LITIGATION PRACTICE

Notes from the Field

Hot Tub Redux

BY LISA C. WOOD

NINE YEARS AGO, I WROTE A COLUMN IN THIS magazine about a trend in the use of expert witnesses in court.[1] The trend, originating in Australia, was to have experts present their testimony concurrently to the court, without lawyers acting as intermediaries. The concurrent presentations allowed the court to directly question the experts in real time about areas of agreement and disagreement. Relative to typical cycles of lawyer intermediated reports, replies, depositions, direct, and cross, the concurrent presentations were less structured and more free-wheeling. With a wink, the process was known as "hot tubbing."

At the time, I was fortunate to be able to interview a federal district court judge from my home District of Massachusetts, Judge Doug Woodlock, who had used the hot tub technique enthusiastically in a few jury-waived proceedings. For a subsequent column, I interviewed several expert witnesses who had experience in Australia with both the hot tub and the similar joint conference process.[2] (The joint conference process has opposing experts meet, without counsel, before trial in an attempt both to narrow the issues in dispute and to prepare a document summarizing the issues on which the experts agree and disagree.)

Since writing those two columns back in 2007, the use of these techniques has spread beyond Australia to the UK and Canada, both of which have adopted rules encouraging hot tubs and joint conferences. And several U.S. federal judges now regularly employ hot tubs. I remain a booster and hope that by sharing these recent developments, the use of expert hot tubs will continue to increase in the United States.

The Use of Hot Tubs and Joint Conferences in the UK

The Current Rules. To get a handle on recent hot tub developments in the UK, I interviewed two experienced UK competition solicitors, Sophie Lawrance and Pat Treacy, partners in Bristow LLP. Sophie and Pat explained that use of the hot tub method has increased in the UK generally, and in particular, in the Competition Appeals Tribunal (CAT), and that court rules have been adopted endorsing the method. The relevant court rules refer to the hot tub method as "concurrent expert evidence" or CEE. An initial rule was adopted in 2013, and then expanded upon in a revised rule just published in December 2017. The rule just adopted in December 2017 provides:

> **Concurrent expert evidence [CEE]**
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> **11.1** At any stage in the proceedings the court may direct that some or all of the evidence of experts from like disciplines shall be given concurrently. The procedure set out in paragraph **11.4** shall apply in respect of any part of the evidence which is to be given concurrently.
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> **11.2** To the extent that the expert evidence is not to be given concurrently, the court may direct the evidence to be given in any appropriate manner. This may include a direction for the experts from like disciplines to give their evidence and be cross-examined on an issue-by-issue basis, so that each party calls its expert or experts to give evidence in relation to a particular issue, followed by the other parties calling their expert or experts to give evidence in relation to that issue (and so on for each of the expert issues which are to be addressed in this manner).
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> **11.3** The court may set an agenda for the taking of expert evidence concurrently or on an issue-by-issue basis, or may direct that the parties agree such an agenda subject to the approval of the court. In either case, the agenda should be based upon the areas of disagreement identified in the experts' joint statements made pursuant to rule 35.12.
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> **11.4** Where expert evidence is to be given concurrently, then (after the relevant experts have each taken the oath or affirmed) in relation to each issue on the agenda, and subject to the judge's discretion to modify the procedure—
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> (1) the judge will initiate the discussion by asking the experts, in turn, for their views in relation to the issues on the agenda. Once an expert has expressed a view the judge may ask questions about it. At one or more appropriate stages when questioning a particular expert, the judge may invite the other expert to comment or to ask that expert's own questions of the first expert;
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> (2) after the process set out in (1) has been completed for any issue (or all issues), the judge will invite the parties' representatives to ask questions of the experts. Such questioning should be directed towards:

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(a) testing the correctness of an expert's view;

(b) seeking clarification of an expert's view; or

(c) eliciting evidence on any issue (or on any aspect of an issue) which has been omitted from consideration during the process set out in (1); and

