Commentary

by Hon. Jack Zouhary

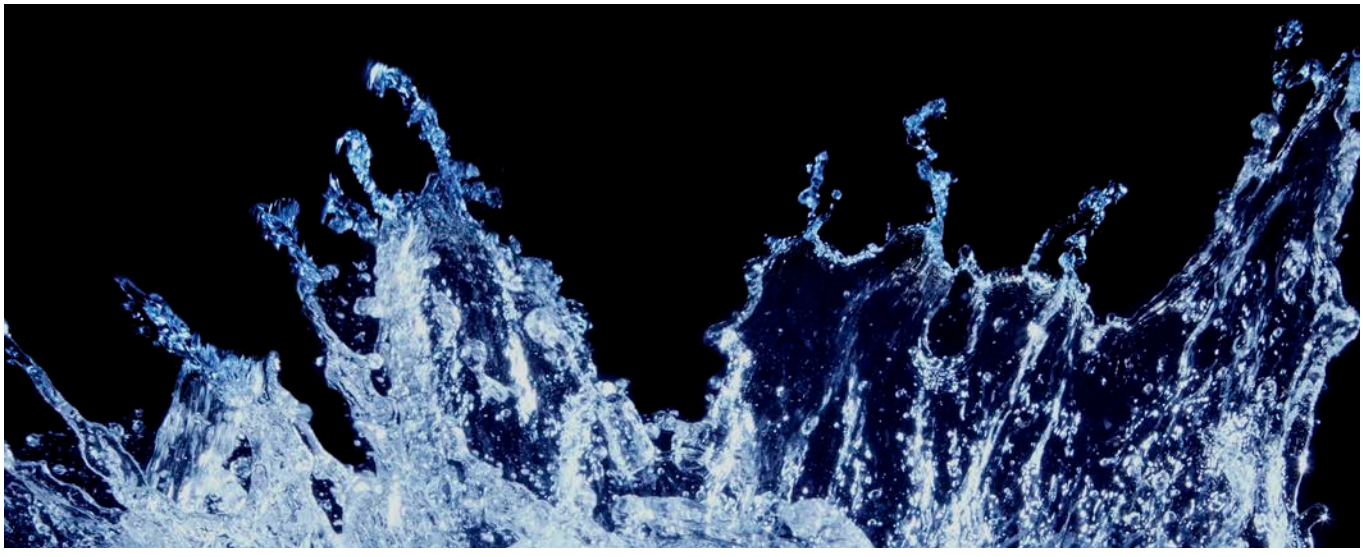
Jumping In — A Different Approach to Expert Evidence

When a lawyer told me he heard I had been "hot-tubbing" in my courtroom, I confess I did not know how to respond. It turns out, what I thought was a novel approach to dealing with expert testimony on a complex matter was not so novel. Put on your swimsuits and hop in while I explain.

Faced with multiple motions for class certification in an antitrust multidistrict litigation, I decided that I needed to see the several key experts identified in the briefing. Their affidavits and sworn deposition testimony needed to be tested. The lawyers clamored for a full-blown evidentiary hearing, including formal cross-examination of opposing expert witnesses. Indeed, some went so far as to argue it would be a denial of due process not to grant a hearing. I disagreed. But I needed a hearing—hundreds of pages submitted by counsel were not enough! We read the briefs, but still had questions. And, not surprisingly, the experts were at odds with each other on a number of points. I felt I needed to see them and to question them directly. This would not be a traditional hearing for counsel to wax on, but a focused hearing with direct contact between me and the experts.

I set the matter for oral argument with the following conditions: At the beginning of each session, all experts for that session will be sworn. This court, the experts, and counsel for each side will then engage in a discussion, structured around this court's questions. That conversation may include back-and-forth directly between the experts, in a point/counterpoint fashion, with this court moderating. For instance, this court may ask the plaintiffs' expert to comment on critiques by the defendants' expert with respect to an aspect of his impact model, then ask [defense experts] to respond, and so on. This court may invite counsel to join in the legal aspects of that discussion, or comment on the legal consequences of the expert back-and-forth (e.g., what would follow, as a legal matter, from accepting or rejecting a particular expert's criticisms). Counsel in each session may also make opening statements (not to exceed 10 minutes each, delivered before discussion with the experts) that show why plaintiffs have or have not met Rule 23's requirements.

With the stage set and a full day set aside for hearing on several motions, I sent to counsel ahead of time a set of questions that I wanted to be the focus of our discussion. I often employ this practice. It forces me to be prepared, and it gives counsel a preview of what I may be thinking. Instead of a seat-of-the-pants response, counsel have time to give my questions some thought (hopefully) and provide me with any additional support, either from the record or from the case law, that might help resolve the questions.



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It was great to have the experts in the courtroom at the same time, nearly face-to-face, with questions they could not duck, and to have the opposing expert comment on what he or she had just heard. I suspect the lawyers were a bit nervous ahead of time because they were not in control of the questioning. But it was great fun for me (perhaps because I'm a former trial lawyer) to be engaged directly with the key testimony that I needed to rule on class certification. More importantly, the hearing allowed me to assess the expert opinions on tough economic issues.

