an advocate for a party. Apart from promoting impartial expert testimony, many Australian supporters of “hot tubbing” believe that it improves the judge’s, experts’ and legal practitioners’ understanding of the evidence. The testimonial dialogue helps to assure that experts deal with the same issues based on the same assumptions at one point in time so that differences of opinion are discussed in this article are those of the authors and do not express the opinions of Jones Day or any of its clients.

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opinion are crystallized or explained. The experts can readily clarify any lack of understanding the judge or counsel may have about a point. The judge is able to compare opposing experts’ evidence as they are giving their testimony rather than attempting the comparison after an interval of days or weeks, and then only by a more arduous and time-consuming process of locating, comparing or contrasting testimony given on separate occasions perhaps on subtly different but important points. Concurrent expert testimony can improve the quality, precision and clarity of the technical communication and sharpen the differences that may exist between experts.

Justice Peter McClellan, one of the Australian judiciary’s most ardent supporters of hot tubbing, has stated that evidence that may have required a number of days of testimony in direct and cross-examination can now be taken in half or as little as 20 percent of the time that would have been necessary.9

The Limited U.S. Experience And Consonance With U.S. Rules

In the United States, the use of the concurrent expert evidence technique has been limited.10 The first reported example took place in a 2003 voting rights case before a three-judge panel of the U.S. District Court for the District of Massachusetts.11 The panel used the concurrent expert evidence technique to examine two political scientists in a case that challenged the Massachusetts Legislature’s redistricting plan based on statistical evidence of discrimination. Two years later, a judge in the U.S. Court of Federal Claims used the concurrent expert evidence technique in a breach of contract case.12 There, the court evaluated the testimony of two damages experts and used the opportunity to pose several fundamental economics questions as well as to clarify questions about demonstrative evidence used earlier in the trial. The practice was also employed during a Daubert hearing in a products liability case pending in the U.S. District Court for the Northern District of Ohio.13 In that case, the court initially heard separately from the parties’ experts. When their testimony revealed vastly different views regarding whether manganese exposure could cause Parkinson’s disease, the court held an additional day of hearings using the concurrent evidence technique. A more recent example includes the use of the concurrent evidence technique in a claims construction (so-called Markman) hearing in a patent infringement case pending in the District of Massachusetts before Judge Woodlock.14

The consensus of the U.S. judges who have used concurrent expert testimony is that the technique can be a helpful learning tool. Indeed, the Ohio judge noted in his Daubert order, “the parties and the court found this ‘hot tub’ approach extremely valuable and enlightening.” In Massachusetts, Judge Woodlock has reported using the concurrent expert evidence technique “in a number of non-jury cases over the years, including in patent and business cases.”15

To date, no reported decision of an American court has examined the compatibility of the concurrent expert evidence technique with civil rules of procedure or evidence. Wigmore cites the technique as one of several possible mechanisms for improving the use of expert testimony.16 And, the Federal Rules of Evidence, while they do not specifically sanction the practice, provide a framework in which the concurrent expert evidence technique seems to fit. Rule 611, for example, gives trial courts “control over the mode and order of examining witnesses and presenting evidence so as to,” among other things, “make those procedures effective for determining the truth” and “avoid wasting time.”17 According to the Advisory Committee’s Notes, the rule empowers trial courts to decide “whether testimony shall be in the form of a free narrative or responses to specific questions,” “the order of calling witnesses and presenting evidence,” and “the many other questions arising during the course of a trial.”18 Additionally, Rule 614 permits trial courts to call and interrogate witnesses, provided that all parties have the opportunity to cross-examine.19 All of these rules, moreover, must be construed broadly to “promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.”20 As long as cross-examination rights are preserved, the use of the concurrent expert testimony technique appears to be a matter of a trial court’s discretion reviewed only for abuse of discretion under the circumstances of a particular case.21

The Impact Of Concurrent Expert Evidence On The Lawyers And The Expert

The concurrent expert evidence technique certainly diminishes the direct control of trial counsel and enhances the flexibility and spontaneity of the expert.

The selection of the expert raises an interesting debate as to whether the characteristics that an expert needs for concurrent evidence varies compared to the traditional manner of experts giving evidence. Experts need to be seen by the court as careful, reliable and authoritative. Concurrent evidence changes how those characteristics are evaluated by moving from the expert being tested by an advocate to being tested by his peers. Discussion and debate – ordinarily unattainable in the relatively constrained realm of cross-examination – become the prominent features in the more free-wheeling hot tub context. The hot tub may require an expert who is more persuasive and cogent in his presentation of views in a “controlled” argument with a peer, rather than in his responses to questions from counsel. However, the view that the hot tub benefits experts who are better communicators or debaters is not uniformly accepted. An alternative view is that the hot tub prevents a diversion from content to style as other experts are present to challenge or verify content.

In the concurrent evidence context, cross-examination is more limited than it is in the traditional expert evidence setting. Justice Peter McClellan sees this as enhancing the judge’s capacity to decide which expert to accept: “a person’s expertise [is not] translated or coloured by the skill of the advocate … you actually have the expert’s views expressed in his or her own words.”22 But from the lawyer’s and client’s perspective, the loss of a careful and searching cross-examination may mean that experts are not as thoroughly tested. Cross-examination and its preparation may involve a more comprehensive review of an expert’s evidence than does the scrutiny afforded by peer review, especially when the litigation stakes are high. Cross-examination is still possible within a concurrent evidence framework, but the advocate’s ability to structure and control the cross-examination may not be as complete if the experts and judge have had a free-flowing discussion beforehand. This can mean that an advocate needs to attempt to carve out a place in which to put a series of questions; to request that a particular issue be dealt with through conventional means; or to consider how one’s own expert can be deployed to contradict or question an opponent’s expert. It also necessitates both an inquiry of the
trial judge as to how she plans on conducting the concurrent evidence session and an opportunity for counsel to make suggestions as to the configuration of the hot tub in a particular case.