(3) after the process set out in (2) has been completed in relation to any issue (or all issues), the judge may summarize the experts' different positions on the issue and ask them to confirm or correct that summary.[3]

Sophie and Pat also provided some helpful context for understanding how hot tubs work in competition cases in the UK. Juries are not used for civil cases, and most civil business cases are heard by specialist rather than generalist judges. Competition cases are heard either in the Competition Appeal Tribunal, in which hearings are presided over by a three-person panel (only one of which need be a judge, and the others may be experts or academics from the CAT panel), or in the Chancery Division of the High Court (in which a single judge presides). Judges are not randomly assigned to cases in the Chancery Division, and attempts are made to assign a judge with competition experience to any competition case being heard there.

Sophie and Pat explained that the judiciary who preside over competition disputes have considerable discretion in how to manage cases, including how best to handle expert evidence. Even before rules were adopted encouraging use of the CEE, some UK judges started experimenting with the technique. In those matters in which the expert evidence is not presented concurrently, direct expert witness testimony is typically presented by written report, and only the cross examination and redirect occurs before the court.

One way in which judges first started trying to better manage the expert evidence was to request that opposing experts meet to determine the issues actually in dispute and prepare a document identifying the issues on which they agree and disagree. This meeting, which appears to be much like the joint conference in Australia, occurs after the experts have submitted their reports but before the trial at which the experts will be cross-examined. Counsel does not participate in this meeting among the experts. In those cases in which a hot tub is utilized, the court uses the report prepared at this expert meeting as an agenda, and in the judgments and transcripts quoted from below, the court thanked the experts for working to reduce the issues in dispute during this pre-trial meeting among the experts.

Efficiency was identified by Pat and Sophie as the primary benefit of the hot tub method; they explained that the courts in the UK are acutely aware of the importance of efficiency because of its impact on the attractiveness of the London courts for the resolution of business disputes. Approximately 80 percent of the cases handled in the Chancery Division of the High Court involve parties from a foreign jurisdiction, and in many cases, both parties are from foreign jurisdictions. The London courts are therefore in competition with other jurisdictions to attract foreign litigants who have the option of selecting a particular jurisdiction.

The primary drawback, Pat and Sophie explained, is the extraordinary effort by the judiciary required to run a hot tub effectively. The court has to understand the issues addressed by the competing experts well enough to ask good questions, and cover all the salient points. Sophie and Pat commented that one of the reasons that the CAT may have utilized the hot tub method more frequently is that in addition to having three people to share the load, they have access to court personnel called référendaires, who are legally qualified assistants trained to assist the judges. The judges in the Chancery Division of the High Court do not have the same access to such personnel, and of course those proceedings are presided over by one judge rather than three.

According to Pat and Sophie, some barristers have criticized CEE because it can limit cross examination. For example, some counsel fear the court will not be as familiar with the issues as is counsel and thus may miss certain issues during the hot tub and yet limit counsel in her subsequent cross examination, thinking the issues have already been adequately covered in the hot tub. The latest practice advisory, just issued in December 2017, appears to try to address this concern by suggesting that the court break up the hot tub into discrete issues and allow counsel to conduct cross examination in stages after the hot tub on each issue. This recommended tweak in the process should also help deal with another criticism, which is that the hot tub method takes away the benefit of surprise. If an expert is not cross examined until after a hot tub on all the key issues, then it is likely she will have had the chance to think through some of the chief criticisms of her work and come up with a better answer than might have been the case on a cross examination conducted without a prior hot tub exercise. This is particularly the case if the expert is permitted to confer with the counsel who retained her, after the hot tub and before cross examination.

The Judiciary's Views. Two recent speeches by prominent UK judges indicate that the UK judiciary had three reasons for recommending use of CEE—encouraging more objectivity by experts, better educating the court on the complex issues addressed by the experts, and reducing litigation costs.

