

From Witness Box to the Hot Tub: How the “Hot Tub” Approach to Expert Witnesses Might Relax an American Finder of Fact¹

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Abstract: The concurrent evidence procedure, informally known as “hot tubbing,” is a method of eliciting expert witness testimony that efficiently aims to educate the finder of fact so a just conclusion of the case is obtained. With experts from both sides of the litigation testifying at the same time, opportunities abound for such result. The basic practice starts with each expert’s opening statement of findings, judges then elicit answers from the expert’s directly, the experts have an opportunity to question each other and challenge the other’s findings, and finally, the attorneys from either side have an opportunity to clarify and cross-examine all the experts. This paper explores the possibility of the procedures usefulness under the scope and structure of the Federal Rules of Civil Procedure and the Federal Rules of Evidence in federal courtrooms across America.

Experts do shade their opinions, overstate the certainty of their opinions, use unreliable methodologies or rely on unproven theories, serve as conduits of inadmissible evidence and occasionally lie in the service of their clients.²

Parties already exert substantial influence over expert witnesses, often paying them handsomely for their time, and expert witnesses are, unfortunately and all too frequently, already regarded in some quarters as little more than hired guns.³

If we ever need an expert on licking ourselves, we’ll give you a call.⁴

I. Introduction

“This is war!” The catchall phrase is used by lawyers across the United States to describe the current adversarial process. While macabre, most of us begin to embrace the concept; we use it to strengthen our wits, work tirelessly, and train ourselves to dominate our competition. The question we must now ask is, “is there a better way?” Nowhere is this better answered than through the battle of experts in a civil trial. Rarely are these experts testifying about totally different methodologies or studies; instead, it is a battle of opinion.⁵ Federal courts are sometimes ill-equipped to discern which of these experts should be relied upon, and our adversary system does not lend itself to a perfect understanding.

The Australian concurrent evidence procedure, informally known as “hot tubbing,” may provide an excellent opportunity for a court to more thoroughly understand the issues between, and testimony of, expert

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² Perrin, Timothy L., *Expert Witness Testimony: Back to the Future*, 29 U. Rich. L. Rev. 1389, 1418-20 (December 1995).

³ *Pace v. Swerdlow*, 519 F.3d 1067, (10th Cir. 2008).

⁴ Murphy, Eddie, voice of Donkey, *Shrek 2*, DreamWorks SKG (May 19, 2004)

⁵ In the case of expert testimony, the pitting of one expert against another is a widely discussed phenomenon. *See generally*, Walter W. Miller, Jr., *Bankruptcy’s New Value Exception: No Longer a Necessity*, 77 B.U.L. Rev. 975, 997-98 (December 1997) (discussing the problems with experts taking an extreme position); David J. Damiani, *Proposals for Reform in the Evaluation of Expert Testimony in Pharmaceutical Mass Tort Cases*, 13 Alb. L.J. Sci. & Tech 517, 527 (2003) (discussing the danger that conflicting views between experts may enhance the “junk scientists” testimony); and Joanne A. Albers, et. Al., *Toward a Model Expert Witness Act: An Examination of the Use of Expert Witnesses and a Proposal for Reform*, 80 Iowa L. Rev. 1269, 1276-77 (1995) (in discussing expert witness reform, the report states, “[b]iased expert testimony . . . is particularly troubling . . . the result is a courtroom battle between experts that overemphasizes disagreements and deprives the fact finder of any helpful consensus in a specialized field.”).

witnesses. This paper aims to provide a basic understanding of concurrent evidence, the procedures used in Australia, and some of its goals and successes. Second, it discusses the Federal Rules of Evidence, Federal Rules of Civil Procedure, and how these rules would permit and perhaps encourage, the use of concurrent evidence in American courts.

2. The Australian Concurrent Evidence Process

Concurrent Evidence is simply a newer method of eliciting expert witnesses' testimony in the courtroom.⁶ The procedure moves away from the strict adversarial direct- and cross-examinations, to a more cordial and open discussion of the issues in which two or more experts from each sides testify at the same time.⁷ Prior to a description of how the procedure takes place, the reader must be aware of two issues. First, the majority of civil cases tried in Australian courtrooms are done so without the use of a jury.⁸ Second, no statutes dictate exactly how the concurrent evidence procedure is to take place within a trial.⁹ With these concepts in mind, the following is a general explanation of how the process is used in Australian courts.

Although distinctions exist among the courts that use the concurrent evidence procedure, most courts tend to follow the same initial steps.¹⁰ First, a court will typically require each expert to prepare a written report and exchange that report with the opposing party's expert(s).¹¹ Then, at the trial, all experts on a particular issue are jointly sworn in, which is then typically followed by the court announcing an oral synopsis of the areas agreed and disagreed upon.¹² At this point, the procedure tends to become less concrete among the various courts; the distinctions seemingly stem from judicial discretion more than anything else.¹³

Some courts allow each expert to provide an "opening statement," which is essentially an overview of the expert's opinions, methods, and experiences, as each relate to the issue at hand.¹⁴ After each expert has opened,

⁶ Freckleton, Ian, and Selby, H., *Expert Evidence: Law, Practice, Procedure and Advocacy*, p. 489-90, 4th ed., Thompson, 2009. Dr. Freckleton notes that the procedure began sometime between the years of 1980 and 1985.

⁷ See generally, Elizabeth Cheeseman, *Hot Tubbing: Concurrent Expert Evidence*, Bar News: The Journal of the NSW Bar Association, p. 54, 57 (Summer 2006-2007), available at <http://www.nswbar.asn.au/docs/resources.php>, click "Bar News: the journal of the Bar Association" link, then select "Summer 2006-2007" PDF (last accessed March 25, 2009).