One Technique For Two Different Models?

In the Australian system, the concurrent evidence practice is seen to promote the impartiality of experts and the elimination of bias. Indeed, the practice fosters adherence to the expert’s written pledge to the tribunal that he will not act as an advocate. This is hardly compatible with traditions in the United States. The American system tolerates, if not encourages, the adversarial use of experts whose allegiance is to the party that retains them and whose opinions may only be cloaked in the rhetoric of objectivity. It may be that the most persuasive expert is also the most truthful, but the American system does not make the expert a functionary of the court. Were that the case, there might well be a history in the United States of some species of Australia’s hot tubbing.

While the expert’s relationship to the tribunal is materially different in the United States, it is obviously desirable in either system to have expert testimony presented in a way that helps to clarify challenging technical issues. Doubtless there are many cases, particularly in the intellectual property world, where judges can benefit from the simplest exposition of technical principles, where an appreciation of technical common ground can advance immeasurably the resolution of technical disagreements. Whether in Australia or the United States, hot tubbing can shorten the time it takes to give expert testimony and focus for the judge areas of technical disagreement. This is especially true in non-jury cases, the only circumstance where hot tubbing has been used in Australia.

In 1901, Judge Learned Hand offered his own comment on the utility of expert testimony.23 He worried that because it was inevitably partisan, it did not really help juries reach the truth. Rather, he suggested that impartial experts be recruited and used as panels who might assess the parties’ partisan expert testimony and offer a neutral, unbiased view for the jury’s consideration. Although Judge Hand’s suggestions in the intervening century have not had much traction in the United States, we do have rules that allow judges to appoint their own experts, something of a variant on the Hand proposal. Rule 706 authorizes the use of neutral experts whom the trial court itself has selected and appointed.24 Such a judicial prerogative is exercised infrequently, but it is available in cases where the court’s ability to reach a reasoned judgment is frustrated by the apparent bias of the parties’ experts. The neutral expert is also available in jury cases in the United States, and the protocols necessary and appropriate to assure the effective use of the neutral, court-appointed expert have also been considered and discussed.25

To reform the adversarial system in the United States by employing an evidentiary practice not fitted for its adversarial system could be a serious mistake. Whether in Australia or the United States, the rules of practice, of procedure and evidence, should fit their intended purpose. If hot tubbing has an American future, at least before the role of experts is broadly reconsidered, there is a case to be made that it should be used in very limited, non-jury contexts where the technical issues are so complex that a “discussion” by the experts is essential for a rudimentary understanding of the dispute, and where trial counsel have been advised well in advance of the court’s intended use of the process.

1 Michael Legg, Case Management and Complex Civil Litigation 115 (Federation Press 2011).
5 Federal Court of Australia Rules 2011 (Cth) r 23.15; Uniform Civil Procedure Rules 2005 (NSW) r 31.35.
7 In the United States, colloquies between experts in the hot tub or in response to court interrogation may necessitate contemporaneous objections to preserve appellate rights, at least when the jury is not present. See Fed. R. Evid. 614(c) (“A party may object to the court’s calling or examining a witness either at the time or at the next opportunity when the jury is not present.”). See generally 29 Charles Alan Wright et al., Federal Practice and Procedure § 6236 (1st ed. 1997 & Supp. 2000) (collecting cases).
8 Federal Court of Australia Rules 2011 (Cth) r 23.12, 13; Practice Note CM7.
10 While limited in U.S. courts, the technique had been used with increasing frequency in arbitration both in the United States and abroad, and may be particularly suited to that forum. See Doug Jones, Party Appointed Expert Witnesses in International Arbitration: A Protocol at Last, 24 Arb. Int’l 1, 146-48 (2008) (“Hot tubbing is frequently used in international arbitration hearings. Given the more flexible and informal nature of international arbitration, it is probably better suited to arbitral proceedings than traditional litigious methods of calling expert evidence.”).
11 See Black Political Task Force v. Galvin, No. 02-11190 (D. Mass.). The transcript of the relevant hearings in Galvin, as well as that in Anchor (see infra note 12), are discussed in detail in Lisa C. Wood, Experts in the Hot Tub, 21 Antritrust 3, 96-101 (Summer 2007).
12 See Anchor v. United States, No. 95-309 (D. Mass.).
14 See Genzyme Corp. v. Seikagaku Corp., No. 11-10636 (D. Mass.).
15 See Wood, supra note 11, at 97.
16 3 The New Wigmore: A Treatise on Evidence § 11.5, at 498 & n.8 (Aspen Publishers 2012) (suggesting that trial courts “[permit] experts from both sides not only to communicate with one another, but to testify concurrently, sitting together on a panel in which the various experts hear each others’ statements, comment on them, and possibly ask questions of each other”).
17 Fed. R. Evid. 611(a)(1)-(2).
18 Fed. R. Evid. 611 advisory committee’s note. See also 4 Weinstein’s Federal Evidence § 614.04(a)[a], at 614-21 (2d ed. 2012) (“Adherence to a particular form of conducting a trial is not required; appellate courts recognize that there is more than one permissible way to preside over a courtroom.”).
19 Fed. R. Evid. 614(a)-(b).
20 Fed. R. Evid. 102.
23 See generally Learned Hand, Historical and Practical Considerations Regarding Expert Testimony, 15 Harv. L. Rev. 40 (1901).
24 Fed. R. Evid. 706.