In a lecture at the London Conference of the Commercial Bar Association of Victoria on June 29, 2016, Lord Justice Jackson explained that he researched the hot tub method in use in Australia as part of his efforts at civil justice reform and civil litigation costs reduction, and concluded it was a cost saving procedure that merited a pilot study in England and Wales. In the surveys undertaken after the pilot studies, Justice Jackson explained that he confirmed that judges and practitioners alike concluded that use of CEE saved considerable time, particularly at trial. He quoted one judge who explained that he had conducted two hot tubs in a case with two sets of experts, each of which lasted 2 days, and estimated this halved the time spent on expert testimony at trial.

> Although views differ on the question of costs saving, most English judges and practitioners agree that CEE leads to a saving of time at trial. Since trial time is the most expensive component of litigation, this is a valuable saving. Solicitors who are striving to bring the actual costs of litigation closer to the approved budget should give serious consideration to proposing the use of CEE.

Justice Jackson also commented that while the hot tub exercise requires more advance preparation by the judge, this was "not a bad thing" as the judge would have to master the expert evidence sooner or later in any event. Justice Jackson concluded his lecture by predicting that as more people became familiar with the concurrent expert evidence technique, its use would increase:

> It is striking that the majority of those who are hostile to the procedure are judges or practitioners who have never used it. Most (but certainly not all) judges and practitioners who have used the procedure are supportive. . . . It is hoped that the use of concurrent evidence will increase as the benefits become more widely appreciated.

Echoing similar themes, Judge Nicholas Green, a judge from the UK High Court who previously practiced as an antitrust lawyer, gave a speech in late 2016 provocatively entitled "People in this Country Have Had Enough of Experts." Judge Green noted the increasing complexity of "services and goods that drive modern economies" that can "be so overwhelmingly specialized that it is beyond all but a few." Compounding the problem, explained Judge Green, is that "this same complexity also encompasses the analytical techniques, those "black boxes" of tricks, which are now routinely used by experts to unlock the most seemingly intractable of technical problems." If courts are going to continue to treat as admissible up-to-date scientific evidence, something must be done to address the knowledge asymmetry between the court and the witnesses before it.

In addressing what courts could do to address this knowledge asymmetry problem, Judge Green recommended increased use of the hot tub method of expert presentation, including the joint conference among experts in advance of trial. He also noted the other benefits of CEE, including better control over expert advocacy:

> The experience of Australia indicates that the practice is effective in saving both time and costs and repatriates to experts their proper role of assisting the court to resolve disputes. It does away with the gladiatorial combat between cross-examining counsel and expert that was hitherto characteristic of litigation. The practice has, albeit slowly, begun to take root in this jurisdiction. A number of judges in the Technology Construction Court ("TCC") regularly use "hot-tubbing." For some judges it is now the rule rather than the exception. The experience is that experts in the field of construction engage well with each other and in court may debate a point constructively to the exclusion of the lawyers who then participate (probably to their chagrin) as no more than interested onlookers.

The judge commented on the importance of judicial preparation to the effectiveness of a hot tub exercise, but also made the important point about the role of counsel and experts in preparing the court for that exercise:

> For "hot-tubbing" to be effective it presupposes that the judge is on top of the expert issues prior to trial otherwise the process of a judge-led structured dialogue will not be effective. And this presupposes also that the material the judge is required to pre-read is comprehensible and manageable. Both premises might be optimistic, albeit that experience from judges familiar with the process is in fact very promising. Of course the hot-tubbing process can be deployed flexibly: the judge can combine inquisitorial questioning from the bench with cross examination by counsel. There are thus many different ways in which the process can be managed so as to maximize efficiency.

CEE in Practice. Pat Treacy and Sophie Lawrance provided me with copies of transcripts from four UK competition cases in which a hot tub was employed. Those cases all were tried in 2016 or 2017, and were in the following litigations:

- *Streetmap v Google* [2016] EWHC 253: hot-tub on Day 5 of the trial.
- *Socrates v Law Society* [2017] CAT 10: hot-tub on Day 3 of the hearing.
- *Agent's Mutual v Gascoigne* [2017] CAT 15: hot-tub at Days 7–8 of the hearing.
- *Generics, GSK & others v CMA* [Paroxetine, combined cases 1251–1255/1/12/16]: hot-tub on Days 7–9; judgment pending.

