



FACT SHEET:

Back-to-Back Experts

Summary: Allow experts to testify sequentially based on the subjects covered by their testimony. Alternatively, allow concurrent expert testimony, wherein both experts testify and answer questions at the same time. The goal is to aid juror comprehension by allowing jurors to more easily compare the testimonies of “battling” experts, as compared with the current practice wherein experts may testify days or even weeks apart. It may also be helpful for the judge to explain why the experts are testifying back-to-back, in part to alert jurors that the subject of the experts’ testimony is likely to be sharply contested by the parties.¹

Empirical Studies: Empirical studies of the use of these forms of expert testimony in the United States are not available.

Current Usage: Concurrent expert testimony is common in Australia, where experts both testify and answer questions at the same time², but it is not used there in jury trials³. The U.S. experience is limited and there is no nationwide survey data available about the usage of back-to-back or concurrent expert testimony. There are limited examples of concurrent expert testimony, including a 2003 case in the District of Massachusetts⁴ and a 2005 Court of Federal Claims case⁵.

¹ Shari Seidman Diamond, *How Jurors Deal with Expert Testimony and How Judges Can Help*, 16 J.L. & POL’Y 47, 65 (2007).

² See Megan A. Yarnall, Comment, *Dueling Scientific Experts: Is Australia’s Hot Tub Method a Viable Solution for the American Judiciary*, 88 Or. L. Rev. 311, 312 (2009); Lisa C. Wood, *Experts in the Tube*, 21 Antitrust 95, 95 (2006)

³ *Room in American Courts for an Australian Hot Tub?*, JONES DAY PUBLICATIONS (Apr. 2013), http://www.jonesday.com/room_in_american_courts/#_edn1.

⁴ See, *Id.*; *Black Political Task Force v. Galvin*, 300 F.Supp.2d 291 (D. Mass. 2004).

⁵ *Anchor v. United States*, 597 F.3d 1356 (Fed. Cir. 2010).

Legal Support: The discussion of this technique is relatively new, and there is not a robust body of court decisions or rules of procedure that specifically mention this practice. However, allowing experts to testify concurrently is one of the methods suggested by Wigmore to improve the use of expert testimony.⁶ Further, the Federal Rules of Evidence Rule 611 gives trial courts “control over the mode and order of examining witnesses and presenting evidence...” which suggest that this technique is not precluded in federal courts.

⁶ 3 THE NEW WIGMORE: A TREATISE ON EVIDENCE: EXPERT EVIDENCE § 11.5 (Aspen Publishers 2012)