⁸ Gary Edmond, *Merton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure* (publication forthcoming), 72 Law and Contemporary Problems 1, 3 (Spring 2009); see also, Fairbairn, John, *Intellectual Property Litigation in Australia* 75 Def. Couns. J. 142, 145 (April 2008) ("[c]ivil proceedings in Australia are generally heard by a judge sitting without a jury. In particular, juries are, as a matter of practice, not available in civil proceedings . . ."). The lack of juries in majority of the experiences with the "hot tub" definitely takes something away from its usefulness in America. However, the lack of juries in Australian procedure does not mean the procedure could not be used in front of a jury, it is simply beyond the scope of this paper to entertain the additional procedural problems it would bring about.

⁹ Federal Court of Australia, Federal Court Rules, Order 34A, Rules 1, 3 (January 1, 2009), available at [http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrumentCompilation1.nsf/0/F7A5650E1149E57CCA25753500058A3D/\\$file/FederalCourtRulesV1.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrumentCompilation1.nsf/0/F7A5650E1149E57CCA25753500058A3D/$file/FederalCourtRulesV1.pdf) (last accessed March 12, 2009) (permitting expert testimony in concurrent manner only in non-jury cases, but otherwise leaving manner of presentation to judicial discretion); Administrative Appeals Tribunal (AAT), *An Evaluation of the Use of Concurrent Evidence in the Administrative Appeals Tribunal*, November 2005 at p. 10 (citing AAT Act 1975 §33(1)(b)), available at <http://www.aat.gov.au/SpeechesPapersAndResearch/Research/AATConcurrentEvidenceReportNovember2005.pdf> (last accessed March 12, 2009) (noting that "a proceeding before the Tribunal shall be conducted with as little formality and technicality . . . as possible . . ."); and supra note 4, Edmond at 7 (Dr. Edmond notes, "[v]ariations in practice reflect not only institutional traditions and rules (or lack of rules) associated with the different courts and tribunals in which concurrent evidence is received . . .").

¹⁰ *Id.*, at 15, AAT at p. 15; and infra note 10.

¹¹ Peter McClellan, Chief Judge at Common Law, Supreme Court of New South Wales, address Before the Medicine and Law Conference Law Institute Victoria: *Concurrent Expert Evidence*, p. 15 (November 29, 2007), [http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/mcclellan291107.pdf/\\$file/mcclellan291107.pdf](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/mcclellan291107.pdf/$file/mcclellan291107.pdf) (last accessed February 21, 2009); and supra note 5, at 490 (citing the Australian Law Reform Commission (2000: at 6.116). See also, supra note 3 (citing Justice G. Downes AM, *Problems with Expert Evidence: Are Single or Court-Appointed Experts the Answer?*, 15 Journal of Judicial Administration 185 (2006)), the "expert report(s)" are then used by opposing experts to distinguish which issues they agree and disagree upon, then it is frequently the case that the court will require the experts to confer and generate a "joint report" (a topic for another paper); all of which is intended to result in narrowing the issues of disagreement.

¹² *Id.*, McClellan; and supra note 8, AAT at p. 15.

¹³ See generally supra note 5, at 489 et seq.; and supra note 7, Edmond at 5-7.

¹⁴ Supra note 6; see also, supra note 12.

the next step is typically a session of court-directed questions to the independent experts.¹⁵ Some courts prefer not to give the experts an opportunity to provide an “opening statement,” and instead proceed directly into questioning the individual experts.¹⁶ In nearly all courts, the experts respond to the court’s questions directed to them and to the other experts; additionally, frequently the experts may ask follow up questions to one another in an effort to test and challenge the other’s methodology and opinions.¹⁷

Although distinctions exist in the process, the attorneys for each side still have a valuable role in the concurrent evidence process. For instance, one of the procedure’s foremost advocates, Justice Peter McClellan, says that when he presides over the process, “[c]ounsel may also ask questions during the course of the discussion to ensure that an expert’s opinion is fully articulated and tested against a contrary opinion.”¹⁸ In other courts, with an exception for objections, attorney involvement is limited to the end of the court’s and experts’ interchange.¹⁹ At which point, these courts ordinarily allow attorneys from opposing sides to ask their experts relevant and unanswered questions, as well as an opportunity to cross-examine the opposing party’s expert witnesses.²⁰ The process resumes from the beginning until all of the issues at hand are thoroughly examined by the court.²¹

The proponents of concurrent evidence find that the procedures, as laid out above, prove to be an effective tool in eliciting the experts’ knowledge.²² For instance, Justice McClellan observes that “the capacity of the judge to decide which expert to accept is greatly enhanced.”²³ He also suggests that writing a judgment is simplified because all of the expert testimony on a particular issue is located in the same place in the transcripts of the hearing.²⁴ However, as noted above, because the process is not uniform throughout the courts that use the concurrent evidence process, some find it to be ineffective and unmanageable.²⁵ No matter which side of the fence the attorneys or judges fall upon, most would agree that it is necessary to develop more specific methods for conducting the procedure so that all parties involved will know in advance how the testimony will take place.²⁶

3. The Philosophy behind the Procedure

The origin of the concurrent evidence procedure used in Australian courts stems from a desire to find (a) reliable and objective expert testimony,²⁷ (b) solutions to the problems judges face in understanding the difficult issues that come before judges,²⁸ and (c) ways to improve judicial efficiency.²⁹

¹⁵ Supra note 5, at 490.

¹⁶ Supra note 8 AAT, at 15; and, supra note 10, McClellan.

¹⁷ *Id.*

¹⁸ Supra note 10, McClellan at 16. *See also*, supra note 13, Dr. Edmond, Dr. Freckleton, and Ms. Cheeseman, note that Justice McClellan has been a staunch supporter of the concurrent evidence procedure in his courtroom and publicly.

¹⁹ Supra note 8, AAT at 16; and supra note 10.