The judgments entered in these cases and several others make enlightening comments about the hot tub method. For example, in the *Streetmap v. Google* matter, which was tried to the Chancery Division of the High Court of Justice, the court commented that the use of the hot tub created efficiencies and helped narrow the issues of disagreement among the accomplished expert witnesses who had both become too much of an advocate in the court's view. The court also commented, as had Judge Green in his speech discussed above, that to be effective, the court must spend considerable time in advance of the hot tub becoming familiar with the issues, and must have a transcript prepared of the exercise:

> Each side called one economic expert and the court used a so-called "hot-tub" for the joint presentation and scrutiny of those experts' oral evidence. I believe that is the first time this has been done in a competition case in the UK, and it led to a constructive exchange which considerably shortened the time taken by the economic evidence at trial. However, I should mention that this process involves considerable preparation by the court and effectively requires (as in the present case) a transcript since the judge is unable to keep a proper note while leading the questioning. Each [expert economist] is a partner in a leading economic consultancy and has frequently been involved in giving economic evidence in competition cases. Both have undoubted expertise in this field, but I found that each displayed a tendency to become an advocate for the party by which he was instructed. Much of their respective reports was concerned with presenting various different measurements of searches for online maps or online mapping websites, and analyzing the results. The fundamental economic issues in the present case are not particularly complex, and on those the hot-tub process led to a significant measure of agreement that was helpful, although the two experts remained very divided on their interpretation of some of the data they presented.

In the judgment rendered in the *British Telecommunications v. Ofcom* matter, another case tried before the CAT, in which a hot tub was employed, the Tribunal also commended the hot tub for its efficiency in narrowing the issues. After a disagreement between the parties on the list of relevant matters for the con-

current session, the Tribunal provided the parties with a list of topics that would serve as an agenda:

> We found the concurrent expert session very useful. Whilst the submissions by the two parties prior to the Hearing did not identify material areas of agreement, the session itself enabled the Tribunal to hear Dr. Padilla's explanation of his work, Dr. Caffarra's criticisms of it and Dr. Padilla's response in an open and accessible form. The Tribunal's ability to lead the examination with the expertise of Professor Colin Mayer enabled it to evaluate the issues effectively in a single morning instead of the one or two full days that might otherwise have been required.

In the judgment rendered in the *Socrates Training* matter, the Tribunal made similar remarks in the judgment:

> Their written reports [of the two economic experts] were commendably clear and their joint statement of issues on which they agreed and on which they disagreed was very helpful. Their oral evidence was heard concurrently, in a so-called 'hot tub', and their constructive and very sensible approach in response to the Tribunal's questions made this a valuable and efficient exercise.

In another judgment entered in a patent matter, in which FRAND issues arose, the court held a hot tub on issues that had not been addressed in the expert reports and that he thought should be addressed at the same time by both experts. The court explained its thinking in the judgment as follows:

> During the trial I decided that it would be useful if the evidence of [the two experts] started with a short period of concurrent evidence (CPR 35PD section 11). This was in order to address certain general questions which I would otherwise have asked the experts during their oral evidence. They were not points addressed to either witness in particular and it seemed to me that the fairest way of dealing with it was to ask them both, hence a concurrent evidence session. . . [T]he concurrent session took place just before [the first expert's] cross-examination. It helped me clarify my understanding of some of the economic issues. . . .

In the *Generics (UK) Limited* matter before the CAT, the hot tub exercise lasted for 3 full days. The experts had with them their reports, the reports of the other experts, and the joint statements, but no other materials. The President of the Tribunal began the exercise by thanking the experts for the joint statement and reminding them of their obligation to be independent of the parties who retained them. The President then summarized the process that would be followed for the hot tub in this matter:

> [W]e will identify the questions that we would like you to respond to or discuss. We will address a question initially to one of you, and then invite others to comment. If you wish to speak at any stage, please indicate appropriately, raise a pencil or your finger, or whatever. But please do not speak across each other or to each other. Not only does that disrupt any orderly discussion, but, as you know, we are having a transcript and it becomes a nightmare for the transcribers if that starts to happen. You will all have a chance to have your say, so do not worry.
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> At various stages after we have completed a topic we will allow counsel to ask any supplementary questions of the expert retained by the other side. . . . We will use your joint statement as a basis.

