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Expert Opinion: Hot Tubbing as an Alternative to Adversarial Expert Testimony

Content Contributors: John “Kai” Kellerman (Claremont McKenna College)
Serena Faruqee (Pitzer College)
Brendan Busch (Claremont McKenna College)
Daniel Krauss, JD, PhD ABPP (Claremont McKenna College)

The role of experts and expert testimony remains a controversial component of the United States legal system. Critics have highlighted that the adversarial nature of U.S. legal proceedings likely creates partisan bias in experts through unconscious affiliation with the side that hires them (i.e., adversarial allegiance) and by attorneys who select and pressure experts to make extreme claims (Murrie & Boccaccini, 2015). Furthermore, a growing body of research suggests experts and their testimonies are susceptible to a host of unconscious biases, which are particularly concerning for cases in which experts provide testimony on complex scientific matters that may confuse judges and juries (Greene & Gordon, 2016). Although existing legal procedures, such as cross-examination and competing experts, are assumed to protect against such biases, extant research suggests otherwise (Krauss & Sales, 2001).

To combat the creation of expert biases and, even more importantly, courts’ reliance on biased expert testimony, legal systems around the world have begun to explore alternatives to traditional adversarial expert processes. Initially developed in Australian courts, concurrent expert testimony, or “hot tubbing,” is a practice in which the two experts sit together in the witness box and provide concurrent testimony. This method aims to decrease expert bias and increase juror comprehension (Reifert, 2011) by allowing judges and juries to question the experts, the experts to question each other, and providing jurors the opportunity to

assimilate and make immediate comparisons between experts and their testimony. There is currently limited research examining whether the “hot tub” procedure accomplishes its intended goals. That said, preliminary survey data indicates promise, with one Australian survey reporting a 95% satisfaction rate among judges, experts, and attorneys (Greene & Gordon, 2016). Although hot tubbing procedures have been implemented in a number of legal systems world-wide, including Canada, the United Kingdom, and New Zealand, its appropriation to the U.S. system is still uncertain (Butt, 2017).

Concerns surrounding partisan bias and its potential effects on jury decisions are especially salient in cases involving mental state at time of offense (MSO) or legal insanity. Research has shown that when complicated scientific evidence is presented through expert testimony, as is often the case in insanity trials, jurors’ evaluations of that testimony tend to rely on peripheral cues, such as expert credentials, rather than the actual merit of the testimony (Greenberg & Wursten, 1998; Levitt & Kovera, 2008). Insanity evaluations also have significantly lower agreement rates between experts than other areas of forensic psychology, with insanity experts disagreeing 25%-35% of the time (Guarnera & Murrie, 2017).

In order to determine the effects that hot tubbing could have on U.S. jurors, we conducted a study with venire jurors in Orange County, California. Participants watched videos of a mock

insanity trial, using either an adversarial process or a limited version of hot-tubbed psychological experts (i.e., cross-examination was the same, except in the hot-tubbed condition it was delivered by the other expert rather than the attorney), and respondents gave their opinions on the credibility of each expert (Krauss, Gongola, Scurich & Busch, in press). Ultimately, defense experts were deemed more credible by participants in the hot tub condition than participants in the adversarial condition, while there was no difference in credibility for prosecution experts. Additionally, while comprehension of expert testimony was equivalent across the hot tub and adversary conditions, finding effects was limited by the lack of a substantial delay between expert testimony in the adversary condition (e.g., in a trial the experts might testify several days apart, but in the experiment simulation it was only a couple of minutes), and ceiling effects in the comprehension questions (i.e., both groups successfully answered almost all the comprehension questions relating to the expert testimony).

Although we expected to find a difference in credibility for both experts, it is still significant that hot tubbing caused an increase in perceived credibility for the defense expert. Americans have a known distrust of the insanity defense, often making it harder for defense experts to convince jurors of the legitimacy of their testimony (see e.g., Hans, 1986). Therefore, when evaluating the insanity defense, the testimony of the defense expert is likely more salient to jurors, as defense experts have to overcome jurors' pre-existing doubts about the insanity defense. Thus, by increasing the credibility of the defense expert, the hot-tubbing format likely increases credibility of the insanity defense as a whole.

Present research aside, we are still left with the fundamental question – can hot tubbing work in the United States? Acknowledging inevitable challenges, recent developments suggests it is indeed possible. About a half-dozen judges in the U.S. have already started experimenting with hot tubbing and have indicated they would like to continue examining the practice (Butt, 2017). There are, however, important distinctions between the Australian and U.S. legal systems that must be considered before hot

tubbing procedures can be implemented on a national level. For example, Australian experts must take an oath of impartiality before offering testimony, while in the U.S. experts are openly adversarial, with attorneys guiding experts' testimonies (Jones-Day, 2013). Therefore, in order to implement hot tubbing in the U.S., both the prosecution and defense attorneys would have to cede a considerable amount of control over their experts. Hot tubbing also raises a host of questions concerning the foundation and legality of questions from other experts, judges, or jurors as well as raises issues surrounding the presentation of expert testimony from the opposing party before the other party's full case has been offered.

Furthermore, in Australia, hot tubbing is only permitted in cases that do not use juries. In the United States, defendants have the right to a jury in most civil and criminal trials, meaning if hot tubbing were imported to the U.S. it would have to be implemented in previously untested jury trials. This does not necessarily preclude it from consideration, as some researchers believe hot tubbing may actually enhance a jury's understanding of expert testimony (Greene & Gordon, 2016). Before bringing hot tubbing to the U.S., we need to learn more about the effects the process has on jurors. We hope future research, including ours, can help advance this conversation and ultimately bring us closer to discovering whether this promising legal innovation can play a positive role in the United States.

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