I found the experience rewarding and will not hesitate to utilize it again in the right case. What is "the right case?" One that involves multiple experts and a lengthy record, or perhaps a complex *Markman* hearing. The procedure requires the dueling experts to focus on the same point at the same time. And the "point/counterpoint" dialogue—as opposed to the traditional appellate-type monologue—is a better way of evaluating the accuracy of an expert's opinion. There is no hiding.

Some describe this "concurrent expert evidence technique" as "hot-tubbing" and point out that while the Federal Civil Rules do not specifically provide for this practice, Federal Evidence Rule 611 gives courts "control over the mode and order of examining witnesses and presenting evidence so as to … make those procedures effective for determining the truth and avoid wasting time." *See* "Is There Room in American Courts for an Australian Hot Tub?" *The Metropolitan Corporate Counsel*, Volume 21, No. 5 (May 2013). And if a district judge and the experts "jump" in the hot tub for purposes of determining whether the expert's testimony is admissible—for example, to decide a *Daubert* motion—when the "splashing" subsides, there is a better chance of reaching a correct conclusion. *See* Fed. R. Evid. 104(a) ("The court must decide any preliminary question about whether … evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.").

Throwing everybody in the water at the same time allows the court, counsel, and experts to confront each other directly. Counsel may also follow up and direct questions to the experts. They may ask questions of their own expert to clarify or rehabilitate—or question the opposing expert to drive a point home. In short, everyone gets a swing. The Australian courts deserve credit for this approach. Surveys of Australian judges found that 95 percent were satisfied with the procedure, felt it increased objectivity and quality of expert evidence, found it made comparisons easier, and enhanced the judge's ability to fulfill the court's role of fact-finding (*The Problems of Partisan Experts and the Potential for Reform Through Concurrent Evidence*, 32 Rev. Litig. 1, 38 (2013)).

As it turns out, a few of my American federal colleagues have tried the hot-tub technique, including in antitrust cases (*Experts in the Tub*, 21-SUM Antitrust 95). While its use in American courts appears to be limited to a bench trials and judicial fact-finding, it may also be helpful in trials where jurors have to make difficult decisions based on complex expert testimony. I'm looking for that right case and, hopefully with agreement from the parties, will take the hot-tub experience to trial. All I need to do is waterproof the courtroom! ⊙

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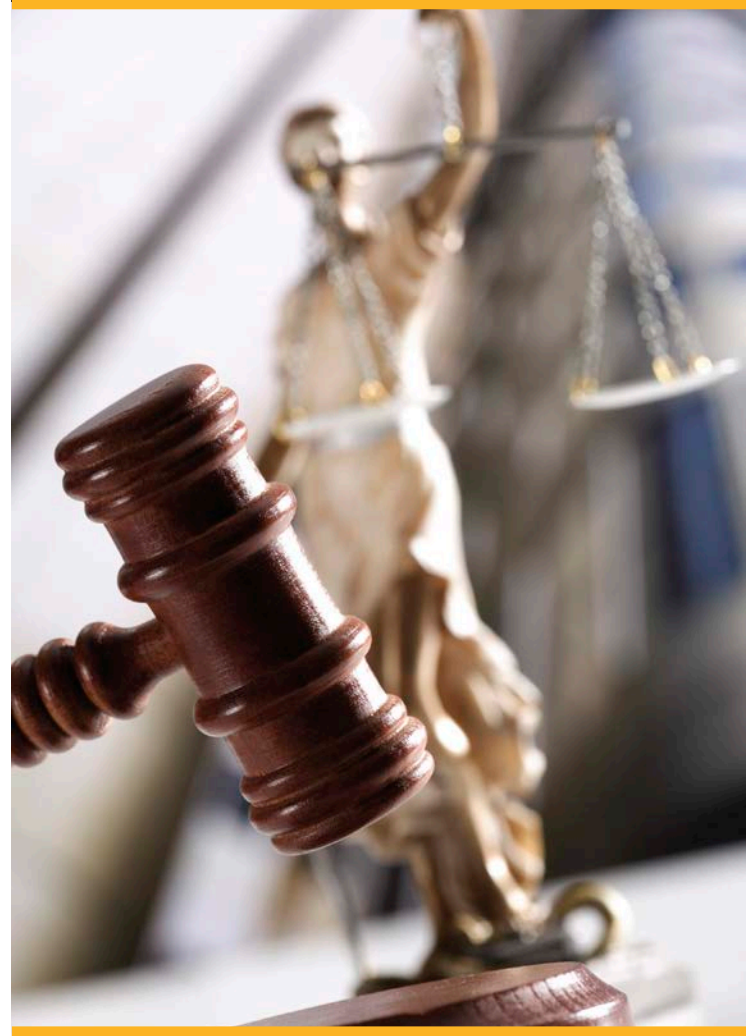

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