At several points during the long hot tub, the judges interrupted one of the experts to remind him that the hot tub exercise was focused on theory and general principles rather than the facts of the case. Also, the President tried to summarize each expert's position after concluding the discussion of each topic, and then asked the expert whether he agreed or disagreed with the stated summary. This must have been a challenging exercise for the experts, who had to listen very carefully, and then try diplomatically to disagree if necessary with the summary as stated by the President. On the third day of the hot tub, counsel agreed to shorten the cross examination of the experts to allow for additional time for the hot tub, which may be another act of diplomacy, or an acknowledgment of the efficacy of the hot tub.

The transcript of the hot tub exercise in the *Agents Mutual* matter before the CAT was also instructive. The Tribunal began by explaining how the process would work:

> Essentially, it is a collaborative process where we, the Tribunal, engage in a form of conversation with you and between yourselves with a view to educating the Tribunal as to the issues in play. So what will happen is that I, in conjunction with my colleagues, will lead the discussion. We'll try and get you to talk both to us and amongst yourselves.

During the hot tub, the Chairman of the Tribunal regularly paused to summarize what he thought a particular expert was saying, and then asked the expert whether he agreed or disagreed with his summary. At one point the Chairman admitted that he had misunderstood one aspect of the expert's report and that the exchanges in the hot tub exercise had cleared up his thinking.

Use of Expert Hot Tubs in Canada

To get a handle on the use of hot tubs in competition cases in Canada, I spoke with Kate McNeece, who is an antitrust associate at the law firm, Blakes. Kate explained that while Canada has adopted rules permitting a court to require the use of a hot tub, and a number of administrative tribunals employ hot tubs, the technique has not yet been used in any competition case. Kate explained that The Federal Courts Rules (SOR/98-106) paras. 282.1 and 282.2 allow the Court to require expert witnesses to testify as a panel:

> **Expert witness panel**
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> **282.1** The Court may require that some or all of the expert witnesses testify as a panel after the completion of the testimony of the non-expert witnesses of each party or at any other time that the Court may determine.
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> **Testimony of panel members**
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> **282.2** (**1**) Expert witnesses shall give their views and may be directed to comment on the views of other panel members and to make concluding statements. With leave of the Court, they may pose questions to other panel members.
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> **Examination of panel members**
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> (**2**) On completion of the testimony of the panel, the panel

> members may be cross-examined and re-examined in the sequence directed by Court.

These rules were the result of 2010 amendments to the Federal Court Rules.[4] The same amendments allowed the court to order expert witnesses to confer with one another in advance of the proceedings in order to narrow the issues (para. 52.6). Kate further explained that similarly, the Competition Tribunal Rules also allow the court to appoint "one or more" independent expert, which is generally understood to contemplate hot tubbing.[5]

In his 2010 article, *The Changing Role of the Expert Witness*, the Honorable Ian Binnie of the Supreme Court of Canada, makes plain that expert advocacy and lack of independence from counsel and litigants is one of the primary reasons for recommending use of a hot tub.[6] Justice Binnie recommended a number of changes to the way in which expert testimony is presented in Canada, including the requirement that "experts exchange reports and meet face to face for an unmediated discussion before trial" much like the joint conference used in Australia and the joint statement now prepared by experts in the UK. Justice Binnie also recommended that "a court should be able to require opposing experts to testify on the same panel and to be subject to questioning in the presence of each other, with the right to question each other in the presence of the trier of fact." After noting that the procedure was used in administrative tribunals in Canada and in courts in Australia, Justice Binnie explained his understanding of the merits of the "hot pot" as he called it:

> The theory is that experts testifying in the presence of one another are likely to be more measured and complete in their pronouncements, knowing that exaggeration or errors will be pounced upon instantly by a learned colleague, as opposed to being argued about days later, perhaps by unlearned opposing counsel.