²⁰ *Id.*

²¹ Peter McClellan, Chief Judge of the New South Wales Land & Environment Court, address before the XIX Biennial LawAsia Conference 2005 Gold Coast March: Expert Witnesses: The Experience of the Land & Environment Court of New South Wales (March 20-24, 2005), [http://www.lawlink.nsw.gov.au/lawlink/lec/II_lec.nsf/vwFiles/Speech_21Mar05_CJ.doc/\\$file/Speech_21Mar05_CJ.doc](http://www.lawlink.nsw.gov.au/lawlink/lec/II_lec.nsf/vwFiles/Speech_21Mar05_CJ.doc/$file/Speech_21Mar05_CJ.doc), p. 18 (last accessed February 21, 2009). In complex cases, where multiple sets of experts will need to testify to different matters, the court will begin the process with each set of experts by swearing the experts in and proceeding as described above. Supra note 5, AAT at 10-11 (citing *In re Coonawara Penola Wine Industry Association Inc.*, [2001] AATA 844).

²² Supra note 10, McClellan, at 16 (“provided everyone understands the process at the outset, . . . there is no difficulty in managing the hearing.”).

²³ *Id.*, at 17.

²⁴ *Id.*

²⁵ Supra note 7, Edmond, at p. 28. Dr. Edmond asks “[h]ow do the new procedures work in situations with less-accomplished, less-experienced, and less-enthusiastic judges and commissioners?”; *see also*, *Id.*, at 33, noting further, “lawyers tend to dislike the concurrent evidence procedures, especially the idiosyncratic ways in which they are implemented by the various institutions and individual judges.”

²⁶ Supra note 8, AAT at 60 (“[i]t will be necessary . . . that they contain a clear set of procedures for the CE process. In particular, the guidelines must address the roles and expectations of the Tribunal members, representatives and experts in relation to giving evidence concurrently.” Noting that making a set of procedures will “assist to make the taking of concurrent evidence as consistent and efficient as possible.”).

²⁷ Supra note 10, at 9 (“The aim of the changes has been to encourage the integrity and reliability of expert evidence.”)

²⁸ *Id.*, at 7-8. Acknowledging the growth in complexity of expert litigation and that many court’s are “a “lay tribunal”, without any expertise, but is required to resolve a dispute between persons who may have expertise at the highest level of a particular scientific or professional discipline.”

A. *Reliable and Objective Experts*

“[T]he difficulties with the integrity of expert evidence when a court is required to resolve a dispute have been recognised for a considerable period of time.”³⁰ Justice McClellan then cites to an article written by Justice Learned Hand, in which Justice Hand discusses the bias attributable to the expert when called in the adversarial process.³¹ As far as expert witnesses are concerned in the adversarial trial, Justice Hand states, “there are good historical reasons why this third method has survived, but they by no means justify its continued existence, and it is, as I conceive, in fact an anomaly fertile of much practical inconvenience.”³² A legal scholar and student of concurrent evidence, Dr. Gary Edmond observed that “[o]ver the last decade, English and Australian judges have become increasingly anxious about the quality of expert evidence appearing in courts, particularly in their civil-justice systems.”³³ Dr. Edmond finds support from a study which reports judges “identified partisanship or bias on the part of expert witnesses as an issue about which they were concerned and in respect of which they thought that there needed to be change.”³⁴ Additionally, the New South Wales Administrative Appeals Tribunal mentions expert witnesses’ integrity as one of the reasons behind its utilization of the concurrent evidence procedure in their courtrooms.³⁵ On the other hand, opponents of concurrent evidence frequently argue it is difficult, if not impossible, to prove an expert failed to uphold his or her oath of objectivity and question if objectivity by any one witness even matters.³⁶

In respect to concurrent evidence, not much literature exists in favor of the opponents’ position that objectivity cannot be tested. However, Dr. Edmond states, “[a]ll experts are (and expertise is) more or less aligned, subjective, interested, biased, and dependent.”³⁷ He then adds that the bias and how it “affects the reliability of expert evidence is a fundamental but complex issue.”³⁸ Dr. Edmond calls the implementation of the concurrent evidence process into question, stating that procedural reforms “offer limited hope for improving the reception and treatment of expert evidence.”³⁹ He also discusses the role of the partisan expert, stating, “[n]ot only do these concepts have limited analytical utility, but there is little evidence to suggest that adversarial bias is deliberate or consistently detrimental to legal practice.”⁴⁰ Additionally, in an interview conducted by Dr. Edmond about the partisanship in the concurrent evidence procedure, a Barrister replied, “I think the judiciary gets overly concerned about trying to find an expert that doesn’t exist.”⁴¹ Thus, the opposition seems to be that getting into the heads of experts to discern their objectiveness is outright impossible and unnecessary.⁴² Regardless of where one stands in respect to concerns about expert objectivity, the court’s ability to understand information presented by experts is paramount to the concept of justice.

²⁹ *Supra* note 20, at 6.

³⁰ *Id.*, at 7.

³¹ *Id.*

³² *Id.*, citing Hand, Learned, Justice, “Historical and Practical Considerations Regarding Expert Testimony” 15 *Harvard Law Review* 40 (1901). Note also, Justice McClellan cites to several other authorities in support of this proposition.

³³ *Supra* note 7, at 2 (citing Dr. Ian Freckleton, Prasuna Reddy & Hugh Selby, *Australian Judicial Perspectives on Expert Evidence: An Empirical Study* at p. 113 (1999) (stating judges “identified partisanship or bias on the part of expert witnesses as an issue about which they were concerned and in respect of which they thought that there needed to be change.”)).

³⁴ *Id.*

³⁵ *Supra* note 8, AAT, at p. 6 (citing, Peter Heerey, Justice, *Expert Evidence: The Australian Experience*, address before the World Intellectual Property Organisation Asia-Pacific Colloquium, New Delhi, February 6, 2002, whom in turn cites to Lord Woolf, *Access to Justice, Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales*, HMSO, London, 1995, p. 183, “Today they are in practice hired guns. There is a new breed of litigation hangers-on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients.”)

³⁶ *Supra* note 7, at 17; *see also*, Gary Edmond, *After Objectivity: Expert Evidence and Procedural Reform*, 2003 *Sydney Law Review* 8 (discussing the limits of expert objectivity).