Increased Use of Expert Hot Tubs in U.S. Courts

Since the "unprecedented" use of a hot tub in the 2003 census-challenge trial presided over by Judge Woodlock and two other federal judges, the use of hot tubs in federal litigation has increased significantly. Adam E. Butt, an Australian litigator who also practices in the U.S., in writing about the use of hot tubs in the U.S., reported that hot tubs have been utilized by several other U.S. judges (in addition to Judge Woodlock) in a range of proceedings, including in *Daubert* hearings, "a claims construction hearing, a class certification hearing and other civil matters."[7] Butt further reported that while "the method has not been seen as problematic in non-jury contexts," its use in jury trials meets with different reactions by the judiciary, some "would avoid using hot tubbing in jury trials, believing it to be inappropriate for judges to inquire into or comment on expert evidence in front of jurors." Butt reported that other judges

> do not consider that the jury is off limits but they have their certain qualifications. For example, Judge Woodlock would need to be comfortable with who the experts were in order to use hot tubbing before a jury. Judge Zouhary would support using hot tubbing in jury cases where the expert evidence was complicated (it helps to comprehend such evidence), but would avoid using it in simpler matters. Judge Weinstein has actually now used hot tubbing in one jury trial, in a birthing case. Nevertheless, he states that he would intervene less in such settings, because his intervention may be demeaning to attorneys, the jury may give greater reliance to questions/positions put forward by the judge, and the concurrent presentation of evidence (*cf.* sequential presentation) may create complications in relation to burdens of proof and allowing attorneys to present their case.

The Ohio Bar Association published a fascinating interview[8] with Judge Zouhary[9] about his first use of the hot tub method in the context of a class certification hearing. Judge Zouhary began the interview by extolling the virtues of the hot tub method: "Throwing everybody in the 'hot tub' at the same time allows the court, counsel and experts to confront or, 'splash,' each other directly, resulting in a better chance of reaching a correct conclusion." He further explained that he had adopted the procedure on his own, without knowing of its use in Australia or elsewhere.

Judge Zouhary was prompted to adopt a hot tub to assist him in ruling on a class certification motion. He wanted to test the expert assertions made in the affidavits and deposition testimony, but wanted to do so short of a full-blown evidentiary hearing. Moreover, he wanted to provide an opportunity for the experts, who disagreed with one another, to have direct contact with him and with one another. This would not be a "traditional hearing for counsel to wax on."

In the interview, Judge Zouhary quoted directly from the order he issued in advance of the hot tub, which is also available on Pacer:

> 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 [plaintiff's expert] to comment on [defendant's expert's] critiques 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.

Judge Zouhary further explained that after setting aside a full day for this hot tub exercise, he sent "counsel ahead of time a set of questions that [he] wanted to be the focus of our discussion," a technique he also uses in advance of oral argument and other pre-trial hearings. He explained why he liked the hot tub so much:

> I found the experience rewarding and will not hesitate to use 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.

Judge Susan Illston, of the Northern District of California has utilized procedures very similar to hot tubs in antitrust cases. For example, Judge Illston has had the plaintiff's and defendant's experts testify "back to back on particular, difficult issues."[10] Judge Illston argues that this and other procedures create an order to the evidence which, in turn, allows the jury to "retain a better understanding of what those [disputed] issues are."