³⁷ *Id.*

³⁸ *Id.* (citing Yearly, Steven, *The Relationship Between Epistemological and Sociological Interests*, 13 *Hist. & Phil. Sci.* 353, 375 (1982)).

³⁹ *Id.* (citing Daston, Lorraine and Galison, Peter, *Objectivity*, (2007) (discussing the socially contingent nature of “objectivity”)).

⁴⁰ *Id.*

⁴¹ *Id.*, at 31; *see also Id.*, at 32 (expert witnesses’ views on partisanship, note the split in their opinions: one flatly stating “I’m not getting instructions saying you’ve got to say this or say that[.]” and another stating, “[c]ertainly, when you act for a party, and they’re present, and you know you’re being paid, you feel a little bit more heat to give the evidence that you’ve prepared.”)

⁴² *Supra* note 35.

B. Understanding the Expert:

In a world of rapid advancements in nearly every area of expertise, it is unimaginable for anyone to have a full understanding in any particular field, let alone several or many. Justice G.L. Davies from the Court of Appeals in Queensland, Australia, has stated:

*Scientific and technical evidence has increased dramatically [since the 1960's] both in its frequency and its complexity; and the difficulty of a trier of fact, whether judge or jury, in understanding and consequently in assessing the reliability of such evidence, though not a new problem, has now become a critical one. ... There is now a good deal of such evidence that is quite beyond the capacity of most judges to understand. And in many cases in which a judge has some capacity to understand the evidence, he or she will lack the capacity to decide between competing opinions. Nevertheless, here and elsewhere, judges continue to decide such questions on the apparent assumption that they have the capacity to do so.*⁴³

The Administrative Appeals Tribunal (AAT) study notes that concurrent evidence was a byproduct of procedural reform aimed at assisting the fact finder in understanding the experts' testimony.⁴⁴ Furthermore, United States District Judge Marvin Garbis may have summed up this concern the best as he stated, "[a]t the threshold, it is appropriate to recognize that the challenge or problem of educating a judge who may be ignorant (or, better said, uninformed) about a subject at issue is neither new nor confined to matters technological."⁴⁵ He continues, "[i]t is impossible to make every judge, or any judge for that matter, an engineer, chemist, physicist, surgeon and biologist."⁴⁶

The proponents of concurrent evidence acclaim the procedure for the accessibility it provides to the experts and their knowledge.⁴⁷ In an article promoting the use of concurrent evidence in Ireland, Justice Philip O'Sullivan recounts his first experience with a medical negligence case in which he analyzed several expert witnesses' opinions to the best of his ability, colorfully acknowledging, "I did this as best I could but I have to say my supply of commonsense told me that there was no easy or obvious solution and I was left feeling like an intellectual pygmy looking up at two giants: from that vantage point one simply cannot tell which of them is taller."⁴⁸ After a short discourse on the concurrent evidence procedure and its benefits, Justice O'Sullivan concluded that he believes the process would in fact benefit his decision making process and that the rules of his court should be changed.⁴⁹ Judge McClellan notes that the ability to observe the witnesses' interactions between one another and to be able to ask questions of the witnesses, such that "the capacity of the judge to decide which expert to accept is greatly enhanced."⁵⁰ Likewise, Dr. Freckleton discusses a case in which the court commented about its use of the concurrent evidence procedure to differentiate between two expert witnesses, concluding, "I consider it appropriate to record how helpful I found it to be There is benefit in a more investigative and less adversarial approach."⁵¹ Additionally, the Western Australia State Administrative Tribunal notes that one of the benefits of the process is that it "enables the Tribunal to gain a clear understanding of the different opinions of the experts"⁵²

⁴³ See Marvin J. Garbis, *Aussie Inspired Musings on Technological Issues--of Kangaroo Courts, Tutorials & Hot Tub Cross-Examination*, 6 Green Bag 2d 141, 142 (Winter 2003) (citing G.L. Davies, *The Changing Face of Litigation*, 6 J. Jud. Admin. 179, 188 (1996)).

⁴⁴ Supra note 8, AAT at 7 (citing Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No. 89 (31 December 1999) ("Present hearing practices do not always allow experts to fully communicate their opinions to the decision maker.")).

⁴⁵ Marvin J. Garbis, American Law Institute-American Bar Association Continuing Legal Education ALI-ABA Course of Study, September 18-19, 2003, *Trial of a Patent Case: Some American and Australian Judicial Approaches to Scientific and Technological Issues*, p. 477, 482.

⁴⁶ *Id.*, at 484.

⁴⁷ See generally, supra note 6; and supra note 4, Edmond at 27-29.

⁴⁸ O'Sullivan, Philip, J., *A Hot Tub for Expert Witnesses*, 2004 4(1) JSIJ 1 (2004), available at <http://www.legalperiodicals.org/disp.php?pub=Judicial+Studies+Institute+Journal&yr=2004> (last accessed February 22, 2009).

⁴⁹ *Id.*

⁵⁰ Supra note 10, McClellan at 17.

⁵¹ Supra note 5, Freckleton at 493 (quoting *Re Temple and Repatriation Commission* [2001] AATA 490).

⁵² Western Australia State Administrative Tribunal, *A guide for experts giving evidence in the State Administrative Tribunal*, brochure available at http://www.sat.justice.wa.gov.au/files/Expert_Evidence_Brochure.pdf (last accessed February 22, 2009).

On the other hand, some judges have found that using the procedure in particularly difficult cases is unhelpful, and even burdensome, to their understanding of the case.⁵³ For example, Judge Hoffman of New South Wales notes that the experts' disagreement on technical matters in a case was so great that neither the joint conference nor the concurrent evidence procedures were successful.⁵⁴ Mr. Lindsay, of the Administrative Appeals Tribunal, noted that the use of concurrent evidence in another case "clarified some elements of the different diagnosis but still left the tribunal with the task of resolving the differing opinions."⁵⁵ Since the procedure may not always improve the court's understanding of the experts' testimony, the question must be asked, why? Perhaps the best answer lies within the AAT's study, which suggests the difficulties nearly always come down to the court's management of the system and the participants', both legal and expert, willingness to cooperate with the procedure.⁵⁶

C. Judicial Efficiency

The proponents of concurrent evidence find that when the procedure is used properly, it is a welcome tool and it streamlines the experts' role in the courtroom.⁵⁷ In the words of Justice McClellan, "[i]t is also significantly more efficient. Evidence which may have required a number of days of examination in chief and cross-examination can now be taken in half or as little as 20% of the time which would have been necessary."⁵⁸ In the New South Wales study, the authors note "the process can save time, minimizing the time spent on preliminaries and allowing the key points to be quickly identified and discussed."⁵⁹ Additional support is found directly from the New South Wales *Civil Procedure Act* of 2005, which ensures the use of the concurrent evidence and states, "[t]he overriding purpose of this Act . . . is to facilitate the just, quick and cheap resolution of the real issues in the proceedings."⁶⁰

Even with all of the procedure's potential to save time and money, some unease exists about its use for these purposes. In the case of concurrent evidence, even the most loyal proponents have been known to warn about the weaknesses of the procedure and take caution to avoid advocating its usefulness in every situation.⁶¹ The AAT study concluded that among the benefits of concurrent evidence, several concerns exist about the procedure's efficiency.⁶² The more prolific concerns rested upon potential higher cost to the parties, lack of uniformity among the different judges and courts, and a lack of support from the participants.⁶³ Additionally, Dr. Edmond notes in his article, "at present there are no ready means to determine which cases will produce these savings or how "quicker" and more "cost effective" justice should be assessed against more refractory values such as fairness, accuracy, or institutional legitimacy."⁶⁴ Even Justice McClellan seems to warn his audience in a roundabout way, as he states, "provided everyone understands the process at the outset, in particular that it is to be a structured discussion designed to inform the judge and not an argument between the experts and advocates, there is no difficulty in managing the hearing."⁶⁵ Through recognition of these concerns, where the procedure is to be used, the judge should have a firm grasp of it, understand its potential pitfalls, and carefully scrutinize the case to decide if the procedure is truly appropriate.

⁵³ Supra note 7, at 27-28.

⁵⁴ *Id.*, at 27 (citing *Synergy Env'tl. Planning v. Cessnock City Council (No.2)*, (2005) 156 N.S.W.L.R. para. 9, available at <http://www.austlii.edu.au/au/cases/nsw/NSWLEC/2005/156.txt> (last accessed March 1, 2009)).

⁵⁵ *Id.*, at 27-28 (quoting from *Rezk and Australian Postal Corporation* (2005) 67 A.L.D. para. 51 (AAT), available at <http://www.austlii.edu.au/au/cases/cth/AATA/2005/67.txt> (last accessed March 1, 2009)).

⁵⁶ *Id.*, at 27-28; see generally supra note 5, AAT at 51-54.

⁵⁷ Supra note 10, McClellan at p. 8; supra note 4, Edmond at p. 17; and see generally supra note 2.

⁵⁸ Supra note 9, at 17.

⁵⁹ Supra note 8, AAT at p. 9 (citing New south Wales Law Reform Commission, Report 109—Expert Witnesses, June 2005, http://www.lawlink.nsw.gov.au/lawlink/lrc/lrc.nsf/pages/LRC_r109toc at 6.56).

⁶⁰ Supra note 9, at 4 (citing Civil Procedure Act, 2005, § 56 (N.S.W.)).

⁶¹ Supra note 5, at 494 (quoting Judge Davies "whilst the hot tub method has some advantages over the process of calling expert witnesses as part of each party's case, it remains, in substance, a partisan procedure which has a high risk that adversarial bias will distort the result."); and supra note 5, AAT at p. 15 (the study lists "Criteria for identifying suitable matters for CE", suggesting that those conducting the study understood that not every case involving experts is an ideal candidate for concurrent evidence) (emphasis added).

⁶² Supra note 8, AAT at pp. 59-61.

⁶³ *Id.* (the report states that "it will be important to ensure that Tribunal members are provided with information and training in relation to selecting matters where CE may be suitable and the procedure for using CE at hearing[.]" to make the procedure more effective).

⁶⁴ Supra note 7, at 21.

⁶⁵ Supra note 10, at 16.

4. The Federal Rules and the Use of Concurrent Evidence in the United States

A. Federal Rules of Evidence

Several rules in the Federal Rules of Evidence (“FRE”) are of importance in discussing whether a court can hear expert witnesses’ testimony in the form of concurrent evidence. First, Rules 611(a) and 614 provide for the court to direct testimony as necessary and to question the witnesses directly. Second, Rules 702 and 706 are discussed in an effort to give credence to the idea that the Australian courts are not alone in their concern about understanding the expert’s testimony. Third, Rule 102 is explored to emphasize the overriding purpose of the FRE and why concurrent evidence fits squarely within those aims.

(i) Rules 611 and 614

The court has a duty to manage the manner in which witnesses are called and what information, within reason, is to be admitted before it.⁶⁶ Although this concept seems fundamental, the framers of the FRE ensured its vitality through the incorporation of Rules 611 and 614.⁶⁷ Rule 611 commands that the court use “reasonable control over the mode and order of interrogating witnesses and presenting evidence” in an effort to make the testimony “effective for the ascertainment of truth,” and to “avoid the needless consumption of time[.]”⁶⁸ Additionally, Rule 614 permits the trial court to call and interrogate witnesses, with a caveat that the court permits all parties to cross-examine the witnesses.⁶⁹

The Advisory Committee Notes (“ACN”) advance the scope of Rule 611 by stating, “[i]t covers such concerns as whether testimony shall be in the form of a free narrative or responses to specific questions, [. . .] and many other questions arising during the course of a trial which can be solved only by the judge’s common sense and fairness in view of the particular circumstances.”⁷⁰ The Rule does not dictate exactly how far a trial court may go in exercising this discretion; however, it is widely understood that the court has an inherent right to “question witnesses, elicit facts, clarify evidence and pace the trial.”⁷¹ In the same vein, the Ninth Circuit has found a trial court does not abuse its discretion under Rule 614 by “questioning the expert witness on its own accord.”⁷² The Ninth Circuit adds, “[i]t is entirely proper for the court to question witnesses in order to clarify questions and develop facts, so long as questions are nonprejudicial in form and tone, and the court does not become personally overinvolved.”⁷³ Of course Rules 611 and 614 do not completely envision the concept of concurrent evidence; thus, a shift of focus towards the expert’s role in the FRE is necessary.