Another context in which hot tubs have been used in U.S. courts is in the U.S. Tax Court. In several instances, Tax Court judges have, with the consent of the parties, received concurrent evidence from expert witnesses.[11]

Conclusion

Why, you may ask, do I remain a hot tub enthusiast? In addition to the benefits now recognized by judges and advocates in Australia, the UK, Canada and the U.S., I believe strongly that the UK hot tub is a more effective way to present complex expert testimony. In two of the hot tubs for which I read a transcript, the hot tub took place over two or three days, with vigorous questioning by the tribunal and the opposing experts. While some advocates may feel as though the hot tub robs them of the opportunity for cross examination, my reaction upon reading the transcripts of these longer hot tubs was that it was more effective than cross examination at ferreting out the issues, and displaying the weaker or less credible opinions. This was both because of the interactive nature of the exercise and the fact that the opposing views on each issue were addressed concurrently.

Another benefit of the hot tub exercises I reviewed is that the court was obviously more engaged in the discussion because it was asking the questions. Watching someone else conduct a cross examination can be much less exciting and engaging than undertaking the exercise oneself. It reminded me of the benefits of an active bench when presenting an oral argument. I always view arguments before a "dead bench" as a wasted opportunity.

There are a few drawbacks to this method, but these largely can be addressed with careful planning by the advocate. Not all expert witnesses will be up to the challenge of engaging in two days of vigorous debate with the court and the opposing expert. Moreover, those experts who suffer from arrogance will be at a disadvantage. A willingness to concede weak points or to credit the opposing expert will be essential to obtaining the trust and respect of the court. Thus, as always, one must choose your expert witness wisely. The other potential drawback is that not all judges would have the resources to run an effective hot tub. However, there are many different ways to structure the hot tub—they need not all be a two-day grilling of an expert panel.

In my view, any opportunity for the court to engage directly with an expert should be encouraged, but the advocate must know her expert and judge when recommending a particular type of hot tub exercise.

The increased use of hot tubs both here and abroad should encourage additional judges and litigants to experiment with this interesting tool. I look forward to hearing of your hot tub experiences at **lwood@foleyhoag.com**. ■

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1 Lisa C. Wood, *Experts in the Tub*, ANTITRUST, Summer 2007, at 96.

2 Lisa C. Wood, *Experts Only: Out of the Tub and into the Joint Conference*, ANTITRUST, Fall 2007, at 89.

3 Paragraph 11 of Practice Direction 35, entitled Experts and Assessors (adopted Dec. 21, 2017). Practice Directions apply to Civil Procedure Rules in effect in civil cases in the Queen's Bench Division and the Chancery Division of the High Court, and to litigation in the county courts other than family proceedings. They are issued by the Lord Chief Justice.

4 The *Federal Courts Rules* can be found at http://laws-lois.justice.gc.ca/eng/regulations/SOR-98-106/FullText.html. (SOR/2008-141), para. 80(1).

5 The Competition Tribunal Rules can be found at http://laws-lois.justice.gc.ca/eng/regulations/SOR-2008-141/FullText.html.

6 49 S.C.L.R. 2d 179 (2010).

7 Adam E. Butt, *Concurrent Expert Evidence in the United States—Is There a Role for Hot Tubbing?*, The Civil Jury Project at NYU School of Law (2018), http://civiljuryproject.law.nyu.edu/concurrent-expertevidence-in-the-united-states-is-there-a-role-for-hottubbing/.

8 Jack Zouhary, *Splash: Hot Tubbing in a Federal Courtroom*, 29 OHIO LAW. 10 (2015), https://www.ohiobar.org/NewsAndPublications/OhioLawyer/Pages/Splash-Hot-tubbing-in-a-federalcourtroom.aspx.

9 Judge Jack Zouhary is a federal district court judge sitting in Toledo, Ohio. He has served as a visiting district court judge in several states, sits by assignment on the Sixth and Ninth Circuit Courts of Appeals, and is an active Fellow of the American College of Trial Lawyers.

10 Melissa Lipman, *Judge Illston's Tips for Economic Experts in Antitrust Cases*, LAW360 (Apr. 16, 2015).

11 *See* Rovakat v. Comm'r, 255 TCM 29, XIV C (20100), Crimi v. Comm'r, 51 TCM (2013); Green Gas Delaware Statutory Trust v. Comm'r, 147 T.C. No. 1 (July 14, 2016).