(ii) Rules 702 and 706

No discussion about expert testimony under Rule 702 would be complete without some discussion about the *Daubert* trilogy.⁷⁴ The Supreme Court in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), and its progeny, replaced the longstanding test that expert testimony had to be “generally accepted by the relevant scientific community[.]” to be admissible.⁷⁵ The *Daubert* Court found that the recently promulgated Federal Rules of Evidence superseded the *Frye* test and the Rules required the trial judge to “ensure that any and all scientific

⁶⁶ See generally, Fed. R. Evid. 102, 611, and 614 (Vernon 2007).

⁶⁷ *Id.*, at 611, 614.

⁶⁸ *Id.*, at 611(a).

⁶⁹ *Id.*, at 614.

⁷⁰ Fed. R. Evid. 611 (ACN para. 2).

⁷¹ *Cranberg v. Consumers Union of the U.S., Inc.*, 756 F.2d 382, 391 (5th Cir. 1985) (citing *Ruiz v. Estelle*, 679 F.2d 1115, 1129 (5th Cir. 1982), *modified*, 688 F.2d 266 (5th Cir. 1982), *cert denied*, 460 U.S. 1042, 103 S. Ct. 1438 (1983)).

⁷² *United States v. Velasques-Ramirez*, 619 F.2d 789, 795 (9th Cir. 1979) (citing *United States v. Landof*, 591 F.2d 36, 39 (9th Cir. 1978)).

⁷³ *Id.*

⁷⁴ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Joiner v. General Electric Co.*, 522 U.S. 136 (1997); and *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

⁷⁵ Bruce Abramson, *Blue Smoke or Science? The Challenge of Assessing Expertise Offered as Advocacy*, 22 Whittier L. Rev. 723, 731 (Spring 2001).

testimony or evidence admitted is not only relevant, but reliable.”⁷⁶ In the second case of the series, *Joiner v. General Electric Co.*, 522 U.S. 136 (1997), the Court determined that the proper standard of review for a trial court’s ruling on the admissibility of expert testimony is the “abuse of discretion” standard.⁷⁷ Then, in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Court extended the *Daubert* analysis to “all expert testimony provided under Fed. R. Evid. 702”.⁷⁸ These cases form the “gatekeeping” function of the judge, a role that is often times exercised during pre-trial motions and hearings known as *Daubert* hearings.⁷⁹ The ultimate aim of a *Daubert* hearing is to ensure an expert “employs the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”⁸⁰ The issue then arises, how is a trial court to determine whether an expert meets these admissibility standards?

Typically, a *Daubert* hearing originates after a party files a motion in limine to challenge another party’s expert witness.⁸¹ Upon this motion, the trial court has broad discretion in how it will determine the admissibility of the proffered expert.⁸² This discretion grants to the court the power to “rule on a *Daubert* motion on the pleadings, reports, affidavits, and memoranda of law without actually conducting an evidentiary hearing.”⁸³ However, it is customary and “highly desirable” for the court to conduct an evidentiary hearing because it allows the “parties to present expert evidence and conduct cross-examination of the proposed expert, thus assisting the court in its gatekeeping function.”⁸⁴ Regardless of the method used by the court, the end result is that “[e]xpert opinions derived from methods recognized as valid must be admitted. Opinions derived from methods that are not so recognized may be excluded.”⁸⁵

The court’s concern in using Rule 702, similar to that of the Australian courts, is to assist in the understanding of the issues at controversy.⁸⁶ Rule 702 states, “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . . [the expert] may testify thereto in the form of an opinion or otherwise . . .”.⁸⁷ (Emphasis added) The ACNs acknowledge that not all expert conclusions will be agreed upon, and that it is up to the court to ensure that an expert’s testimony is not excluded “on the ground that the court believes one version of the facts and not the other.”⁸⁸ The ACNs, and more importantly the rule, never discuss how the expert’s testimony is to be taken. However, the ACNs do mention a case in which the 9th Circuit Court of Appeals upheld a trial court’s decision that “repeatedly ordered the experts to explain the reasoning and methods underlying their conclusions[]”, by the use of affidavits.⁸⁹ The main issue before the Court was the validity and objectivity of the experts’ scientific methods; however, an argument lies within that a judge has a fair amount of latitude on how best to use the expert’s testimony to understand the information presented.⁹⁰ Similarly, the availability of court appointed experts also lends some credence to the idea that a court is free to explore alternatives to understanding an expert’s testimony and the nature of the claims in front of the court.⁹¹

⁷⁶ Supra note 73, *Daubert* at 589. The Court also provided four non-exclusive factors to assist the trial court in determining the reliability of an expert’s theory: whether the theory can or has been tested; has been subject to peer review or publication; has a known or potential error rate; and has a general level of acceptance in the community. *Id.*, at 593-595.

⁷⁷ Supra note 73, *Joiner* at 139.

⁷⁸ Stan Bernstein, Susan H. Seabury, and Jack F. Williams, *The Empowerment of Bankruptcy Courts in Addressing Financial Expert Testimony*, 80 Am. Bankr. L.J. 377, 383 (Summer 2006).

⁷⁹ *Id.*, at 391; supra note 74, at 391; and Robert A. Weninger, *Evidence*, 29 Tex. Tech L. Rev. 659, 671 (1998) (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), “[o]verall, the task for trial judges is not to determine whether the proffered evidence (the conclusion) is correct, but whether the science (the underlying principles and methodology) is valid enough to be reliable.”).

⁸⁰ Supra note 77 (citing *Kumho Tire*, at 152).

⁸¹ *Id.*

⁸² David F. Herr, and Catherine Ahlin Halverson, American Law Institute-American Bar Association Continuing Legal Education ALI-ABA Course of Study, February 14-15, 2009, *Opinion and Expert Testimony in Federal and State Courts-Appellate Review of Expert Testimony*, p. 451, 479 (citing *Kumho Tire*, at 152).

⁸³ Supra note 77, at 389-90.

⁸⁴ *Id.*, at 390.

⁸⁵ Supra note 74, at 733 (citing *Daubert*, at 590-97).

⁸⁶ Fed. R. Evid. 702; see also supra note 32-33.

⁸⁷ *Id.*, at Rule 702.

⁸⁸ *Id.*, ACN, at para. 15.

⁸⁹ *Id.*, ACN at para. 17 (citing *Claar v. Burlington N.R.R.*, 29 F.3d 499, 502 (9th Cir. 1994)).

⁹⁰ *Id.*

⁹¹ Fed. R. Evid. 706.

The use of court-appointed experts is authorized statutorily under Rule 706.⁹² Although the rule and the ACNs following it fail to explain where the appointment is best used, several cases provide sufficient insight. For instance, a bankruptcy court noted that “[i]n large or particularly complex cases, the Court may appoint a fee examiner pursuant to § 105 or Fed. R. Evid. 706(a) to assist the Court in carrying out its duties.”⁹³ It concluded that in the case at hand, “the magnitude of the fees in this case and the importance and complexity of the questions . . . , make it necessary and appropriate to appoint . . . , an expert.”⁹⁴ In another case a trial court appointed an expert because “the court found the evidence concerning fibromyalgia to be confusing and conflicting.”⁹⁵ The appellate court reviewing the case found it was “an appropriate occasion to appoint an independent expert to assist the court in evaluating contradictory evidence about an elusive disease of unknown cause.”⁹⁶

In a recent case, the 7th Circuit reversed and remanded a case to the district court where the trial judge failed to appoint an expert under Rule 706; the opinion stated:

Turning to the technical statistical evidence (not the data themselves, which for the most part are uncontested, but the inferences drawn from them by the use of statistical methodology), we recommend that the district judge use the power that Rule 706 of the Federal Rules of Evidence expressly confers upon him to appoint his own expert witness, rather than leave himself and the jury completely at the mercy of the parties’ warring experts. [citations omitted] [. . .] The neutral expert will testify . . . [.] The judge and jurors may not understand the neutral expert perfectly but at least they will know that he has no axe to grind, and so, to a degree anyway, they will be able to take his testimony on faith.⁹⁷

In all of these cases, and many others, the purpose of the court-appointed expert is to ensure the trier of fact understands the issues presented and to create an atmosphere of reliability and objectivity of the testimony. Of course, all of the above discourse promoting the utility of concurrent evidence in American courtrooms would be almost nonsensical without keeping in mind the overall aims of the FRE.

(iii) Rule 102

The goals of the FRE are to promote a just determination of the case. More eloquently, Rule 102 states, “[t]hese rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”⁹⁸ As should be commonplace by now, there is no direct support that the Rules outwardly call for the use of the concurrent evidence procedure; nevertheless, the ACNs may provide that nudge the procedure needs to land squarely within the rules’ liberal construction. “Rule 102 gives the Trial Judge authority to fashion evidentiary procedures to deal with situations not specifically covered by the Rules.”⁹⁹ But just how far can the court go in “fashioning” the evidentiary procedures? The Committee provides some guidance by acknowledging that bench trials are different from jury trials, and that the former have more room for flexibility within the rules than the later.¹⁰⁰ Thus, at least initially, it is arguable that for concurrent evidence to gain acceptance under the FRE, it should find its origin in bench trials.

⁹² *Id.*, at 706(a) (“The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection.”).

⁹³ *In re Collins & Aikman Corp.*, 368 B.R. 623, 625 (Bankr. E.D. Md. 2007).

⁹⁴ *Id.*, at 626.

⁹⁵ *Walker v. American Home Shield Long Term Disability Plan*, 180 F.3d 1065, 1071 (9th Cir. 1999).

⁹⁶ *Id.*

⁹⁷ *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651, (7th Cir. 2002 writ denied by Supreme Court 2003).

⁹⁸ Fed. R. Evid. 102.

⁹⁹ *Id.*, ACNs at para. 1.

¹⁰⁰ *Id.*, ACNs at para. 13 (“a civil case tried to a Judge should not necessarily require the same evidentiary formalities as a criminal case tried to a jury.”) (it is not this paper’s position that concurrent evidence could never be used in a jury trial; however, a jury no doubt brings with it a whole new realm of complexities that are beyond the scope of this paper)

B. Federal Rules of Civil Procedure

There is much to be said about the Rules of Procedure anytime a new procedural concept is introduced to the courtroom. However, the introduction of the Federal Rules of Civil Procedure (FRCP) are introduced within this paper merely to provide a background of specific rules that may come into play where the concurrent evidence procedure is used. Acknowledging that this analysis is far from complete, the paper will present some of the Rules in an effort to demonstrate the general availability for concurrent evidence in civil cases.

As in the case of the FRE, the FRCP endeavor to secure the overall objective of coming to a just, efficient, and inexpensive resolution of the matter before the court.¹⁰¹ The aims of FRCP 1 thus seemingly provide the starting point for all interpretations of a Rule, whether a court vocalizes it or not in an opinion.¹⁰² Even though it is widely accepted that the Rules should be interpreted liberally, the court must still work within the Rules' confines.¹⁰³

The FRCP provides that the witnesses' testimony is to be taken in "open court," with narrow exceptions not relevant here.¹⁰⁴ The reasons for such testimony are to "ensure that the accuracy of witness statements may be tested by cross-examination and to allow the trier of fact to observe the appearance and demeanor of the witnesses."¹⁰⁵ The concerns that form the basis for requiring open court testimony are synonymous with those the Australian courts strove to address through the concurrent evidence procedure: namely, that the testimony be subject to first hand observations for accuracy and comprehension.¹⁰⁶ Thus, a court considering the use of concurrent evidence in the United States will be well advised to ensure all witnesses testify in person.¹⁰⁷ Additionally, the establishment of local rules may assist in providing credibility to the procedure.

Many litigators will likely balk at the idea of implementing local rules to secure the administration of the procedure.¹⁰⁸ However, Rule 83 provides that local civil courts may adopt "and amend rules governing its practice[.]" so long as the local rules do not cause a party to lose rights.¹⁰⁹ Interestingly, the Rule also provides individual judges the right to use discretion on proceedings within trials where local rules are absent.¹¹⁰ The ACNs for the 1995 amendments state explicitly, "[t]his rule provides flexibility to the court in regulating practice when there is no controlling law. Specifically, [it] permits the court to regulate practice in any manner consistent with Acts of Congress . . . , and with the district local rules."¹¹¹ Thus, regardless of whether a local court entity is compelled to implement a local rule or not, individual judges are likely to find they are free to use the concurrent evidence procedure where the case fits the bill.

¹⁰¹ Fed. R. Civ. P. 1 ("should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.").

¹⁰² See generally, *United States v. Texas*, 523 F. Supp. 703, 723 (E.D. Tex. 1981) (discussing FRCivP, "[r]ule 1, one of the least frequently cited, but most important, of all the rules, requires that they be construed "to secure the just, speedy, and inexpensive determination of every action."); and *Seligson v. Camp Westover*, 1 F.R.D. 733, 734 (S.D.N.Y. 1941) (discussing the new Federal Rules of Civil Procedure, "it must be kept in mind that the new Rules of Civil Procedure are fashioned to eliminate the old concept of litigation as a battle of wits and to provide the tools whereby litigants may bring before a court or jury all the facts from which the truth may be more easily ascertained and substantial justice done.").

¹⁰³ See *Duquesne Light Company v. Westinghouse Electric Corp.*, 66 F.3d 604, 609 (3rd Cir. 1995) (citing *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 652 (7th Cir. 1989) (en banc) (quoting *Landau & Cleary, Ltd. v. Hribar Trucking, Inc.*, 867 F.2d 996, 1002 (7th Cir. 1989), "a district court has inherent power to control cases before it, provided it exercises the power in a manner that is in harmony with the Federal Rules of Civil Procedure.") (internal quotations omitted).

¹⁰⁴ Fed. R. Civ. P. 43.

¹⁰⁵ See *In re Adair*, 965 F.2d 777, 780 (9th Cir. 1992) (per curiam).

¹⁰⁶ Supra note 103; supra note 43; and supra note 44.

¹⁰⁷ The need for in court testimony under the United States rules differs significantly from Australian procedures, where an expert witness may testify via telephone; see Supra note 8, AAT at 44-45 (noting the difficulties encountered in using a phone-in expert during the hot tub procedure).

¹⁰⁸ See generally, Daniel R. Coquillette, Mary P. Squiers, and Stephen N. Subrin, *The Role of Local Rules*, 75 A.B.A.J. 62 (January 1989) (discussing the problematic use of local rules in district courts); see also, Carl Tobias, *Local Federal Civil Procedure for the Twenty-First Century*, 77 Notre Dame L. Rev. 533, 595 (discussing the abundance of local rules and the problems associated with them, concluding it "has detrimentally affected modern process. Increasing numbers of local strictures . . . have created confusion, imposed greater cost and delay in federal practice, and further balkanized federal procedure.").

¹⁰⁹ Fed. R. Civ. P. 87.

¹¹⁰ *Id.*, at 87(b).

¹¹¹ *Id.*, at Notes of Advisory Committee on 1995 amendments para. 4.

In summation, it is expected that a court relying on the liberal construction of the Federal Rules of Evidence and the Federal Rules of Civil Procedure may in fact use the concurrent evidence procedure in its courtroom.¹¹²

6. Conclusion

It is true that “this is war;” but there is no reason why “war” cannot be civil and elucidating to the fact finder. The concurrent evidence procedure encapsulates this phrase, while encouraging a complete understanding of the experts’ testimony by the judge. The procedure provides a judge the opportunity to clarify divergent experts’ knowledge and to gain valuable insight to the experts’ realm of knowledge.¹¹³ Yet, it still allows the attorneys’ an opportunity to direct- and cross-examine the witnesses for accuracy.¹¹⁴ Granted, the procedure stands in stark contrast to the traditional adversarial methods of conducting expert witness examination used in American courtrooms; it seemingly fits in well with the liberal interpretation of the Federal Rules of Civil Procedure and Evidence.¹¹⁵

Within the construct of the Federal Rules, case law, and the general promotion of judicial efficiency, the Australian “hot tub” provides American courts’ with a viable, albeit novel, tool in structuring expert witness testimony.¹¹⁶

¹¹² In fact, at least two District Courts have used a similar proceeding in their courtrooms. *See*, Lisa C. Wood, *Experts in the Tub*, 21 Antitrust A.B.A. 95 (Summer 2007) (noting the Federal District Court for the District of Massachusetts and the United States Court of Federal Claims have used the procedure in complex situations involving expert testimony).

¹¹³ *Supra* note 10, McClellan.

¹¹⁴ *Supra* note 8, AAT at 15.

¹¹⁵ *Supra* notes 98, and 101.

¹¹⁶ I anticipate that the idea of a wide spread implementation of the use of concurrent evidence in American courts is likely to draw some negative feedback from the litigation sect of American practitioners. As such, it is my fullest intention to conduct an empirical study and gather the thoughts of the litigation community. It is hoped that upon sufficient time and data, a review of this data will be forthcoming.